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2007 License and Dues
- The 2007 License and Dues forms have been mailed.
- License and dues fees are due on or before Feb. 1, 2007.
- Members who have not received the form by the end of December should notify the State Bar, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, fees are due regardless of whether members receive a form.
   Late fees may be assessed if payment is not postmarked by Feb. 1, 2007.

Special Insert:
New Mexico Lawyer

www.nmbar.org
KOB LAWLINE 4
2007 SIGN-UP

The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:00 p.m. Please note that the November 14 date is the second Wednesday of the month, also, there will be no sessions in January or December.

PLEASE CONSIDER SIGNING UP NOW SO YOU CAN CALENDAR YOUR PARTICIPATION. This is a tentative commitment: someone will call you 10 days to 2 weeks in advance of each scheduled date to confirm the date, time and your continued ability to participate.

(Check the box after the DATES AND TIMES you want to sign up for)

February 21  5:00 – 7:00 p.m.  □  September 19  5:00 – 7:00 p.m.  □
July 18  5:00 – 7:00 p.m.  □  May 16  5:00 – 7:00 p.m.  □
March 21  5:00 – 7:00 p.m.  □  October 17  5:00 – 7:00 p.m.  □
August 15  5:00 – 7:00 p.m.  □  June 20  5:00 – 7:00 p.m.  □
April 18  5:00 – 7:00 p.m.  □  November 14  5:00 – 7:00 p.m.  □

NAME: _____________________________________ PHONE: _____________________________

I have some questions. Please call me at: _____________________________________________

I have an attorney associate/friend/acquaintance that might be interested in participating. Call____________________________________________________________________________

(NAME)  (Telephone Number)

You may use my name as a reference: □  DO NOT use my name as a reference: □

If you have any questions, please call Chris at 797-6054.

PLEASE RETURN TO:  Public & Legal Services Department
State Bar of New Mexico
P.O. Box 92860
Albuquerque, NM 87199-2860

OR FAX TO:  505 797-6074
Get the Best of Both Worlds!
New! Free On-Line Access to all One Source of Law®
DVD/CD-ROM
Subscribers!

New Mexico One Source of Law®
DVD and On-Line Contents:

- Official New Mexico Statutes Annotated, 1978™ including prior statute histories. Versions from 1989 to present including Annotations, Authority and Affected Notes, cross references, tables and index.
- NMSA, 1978™ includes fully linked access to helpful research tables as:
  - Tables of Disposition of Laws; Tables of Corresponding Code Sections; Tables of Abbreviations; Table of Adjournment;
  - Perpetual Calendar; Morality Tables; Annuity Tables;
  - Interest Tables — Thousands of links added to get you what you want, when you need it.
- New Mexico Session Laws from the 1993 Regular Session to present
- New Mexico Supreme Court Decisions, Jan. 1852 to present
- New Mexico Court of Appeals Decisions, Nov. 1966 to present
- New Mexico Attorney General Opinions, 1909 to present
- New Mexico Administrative Code
- New Mexico Judicial Decisions
- New Mexico Federal Judicial Decisions
- New Mexico Federal Rules
- U.S. 10th Circuit Judicial Decisions
- New Mexico Resources Journal and New Mexico Law Review
- Expanded Coverage for U.S. Supreme Court Cases
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### Center for Legal Education
**NEW MEXICO STATE BAR FOUNDATION**

**FEBRUARY 6TH VIDEO REPLAYS - STATE BAR CENTER**

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<tr>
<td>Pro Se Can You See</td>
<td>February 6, 2007</td>
<td>8 – 10 a.m.</td>
<td>State Bar Center</td>
<td>1.0 Ethics &amp; 1.0 Professionalism CLE Credits</td>
<td>$79</td>
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<td>Professionalism: All the World is a Stage</td>
<td>February 6, 2007</td>
<td>10:30 a.m. – 11:30 a.m.</td>
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<td>New Challenges on Professional Liability Insurance</td>
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<td>Santa Clara Pueblo v. Martinez: Past and Present Day Consequences</td>
<td>February 6, 2007</td>
<td>1 – 3:45 p.m.</td>
<td>State Bar Center</td>
<td>2.7 General CLE Credits</td>
<td>$109</td>
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<td>Climate Change Impacts, Laws and Policies</td>
<td>February 6, 2007</td>
<td>8:30 a.m. – 3:30 p.m.</td>
<td>State Bar Center</td>
<td>4.8 General, 1.0 Ethics &amp; 1.0 Professionalism CLE Credits</td>
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### 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](http://www.nmbar.org), click CLE, then area of interest

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

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## From the New Mexico Court of Appeals

- 2007-NMCA-006, No. 24,880: State v. Peter A. Vargas
- 2007-NMCA-007 No. 25,789: In Re New Mexico Indirect Purchasers Microsoft Corporation Antitrust Litigation

## Professionalism Tip

In all matters: “My Word is My Bond.”

### Meetings

#### January

- **30**
  - Criminal Law Section Board of Directors, noon, State Bar Center

#### February

- **2**
  - Trial Practice Section Board of Directors, noon, State Bar Center
- **5**
  - Attorney Support Group, 5:30 p.m., State Bar Center
- **7**
  - Employment and Labor Law Section Board of Directors, noon, State Bar Center
- **8**
  - Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe
- **10**
  - Ethics Advisory Committee, 10 a.m., State Bar Center
- **12**
  - Taxation Section Board of Directors, noon, via teleconference
- **14**
  - Children’s Law Section Board of Directors, noon, Juvenile Justice Center

### State Bar Workshops

#### February

- **22**
  - Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
- **28**
  - Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

#### March

- **22**
  - Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
- **28**
  - Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

#### April

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

For more information, call Marilyn Kelley, (505) 797-6048 or (800) 876-6227, or visit www.nmbar.org.

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**Cover Artist:** Phil Hulebak has been inspired most of his life by the Southwest and the Rocky Mountains. As a landscape painter, he captures the subtlety in the light of the moment that gives a sense of appreciation for nature and the creator. For Hulebak, color and harmony are his mainspring. His work can be seen in the November 2005 issue of Southwest Art as well as the Collectors Guide and is currently on display at the Weems Gallery in Old Town Albuquerque. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
Destruction of Criminal Tapes
Pursuant to the Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy tapes filed with the Court in criminal cases for years 1983 to 1986 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and who wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after February 16.

Fifth Judicial District Nominating Commission Notice of Meeting
The 5th Judicial District Nominating Commission will reconvene at 9 a.m., Jan. 29, at the Eddy County Courthouse, 102 N. Canal, Carlsbad, to consider Governor Richardson’s request for additional names to fill the vacancy on the 5th Judicial District Court which exists due to the retirement of the Honorable Jay Forbes.

Reconstruction of Criminal Tapes
Pursuant to the Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy tapes filed with the Court in criminal cases for years 1970 to 1990 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and who wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after February 16.

Quality of Life Quote
The most important thing is to not stop questioning.
Albert Einstein

U.S. District Court for the District of New Mexico Courtroom Technology Training
The U.S. District Court for the District of New Mexico utilizes advanced courtroom technology in a number of locations within the district. In support of these technologies, the Court provides training on an as-needed basis. Those interested in training in the use of courtroom technology, should contact Scott Ferguson, (505) 348-2063, to arrange for training sessions. For details regarding the courtrooms which are outfitted with advanced technology and what technologies are available, visit the Court’s Web site at www.nmcourt.fed.us.

Reduction of Calendar Year 2007 Annual Federal Bar Dues
For the past two years, Federal Bar dues for the District of New Mexico have been waived. With the concurrence of the Article III judges, collection of the calendar year 2007 attorney dues has been ordered at a reduced rate of $15 instead of $25. This rate is effective for calendar year 2007 dues only. Dues should be submitted to the Clerk of Court, U.S. District Court, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. For anyone who has submitted dues calendar year 2007 in the amount of $25, reimbursement of the difference will be forthcoming.

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 next Attorney Support Group meeting will be held at 5:30 p.m., Feb. 5, at the

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

First Judicial District Court
Destruction of Exhibits
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 1970 to 1990 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through April 27. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Bernalillo County Metropolitan Court Nominees
The Judicial Nominating Commission convened Jan. 19 in Albuquerque and completed its evaluation of the 12 applicants for the vacancy on the Bernalillo County Metropolitan Court. The commission recommends the following three applicants to Governor Bill Richardson:

Frances P. Brummett
Clyde DeMersseman
Sharon L. Gentry

Second Judicial District Court
Destruction of Life Quote
The most important thing is to not stop questioning.
Albert Einstein

Frances P. Brummett
Clyde DeMersseman
Sharon L. Gentry

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

Casemaker
Online Legal Research
Free Training Available
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:
- Las Vegas: Feb. 2, noon to 1 p.m., Las Vegas Courthouse, 500 W. National, Las Vegas, N.M. R.S.V.P. to (505) 425-3900.
- State Bar Center, Albuquerque: Feb. 16 and March 26, 3 to 4 p.m. R.S.V.P. to (505) 797-6000.
- Farmington: Feb. 20, 12:30 to 1:30 p.m., San Juan Country Club, Farmington. Lunch is $12 and will be served from noon to 12:30 p.m. R.S.V.P. to Doug Echols, (505) 334-4301.

Seating is limited. The training is approved for 1.0 CLE general credit.

Anyone who has problems with access should contact the Casemaker helpline at (505) 797-6039 or e-mail vcordova@nmbar.org.

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, Feb. 7, 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 Charles Archuleta, section chair, (505) 346-4646.

Pro Hac Vice Fund
2007 Grant Application and Guidelines
The State Bar of New Mexico seeks grant applications from non-profit organizations that provide civil legal services to poor New Mexicans within the scope of the state plan for delivery of civil legal services as designated by Rule 24-106 NMRA. Pursuant to the rule, the State Bar of New Mexico collects a registration fee of $250 from non-admitted attorneys intending to appear in civil actions before New Mexico courts. The State Bar holds these fees in the State Bar Pro Hac Vice Fund which is distributed annually to nonprofit organizations providing or supporting the provision of civil legal services to the poor. The 2007 Grant Application and Guidelines are now available online at www.nmbar.org. The deadline for the 2007 grant application is 5 p.m., Feb. 5.

Public Law Section
Nominations Sought for
Public Lawyer Award
The State Bar Public Law Section is currently accepting nominations for the ninth annual Public Lawyer of the Year Award, which will be presented on Law Day, May 1. Prior recipients include Florenceruth Brown, Frank D. Katz, Douglas Meiklejohn, Martha A. Daly, Charles N. Estes, Mary M. McNerney, Gerald Bruce Richardson, Peter T. White, Robert M. White, Paul L. Biderman and Frank D. Weissbarth.

The work or service recognized by the award must have occurred in New Mexico. A candidate must be admitted to practice in New Mexico but does not have to be a member of the Public Law Section to be eligible. The following are factors that will be considered in making this award. An applicant need not meet all of these criteria:
1. significant length of service in government, which does not have to be continuous or for one specific employer, or for work as an attorney;
2. excellence as an attorney/advisor and/or advocate;
3. training or education of the public or State Bar concerning public issues;
4. mentorship of junior attorneys in the public sector;
5. role model for other public lawyers;
6. involvement in one particularly difficult or important case or negotiation that significantly advanced a governmental policy or purpose;
7. service to social welfare organizations, charitable institutions or nonprofit entities connected with the practice or enhancement of an area of public law;
8. advocacy of, or work on, issues or legislation of importance in the public sector, such as open meetings and public records, public procurement and administrative procedures;
9. a lawyer who is not likely to be recognized for his or her outstanding work as a public lawyer; and
10. a lawyer whose personal character and dedication to public law and public service furthers the integrity and repute of the legal profession.

Send nominations by 5 p.m., March 1, to Doug Meiklejohn, dmeiklejohn@nmelec.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe 87505-4074. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Senior Lawyers Division
Judicial Service Award Request for Nominees
The Senior Lawyers Division plans to recognize judges who have 25 years of service on the bench in the state of New Mexico. Service may be for any combination of courts if the total tenure on the bench reaches 25 years. E-mail or mail nominations of judges eligible for this recognition to The Honorable Robert Hayes Scott, rscott@nmcourt. fed.us, or 333 Lomas Blvd., NW, Chambers 620, Albuquerque, NM 87102.

Solo and Small Firm Practitioners Section
Luncheon Presentation
Jason Marks, Public Regulation Commission, District 1 (Albuquerque area), will speak before the Solo and Small Firm Practitioners Section on Update on the PRC, Renewable Energy and Climate Change. The PRC regulates the utilities, telecommunications, motor carriers and insurance industries to ensure fair and reasonable rates and reasonable and adequate services to the public as provided by law. Marks, who holds a law degree from the UNM School of Law, also has extensive experience in health care financing.

The meeting will be held at noon, March 20, at the State Bar Center, and lunch will be served to those who R.S.V.P. by March 19 to Tony Horvat, thorvat@nmbar.org, or (505) 797-6033. Each attendee should bring a $5 check made payable to the State Bar Solo and Small Firm Practitioners Section to help defray the cost of the lunch. The board of directors will meet at 11:30 a.m.
Summer Law Clerk Program
Seeking Participating Firms and Agencies
The State Bar of New Mexico is partnering with major New Mexico law firms and governmental law departments to provide excellent employment opportunities for diverse and deserving law students at the UNM School of Law. The Summer Law Clerk Program provides law students who have capable research and writing skills with the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions.

The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that have nothing to do with performance or the potential for success as an attorney. The rigorous application and interview process combines a unique learning experience for law students with a unique insight into the qualifications and potential of our applicants.

Working with law firms and agencies who are committed to the ideal of diversified applicant pools, the Summer Law Clerk Program has been bringing down artificial barriers to employment, producing quality law clerks and diversifying attorney applicants for nearly a generation. Law firms or agencies interested in participating in the 2007 Summer Law Clerk Program should contact Art Jaramillo, Arturo.Jaramillo@state.nm.us, by 5 p.m., February 28. Interviews will be held at UNM on March 3rd.

Young Lawyers Division Disma House Project
The Young Lawyers Division (YLD) is sponsoring the Second Annual Tools for Success Program for Disma House, a transitional home with a family atmosphere for nonviolent parolees who are transitioning back into society.

YLD is seeking volunteer attorneys to provide training sessions to Disma House residents on the following dates and topics:

- March 28: Child Custody/Divorce
- May 23: Criminal Law Issues
- Aug. 29: Landlord/Tenant Law
- October 17: Restoration of Drivers License

Contact Briana Zamora, bhzamora@btblaw.com, to volunteer.

Other Bars
Albuquerque Bar Association
Membership Luncheon
The Albuquerque Bar Association’s membership luncheon will be held at noon, Feb. 6, at the Albuquerque Petroleum Club. Mayor Martin Chavez will present the luncheon program on the State of the City.

The CLE (3.0 general CLE credits) will be from 1:30 to 4:30 p.m. Collaborative Law: What It Is and What You Need to Know will be presented Gretchen Walther and David Walther, Walther Family Law PA; Tom Burrage, CPA, Meyners and Company; Jan Gilman-Tepper, Little & Gilman-Tepper PA; and Max August, LL.M., Children First, Santa Fe.

Lunch only: $20 members/$25 non-members with reservations; $5 additional at the door. Lunch and CLE: $80 members/$105 non-members; $5 additional at the door. CLE only: $60 members/$90 non-members.

Register for lunch by noon, Feb. 2. Register online at www.abqbar.com; by e-mail at 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
Paul G. Herne Award
The American Bar Association Commission on Mental and Physical Disability Law is pleased to announce that nominations for the seventh annual Paul G. Herne Award for Disability Rights are now being accepted. The award is presented to an individual or an organization that has performed exemplary service in furthering the rights, dignity and access to justice for people with disabilities. The 2006 award went to Louise A. McKown, a disability rights advocate and systems change analyst. Other past recipients include The Honorable Rhonda J. Brown, Anil Lewis, Robert Perske, Professor Stan Herr, Maryloy Breslin and Professor Jim Ellis.

Submit a nomination form and all related documents electronically. The form can be completed at http://www.abanet.org/disability or download the print version and e-mail it to Jonathan Simeone, simeonej@staff.abanet.org. Direct questions to (202) 622-1576. Nominations must be received by April 1.

UNM
School of Law
Library Spring Hours
Building and Circulation
Monday–Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 11 p.m.
Mar. 12–16, Spring Break 8 a.m. to 6 p.m.
Reference
Monday–Friday 9 a.m. to 6 p.m.
Saturday Closed
Sunday Noon to 4 p.m.

School of Medicine
Institute for Ethics
Health Care Ethics Program
UNM’s School of Medicine is continuing its interdisciplinary Health Care Ethics Certificate Program. Space is limited and will be filled on a first-come/first-served basis.

The first session focuses on basic ethical, legal and cultural issues in health care and begins Saturday Feb. 3, and will continue Tuesdays from 4:30–6:30 p.m.

The second session, which tackles more advanced topics, will begin Feb. 1, 2007 and be held from 4:30–6:30 p.m. every other Thursday. Tuition is $800 for each module. Call (505) 272-4635 for more information and to register. This program is open to both professionals (lawyers, doctors, nurses, social workers) as well as non-professionals and those in the community who are interested in learning more about today’s ethical issues.

Other News
Mock Trial Program
Attorney Volunteers Needed
Pojoaque High School needs three attorneys to provide legal expertise and coaching for their three teams that are registered for the 2007 New Mexico High School Mock Trial program. The amount of time invested will be decided by the volunteer and the teacher advisor, but teams usually meet at least once each week. Regionals are Feb. 16 and 17, state finals are March 16 and 17 and nationals are May 10 – 13. Interested attorneys should contact Michelle Giger, (505) 764-9417, ext. 11.
Happy Birthday, State Bar

State Bar members, staff and honored guests gathered Jan. 19 to commemorate the 121st birthday of the State Bar.

State Bar President Dennis Jontz presents honorees with certificates commemorating their service to the State Bar. Donald B. (Fuzzy) Moses (left), 95, was the senior member of the State Bar attending the event. Moses graduated from the University of Colorado Law School and joined the State Bar in 1934. He founded the Albuquerque law firm of Moses Dunn Farmer & Tuthill in 1954 and practiced for 63 years before choosing inactive status in 1997. In 1963 and 1964 he served as president of the State Bar and in 1984 received the Distinguished Bar Service Award and the State Bar Professionalism Award in 1993.

The longest practicing woman attorney in the State Bar is Lynn Allan (center). Allan was born and raised in Washington, D.C. She graduated from Washington College of Law at American University in 1964 and practiced criminal law in Washington for 10 years. She joined the State Bar in 1974 and worked for about a year as the assistant executive director. She has practiced criminal law in Albuquerque since then.

Amber Creel, 24 (right), is the youngest member of the State Bar. She was born in Albuquerque and attended Albuquerque Academy. Creel graduated *cum laude* from Boston University in 2003, from the UNM School of Law, *magna cum laude*, in 2006 and joined the State Bar last September. She spent many summers working at the Beall & Biehler firm in Albuquerque and is now working in the Rodey firm’s litigation department with an emphasis in professional liability.

Two of the honorees were unable to attend. Thomas P. Foy, 92, is the State Bar’s eldest practicing attorney. He graduated from Notre Dame Law School and joined the State Bar in August 1946. Foy served in World War II and is a survivor of the Bataan Death March. From 1978 to 1998, he served two terms as the 6th Judicial district attorney and as a state representative of the 39th district.

The longest practicing attorney in the State Bar is Lynell Skarda of Clovis. Skarda graduated from the University of California at Berkeley in 1937 and Washington and Lee School of Law in 1941. He joined the State Bar in 1941. During his career as a lawyer, he spent 20 years on the Committee to Establish Uniform Jury Instructions for Civil Courts and was the district attorney in the 9th Judicial District. He also clerked for The Honorable Sam G. Bratton in the U.S. Court of Appeals for the 10th Circuit.

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Terrence Revo (top left), chair of the Senior Division, presents remarks about the division and the ongoing oral history project.

Stephen Bowen (center) began practice and joined the State Bar in 1948.

John Speer (top right) began practice in 1949 and joined the State Bar in 1962.

Guests included Peter Winograd, associate dean at the UNM Law school, and The Honorable and Mrs. Gene Franchini (left).

After the birthday celebration, attorney volunteers met with students on a one-on-one basis to critique resumés and offer suggestions. Ten students took advantage of this unique opportunity. Past President Virginia Dugan reviews Carrie Martell’s resumé.
LEGAL EDUCATION

JANUARY

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G = General E = Ethics P = Professionalism VR = Video Replay

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**OPINIONS**

**AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS**

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

**EFFECTIVE JANUARY 19, 2007**

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Early Origins of Metro Drug Court

By Judge Roderick Kennedy

In the early nineties, I was a member of the Bernalillo County task force that was developing a centralized intake unit for persons with substance abuse problems. The purpose of this project was to provide a centralized location where persons needing assistance or treatment could go to obtain a referral to the various providers throughout the county, much like the hub of a spoked wheel. At the same time, I chaired the Bernalillo County DWI Planning Council, which had embarked on a large project that ultimately resulted in the beginning of the inpatient alcohol treatment program at the Bernalillo County Detention Center. Methods of best accomplishing the goal of early and meaningful intervention to get persons with problems to treatment were widely discussed by many professionals.

It occurred to many of us that conditional release through pretrial services could provide a useful vehicle for intervention. The idea of the offender in a cell all night, asking himself, “How could I have gotten to this point?” seemed like an opportune time to tell such a person, “You have a problem with alcohol. You need to get fixed. We will let you out of jail on your recognizance only if you agree to be supervised and get treatment.” For a court system, this time is represented by custody arraignments. Anyone who sits in the basement custody room on a Monday morning, stewing in the odor of an 80-person hangover, quickly realizes an opportunity for meaningful intervention. We got a grant for pretrial services for a pilot program for “significant offenders” and were off and running.

Literature tells us that persons with high blood alcohol content (BAC) are more likely to be DWI recidivists and also present a likelihood of having serious addiction problems. Similarly, subsequent DWI offenders are more likely to cause accidents (and human consequences).

We determined that second and third offenders with BACs above .16 would be offered an opportunity for early intervention, pretrial supervision and treatment, and the chance to argue at a later point in their case that they had turned themselves around. Offering such a chance to a bleary-eyed disheveled person in a blue jumpsuit who stank of last night’s drinking was, we hoped, something that person would be in a position to find an interesting proposition.

The program lasted about a year; the legislature cut funding to pretrial services, and the Planning Council could only make up so much of the shortfall. A year later, however, results were encouraging, with DWI recidivism rates for high-BAC multiple offenders coming in significantly lower than the rate for first offenders. Not long after this, the 2nd Judicial District Court looked to begin its drug court, and Judge Richard Knowles asked us about our program. The idea that early and significant intervention can produce results when it comes to turning around offenders’ lives is something that is now universally accepted, but it was the visionaries in Metro Court who put together the first program.

About the Author:
Judge Roderick Kennedy was first elected to the bench in 1988, serving on Albuquerque’s Metropolitan Court for eleven years until his merit selection and appointment to the Court of Appeals in 1999 and again in 2001. Judge Kennedy represented Metro Court on Bernalillo County’s DWI Planning Council, serving as its first chair and leading the creation of a $2.5 million treatment center at the Bernalillo County Jail and the intensive pretrial supervision program that formed an early model for what is now Drug Court in Albuquerque.
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ounded by Judge Victoria J. Grant in 2002, the Bernalillo County Metropolitan Homeless Court Program is a specialty court within Metropolitan Court. The Homeless Court’s mission is to assist homeless people who are striving to break away from the homeless lifestyle by providing them with an alternative means to resolving the legal issues that bar them from reentering the community as responsible and productive citizens. The Homeless Court hears a wide range of misdemeanor cases that fall within the jurisdiction of the Bernalillo County Metropolitan Court. The most common charges are quality of life offenses, including drinking in public, criminal trespass and public nuisance. The court does not entertain felony cases or cases arising from domestic violence, driving while intoxicated, probation violations or restitution charges.

The judges of the Homeless Court literally take this court to the streets. Hearings are held once a month at St. Martin’s Hospitality Center, a drop-in center for the homeless and one of New Mexico’s largest multi-program providers of services to the homeless. St. Martins provides the court a meeting room, which is transformed into a traditional courtroom, complete with a judge’s bench, counsel tables, U.S. and state flags and two deputy sheriffs. Judge Grant and Judge Benjamin Chávez, who preside over the hearings on an alternating basis, are joined by six attorneys who provide legal counsel for the program on a pro bono basis. Assistant 2nd Judicial district attorneys Jonathan Ybarra, Carlos Pacheco and Vashi Lowe represent the state. Private-practice defense attorneys Thomas Clear, Daniel Ivy-Soto and Marcella Neville represent the homeless defendants.

A homeless defendant is given access to the Homeless Court Program through a referral letter submitted to the court by a case manager, counselor or client advocate representing an agency that is providing services to the homeless defendant. Once the defendant is in the program, any bench warrants associated with the defendant’s cases are temporarily cancelled, allowing the defendant to pursue treatment, employment and housing without the fear of being arrested. The bench warrants are reinstated if the defendant fails to comply with the treatment outlined by their referring agency or if they fail to appear for their Homeless Court hearing.

Before any Homeless Court hearing, the defendant’s agency representative must submit a progress letter and supporting documents verifying the progress and efforts the defendant has made in treatment programs, employment and stable housing searches. The presiding judge, assistant district attorneys and private-practice defense attorneys review this letter and supporting documents. If the judge determines from the documentation that the defendant is following the agency’s outlined program and showing progress in moving from the streets to self-sufficiency, the judge will order the defendant’s cases be calendared for a Homeless Court hearing. Upon this determination, the prosecutors meet with the defense attorneys and attempt to reach an agreement that will resolve the defendant’s cases. In most instances, where the defendant has succeeded in completing a treatment program and finding employment and housing, the prosecution will offer a motion to dismiss the charges. If the judge orders the charges dismissed, the defendant’s work in the treatment program and efforts in securing employment and housing are converted to credit time served and applied to the sentence to resolve the case.

For the defendant, having a case dismissed may have far-reaching effects. Homeless people are often denied services and benefits, even from homeless providers, if they have pending criminal cases or outstanding warrants. Once they have resolved these cases, many become eligible to receive certain government benefits and housing assistance as well as reinstatement of their drivers’ licenses.

At the first Homeless Court session in 2002, Judge Grant heard the cases of one defendant. Since that session, the number of defendants and cases has gradually grown. In 2005, approximately 200 cases were transferred from the traditional trial court to the Homeless Court Program. Of this total, 80 cases were resolved in Homeless Court hearings, and 116 cases were removed from the program and reassigned to the original trial court. (Reassignment to the original trial court typically occurs because the defendant stops going to treatment.) On average, six to ten defendants appear before the Homeless Court each month. Approximately 99 percent of their cases are resolved at the monthly hearing. Cases that are not resolved are continued to the next Homeless Court session.

The presence of a traditional courtroom within the environment of a drop-in center for homeless people often produces a unique and special atmosphere. During these hearings, it is common to see a homeless defendant express genuine appreciation to the judges, defense attorneys and prosecutors for assisting them in resolving their cases. Some are moved to walk past counsel tables and shake the hands of each defense attorney and prosecutor. It is also common to overhear judges, attorneys and court observers express their gratitude for the opportunity to play a part in these hearings.

For years the Metropolitan Court has been working collaboratively with the mental health community. The court and others have often struggled with finding the delicate balance of protecting public safety and providing treatment to mentally ill individuals who enter the criminal justice system. Under the leadership of Judge Kevin Fitzwater, the Mental Health Court was established in response to that need in 2002.

The primary purpose of the program is to successfully divert mentally ill defendants from prosecution or provide a sentencing alternative to jail when it is appropriate. Beyond this the program uses the auspice of the court to help those individuals who are not in immediate crisis and who may not be competent to secure access to housing, treatment and community support.

The court serves as a “single point of contact” where a team of specialists works with mentally ill offenders. The team consists of the program judge, prosecutor, defense attorney, clinician, supervising officers and case managers. The team utilizes their skills and expertise to work
with mentally ill defendants and offenders to develop treatment plans, obtain services, provide supervision and monitoring, and case management services. The Mental Health Court accepts referrals of those individuals charged with misdemeanor offenses filed in the Bernalillo County Metropolitan Court. Those referred must have a mental illness and/or be developmentally disabled.

Program participants must attend one-on-one status hearings with Judge Fitzwater, the Mental Health Court judge, as mandated and comply with all court orders. In addition they must follow the assigned treatment plan that may include: a physician’s medication plan; counseling, therapy and support groups; alcohol and other drug screening; and other assigned treatment requirements. Those in the program also work with specially qualified and trained probation officers.

Successful participants who are dealing with their mental illness by following court orders and treatment plans are offered favorable dispositions to their cases. These depend on the crime, the participant’s history and other factors at the time of graduation. More important than the disposition of the case, participants are assisted in improving their level of mental health and life skills. As a result their lives, our community and public safety are improved.

This past year the Mental Health Court program provided services to approximately two hundred participants, not including those who were not enrolled in the program. An additional one hundred and forty-one were interviewed at the Metropolitan Detention Center by an on-site probation officer and eighty-eight of these were successfully referred to outside agencies.

The Bernalillo County Metropolitan DWI/Drug Court Program was implemented in 1997 in response to the serious drug and alcohol problem faced by our community. The target population is repeat DWI misdemeanor offenders with two to five convictions. With the continuing problem of alcohol and substance abuse in Albuquerque, the DWI/Drug Court possesses the necessary components to impact positively the community, the offender and actual or potential victims through the reduction in the rate of recidivism. It is a voluntary program which seeks to reduce substance abuse, crime and recidivism by providing intensive supervision, treatment and judicial oversight for alcohol/drug dependant participants. The program focuses on the participant living substance free in an environment filled with life’s obstacles and pressures.

The DWI/Drug Court Program is a post conviction/pre-sentence program that utilizes a multi-faceted approach. The four-phase program consists of intensive supervision of clients by probation officers, frequent appearances before the DWI/Drug Court judge, mandatory drug and alcohol counseling, regular attendance at community-based self-help groups (AA, NA or CA) and random drug testing. The first three phases operate on a point system of progression. For each completed activity, whether it is a meeting with the probation officer or going to counseling, the defendant will receive one point. Mandatory employment or full-time school attendance for each phase is required. Also, in the second and third phases, there is a mandatory requirement of community service and attendance of the Victims Impact Panel sponsored by Mothers Against Drunk Driving. When the allotted points are reached for that particular phase, the defendant is eligible to advance to the next phase. Upon completion of the three phases, defendants will be eligible to advance into a minimum three-month transitional care component.

Criteria for acceptance into the program requires that the potential participant has a current DWI case which has resulted in a guilty plea or conviction. The current offense must be classified as non-violent. If the current offense is for DWI involving a crash, there must have been no injury to any victim. There are no exceptions to this rule. There must also be no history of any violent felony conviction. Screenings for eligibility are conducted by the probation officers for all DWI offenders referred to probation prior to sentencing.

The Drug Court probation officer utilizes a screening assessment, which includes questions regarding criminal history, substance use and abuse history, the primary drug of choice and additional relevant information. If the individual is found to be appropriate for the program, the case is set before the court, and it is recommended that sentencing be continued and transferred to the DWI/Drug Court Program.

If any of the conditions set forth by the program are violated, the defendant is immediately seen by the Drug Court judge and sanctions are imposed. These can include daily visits to the probation officer, increased community service, increased treatment and incarceration. Again, there is a zero tolerance policy with regard to drug and alcohol use, driving with a revoked license or without the ignition interlock. These violations result in incarceration.

In an effort to better serve the community, two specialty tracks, Co-Occurring Disorders Track and the Urban Native American Track were created. Both tracks began in 2004. On April 30, 2004, the Bernalillo County Metropolitan Court began the country's first drug court program organized specifically for urban Native Americans. This is the first native drug court in the country that is not on tribal land. Since the programs' inception, 89 participants have been enrolled in the program. There have been 40 successful graduates, and there are currently 27 active participants.

All requirements of the standard drug court and the Urban Native American Track are the same although participants are provided with the opportunity to choose which track will be more conducive to their recovery. Many urban natives are traditional in their beliefs, and this track offers them the opportunity to integrate those beliefs with their treatment as they progress through the program.

The Urban Native American Track was designed to create an atmosphere of healing through mainstream and traditional methods in pursuit of spiritual and physical recovery for Native Americans. This track incorporates traditional approaches including talking circles, sweat lodges and groups focused on living in “two worlds.” The treatment agency, the Evolution Group, provides experienced and specifically trained staff to address issues of native people who live in urban areas. Research has shown that when culturally proficient services and treatment are provided, they are more effective.

The Co-Occurring Disorders Track was implemented in July of 2004. This track was specifically designed to assist multiple DWI offenders with serious mental illnesses by providing intensive supervised treatment and adherence. Participants have their therapy and other needs addressed in an individual and integrated approach. Like the Urban Native American Track, the requirements of the Co-Occurring Disorders Track are the same as standard DWI/Drug Court. Both tracks have an assigned probation officer and one judge for each.

continued on page 10


The Treatment of Methamphetamine Addiction

By Brad Ullrich, 11th Judicial District Adult Drug Court Program Manager

The 11th Judicial District Adult Drug Court began operation in October 1997 with approximately a dozen clients. Since its inception, the program has seen the drug problem in San Juan County move toward methamphetamine (meth) being by far the most popular drug in the area. With 90 percent of the clients currently in the program claiming meth as their drug of choice, the program has been forced to focus almost solely on the treatment of meth addiction. Over the past couple of years, the drug itself has also changed. It has moved away from the powdered “crank” that was predominantly made in small “mom and pop” labs to the “glass” made mostly in large “super labs” that is now prevalent on the street. “Glass” is a much stronger drug than “crank,” and with this increased potency has come greater difficulty in breaking users of their addiction.

Currently the program has approximately 75 clients on the street, another dozen or so in residential treatment, about the same number in jail facing probation violation and 20 absconders. This caseload is managed by three officers, two employed by the District Court and one employed by the state Department of Corrections. Treatment is provided by Presbyterian Medical Services in Farmington.

The Drug Court Model, in existence since the early 1990s, has proven itself over the years and has been successfully adapted to other types of problem-solving courts, including mental health courts and domestic violence courts. The model has proven to be remarkably effective in the treatment of meth addiction with some specific components that enhance the success of the treatment. The model consists of the Ten Key Components, outlined by the Department of Justice and others early on, that are essential to the success of any drug court or for that matter almost any problem-solving court. When it comes specifically to the treatment of meth addiction, some of the components can be seen as slightly larger pieces of the overall treatment puzzle.

Component number one was ironically called into question early on by the treatment community. “Drug courts integrate alcohol and other drug treatment services with justice system case processing.” Before drug courts, the common wisdom among treatment providers was that forcing someone to receive treatment did not work, an assumption drug courts have proven to be false. In fact, it has become quite clear that one of the biggest pieces of the overall puzzle is having a legal structure to deliver that treatment.

The threat of a jail or prison sentence is a very powerful motivator, and if you can coerce someone into treatment at the start, it has been proven that more often than not he or she will eventually become receptive to that treatment. This component is especially important in the 11th Judicial District Adult Drug Court. All clients must enter into a plea agreement or be found guilty in a jury trial, and the completion of the Drug Court is made a condition of their probation at sentencing. The consequences of failure are usually jail or prison, but the consequences of successfully completing the program are just as important. Most graduates of the program receive an early discharge from probation and many of them are first-time offenders that also received a conditional discharge or a deferred sentence, so completion of the program means coming out at the end with no criminal conviction along with being drug-free. This type of incentive, along with any other appropriate awards and sanctions, ultimately makes it very worthwhile for the client to engage in treatment that was initially mandated by the court.

Components four, five and six (“Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services. Abstinence is monitored by frequent alcohol and other drug testing. A coordinated strategy governs drug court responses to participants’ compliance.”) all involve the treatment provider along with the judicial system. In the case of the 11th Judicial District Adult Drug Court, the partnership of the court with a full service treatment provider has been, in my opinion, the key to the success of this court. Meth addicts have proven to have much higher needs than many other types of drug or alcohol addicts, and these needs can only be addressed by a “full service” treatment provider.

Many drug courts contract with a substance abuse counseling service or even a counseling service that covers the full spectrum of counseling, treating not only substance abuse but also other needs. These can include anger management, abuse, life skills, self esteem and others. This second type of treatment provider will be more successful than just a substance abuse counseling service in the treatment of meth addicts. To be truly successful in the treatment of this type of client, it is vital that the treatment provider not only be a full spectrum counseling service, but also be able to treat the multitude of other problems that a meth addict has—health, both physical and psychological, with dental issues being the primary physical issue.

Methamphetamine in its present predominant form is the worst type of drug that society is faced with today. The addiction to meth is not so much a physical one as it is a very powerful psychological addiction. The physical aspects of the drug manifest themselves in dramatic weight loss and many other serious health issues, and most noticeable among those other issues is the devastation to the clients’ dental health.

The other very serious physical damage is not as plainly visible as the weight loss or dental problem, but it is possibly even more serious due to the long term and possibly permanent effects. The damage done to the various chemical receptors in the brain has been studied very closely over the past several years and has been found to be devastating and possibly permanent to a very large degree.

So, where do all these problems caused by meth leave us in the treatment of the addict? This is where the approach adopted by the 11th Judicial

continued on next page
District Adult Drug Court has proven to be so successful. Over the past five years the program has partnered with Presbyterian Medical Services, a full service medical facility that also has dental services and counseling and psychological services covering the full spectrum of the clients’ needs. You cannot just address a meth addict’s substance abuse and addiction. Treating the whole person is essential to getting meth addicts to stop using and for them to continue their abstinence.

For a meth addict to continue to stay clean, their physical and psychological/mental health must be addressed. Having all these issues addressed by one provider allows for a seamlessly coordinated treatment. The physical damage brought on by heavy meth use is handled by the medical department of the provider, and this can be fully coordinated with the psychotropic medications that are often necessary and are provided by a staff psychiatrist. The serious dental issues are also addressed by a coordinated effort. Finally, any counseling issues to include substance abuse (the Matrix Model or a similar approach is proving to be very successful) and any other issues are addressed by a full service counseling department. Having all of these client issues addressed under one roof is the key to the successful treatment of meth addiction. You will not have a successful, long term outcome without addressing all of the clients’ needs over the long term.

About the Author:
Brad Ullrich is the Program Manager for the Eleventh Judicial District Adult Drug Court in Aztec, NM. He has managed the program since May 1998. He has also been a Probation Officer in both Arizona and New Mexico supervising a variety of caseloads including Intensive Supervision and Community Corrections.

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Juvenile Drug Court:
By Cynthia Ferrari and The Honorable John W. Pope

This story begins when Carlton Liggins approached District Judge John Pope about starting a juvenile drug court program in Valencia County in the fall of 2001. Liggins was the juvenile probation office supervisor for the New Mexico Children, Youth and Families Department (CYFD). He knew there were potential federal planning grants available, with the possibility of more federal pilot monies being available in the future. Judge Pope was skeptical both of the federal grants and drug court and whether there could be a reliable, evidence-based assessment done to show that the program was capable of meeting his expectations. Trusting Liggins, Judge Pope agreed to lead the program. They decided they would not wait for a planning or implementation grant but would assemble a strong team of volunteers and start a pilot project with no money or assets. Team members included therapists, probation officers, an assistant district attorney, a public defender, a district judge and others with interests in the educational and community components of the issue. It was important to have enthusiastic people since there were no other resources. Randy Chavez, a public defender, was an original and valuable member of the team who initially volunteered his services. Youth Development, Inc. helped in getting the drug court program started. The D.A.’s office, primarily through Burt Parnell and Beverly Taylor, gave its time and dedication. The commitment of the juvenile probation office was critical to the establishment of the drug court program. The Court provided facilities. Many of the above agencies and others, willingly or unwittingly, provided material resources.

For the drug court to prove successful, there had to be a method to measure the qualitative and quantitative effectiveness of the program. A preferred way to accurately measure efficacy through third-party evaluation is to have an MIS (management information system or database) where all program data is collected and stored. The team realized it needed the database but did not have the funds to pay for one that had the capacity to capture the data the team required and to generate the corresponding reports.

The newly hired program director, Cynthia Ferrari, designed a database which was more sophisticated than anything available. Paul Martin, of Martin & Sabo, was hired on a contract basis to do the computer programming. This database was later used as a model when the state-wide database was created. The MIS collects all participant information including client office and phone contacts, phase changes, drug test results, educational and recreational activities completed, counseling, and clients’ progress and participation in the program. The database generates accurate and comprehensive reports which prove invaluable in performing the program evaluation.

One of the strengths of the program is its team concept. By relying on a team concept, there has been more “buy-in” from both individuals and the agencies involved. The team approach accepts that team members come from different interests and values; however, consensus ultimately needs to be achieved so that the decisions reached regarding the participants are balanced and holistic. The team approach allows members to set goals, align values and build trust, and therefore share risks. In order for the drug court program to thrive, team members have to constantly consult with each other to remain responsive to needs and quickly adapt to change. The team consults frequently with its clients to improve the effectiveness of the drug court program.

The Valencia County Juvenile Drug Court has remained responsive to the changing needs of its clients, families and community by continued on page 10
Lea County Family Drug Court

First in New Mexico

By Sherry Buie

Lea County Family Drug Court (LCFDC) is a new and exciting program breaking ground in Lea County. Modeled after several pre-existing drug court programs from across the nation, LCFDC consists of intensive wrap-around and case management services to address substance abuse issues in families. In an effort to enhance and restore a family’s capacity for social functioning, LCFDC focuses on providing children a safe home with drug-free parents via judicially managed and community-based services. At this time the population served in Lea County is CYFD/PSD clients and 5th Judicial District criminal cases determined by the courts. These individuals with substance abuse issues have children who have been removed from their homes or are at risk of losing their children.

In establishing the Family Drug Court Program in Lea County, Judge R.W. Gallini, Judge William McBee, and members of CYFD approached community members and professionals to participate on an LCFDC implementation team. This core team consisted of Judge William McBee; Sheri Buie, program director; Mayte Zepeda, administrative assistant; Randy Owensby, substance abuse counselor; Socorro Telles, parenting specialist; Saul Monroy, domestic violence/relationship counselor; Cori McCarrell, CYFD county office manager; Barbara Greenwood, SW supervisor; Cathy Sims and Lorna Haynes CYFD social workers; Probation and Parole, law enforcement, Guidance Center and Zia Consulting; and respondents’ attorneys.

In building the LCFDC program, the team visited sites across the nation to observe existing drug court programs and participate in training that was coordinated by the Office of Justice Programs. Utilizing the information gathered through these existing programs, the LCFDC Program was developed to fit the needs of CYFD clients in Lea County as well as other parents who are at risk of losing their children. Recently, the program accepted clients who met eligibility criteria through the judicial system. These clients, referred to LCFDC by the court, have an opportunity to defer their criminal charges upon successful completion of the program and of probation. They are dually managed by Probation and Parole and LCFDC.

The program requires a one-year minimum commitment in which the participants advance through a series of four three-month phases. Linked to a number of community services, participants are required to participate in a 12-step program, undergo weekly individual and group therapy sessions, submit to random urinary analysis, and attend weekly Judicial Drug Court. Before the weekly court review hearings, the team staffs with the judge to discuss the progress or lack of progress of each client. The clients report to the judge on their individual progress and/or regression. Through this process, they are empowered, thus allowing for greater participant accountability. Immediate sanctions/consequences, as well as incentives/rewards, are based on participant compliance or noncompliance. Upon the successful completion of the program, a graduation ceremony is held in their honor. Graduates receive a dozen roses, an engraved Nambe platter and a candlelight ceremony.

A strength-based and holistic approach is used in meeting client needs and through the LCFDC Program. The social worker/case manager is able to provide the client with immediate resource access. Assessment begins by meeting the client where they are in their sobriety, educational level and ability to parent, therefore providing the client with a clear understanding of LCFDC expectations.

LCFDC has been in operation since August 2002. Since that date, approximately 60 new participants have entered the program. LCFDC is also proud that 11 mothers have given birth to drug-free babies while participating in the program. The Drug Court is proud of our current recidivism rate of 20 percent. The participants assist in the development of their two-three year after-care plan which includes mentorship of current clients in the program and continued participation in group therapy and LCFDC activities. Success is measured by tracking the graduates for a minimum of three years to determine recidivism.

By evaluating the LCFDC Program, CYFD social workers have found success to be measured by the timely, intense and structured reunification of children with their parents based on successful participation and progress in meeting their treatment requirements. Social workers have attributed this to client ownership of the program and learned accountability and responsibility.

At this time, the standing success rate of LCFDC is at 85 percent. The goal of LCFDC is to expand services to the entire population of Lea County through community networking, with eventual expansion across New Mexico. The old saying goes, “It takes a village to raise a child,” it takes a whole community to meet the needs of a family dealing with substance abuse issues that result in child abuse and neglect.

Federal and state funding were granted to support the Family Drug Court Program under the Administrative Office of the Courts in the 5th Judicial District specifically to meet treatment costs and fund the drug court coordinator position. This funding does not cover incentives, rewards or incidental costs incurred by clients working to meet their daily needs and treatment goals. Through community support, families are receiving full wrap-around services that are needed to produce successful results that help keep children safe and reunified with family.

About the Author: While working for the Children, Youth and Families Department, Sherry Buie collaborated with Lea County Office Manager Cory McCarrell to start a family drug court. After approximately two years of research, planning, and meeting with community resources and partners, the drug court became a reality. Buie is currently the program director for the 5th Judicial District Court.
5-Year Plan

By Peter Bochert

“I wasn’t arrested. I was rescued.” This surprising declaration was made by a methamphetamine addict as he finally completed a court-monitored treatment program. The program had taken him more than two years to complete, during which time he was subject to frequent and often random drug testing, weekly counseling, home visits by probation-surveillance officers and biweekly to monthly appearances before the judge. He had been subject to an intense and invasive court-monitored effort to change his addictive behavior and take responsibility for his actions, yet he claimed, “It’s all been worth it. I’m clean. I’m free. I’ve got my family back.”

The remarkable court program he graduated from is called “drug court,” and his is just one story among the more than three thousand graduates of the programs over the last eleven years. There are 30 such programs around the state, working with offenders in 18 of the state’s 33 counties, and the New Mexico Supreme Court would like to see them established in the remaining 15 counties. Toward that end, on Jan. 18, 2006, the Supreme Court approved the 5-Year Plan for Growth of New Mexico Drug Courts.

“Drug Court is not about doing without dope. It’s learning to live responsibly.”

Program Graduate

A drug court is a judicial program that combines substance abuse treatment with intensive supervision and the coercive power of the judiciary. Participants’ offenses range from the clearly drug-related, such as drug possession, to property crimes and even embezzlement. Substance abuse and addiction are the common threads tying them all together, and the offenders are referred to drug court because their underlying substance abuse leads them to repeated criminal behavior.

Dirty drug tests, skipped treatment sessions and other acts of non-compliance lead to immediate sanctions from the judge, up to and including incarceration. Programs average 12 to 14 months in length, and they are very demanding. Graduation is not guaranteed—it has to be earned. Tough as these programs are, current performance measures indicate that 60 percent of New Mexico’s drug court participants graduate, and only 13.4 percent re-offend within three years of graduation. The average cost-per-client-per-day is $24.11, which is far less than the average daily cost of $81.35 for incarceration.

Such positive outcomes have been reported from drug court programs around the country (there are now over 1600 nationwide), leading to interest in their continued growth in New Mexico. In 2003, the New Mexico Supreme Court created the Drug Court Advisory Committee (DCAC) for oversight of the state’s growing number of drug courts. As part of its order, the Supreme Court directed DCAC to “develop a five-year strategic plan” to include “access to [drug court] programs in all courts by more offenders.” DCAC’s primary goal was to make the programs accessible to every New Mexico resident who could benefit from their services. For strategic growth purposes, DCAC further defined this goal to mean (a) implementation of a drug court program in every county in the state, while also (b) considering expansion of existing drug court programs where need is greatest.

The 2006 Legislature replaced lapsing federal funds at eight drug court programs, institutionalizing them with recurring state funds. It also provided funding to start two new adult drug courts in counties that were lacking a drug court program of any kind. That resulted in drug courts in 18 of the state’s 33 counties, leaving 15 counties still without a drug court.

A secondary goal of the five-year plan is to provide a reasonably stable and predictable level of funding requests to the legislature each legislative session. DCAC has defined an application process by which courts will make known their interest in starting a new drug court so that DCAC can guide each court through the planning and implementation process. This will further allow DCAC to help schedule the creation of the 15 new drug courts, spreading their implementation over the next four fiscal years and allowing the judiciary to make reasonably stable and predictable funding requests on behalf of drug courts during the next four legislative sessions:

FY08 (7/1/07–6/30/08) Total = $1.35 million:

- $296.8K for replacement of lapsing funds and resources at several drug court programs, and
- up to $1,053 million for expansion requests of existing or new programs around the state.

FY09 through FY11 (7/1/08–6/30/11) Total = $1.6 million each of the 3 fiscal years:

- $1.35 million for replacement of lapsing federal funds at six new drug court programs each of the three fiscal years, and
- up to $250.0K for expansion requests of existing programs each fiscal year.

This targeted and controlled growth will require approximately $6.15 million in recurring funds over the next four fiscal years at an average of $1.54 million each year. It will create 18 new drug courts, with 15 in counties currently without one of any kind. It will also allow approximately $1.94 million for expansion of existing programs over the course of the five-year plan. (The entire plan can be downloaded at www.nmadcp.org.)

The financial investment in developing these programs is significant but so are the potential returns. Besides the reduced recidivism rate and low cost, studies have demonstrated that graduates earn higher wages and work longer than probationers, resulting in the collection of higher taxes and FICA payments and lower welfare and food stamp costs. Graduates’ health care costs and mental health services are also significantly lower than those for probationers. In other words, drug courts turn offenders from tax drains into taxpayers.

As the methamphetamine addict mentioned earlier in this article said, “Drug court is not about doing without dope. It’s learning to live responsibly.” Chief Justice Richard J. Bosson, in announcing the 5-Year Plan earlier last year, said, “Drug courts have proven to be an extraordinarily effective tool in touching the lives of substance abusers because the program treats more than just addiction.” The state’s judiciary welcomes the opportunity to expand these remarkable programs and help more offenders recover from addiction and lead law-abiding, productive lives.

About the Author:
Peter Bochert is the statewide drug court coordinator with the Administrative Office of the Courts, a position created in 2003 to help with centralized administration of New Mexico’s drug court programs.

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program for oversight. In addition, all aspects of the program are available in Spanish. There are bi-lingual (Spanish) probation officers, treatment providers and a judge who conducts DWI/Drug Court sessions weekly.

The Metropolitan Court judges are proactive in their leadership in providing services that help change the lives of defendants. The recidivism rate is significantly lower for those who participate in DWI/Drug Court than the rate for those who do not. Nationally, recidivism rates for defendants on regular supervision are between 40 percent and 60 percent as compared to the DWI/Drug Courts' rate of 11.2 percent after five years. As a result, our community is safer for us all.

About the Authors:
Judge Victoria Grant was appointed to Metropolitan Court in 1996 where she has served as criminal presiding judge since 2001. She is the past president of the New Mexico Association of Drug Court Professionals and continues to serve as Drug Court judge in Metro Court for the Urban Native American DWI/Drug Court.

Ana Benford is the supervising probation officer for the DWI/Drug Court Program. She has been with the New Mexico judiciary since 1981 and with the DWI/Drug Court Program since 2003. She is a graduate of UNM.

Juvenile Drug Court, Ferrari and Pope

constantly re-evaluating its programming and making changes when needed. Expansion and enhancement of services and opportunities for the children are on-going. Children are provided with positive activities to replace the former negative ones. Horse therapy, art and clay classes, dance and exercise, rafting, camping, rock climbing, ropes course, life skills, cooking, airbrushing and animation drawing are examples of programs that have been offered.

In addition to the recreational programming, the Valencia County Juvenile Drug Court has implemented a strong educational component. All participants are given educational placement tests upon entrance into Drug Court. Tutoring and homework assistance is provided to individuals whose results are below the expectations of their grade level. All participants are required to attend school or GED classes, provided in-house by a certified bi-lingual instructor. This allows for intensive and individualized attention to each student. One sixteen-year-old participant was illiterate upon entrance to Drug Court. Upon graduation, this child was able to read and write because of this intensive literacy program.

It was quickly apparent that the participants were not interested in reading books and had poor reading and writing skills. In an effort to address this problem, the Juvenile Drug Court implemented a book program. Initially, a participant was required to perform 20 hours of voluntary community service to move to Phase 3 or 4 in the program. The team decided to have the children pick a book to read and write a four-page report in lieu of some of their community service. This has been a very successful component of the program, proving itself effective in getting many of the children interested in reading. Children have commented that it was the first time they had read a book and enjoyed it.

The Valencia County Juvenile Drug Court created a sustainable program with buy-in from all the necessary agencies and the community by having accountability and being able to show concrete results supported by reliable data to satisfy both funding sources and the community. Many strong partnerships have been created with local agencies and individuals, allowing the program to integrate seamlessly into the community. The program is able, through these partnerships, to offer previously unavailable services to the participants. All services have been tailored to the unique needs of participants utilizing the limited resources of Valencia County.

The Juvenile Drug Court program has proven successful in reducing recidivism and rehabilitating its young participants. Collected data shows that graduates in 2006 had a recidivism rate of 10 percent, which is much lower than the national average of 45 percent. Many of the program graduates have gone on to college or work, leaving behind their former lifestyles of substance abuse and crime.

It has been repeatedly shown on a national level that drug courts with intense judicial involvement are the most successful. This involvement generally occurs on three levels. The first and most important point of involvement is with the clients, in this case the children. The judge convenes Drug Court at 4 p.m. most Fridays to evaluate participants’ progress and for rewards and sanctions. It is important for the children to know that an authority figure is interested in their progress and cares about them. The second role for the judge is to be first among equals on the team, to provide an over-arching direction to the program. The third level is community contact. The judge has to be committed to the drug court program and to selling its goals to the community.

Early on in the program, the team decided, while the emphasis had to remain on sobriety, that sobriety could only come with the concept of personal responsibility, which itself could only be built on a solid base of education and a wide base of opportunities for participants. The Valencia County Juvenile Drug Court has been successful because it has remained mindful of these goals and has been adaptive to changing circumstances.

About the Authors:
Cynthia Ferrari obtained a paralegal degree in 1999 and soon thereafter began working for the 13th Judicial District Court. In 2002, she became the program director for Valencia County Juvenile Drug Court. She was given an award for “Excellence in Public Program Management” in 2006. She is currently serving on the board of directors for the New Mexico Association for Drug Court Professionals.

District Judge John W. Pope has been on the district court bench for 14 years and has received the Outstanding Judicial Service Award from the State Bar of New Mexico twice. He has been a college professor for 24 years at the UNM School of Law and is a published poet and historian.

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Opinion

A. Joseph Alarid, Judge

1 This case presents an opportunity to clarify the requirements of the knock-and-announce rule. We hold that the announcement component of the knock-and-announce rule requires officers executing an arrest warrant to inform the occupants of a residence that the officers are proceeding pursuant to a warrant. We further hold that unless and until officers have announced that they are executing a warrant, an occupant’s refusal to admit the officers into a residence does not automatically render futile further announcement of the officers’ purpose and authority nor does it constitute a per se exigency excusing compliance with the announcement component of the knock-and-announce rule.

BACKGROUND

2 During the swing shift on December 3, 2002, Patrol Sergeant Chris Miller of the Las Cruces Police Department learned that there was an unexecuted bench warrant authorizing Defendant’s arrest for failure to appear in district court to answer a felony charge of battery on a peace officer. Sergeant Miller had encountered Defendant the previous day in municipal court, but at that time had not known of the felony warrant. Sergeant Miller checked computer records, which gave two addresses for Defendant. Sergeant Miller contacted dispatch and requested that they send officers to both addresses to execute the warrant.

3 Officer Robert Elrick was directed to execute the warrant. Dispatch did not disclose the specific underlying felony charge. The dispatcher provided a general description of the subject: adult male, medium build, with a ponytail and goatee. Officer Frank Flores was on duty and was listening in on his radio and on his own initiative decided to assist Officer Elrick. Officers Elrick and Flores were aware that they were being sent to a possibly out of date, “secondary” address and that at the same time they were attempting to execute the warrant, a larger team of officers would be attempting to execute the warrant at a more recent address. Officers Elrick and Flores did not consider it likely that they would encounter the subject at the secondary address. Other officers listening in on the dispatch advised Officers Elrick and Flores that the subject of the warrant was involved in drugs and that he might fight them. Officers Elrick and Flores had no other information suggesting that the subject was armed or dangerous. Officer Flores was a team leader for a SWAT team. In his view, the attempt to execute the warrant was “nothing like” a SWAT situation. A “high risk warrant” would have been assigned to a tactical unit for execution, not to a single patrol officer.

4 Officer Elrick was wearing a standard uniform with a metal badge. Officer Flores was dressed in a navy blue bike uniform with shorts, a yellow cloth badge, and a leather Sam Browne belt with his equipment and gun. The officers arrived at the address provided by dispatch around 8:00 p.m. The address was an apartment building.

5 The officers approached the door to the subject’s apartment, and, as a routine safety precaution, stationed themselves off to the sides of the door, with Officer Elrick on the right, doorknob side and Officer Flores on the left side of the door. The officers did not engage in any reconnaissance other than to pause momentarily to listen for voices or other sounds inside the apartment. The officers heard two voices, one of which was male. As Officer Elrick was preparing to knock, the door was opened from the inside by a man whose appearance matched the general description of the subject given by the dispatcher. The man remained behind the door, inside the threshold of the apartment. Officer Elrick said “Hi, how ya’ doin’,” or “Hey bro’, how ya’ doin’?” The man exclaimed “Oh shit!” and attempted to shut the door. Officer Elrick and Officer Flores each blocked the door with a foot. Officer Flores, shouted “don’t close the door, don’t close the door!” As the man struggled to shut the door, Officer Flores saw a “bluish-purplish, dark-colored blur” move across the man’s body. The movement was followed by a “loud thump” consistent with an object of significant weight hitting the floor. The officers were concerned that the thump might have been the sound of a firearm hitting the floor. The man let go of the door and Officer Flores entered the apartment with his gun drawn, followed by Officer Elrick. Officer Flores did not announce his purpose or authority prior to entering the apartment; indeed, Officer Flores’s practice was to not disclose the existence of an arrest warrant to a person answering the door due to his concern that the subject of the warrant would “take off” if he realized that officers were present to make an arrest.
{6} In addition to the man, the officers encountered a woman, who was reclining on a couch as the officers entered. The man angrily complained to the officers that they had “just busted into the apartment,” and “had no reason for being there.” The man asked Officer Flores “what are you doing, breaking into my house?” The officers ordered the man and woman to sit on the couch while they confirmed the man’s identity. The man complied with all the commands that were given to him by the officers after they entered.

{7} Upon entering the apartment, Officer Elrick immediately looked for the object that had made the thump. He located and retrieved a Crown Royal bag. He felt a square, solid object within the bag. He looked in the opening of the bag to determine if the object was a gun. He observed a green, leafy substance that he thought might be marijuana. He emptied the bag and discovered marijuana, cocaine, scissors, and an electronic scale.

{8} As Officer Elrick was securing the Crown Royal bag, Officer Flores was confirming that the man in the apartment was the subject of the warrant. The man told Officer Flores his name was Peter Vargas. He gave Officer Flores his date of birth and social security number. The man and the woman claimed that the man had “taken care” of the warrant. Based on his past experience, Officer Flores was skeptical. The woman showed Officer Flores paperwork establishing that a Peter Vargas had appeared in magistrate and municipal court the day before. However, the warrant numbers on the paperwork did not match the warrant that the officers were executing. The officers handcuffed the man, now identified as Defendant, and arrested him.

{9} Defendant was indicted by a grand jury and charged with narcotics trafficking, possession of drug paraphernalia, and possession of marijuana. Defendant moved to suppress the evidence seized by Officers Elrick and Flores, arguing, inter alia, that the officers violated the knock-and-announce rule as set out in State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994), when they “immediately barged” into his apartment. In response, the State argued that the officers were proceeding pursuant to an arrest warrant; that the officers’ observation of Defendant when he opened the door gave them reason to believe that the subject of the warrant was present in the apartment; and that Defendant’s attempt to shut the door coupled with the loud thump gave rise to exigent circumstances allowing them to pursue Defendant inside the apartment. The district court held an evidentiary hearing at which Sergeant Miller, Officer Elrick and Officer Flores testified. The district court found, inter alia, that:

1. As officers moved to knock, the door was opened by a man matching the general description of the man sought to be arrested pursuant to a bench warrant. That man said, “oh shit” on seeing the two men, who w[ere] dressed as police officers, and attempted to shut the door.

2. Due to the particular facts of this case, it would be inappropriate and unsafe to require the officers to allow the door to be shut and then knock and announce their presence and purpose.

3. The move made by the officers inside the door to identify that man (who later turned out to be the defendant) was justified by concern for officer safety.

Following the denial of his motion to suppress, Defendant entered a conditional guilty plea to the trafficking count, reserving the right to appeal the denial of his motion to suppress.

DISCUSSION

{10} In reviewing a ruling granting or denying a motion to suppress, we apply the deferential standard of review adopted by our Supreme Court. State v. Lopez, 2005-NMSC-018, ¶ 9, 138 N.M. 9, 116 P.3d 80.

{11} In Attaway, 117 N.M. at 150, 870 P.2d at 112, our Supreme Court held that Article II, Section 10 of the New Mexico Constitution requires law enforcement officers executing a warrant to knock and announce their identity and purpose prior to entering the premises that are the subject of a search warrant. Shortly after our Supreme Court decided Attaway, the United States Supreme Court held that the knock-and-announce principle is a component of the reasonableness inquiry under the Fourth Amendment of the United States Constitution. Wilson v Arkansas, 514 U.S. 927, 929 (1995). We have held that the knock-and-announce rule applies to the execution of arrest warrants as well as search warrants. State v. Halpern, 2001-NMCA-049, ¶ 9, 130 N.M. 694, 30 P.3d 383.

{12} It is well settled that absent consent, exigent circumstances, or hot pursuit, police officers may not enter a suspect’s residence to effect an arrest without a warrant. See Payton v New York, 445 U.S. 573, 576 (1980). Where a warrant is required, a police officer who enters a private residence without permission and without a warrant “is little more than a trespasser.” Dickens v State, 59 So.2d 775, 775 (Fla. 1952). A person present within his or her home may decline to enter into a citizen-police encounter by not answering the door or, if the person has previously answered the door, the person may terminate the citizen-police encounter simply by shutting the door. See Cummings v City of Akron, 418 F.3d 676, 686-87 (6th Cir. 2005) (concluding that police officers violated homeowner’s Fourth Amendment rights by blocking his attempt to shut his front door and forcing their way into his home where the entry was not supported by a warrant, exigent circumstances, or hot pursuit). In short, without a warrant and in the absence of exigent circumstances, police may request entry, but they may not demand entry as a matter of right. “Get a warrant” remains a potent response to a request by police to enter a private residence.

{13} Warrants are issued in ex parte proceedings. State v Maes, 2003-NMCA-054, ¶ 7, 133 N.M. 536, 65 P.3d 584. Typically, a person first learns that his or her person or residence is the subject of a warrant when the person is advised by the officers executing the warrant of the existence of the warrant. Unless and until police announce that they are proceeding under the authority of a warrant, a person may have no way of knowing whether he must accede to an intrusion into his home or whether he has the constitutional right to refuse entry. Thus, an essential item of information conveyed by an announcement is the existence of a warrant authorizing a non-consensual entry:

But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.[] Wilson, 514 U.S. at 931-32 (quoting Semayne’s Case, 77 Eng. Rep. 194, 195-96 (K.B. 1603) (emphasis added)).
We recognize that in the past we have stated that “once the occupants have voluntarily opened the door to uniformed officers, the requirements of the knock and announce rule are satisfied.” State v. Chandler, 119 N.M. 727, 735, 895 P.2d 249, 257 (Ct. App. 1995). In making this statement, we appear to have given insufficient consideration to a person’s constitutional right to deny entry to officers desiring to enter private premises without a warrant. We therefore qualify our statement in Chandler. Where the lawfulness of a non-consensual entry into a residence or other private premises depends upon the authority conferred by a warrant, the announcement component of the knock-and-announce rule necessarily includes a requirement that officers executing a warrant announce that they are present under the authority of a warrant—e.g., “we have a warrant.” In such cases, a mere announcement of police presence without reference to the warrant does not alert the occupants of a residence to the executing officers’ authority to effect a non-consensual entry under the warrant. “[T]he policemen must identify themselves as police and indicate that they are present for the purpose of executing a search warrant. It is not enough that by knocking on the door or in some other way the occupant has been made aware that someone is outside.” 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.8(c) at 671 (4th ed. 2004) (footnote omitted; emphasis added).

In this case, Defendant appears to have been alerted to the presence of the police officers when he opened the door. His exclamations of “Oh shit!” strongly suggests that Defendant, who was in possession of illegal drugs at the time, and understandably, would have desired to avoid an encounter with police, recognized that the persons confronting him were uniformed police officers. We agree with the State that on the facts of this case the officers were not required to knock and announce their presence. To the extent the knock-and-announce rule is designed to insure that the subject of a warrant is aware of the presence of police outside his residence, Defendant’s own actions in opening the door and observing the uniformed officers satisfied that part of the rule. But as we have noted above, a constitutionally adequate announcement alerts the occupant to the fact that the officers are acting under the authority of a warrant, not merely to their presence. Id. at 693 (observing that “there is no good reason for concluding, as some courts have done, that the occupants are aware of the authority and purpose merely because the police knew that someone within had been seen them approaching or that someone outside had shouted something into the premises”) (footnote omitted). Here, there is no dispute that the officers did not refer to the arrest warrant prior to forcing entry. This case, therefore, turns upon whether the facts known by the officers justified the officers in dispensing with an announcement of their purpose and authority.

We reject the State’s argument that the occupant’s surprise upon seeing the officers and his attempt to immediately close the door rendered further compliance with the announcement component of the knock-and-announce rule a useless gesture. Officers executing a warrant are excused from announcing their purpose and authority where facts known to the officer “justify them in being virtually certain that the [subject] already knows their purpose so that an announcement would be a useless gesture.” See Miller v. United States, 357 U.S. 301, 310 (1958) (discussing futility exception to the common-law announcement rule). We decline to adopt a presumption that a homeowner who peacefully opposes an apparently warrantless (and therefore apparently unlawful) entry necessarily will resist the authority of a warrant. See Semayne’s Case, 77 Eng. Rep. at 196 (presuming that a homeowner will obey the authority of a warrant). Where an occupant’s conduct in shutting a door or otherwise denying consent to enter private premises is consistent with his assertion of Fourth Amendment rights, officers must be aware of other facts that reasonably justify them in assuming that the occupant would refuse to accede to the authority of a warrant before foregoeing an announcement of their purpose and authority on the ground of futility.

It is well established that, apart from futility, compliance with the knock-and-announce rule may be excused by exigent circumstances. Lopez, 2005-NMSC-018, ¶ 10. Whether officers were confronted with exigent circumstances sufficient to excuse compliance with the knock-and-announce rule is a mixed question of fact and law. Id. ¶ 11. We defer to the district court’s findings of historical fact if supported by substantial evidence. Id. ¶ 9. We review de novo the constitutional question of whether the district court correctly balanced individual privacy interests against the State’s interest in effective law enforcement. Id. ¶ 11.

The initial Fourth Amendment/Article II, Section 10 intrusion occurred when Officers Elrick and Flores placed their feet between the doorjamb and door to prevent Defendant from shutting the door. See State v. Reynaga, 2000-NMCA-053, ¶ 9, 129 N.M. 257, 5 P.3d 579; State v. Maland, 103 P.3d 430, 434 (Idaho 2004); State v. Larson, 668 N.W.2d 338, 342 (Wis. Ct. App. 2003); State v. Robinson, 659 N.E.2d 1292, 1295 (Ohio Ct. App. 1995); see also Halpern, 2001-NMCA-049, ¶ 14 (observing that “[t]he protections of the Fourth Amendment and Article II, Section 10 place a priority on protection of the home, and draw ‘a firm line at the entrance to the house’)” (quoting Payton, 445 U.S. at 590). If this initial intrusion into Defendant’s home was unlawful, then Defendant’s subsequent actions cannot be relied upon to establish exigent circumstances justifying the initial intrusion. Reynaga, 2000-NMCA-053, ¶ 14. Thus, the crucial question in this case is whether exigent circumstances justifying noncompliance with the knock-and-announce rule existed at the point that Officers Elrick and Flores crossed the threshold of the apartment. Here, officer safety was the sole law enforcement interest relied on by the district court to justify an unannounced entry by force.

At the point that the officers crossed the threshold of the apartment, the officers were aware that: (1) the subject of the warrant had failed to appear in district court on an undisclosed felony charge; (2) the subject of the warrant might be involved with illegal drugs; (3) under certain circumstances, the subject of the warrant might fight officers; (4) the occupant who answered the door matched the description of the subject of the warrant and was surprised to find police officers outside his door; and (5) the occupant attempted to avoid contact with the officers by shutting the door.

The first two factors—probable cause to believe Defendant had committed a felony and reason to believe that Defendant was involved with illegal drugs—are routinely present in any case in which police are executing a warrant related to a felony drug
offense. It is well-established that knowledge regarding the general propensity of drug dealers to arm themselves or to resist police ordinarily is not sufficient of itself to excuse compliance with the announcement requirement. *Lopez*, 2005-NMDC-018, ¶ 8; *Attaway*, 117 N.M. at 152, 870 P.2d at 114. Here, Officers Elrick and Flores—the officers actually executing the warrant—had not been advised that the subject of the warrant had been charged with battery on a police officer and had no information, other than his possible involvement with unknown amounts and types of illegal drugs, that the subject of the warrant might be armed with a dangerous weapon.

{21} The State argues that we should treat Defendant’s surprise and his attempt to shut the door in response to seeing the officers as exigent circumstances excusing an announcement. The State fails to recognize that, as we have noted above, shutting a door can be an assertion of constitutional rights.

The defendant communicated to the officers the limited scope of his consent . . . when he attempted to bar the officers’ entry into the apartment by closing the door, and the officers exceeded the scope of [the defendant’s] voluntary consent when they forced their way over the threshold and into the apartment. *Robinson*, 659 N.E.2d at 1295. Generally, a person’s assertion of his Fourth Amendment rights is not probative of “guilt, suspicion, or dangerousness.” *State v. Vandenberg*, 2003-NMDC-030, ¶ 46, 134 N.M. 566, 81 P.3d 19. It would be “anomalous” to treat a person’s refusal to consent to an apparently warrantless intrusion into his home as a circumstance justifying dispensing with another component of the Fourth Amendment/Article II, Section 10’s protection against unreasonable searches and seizures. Cf. *State v. Garcia*, 2005-NMDC-017, ¶ 31, 138 N.M. 1, 116 P.3d 72 (observing that a person’s exercise of the constitutional and statutory right to bear arms by itself cannot support a reasonable suspicion that he is both armed and dangerous). Due to the absence of an announcement of the officers’ purpose and authority, Defendant’s attempt to shut the door did not constitute an exigency per se.

{22} The State suggests that we defer to the opinions of Officers Elrick and Flores, who testified that they perceived Defendant’s conduct in attempting to shut the door as a threat to their physical safety. While we agree that the testimony of these officers is important evidence, it cannot be dispositive of itself of reasonableness in the constitutional sense. Due to training and work experience, law enforcement officers perceive the world differently than do civilians:

[Police work . . . by its nature, puts officers in personal jeopardy, and often requires officers to assert authority over others. . . . [T]hese two phenomena—personal danger and the need to assert authority—deeply affect officers’ views of the world. . . . ‘Working together, the factors of danger and authority tend to make police officers constantly vigilant, suspicious, and ready to assert dominant authority’ over civilians in situations where an officer’s authority is questioned in even the most minor of ways. Necessarily, it would appear, the same vigilance that officers apply to detect criminality as part of their work becomes a “fact of life” for their interactions with the broader public.

Eliot Spitzer, Office of the Attorney Gen. of the State of N.Y., *The New York City Police Department’s “Stop & Frisk” Practices: A Report to the People of the State of New York From The Office Of The Attorney General 67 (1999)* (footnotes omitted). The magnitude of the harm in a worst case scenario—death or serious physical injury—understandably encour-
ages an attitude that it is better to treat every citizen-officer encounter as potentially threatening rather than risk overlooking a single actual threat to the officer’s personal safety. A purely police-centric standard of objective reasonableness can be expected to be significantly over-inclusive in the perception of threat, and, in conjunction with the already-relaxed constitutional standard, is likely to result in a large number of intrusions into the privacy of persons who in fact pose no actual threat to police, but whose conduct is perceived as threatening or uncooperative from the better-safe-than-sorry viewpoint of law enforcement officers. We are also concerned that a purely police-centric standard will shortchange individual privacy interests by viewing constitutional limitations on police discretion largely as impediments to safety. Thus, although evidence of what law enforcement authorities deem an appropriate and professionally reasonable response to perceived threatening conduct is a factor to be considered, it cannot be dispositive of itself of the constitutional reasonableness of police conduct—particularly when the perceived threatening or non-compliant conduct is consistent with the subject’s assertion of constitutional rights.

{23} The one circumstance known to Officers Elrick and Flores that clearly stands out was an unidentified officer’s opinion that Defendant might fight. Although this circumstance would have justified a reasonable officer in exercising caution, it is not clear to us that this circumstance necessarily weighs in favor of dispensing with an announcement of the officers’ purpose and authority. Reasonable officers will be alert to the possibility that reflexive, immediate resort to force is not always the best course and that an unannounced entry by force may increase, rather than reduce, the risk of harm as compared to an entry after full compliance with the knock-and-announce rule. By bursting into Defendant’s home without announcing their purpose and authority, the officers deprived Defendant

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3From information in the record proper documenting Defendant’s prior convictions, it appears to a near certainty that Defendant is the same Peter Vargas whose convictions we affirmed in *State v. Vargas*, 121 N.M. 316, 910 P.2d 950 (1995). In that case, we upheld a forceable entry made simultaneously with the announcement of the executing officers’ presence and purpose based on evidence that would give reasonably well-trained officers grounds to believe that the defendant and his brother would be armed and dangerous. The facts that are documented as a matter of public record in *Vargas I* were not communicated to Officers Elrick and Flores.


5We assume that the unidentified officer would not have advised Officers Elrick and Flores that Defendant “might fight them” if he had meant to communicate his belief that Defendant would resist arrest with deadly force and that Officers Elrick and Flores would have understood the officer’s warning as a reference to possible resistance not involving deadly force.
of the opportunity to peacefully accede to the authority of the warrant. See Reynaga, 2000-NMCA-053, ¶ 12 (observing that “it is the state of mind of occupants who have conceded the right of the police to enter that reduces the potential for violence”). Reasonable officers would have recognized that bursting into a home without consent and without an announcement of purpose and authority is precisely the type of conduct that can be expected to provoke an instinctive defensive response from a peaceful homeowner. See Hudson v. Michigan, __U.S.__, __, 126 S. Ct. 2159, 2165 (2006) (noting that protection of human life and limb is an interest furthered by the knock-and-announce rule “because an unannounced entry may provoke violence in supposed self-defense by the surprised resident”).

{24} It is important to distinguish this case from cases involving search warrants and cases involving occupants who are reasonably believed to be armed and dangerous. When officers are executing a search warrant and have reason to believe that the occupants of a premises will destroy evidence or contraband that is the subject of a search warrant, the officers must act quickly to prevent the loss of the items that are the subject of the warrant. Ordinarily, this requires the officers to enter the premises and physically separate the occupants from the items that are the subject of the warrant. Similarly, when officers executing a search or arrest warrant have reason to believe that the occupants are armed and dangerous, the officers must enter the premises in order to deny the occupants the use of their weapons, either by securing the weapons or restraining the occupants. In these cases, the executives executing arrest warrants are, in effect, engaged in a footrace with the occupants in which time is of the essence. In contrast, officers executing an arrest warrant can anticipate and prevent the escape of the arrestee without engaging in any Fourth Amendment/Article II, Section 10 intrusion simply by stationing officers at strategic locations outside the subject’s residence. Where, as here, the officers were not executing a search warrant and had not been informed of facts suggesting that Defendant was armed and dangerous or particularly likely to flee, the case for dispensing with a full announcement on grounds of temporal exigency is much less clear.

{25} We of course may not engage in a “divide-and-conquer analysis” in which we consider each allegedly exigent circumstance out of context, dismissing that particular circumstance as insufficient of itself to justify the actions of the law enforcement officers. State v. Vandenberg, 2002-NMCA-066, ¶ 32, 132 N.M. 354, 48 P.3d 92 (Pickard, J., dissenting) (internal quotation marks omitted), rev’d 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19. Whether exigent circumstances justifying an unannounced entry were present must be judged under the “totality of the circumstances.” Lopez, 2005-NMSC-018, ¶ 16. This standard requires us to consider in the aggregate all exigent circumstances “found or impliedly found” by the district court that were known to the executing officers at the time of entry. Id. ¶ 22 (internal quotation marks omitted). While we separately discussed the factors relied on by the State, we have also considered them in the aggregate in determining whether the totality of the circumstances excused the officers from announcing their purpose and authority prior to entering.

{26} The Fourth Amendment and Article II, Section 10 protect the people against unreasonable searches and seizures. Because the crucial modifier “unreasonable” is not self-defining and because searches and seizures occur in innumerable and varied factual contexts, the line between reasonable and unreasonable searches and seizures is drawn by judicial decisions. Fourth Amendment/Article II, Section 10 analysis of police conduct is to a considerable extent a matter of circular, “chicken or the egg,” reasoning: does police practice prescribe what expectations of privacy are constitutionally reasonable, or do judicial rulings validating expectations of privacy as reasonable prescribe police practice? When a court denies a motion to suppress, it is deciding that the officers’ view of the world was reasonable and that the individual’s expectation of being free of the particular intrusion was unreasonable. When a court grants a motion to suppress, it is validating an expectation of privacy as reasonable and simultaneously deciding that the officers’ conduct was unreasonable under the circumstances. The reality and the irony of search and seizure jurisprudence is that the rights of law-abiding citizens to go about their daily activities free of random and arbitrary intrusions by law enforcement officials is primarily determined by rulings on motions to suppress evidence filed by the defendants in criminal cases, and not by judgments in civil rights cases vindicating a citizen’s expectation of privacy as reasonable: “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” Florida v. Riley, 488 U.S. 445, 463-64 (1989) (Brennan, J., dissenting) (quoting United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (internal quotation marks and brackets omitted), overruled by Chimel v. California, 395 U.S. 752 (1969)).

{27} We offer the following in response to the dissent.

{28} Because reasonableness is fact specific, it is essential that a court base its reasonableness analysis on the record. Here, the timing of events is critical to the analysis of the constitutionality of the unannounced entry. Although the dissent states that “Defendant disobeyed the commands of uniformed officers immediately before their entry into his apartment,” (emphasis added), see dissent ¶ 45, a careful review of the record establishes that at the point in time that Defendant began to shut the door the only thing the officers had said was “Hi, how ya’ doin” or “Hey bro’, how ya’ doin’?” Defendant could not have disobeyed the officers’ commands when he began to shut the door, because the officers had not ordered him to do anything at that point. The officers blocked the doorway in response to Defendant’s entirely lawful attempt to shut the door. Even if the ensuing struggle (which Defendant himself peacefully terminated after a few seconds) can be characterized as unlawful, see NMSA § 30-22-1(D) (1981), that conduct cannot retroactively justify the officers’ decision to enter Defendant’s apartment in order to block the doorway.

New Mexico law does not criminalize a refusal to admit officers executing a warrant when the defendant does not know that the officers are attempting to serve or execute process. NMSA 1978, § 30-22-1(A) (1981). The crime of evading arrest includes a requirement that the defendant have had knowledge that the officer was attempting to apprehend or arrest the defendant. Subsection 30-22-1(B); UJI 14-2215 NMRA. These mens rea requirements underscore the importance of announcing the authority of the warrant early in the process of executing the warrant so as to render resistance or evasion unlawful.

The purpose of executing an arrest warrant of an announcement of purpose and authority. In other words, it is unreasonable to sacrifice privacy interests absent a corresponding gain in safety. This requires more than a finding that the executing officers were “unsafe” in some general sense as found by the district court. Serving a warrant rarely will be completely safe, yet announcement remains the constitutional default rule, not the exception. Moreover, the knock-and-announce rule further occupant safety as well as officer safety. Attaway, 117 N.M. at 151, 870 P.2d at 113. Even if we were to assume that a practice of immediate resort to armed force materially advances the interest of officer safety by comparison to entry after compliance with the knock-and-announce rule—a circumstance that has not yet been proven—any gain in officer safety from immediate resort to entry by force with guns drawn still must be balanced against any increased risk that civilian bystanders will be injured in the course of an entry by force.

31] Contrary to the dissent’s assertion, we have not established a bright line rule that an officer’s crossing the threshold of a residence to block a doorway prior to an announcement will always violate the Fourth Amendment or Article II, Section 10. By way of example, a case in which the officer blocks the door while simultaneously announcing that he has a warrant would be materially distinguishable from the present case. Moreover, we have not decided that the unannounced forced entry in this case was unreasonable as a matter of law, nor do we mean to foreclose the State from proving on remand that the course of conduct followed by the executing officers was constitutionally reasonable. Rather, we merely held that on the record before us, the State did not meet its burden of proving that the alternative course of conduct followed by the officers in fact furthered the interest in officer and occupant safety. We decline to unquestioningly accept the unproven proposition that immediate resort to armed force actually advances the interests of officer and occupant safety. Without proof that safety interests in fact are advanced by a forced entry at gunpoint, a court can only speculate as to how the balance of interests furthered by an unannounced forced entry at gunpoint compared to the balance of interests furthered by an announced entry.

32] We conclude that on the particular facts of this case, the State failed to carry its burden of demonstrating that the balance of privacy interests versus law enforcement interests justified dispensing with an announcement of the officer’s purpose and authority. Two factors stand out. First, and most importantly, the officers executing the warrant were not given any specific information that Defendant or any other occupant was armed and dangerous. Second, the intrusion in this case was into a private residence, a setting where Fourth Amendment and Article II, Section 10 privacy interests traditionally are of heightened importance.

33] We conditionally reverse the order denying Defendant’s motion to suppress. We remand to the district court for reconsideration of Defendant’s motion under the standards set out in this opinion. Since service of an arrest warrant seems to us to be a Fourth Amendment context in which empirical evidence can be useful in “unmasking the theoretical assumptions that undergird constitutional law,” Tracey L. Meares & Bernard E. Harcourt, Forward: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 J. Crim. L. 733, 736 (2000), we encourage the district court to receive empirical evidence bearing upon the reasonableness of the officers’ decision to force entry without an announcement that they were acting pursuant to a warrant.

34] IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

I CONCUR:
RODERICK T. KENNEDY, Judge
JAMES J. WECHSLER, Judge
(dissenting).

WECHSLER, Judge (dissenting).

35] I respectfully dissent from the majority opinion. I agree with the majority that announcement is preferable. I also agree with the majority’s discussion of the history, importance, and purpose of the knock-and-announce rule, but I conclude that the ultimate test, reasonableness, was met in this case. The majority opinion appears to create a bright-line rule of announcement before officers make any entry beyond a doorway. But see, e.g., State v. Duran, 2005-NMSC-034, ¶ 34, 138 N.M. 414, 120
P.3d 836 (“Our case law has consistently disfavored a bright-line test in analyzing Fourth Amendment questions.”); State v. Bricker, 2006-NMCA-052, ¶ 26, 139 N.M. 513, 134 P.3d 800 (“Our appellate courts have preferred a balancing-of-interests test for reasonableness, rather than a bright-line test.”), cert. granted, 2006-NMCERT-005, 139 N.M. 568, 136 P.3d 569. Because I believe that the reasonableness test was met under the specific and unusual facts of this case, I dissent.

{36} When our Supreme Court in Attaway first held that the knock-and-announce rule has constitutional significance, it stressed that “the ultimate question in all cases regarding alleged search and seizure violations is whether the search and seizure was reasonable.” Attaway, 117 N.M. at 149, 870 P.2d at 111. Attaway held that “partial compliance or non-compliance with the rule of announcement may be excused if exigent circumstances exist.” Id. at 151, 870 P.2d at 113. These rules remain unchanged. See Lopez, 2005-NMSC-018, ¶ 27.

{37} “[T]he reasonableness of the manner of execution of a warrant must be evaluated in the light of each of the interests served by the announcement rule.” Reynaga, 2000-NMCA-053, ¶ 13. In weighing the purposes served by the knock-and-announce rule, I find Chandler to be persuasive. In Chandler, police officers executing a search warrant knocked on the defendant’s door. Chandler, 119 N.M. at 734, 895 P.2d at 252. The defendant answered and police entered without announcing their purpose. Id. at 734-35, 895 P.2d at 256-57. We held that it was not ineffective assistance of counsel for the defendant to fail to raise a knock-and-announce challenge because it was “highly unlikely that [the defendant] could have prevailed.” Id. We noted that “[o]nce the property owner answers the door, opens it, and sees uniformed officers, there is no need to destroy property through forced entry; the home is not defiled through a surprise assault; and the occupants will not resort to violence in the misapprehension that robbers have attacked their dwelling.” Id. at 735, 895 P.2d at 257.

{38} In this case the policy concerns underlying the adoption of the knock-and-announce rule—officer safety, protection of privacy, and avoidance of property damage—were all better served by the officers’ actions than by a strict application of the knock-and-announce rule. See id. The majority’s proposed procedure—requiring officers to allow Defendant to close the door before announcing their presence and waiting for a response—would have only frustrated the purposes of the knock-and-announce rule.

{39} First, had Defendant successfully closed his door against the orders of the officers, he could have escaped or armed himself. This case is not one in which Defendant might have mistakenly attacked the officers in response to what appeared to be a burglary or another illegal intrusion. See, e.g., Reynaga, 2000-NMCA-053, ¶ 13 (noting that officer safety is better preserved by avoiding “forcible entry by an officer masquerading as a maintenance man”). The officers were both in uniform and Defendant’s response to their presence indicated that Defendant knew they were officers. This case is also not a situation in which it was unclear whether Defendant intended to resist police action. See, e.g., id. ¶ 12 (“It is not at all clear to us that it is to an officer’s advantage for [the decision to accede or resist authority] to be made after the officer has entered the premises to be searched.”). At the time that the majority would have had the officers step back and announce the purpose of their visit, Defendant was actively, and forcefully, disobeying the directions of the officers to not close the door.

{40} Second, the officers would have been more likely to damage property in their entry if they had waited until the door was completely closed before forcing it open. See Reynaga, 2000-NMCA-053, ¶ 13 (noting that “[a] ruse that causes an occupant to open a door . . . may very well serve the interest of avoiding the damage to the door that would result from a breaking”); see also, e.g., Hudson, ___ U.S. at ___, 126 S. Ct. at 2165 (noting that one purpose of the knock-and-announce rule is to allow the door to be opened rather than broken); United States v. Kemp, 12 F.3d 1140, 1142 (D.C. Cir. 1994) (noting that the interest in “preventing unnecessary destruction of property [is not] implicated when the door is open and the officers can enter peaceably into the premises”).

{41} Finally, Defendant and others in the residence are more likely to be surprised, and their privacy invaded, a minute or two after the door closes than they are when the door remains open and they know the interior of their apartment is exposed to view by passersby in the hall. I certainly agree with the majority that “[t]he sanctity of the home is not abandoned simply by leaving a door cracked.” Halfpenny, 2001-NMCA-049, ¶ 14. But the privacy interests served by the knock-and-announce rule are not identical to the privacy interests served by the rule requiring a search warrant. The interest served by the knock-and-announce rule: protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the opportunity to prepare for the entry of the police. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed. In other words, it assures the opportunity to collect oneself before answering the door.

Hudson, ___ U.S. at ___, 126 S. Ct. at 2165 (internal quotation marks and citation omitted). In this case, Defendant had collected himself in anticipation of leaving his apartment when the door opened. I would therefore conclude that Defendant’s privacy interest, if any, was minimal, and that the majority’s proposed procedure—allowing Defendant to close the door and then reopen it after a moment had passed—would not have significantly furtheered his interest.

{42} In balancing the totality of the circumstances, then, I would hold that the interests underlying the knock-and-announce rule were met in this case and that the officers’ entry was therefore reasonable. See Lopez, 2005-NMSC-018, ¶¶ 26-28 (holding that determination of reasonableness requires viewing the totality of the circumstances and weighing the interests of the State against the interests of the defendant). The State’s interest in safely apprehending Defendant were strong. Cf. id. ¶ 26 (finding a “legitimate and strong” interest in “the expeditious and safe execution of a search warrant”). Defendant’s interests in property and privacy, on the other hand, were minimal at the time he opened the door. See Attaway, 117 N.M. at 151, 870 P.2d at 113 (“An otherwise legal search pursuant to a warrant is not made unreasonable by an unannounced entry when privacy and occupant safety interests are minimal and the interests of law enforcement are strong.”).

{43} The facts of this case, particularly when viewed in the light most favorable to the State, evidence reasonable actions on the part of the police officers. The officers went to an apartment to execute a valid warrant. Before they knocked, the door opened and officers saw a man fitting the description of the person they sought. Both officers testified that upon seeing the officers, the man attempted to retreat into
the apartment and close the door. The officers told Defendant not to close the door and put a foot into the doorway to prevent Defendant from disobeying them. It would have been unreasonable for the officers to allow Defendant to close the door and escape while the officers waited for him to return to the door, and the law should not require such an impractical result. I agree that it would have been better had the officers informed Defendant that they had a warrant immediately upon seeing him, but I would not fault them for a delay of only a few seconds while they prevented Defendant from barricading himself inside the apartment or escaping through a window.

Furthermore, our courts have recognized a futility exception to the knock-and-announce requirement. See, e.g., Lopez, 2005-NMSC-018, ¶ 10 (listing circumstances in which the knock-and-announce rule is not mandated, such as when officers have reasonable suspicion that compliance would be futile); Attaway, 117 N.M. at 151 n.7, 895 P.2d at 113 n.7 (recognizing that circumstances besides officer safety concerns, including when a “suspect knows of officer’s presence and purpose before compliance,” might justify noncompliance with the knock-and-announce rule); State v. Ortega, 114 N.M. 193, 196, 836 P.2d 639, 642 (Ct. App. 1992) (noting that noncompliance with the knock-and-announce rule has been held to be justified when occupants know of the presence and purpose of law enforcement), aff’d, 117 N.M. 160, 870 P.2d 122 (1994); State v. Kenard, 88 N.M. 107, 108-09, 537 P.2d 1003, 1004-05 (Ct. App. 1975) (holding that the officer’s failure to state his purpose was justified when the defendant fled from the door upon being confronted by police). The United States Supreme Court has also recognized that incomplete compliance with the knock-and-announce rule may be excused when full compliance would have been futile. See, e.g., Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting in part) (“Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except . . . where the persons within already know of the officers’ authority and purpose . . . or . . . where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.”), adopted in relevant part by Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968); Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (“In order to justify a “no-knock” entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”).

The circumstances in this case justify the officers’ partial compliance. I agree with the majority’s refusal “to adopt a presumption that a homeowner who peacefully opposes an apparently warrantless . . . entry necessarily will resist the authority of a warrant.” However, given the facts of this case, in which Defendant disobeyed the commands of uniformed officers immediately before their entry into his apartment, I believe it would have been futile for the officers to announce their purpose. Defendant’s actions were not mere opposition and the officers’ response was reasonable. At least two other jurisdictions have concluded that the knock-and-announce rule was not violated by police action in similar situations. See State v. Berry, 496 N.W.2d 746 (Wisc. Ct. App. 1993); Commonwealth v. Davis, 480 A.2d 1035 (Pa. Super. Ct. 1984); see also 2 LaFave, supra, § 4.8(c), at 671 n.59 (“But if the announcement to the person who answers the door that the caller is a policeman results in immediate resistance, entry may be accomplished prior to announcement of purpose . . . .”); 2 Joseph G. Cook, Constitutional Rights of the Accused § 4:40 (3d ed. 1996) (“A refusal to open the door once the presence of officers is known will justify a forcible entry.”).

Officers in Berry were approaching a house to execute a search warrant when they saw an occupant looking at them from a window. Berry, 496 N.W.2d at 747. The uniformed officers yelled “police,” but the occupant moved to close the front door. Id. When the officers reached the house, they opened the front door, which had not been completely closed, without any additional announcement. Id. The court found no knock-and-announce violation:

Likewise, we determine that rigid compliance with the rule of announcement in this case would have been a useless gesture. [The defendant] had been looking out the window as the officers approached the house and yelled “Police.” The officers were dressed in a manner that clearly identified them as law enforcement. After seeing the officers, [the defendant] began to close the door in an obvious attempt to prohibit the officers from gaining entry. From this action, the officer reasonably believed that to announce that he had a search warrant to wait for admission would have been futile.

Id. at 748. The court noted that “[i]t stretches belief to suppose that [the suspect] would have immediately stopped pushing on the door if [the officer] had added, after identifying himself as a police officer, that he possessed a search warrant.” Id. at 749 (alterations in original) (internal quotation marks and citation omitted).

In Davis, officers executing a search warrant were approaching a house when a man saw them and fled inside. Davis, 480 A.2d at 1041. The police knocked and announced their presence, but did not inform the occupants of the house that they had a warrant and did not wait more than ten seconds before forcing entry. Id. The defendant argued that officers violated the knock-and-announce rule both by failing to state that they had a warrant and by failing to wait a reasonable amount of time before forcing entry. Id. The court disagreed. Instead, the court noted that “[i]t has long been the rule . . . that where the police are reasonably certain that the occupants are aware of their presence and purpose, the police need not knock and announce, and held that “[w]here an occupant sees the police and immediately retreats back into the premises, as is the case here, the duty of the police to knock, announce, and wait is obviated.” Id. at 1042.

Because I conclude that further compliance with the knock-and-announce rule would have protected no legitimate interest of Defendant and could have served no purpose but allowing Defendant to arm himself or escape, I believe the Fourth Amendment and Article II, Section 10 were not violated by the officers’ entry in this case. I do not believe that it is reasonable to require officers to follow futile procedures. I therefore agree with the district court that, under the limited facts of this case, the officers’ conduct was justified.

I also disagree with the majority’s characterization of Defendant’s actions in resisting the officers as “an assertion of constitutional rights.” Certainly shutting a door can successfully terminate a consensual encounter with police. Cf. State v.
I believe the officers were engaged in lawful execution of a warrant and did not violate the Fourth Amendment or Article II, Section 10. But even if the officers were engaged in unlawful police conduct, I believe that Defendant did not have the right to disregard their commands. Nor did Defendant have the right to close his door on Officer Elrick’s foot, even if it was in the doorway in violation of Defendant’s rights. In New Mexico the remedy for an unlawful arrest or search is civil. See State v. Chamberlain, 112 N.M. 723, 729, 819 P.2d 673, 679 (1991) (“If the [police conduct] had been illegal, there are remedies within the law to protect appellant’s rights. Those remedies do not include resort to self-help measures.”). The victim of a peaceable, but illegal, arrest has no right to commit assault or to otherwise resist the commands of the arresting officers.

{50} For the above-stated reasons, I respectfully dissent.

JAMES J. WECHSLER, Judge

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**Certiorari Denied, No. 30,135, January 5, 2007**

From the New Mexico Court of Appeals

**Opinion Number: 2007-NMCA-007**

IN RE NEW MEXICO INDIRECT PURCHASERS MICROSOFT CORPORATION ANTITRUST LITIGATION No. 25,789 (filed: November 15, 2006)

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

**DANIEL A. SANCHEZ,** District Judge

**CHARLES B. CASPER**

MONTGOMERY, MCCRACKEN,

WALKER & RHoads, L.L.P.

Philadelphia, Pennsylvania

**RICHARD J. WALLIS**

STEVEN J. AESCHBACHER

MICROSOFT CORPORATION

Redmond, Washington

**DAVID B. TULCHIN**

SHARON L. NELLES

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New York, New York

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**LEONARD B. SIMON**

PAMELA M. PARKER

SUSAN G. TAYLOR

LERACH, COUGHLIN, STOIA,

GELLER, RUDMAN & ROBBINS, L.L.P.

San Diego, California

for Appellees

**Celia Foy Castillo, Judge**

[1] In this case, we examine the reasonableness of attorney fees that were awarded on the basis of the common fund doctrine, pursuant to terms in a class action settlement agreement. We conclude that under the circumstances of this case, the settlement provisions regarding the common fund doctrine are dispositive and that the district court did not abuse its discretion in awarding fees by using the percentage-of-recovery method or in its application of the method. Relying on our evidentiary review of the Rule 16-105 NMRA factors used by the district court to evaluate the reasonableness of the fee, we also conclude that the fee awarded in this case was reasonable. Accordingly, we affirm.

**I. BACKGROUND**

[2] This class action is one of many related suits filed against Appellant Microsoft Corporation (Microsoft) in federal and state courts throughout the country. Numerous complaints were filed after the United States District Court for the District of Columbia issued in July of 1999 findings of fact establishing that Microsoft had engaged in conduct indicating an improper use of market advantage to stifle innovation. See United States v. Microsoft Corp., 84 F. Supp. 2d 9, 12 (D.D.C. 1999); see also United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (concluding that Microsoft violated the Sherman Antitrust Act and analogous state statutes), aff’d in part and rev’d in part, 253 F.3d 34, 46 (D.C. Cir. 2001).

[3] In New Mexico, three class action complaints were filed before March 2000. The three cases were then consolidated by a writ of superintending control issued by the New Mexico Supreme Court. The
consolidated amended complaint, alleging that Microsoft had violated New Mexico’s Antitrust Act and Unfair Practices Act, was filed in late 2000. Microsoft filed a motion to dismiss, and Class Plaintiffs filed a motion to certify the Class, both of which were fully briefed and argued. The motion to dismiss was granted in part and denied in part, and a second consolidated amended complaint was filed and answered. Extensive discovery began and continued through June 28, 2002.

{4} By late 2002, the district court had certified the Class, and the order granting certification was on appeal to this Court. That appeal was fully briefed, and trial preparation continued while a settlement was negotiated. The Settlement Agreement (Agreement) was finally approved in December 2004, and the pending appeal of the class certification was dismissed. The terms of the Agreement fall into three main categories. First, Microsoft agreed to provide vouchers that could be claimed by a member of the Class and redeemed for a cash reimbursement after purchase of any qualified computer hardware or software. Second, Microsoft agreed to provide a cy pres award of vouchers to eligible schools in New Mexico. The amount of the cy pres award is based on a percentage of vouchers unclaimed and a percentage of claimed vouchers unredeemed by members of the Class. Third, Microsoft promised to pay reasonable attorney fees and expenses, and the parties agreed that the attorney fees would be determined on the basis of the “common fund” doctrine.

{5} Subsequently, after hearing oral arguments regarding Class Counsel’s fee application, the district court awarded $6.1 million in attorney fees, plus appropriate gross receipts tax, and $525,179 in expenses. The court used a percentage-of-recovery calculation and then applied the lodestar method to double-check the reasonableness of the fee award. For additional guidance regarding reasonableness, the court below also considered the factors in Rule 16-105 of the New Mexico Rules of Professional Conduct. Microsoft appeals this award. Additional facts will be developed as relevant to our discussion of the issues.

II. DISCUSSION

A. Standard of Review

{6} An award of attorney fees is reviewed for an abuse of discretion. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450; Gavin Maloof & Co. v. Sw. Distrib. Co., 106 N.M. 413, 415, 744 P.2d 541, 543 (1987) (“[T]he amount of an award of attorney fees lies within the sound discretion of the trial court.”); Hertz v. Hertz, 99 N.M. 320, 331, 657 P.2d 1169, 1180 (1983) (“It is well [ ]settled that an award of attorney’s fees on the basis of reasonable compensation is a finding not to be disturbed unless patently erroneous as reflecting an abuse of discretion.” (emphasis, internal quotation marks and citations omitted)). A discretionary decision based on a misapprehension of the law is an abuse of discretion that must be reviewed de novo. NARAL, 1999-NMSC-028, ¶ 7. Thus, the question of whether the correct law has been applied and the district court’s application of that law to the facts are reviewed de novo. Id. ¶ 7-8. After we determine whether the correct law has been applied, we review a discretionary decision for an abuse of discretion and reverse “only if it [is] contrary to logic and reason.” Id. ¶ 8 (internal quotation marks and citation omitted). “The test is not what we would have done had we heard the fee request, but whether the trial court’s decision was clearly against the logic and effect of the facts and circumstances before the court.” In re Estate of Greig, 107 N.M. 227, 230, 755 P.2d 71, 74 (Ct. App. 1988).

B. Microsoft’s Arguments

{7} Microsoft makes three main arguments that the district court abused its discretion by awarding attorney fees in an amount that is vastly disproportionate to the benefit obtained for the Class. First, Microsoft asserts that the district court erred by applying the percentage-of-recovery method (percentage method) to calculate the fee award and that in these circumstances, the lodestar method should have been used to calculate the fee. Microsoft alternatively contends that even if the percentage method were permissible, the district court erred in its valuation of the recovery and that this error resulted in a fee that was disproportionate to the recovery.

{8} Second, Microsoft argues that the district court erred by automatically accepting Class Counsel’s proffered lodestar because out-of-state Class Counsel’s hourly rates were not defined by market rates in New Mexico and because Class Counsel improperly submitted hours spent both on fee litigation and on work performed for Microsoft cases in other states. Microsoft also asserts that Class Counsel failed to provide supporting documentation “for $81,201 worth of lodestar.”

{9} Third, Microsoft argues that the district court erred by concluding that a multiplier of three was an appropriate enhancement of the lodestar in these circumstances. Microsoft contends that this case was a tag-along action, “piggybacking” actions from the federal court and other state courts, and that “[n]either the efforts expended, nor the risks assumed, nor the results obtained . . . were exceptional” enough to justify a multiplier of three. Microsoft asserts that a proper lodestar would be $1,509,023 and that this lodestar, enhanced by a multiplier of 1.5, would produce a reasonable fee of $2,263,534, a reduction of almost $4 million from the amount actually awarded.

{10} In addition to the arguments regarding the disproportionality of the fee, Microsoft also challenges the district court’s automatic acceptance of Class Counsel’s claimed expenses. Microsoft contends that the district court did not address Microsoft’s objections to the claimed expenses and “gave no reason at all for its finding that expenses . . . were reasonable.” Moreover, Microsoft asserts that out-of-state Class Counsel claimed $225,833 in expenses without a requisite “showing that those expenses were reasonably and necessarily incurred in the New Mexico case . . . [and thereby] failed to satisfy their burden of proving that the expenses . . . provided any benefit” to the Class.

C. Preliminary Considerations

{11} The reasonableness of attorney fees awarded after a class action settlement is an issue of first impression for this Court. Where New Mexico law is not instructive, we find guidance in other jurisdictions. Law from other jurisdictions is not binding on us, however, even though it may be persuasive. See Breen v. Carlsbad Mun. Sch., 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413 (“Federal case law is certainly informative, but only to the extent it is persuasive.”); Sec. Ins. Co. of Hartford v. Chapman, 88 N.M. 292, 298-99, 540 P.2d 222, 228-29 (1975) (noting that the decisions of other states with similar statutes are persuasive but not binding).

{12} Generally, the determination of a fee award after settlement of a class action and the subsequent review of that determination involve consideration of a variety of competing interests and responsibilities. First, the judiciary has a duty, pursuant to Rule 1-023(E) NMRA, to review the reasonableness of any award of fees in a class action. See 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 14.1, at 507 (4th ed. 2002) (“To fully discharge its duty to review and approve class action settlement agreements, a district court must assess the reasonableness
of the attorney’s fees.”). A court acts as a fiduciary for class members and, in doing so, weighs the interests of the class in light of class counsel’s efforts on their behalf. See In re Copley Pharm., Inc., 1 F. Supp. 2d 1407, 1409 (D. Wyo. 1998) (citing Brown v. Phillips Petroleum Co., 838 F.2d 451, 456 (10th Cir. 1988)); see also In re FPI/Agretech Sec. Litig., 105 F.3d 469, 473 (9th Cir. 1997) (discussing the lower court’s role to protect class interests). A court assumes this responsibility because class members often have low individual stakes in the outcome of a case and thus often do not object to the settlement or fee award. Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993). Moreover, the defendant often has no interest in division of the fund between class members and class counsel. Id. Thus, a court has a duty to establish the reasonableness of a fee award, which arises out of its obligation to protect class interests by, inter alia, preventing conflicts of interest between class counsel and the class members and preventing collusion between class counsel and the defendant. See Staton v. Boeing Co., 327 F.3d 938, 959-60 (9th Cir. 2003) (discussing the inherent dangers of class settlements, including the compromising of class members’ interests and collusion between negotiating parties); In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig. (In re GM Trucks), 55 F.3d 768, 819-20 (3d Cir. 1995) (discussing the necessity for oversight to prevent abuse that may arise from potential conflict between the class and its counsel, even in situations that do not meet the strict definitions of a common fund), holding limited on other grounds, Amchem Prosds., Inc. v. Windsor, 521 U.S. 591, 619-20 (1997); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) (discussing the potential for conflict between a class and its attorneys, both when fees are paid by the defendant and when fees are distributed from the common fund, because class counsel might urge a settlement for less “in exchange for red-carpet treatment on fees”).

Second, a court must acknowledge the public perception of windfall fees in class actions and use judicial oversight to ensure that fees awarded to class counsel are proportional to the benefit obtained for the class. See Third Circuit Task Force, Third Circuit Task Force Report on Selection of Class Counsel, 74 Temp. L. Rev. 685, 692 (2001) [hereinafter Task Force Report II]. We are sensitive to the criticism of fees that have been awarded in some class actions. See In re Copley, 1 F. Supp. 2d at 1418. We are also aware, however, that this perception can be unfounded. See Task Force Report II, 74 Temp. L. Rev. at 692 (“When there is a public reaction to an attorney fee award in a given case, the public is usually unaware of what the lawyers actually did, what risks they took, what investment they made, and how important their lawyering was to victory for the class.”).

Third, this Court must be mindful that it does not substitute its judgment for that of the district court. Mayeux v. Winder, 2006-NMCA-028, ¶ 32, 139 N.M. 235, 131 P.3d 85; cf. Staton, 327 F.3d at 960 (noting that the abuse of discretion standard limits an appellate court’s review of settlement fairness). We do not reverse a decision under the abuse of discretion standard, unless the ruling below “exceeds the bounds of all reason” or is “arbitrary, fanciful, or unreasonable.” Mayeux, 2006-NMCA-028, ¶ 32 (internal quotation marks and citation omitted). “Indeed ‘abuse of discretion’—already one of the most deferential standards of review—takes on special significance when [a court is] reviewing fee decisions. The district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record.”


Fourth, we must conserve judicial resources and promote judicial efficiency. See NARAL, 1999-NMSC-028, ¶¶ 12, 13. Generally, equitable and statutory exceptions to the American rule are not a burden on judicial resources. See id. ¶¶ 15, 25, 31 (declining to adopt a private attorney general doctrine because, inter alia, it would not further the goal of conserving judicial resources). The United States Supreme Court reminds us that a fee application “should not result in a second major litigation.” Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Finally, we note that the approval of the settlement is not before us; we review only the award of attorney fees, as provided by the parties’ Agreement. The provisions in the Agreement are controlling, unless the terms produce a result that is unfair to the Class or contrary to the policies underlying class actions. See Montoya v. Villa Linda Mall, Ltd., 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) (stating that the scope of contractual authority to award fees outside of the American rule is defined by the contract and that determining what fees are appropriate is a matter of contract interpretation). We review the district court’s determination of the fee award through the lens of each of the above considerations before we reach our conclusions.

D. The Settlement Agreement and the Common Fund Doctrine

[17] We begin with a review of the pertinent provisions in the Agreement. Microsoft agreed “to pay reasonable attorneys’ fees and expenses in an amount to be determined by the [district court].” Microsoft reserved the right to oppose the fee application, and both parties reserved the right to appeal the district court’s award. The Agreement provided that litigation of the fee issues would be subject to the following stipulations relevant to this appeal:

1. The attorneys’ fees and costs will be paid by Microsoft in addition to the recovery to the New Mexico Settlement Class and the cy pres remedy . . . ;
2. The amount of the attorneys’ fees will be determined upon the basis of the “common fund” doctrine rather than as a “prevailing party” or statutory fee, with each party being free to argue for what it believes is a reasonable common fund fee;
3. Plaintiffs are free to argue that the value of the “common fund” created by the litigation is any amount up to (but in no case exceeding) Face Value, plus notice and administrative expenses and costs; and
4. Microsoft is free to argue that the “common fund” created by the litigation is any amount less than the Face Value or is the amount of the benefit conferred directly on class members by virtue of this litigation.

Since the common fund doctrine is essential to our analysis, we proceed with an overview of the principles and development of the common fund and fee awards.

[18] The common fund doctrine is an equitable exception to the American rule. NARAL, 1999-NMSC-028, ¶ 19. Under the American rule, litigants are responsible for payment of their own attorney fees, unless otherwise provided by statute, court rule, or contract. Id. ¶ 9. Under the common fund doctrine, a litigant or a lawyer who recovers, preserves, or increases the value of a common fund, thereby benefitting other persons, may be reimbursed for reason-
able fees and expenses from the fund as a whole. Boeing Co. v. Van Gemert, 444 U. S. 472, 478 (1980); Swedish Hosp. Corp., 1 F.3d at 1265. The common fund doctrine generally rests on the principles of quantum meruit and unjust enrichment. 4 Conte & Newberg, supra, § 14:6, at 547. Attorneys are entitled to compensation in proportion to the benefit obtained for the class, see id., and unnamed class members who share in a common recovery are unjustly enriched if named class members must bear the burden of litigation. Van Gemert, 444 U.S. at 480. The common fund doctrine is consistent with the American rule; fees are spread among all of the class members of the prevailing party by the allocation of proportional shares of the recovery. Id. at 479, 481.

[19] In this case, Microsoft has contractually agreed to pay attorney fees. A contract providing for attorney fees is enforceable. See NARAL, 1999-NMSC-028, ¶ 9 (stating that the American rule does not bar enforcement of a contractual provision for attorney fees). The Agreement specifically provides that Microsoft pay reasonable attorney fees. The Agreement created a fee arrangement that provides that Microsoft pay reasonable attorney fees. The Agreement specifically provides that Microsoft pay reasonable attorney fees.

[20] Historically, attorney fee awards made on the basis of the common fund doctrine are reviewed for reasonableness. See, e.g., Edwards v. Alaska Pulp Corp., 920 P.2d 751, 756 (Alaska 1996) (“Although courts may differ and the federal circuits are divided over how best to determine the amount of attorney’s fees under the common fund doctrine, all agree that a ‘reasonable’ attorney’s fee is the proper standard.”); 1 Alba Conte, Attorney Fee Awards § 2:3, at 61 (3d ed. 2004); 4 Conte & Newberg, supra, § 14:8, at 603 (“Reasonableness is the touchstone.”). Benefited to the class is the talisman for fees and costs in a common fund case, and the common fund is the benchmark used to measure reasonableness. In re The Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 338 (3d Cir. 1998) (“[T]he amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed.” (internal quotation marks and citation omitted)); In re Horizon/CMS Healthcare Corp. Sec. Litig., 3 F. Supp. 2d 1208, 1213 (D.N.M. 1998); 1 Conte, supra, § 2:7, at 85 (“[T]he common fund represents the benchmark on which a reasonable fee will be awarded.”). Thus, we ask if the district court properly determined what benefit was obtained by Class Counsel on behalf of the Class. For the following reasons, we conclude that the district court did not abuse its discretion in determining the value of the benefit to the Class.

E. Benefit to the Class and Proportionality of the Fee Award

[21] Microsoft argues that the district court abused its discretion because the fee award is vastly disproportionate to the benefit obtained for the Class. Microsoft likens the fee award in the instant case to a windfall fee that contributes to the adverse public perception of the legal profession, as vividly described in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), abrogated on other grounds, Goldberger, 209 F.3d at 49-50. “[T]he betterest complaints about the legal profession] from many laymen] are directed at] the windfall fees and featherbedding that lawyers have managed to perpetuate through . . . their influence with the judiciary,” Id. at 469 (second, third, and fourth alterations in original) (internal quotation marks and citation omitted). This argument rests on Microsoft’s assertion that the measure of recovery is “the actual amount expected to be received by the Class,” which was a maximum of $3.1 million in vouchers (10% of the face value of the settlement). Ultimately, the value of claimed vouchers reached only $725,366. Microsoft argues that if either figure is used, a fee award of $6.1 million is disproportionate to the amount that the Class members will receive. The district court valued the benefit to the Class at $24,475,179.

1. Value of the Settlement to the Class

[22] When determining a fee award based on a common fund, the district court must make a reasonable estimate of the value of the settlement. In re Prudential, 148 F.3d at 333-34. The parties contemplated litigation over the reasonableness of the fee and stipulated to a minimum and maximum valuation of the common fund for purposes of argument: “[P]laintiffs are free to argue that the value of the ‘common fund’ created by the litigation is any amount up to (but in no case exceeding) Face Value, plus notice and administrative expenses and costs; and Microsoft is free to argue that the ‘common fund’ created by the litigation is any amount less than the Face Value or is the amount of the benefit conferred directly on class members by virtue of this litigation[.]” Class Counsel did rely on the face value of $31.5 million and argued that it was entitled to 25% of $32 million ($31.5 million, plus the costs of settlement administration), for a total of $8 million in attorney fees. The district court listened to arguments regarding the value of the common fund and, in its discretion, declined to award fees as a percentage of the face value, as argued by Class Counsel. Instead, the court relied on the approximate figures put forth by Microsoft.

[23] Microsoft estimated the value of the total settlement in pleadings below: “The total value of the settlement is likely to be $17 million, and the net value to the [C]lass around $3.1 million.” Counsel for Microsoft repeatedly referred to these estimations at the fee hearing: “The total amount at issue is about $17 million. That’s how much the schools will receive in vouchers, and about 3.1 million will go in vouchers to the Class . . . .”

The district court did not abuse its discretion when it relied on representations made by Microsoft’s counsel.

[24] On appeal, Microsoft compares the fee award of $6.1 million to the value of the vouchers actually claimed by the Class members—$725,366. The district court did not have this amount before it because the claims period had not expired at the time of the fee hearing and the information was not yet available. Microsoft did not object that the court did not have the actual figures before it. Although the parties stipulated that the “subsequently available claims rate be included in the appellate record,” we decline to consider evidence that was not before the court below. An appellate court does not review a district court decision on the basis of facts that are ostensibly in the record but were not before the court below when it made its ruling. See Rule 12-209(A), (C) NMRA (defining the record proper as papers and pleadings filed in the district court and stating that modification of the record may be made by stipulation “[i]f anything material to either party is omitted from the record proper by error or accident”); Martinez v. N.M. State Eng’r Office, 2000-NMCA-074, ¶¶ 47-49, 129 N.M. 413, 9 P.3d 657 (stating that appellate courts do not consider matters that are made part of the record but were not presented
to the initial decision maker); *In re Estate of Keeney*, 121 N.M. 58, 60, 908 P.2d 751, 753 ( Ct. App. 1995) (indicating that an appellate court would consider only matters that were considered by the trial court at the time it made its decision); *John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 506 (10th Cir. 1994); cf. *State v. Vincent*, 2005-NMCA-064, ¶ 9, 137 N.M. 462, 112 P.3d 1119 (“[U]nless the facts necessary to consider a contention are in the record on appeal, we cannot consider the claim.”), cert. granted, 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346. The value of the claimed vouchers was not “omitted” from the documents filed in the district court; this value had not yet been ascertained. Thus, we review the lower court’s decision by using only the facts before the court at that time.

{25} On appeal, Microsoft cites two New Mexico cases, one saying that the fee award must be “based upon the benefits actually provided to the client” and the other saying that in determining fees, the court is to consider “the amount involved and the results obtained.” These cases establish some general principles regarding fee awards and illustrate fee awards that New Mexico courts have considered proportionally or reasonably. However, these cases are distinguishable; they do not address class actions, common funds, or cy pres recoveries. See *Calderon v. Navarette*, 111 N.M. 1, 2, 800 P.2d 1058, 1059 (1990) (addressing an award of attorney fees for quantum meruit after concluding that the attorney’s contract with his individual client was unenforceable); *Thompson Drilling, Inc. v. Romig*, 105 N.M. 701, 702, 705, 736 P.2d 797, 980, 983 (1987) (addressing attorney fees available pursuant to a contract in a cause of action to recover money due and to enforce a mechanic’s lien). Microsoft also cites two other New Mexico cases for the proposition that fee awards greater than the client’s recovery are “routinely struck down as excessive.” See *Lenz v. Chalamidas*, 113 N.M. 17, 18-19, 821 P.2d 355, 356-57 (1991) (reducing fees from $17,616, based on time spent, to $8,000, based on time reasonably required, where the judgment was $13,365); *Ulibarri v. Gee*, 106 N.M. 637, 638, 640, 748 P.2d 10, 11, 13 (1987) (reducing attorney fees from $30,101 “to a near mid-point” of $10,000, where the judgment amounted to $28,820); see also *Thompson Drilling*, 105 N.M. at 702, 705-06, 736 P.2d at 980, 983-84 (ruling that a fee award of $15,945, almost two times greater than the jury’s verdict of $8,309, was unreasonable and reducing the award to $5,211). Because these cases do not address class actions, common funds, or cy pres awards, see *Lenz*, 113 N.M. at 18, 821 P.2d at 356 (enforcing a lien); *Ulibarri*, 106 N.M. at 638, 748 P.2d at 11 (same), the cases are not controlling. They do provide general guidance, however. The fee awards in *Lenz*, *Ulibarri*, and *Thompson Drilling* were respectively 59.8%, 34.7%, and 62.7%, of a client’s recovery. Cf. *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 25, 136 N.M. 647, 103 P.3d 571 (concluding that the district court did not abuse its discretion by awarding attorney fees equivalent to approximately 34% of the total judgment); *Lucero v. Aladdin Beauty Colls., Inc.*, 117 N.M. 269, 272, 871 P.2d 365, 368 (1994) (taking “judicial notice of the standard 33-1/3% of the total recovery (50% of the client’s share of the recovery) that attorneys typically receive when retained on a contingent fee contract” and holding that the district court did not abuse its discretion by awarding about 27% of the total judgment, including attorney fees).

{26} Microsoft also relies on an Alabama case, *Union Fidelity Life Insurance Co. v. McCurdy*, 781 So. 2d 186 (Ala. 2000), to support the assertion that the actual amount to be received by the class is the appropriate measure. *Union Fidelity’s* limited holding rested on the court’s conclusion that notice was inadequate and that class members could therefore not make an informed decision regarding whether or not to file a claim made available by the settlement. *Id.* at 190-91 (noting generally “that an informed decision not to participate should not diminish the award to class counsel, because the benefit in such circumstances has actually been provided, and the class member has simply chosen not to reap the rewards due him or her”); see also *Van Gemert*, 444 U.S. at 480 (holding that the fee award could be based on the entire recovery, even though some class members did not elect to pursue their individual recoveries, because the “right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class . . . counsel.”). Microsoft does not contend that Class members in the instant case could not make an informed decision because of inadequate notice.

{27} Moreover, the lower court in *Union Fidelity* estimated that total claims “might reach $10,000 by the end of the class period,” only 0.2% of the $4.5 million face value of the common fund. 781 So. 2d at 191 n.7. In our case, Microsoft represented to the court below that estimated claims could reach 10% of the face value of the settlement and that $3.1 million was an acceptable estimate of “the value of vouchers likely to be given to the [C]lass.” Microsoft also repeatedly represented to the court that the total value of the settlement was $17 million, which included the cy pres award of “another $14 million or so.” Thus, the value of the settlement represented to the lower court in *Union Fidelity* and the value of the settlement represented to the court below in our case are markedly different. Thus, *Union Fidelity* is not helpful to our analysis.

{28} Similarly, the federal cases and the unreported state case cited by Microsoft do not support Microsoft’s contention that the fee award in our case is vastly disproportionate to the benefit received by the Class. With these cases, Microsoft asserts that the benefit to the Class must be measured by the “actual amount expected to be received by the class.” Each case clearly supports the proposition that the benefit to the class must be considered in determining the reasonableness of a fee award. See *In re Prudential*, 148 F.3d at 336-37 n.116 (noting that “the final award must depend on a full assessment of the extent of the benefits received by [the] plaintiffs” (internal quotation marks and citation omitted)); *In re FPI/Agretech*, 105 F.3d at 473 (stating that *In re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), “supports the proposition that a court may reject a fee allocation agreement where it finds that the agreement awards an attorney in disproportion to the benefits that [a specific] attorney conferred upon the class”); *Dotson v. Bell Atlantic-Maryland, Inc.*, Nos. CAL. 99-21004, CAL 00-09962, 2003 WL 23508428, at *13 (Md. Cir. Ct. Nov. 13, 2003) (not reported in A.2d) (“[U]nless the [c]ourt requires . . . a rational connection between the fee award and the amount of the actual distribution of [sic] the [c]lass, the underlying purpose of class actions will be undermined.”). However, to the extent Microsoft may be contending that the fee award in this case must be compared with an in-the-hand recovery by Class members, none of these cases expresses such a mandate. See *In re Prudential*, 148 F.3d at 333-34 (agreeing with the district court that though there was no common fund per se, the case was more like a “common fund paradigm than . . . a statutory fee-shifting case” and that “[c]onsequently, the district court was required to make a “reasonable
estimate’ of the settlement’s value in order to calculate attorneys’ fees using the percentage of recovery method”); *In re FPI/Agretech*, 105 F.3d at 475 (ruling that one of the attorneys representing the plaintiffs was not entitled to share the fees in a second settlement fund because she was not involved in litigating that case); *Dotson*, 2003 WL 23508428, at *2 (“[T]he benefit received by the affected individuals and by society should be weighed against the costs of obtaining it before the legal system[.]” (emphasis added)); see also *Waters*, 190 F.3d at 1295 (“[N]o case has held that a district court must consider only the actual payout in determining attorneys’ fees.”); *id.* at 1296 n.8 (noting that the cases cited by the defendant “illustrate that whether a district court judge considers the total fund or the actual payment will vary according to the circumstances of each case” and concluding that “[h]ere, where the district court considered both the total fund and the possibility that the actual payment would be substantially lower, there is no abuse of discretion”). Thus, these cases do not support Microsoft’s position.

29 In addition, Microsoft discusses the federal Class Action Fairness Act of 2005 (Act), § 3, Pub. L. No. 109-2, 119 Stat. 4 (enacted and effective Feb. 18, 2005) (adding 28 U.S.C. § 1712(a), (e) (Supp. 2006)), in support of the position that the fee award must be measured against the actual benefit to the Class. The Act limits attorney fees that are based on a recovery of coupons to the value of the coupons that are actually redeemed. See 28 U.S.C. § 1712(a). As noted earlier, we are not bound by federal law when we interpret state law. Moreover, the original actions in this case were filed almost five years before enactment of the Act. Cf. *Waters*, 190 F.3d at 1297 n.11 (declining to consider the policy behind legislation that did not apply to actions filed before its effective date). Thus, we decline to consider the provisions of the Act under these circumstances.

30 Finally, we note the conflict that can exist in a district court between a defendant’s representations regarding benefit to the class in a settlement approval hearing and the defendant’s representations regarding benefit to the class in a fee hearing. See *Union Fidelity*, 781 So. 2d at 197 (Johnstone, J., dissenting) (criticizing the majority opinion for rewarding the defendant-appellant’s “likely duplicituousness and lack of candor” regarding benefit to the class). The judiciary’s duty to protect the interests of the class includes the obligation to protect the class from a settling defendant’s conflict of interest when the defendant extols the benefits to the class at the fairness hearing (in order to gain settlement approval) and then denigrates the benefits to the class at the fee hearing (in order to minimize fees). See *id.* at 196-97 (Johnstone, J., dissenting) (noting the conflict that arises when the defendant extols the benefits to the class at the settlement hearing and disparages the benefits to the class at the fee hearing).

2. Error in the Choice of the Percentage Method

31 Microsoft relies on *United Nuclear Corp. v. Allendale Mutual Insurance Co.*, 103 N.M. 480, 709 P.2d 649 (1985), to argue that “application of the percent-of-recovery method . . . was legal error.” Our Supreme Court, in dicta, observed that “[t]he ‘lodestar’ and multiplier have generally been applied in civil rights cases and class action suits.” *Id.* at 485-86, 709 P.2d at 654-55 (addressing the district court’s use of the lodestar method to award statutory attorney fees). *United Nuclear* is not controlling in this case for several reasons. First, as noted by the two Supreme Court justices who wrote on this issue, the issue was not necessary to the ruling in *United Nuclear*. *Id.* at 486, 709 P.2d at 655. Second, the circumstances are inapposite; *United Nuclear* involved attorney fees available pursuant to statutory authority. *Id.* at 485-86, 709 P.2d at 654-55; see *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 12, 135 N.M. 106, 85 P.3d 230 (“[C]ases are not authority for propositions not considered.”) (alteration in original) (internal quotation marks and citation omitted)). Third, the two-justice opinion is not considered precedent. See *Gracia v. Bittner*, 120 N.M. 191, 195, 900 P.2d 351, 355 (Ct. App. 1995). Finally, stating that the lodestar method has been applied in class action suits does not necessarily preclude the existence of another appropriate method to calculate attorney fees in class action suits, particularly where the parties have agreed that the district court would determine a reasonable fee “calculated on a common fund basis.” The phrase “calculated on a common fund basis” would be a strange choice of words if the lodestar method were the only method available.

a. Discretionary Decision

32 In the majority of jurisdictions, the district court has discretion to determine which method should be used to award fees under the common fund doctrine, depending on the circumstances of each particular case. See, e.g., *Goldberger*, 209 F.3d at 49-50 (joining the majority of circuit courts, which afford the district court discretion to choose the method); *In re FPI/Agretech*, 105 F.3d at 472 (stating that deference under the abuse of discretion standard is afforded the court’s choice to use either method for calculating an award); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Edwards*, 920 P.2d at 757-58; *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960-61 (Tex. 1996). Historically, the percentage method was most commonly used to award fees from a common fund. *Swedish Hosp. Corp.*, 1 F.3d at 1265; see also Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 242 (1985) [hereinafter *Task Force Report I*] (stating that the general standard was “reasonableness under the circumstances of the particular case” and that reasonableness was measured by “what the court believed was a ‘reasonable percentage’ of the amount recovered, with the percentages varying considerably from case to case”).

33 Utilization of the percentage method is like calculation of a contingent fee; this method awards to counsel a variable percentage of the amount recovered for the class. *In re GM Trucks*, 55 F.3d at 819 n.38. The percentage method allows the judge to “focus on a showing that the fund conferring a benefit on the class resulted from the lawyers’ efforts” and to award thereby the fee in a way “that rewards counsel for success and penalizes it for failure.” *In re Cendent Corp. Prides Ling*, 243 F.3d 722, 732 (3rd Cir. 2001) (quoting *In re Prudential*, 148 F.3d at 333); *In re Copley*, 1 F. Supp. 2d at 1411. Courts often prefer the percentage method because it is less burdensome than the lodestar method. *In re Copley*, 1 F. Supp. 2d at 1411 (“Simply put, it is much easier and far less demanding of scarce judicial resources to calculate a percentage of the fund fee than to review hourly billing practices over a long, complex litigation.”). In addition, the percentage method rewards efficiency, helps to align the attorneys’ interests with their clients’ interests, and more closely approximates attorney fees found in the marketplace. *Id.* The rationale for the percentage method can also be applied in situations where the fee and the settlement are claimed to be independent but the funds actually come from the same source. *In re GM Trucks*, 55 F.3d at 821. Use of the percentage method, however, has led to criticism of the legal profession because the method has sometimes resulted in large
fee awards that were disproportionate to the actual efforts of counsel. Task Force Report I, 108 F.R.D. at 242.

{34} Alternatively, the lodestar method can be used to calculate attorney fees in a common fund case. The lodestar is ordinarily used in statutory fee-shifting cases because it provides adequate fees to attorneys who undertake litigation that is socially beneficial, irrespective of the pecuniary value to the classes. In re GM Trucks, 55 F.3d at 821; see also Brown, 838 F.2d at 453-54 (“The lodestar . . . provides the starting point for appellate court review of statutory fee awards.”). A lodestar is determined by multiplying counsel’s total hours reasonably spent on the case by a reasonable hourly rate. Kennedy v. Dexter Consol. Sch., 2000-NMSC-025, ¶¶ 34, 35, 129 N.M. 436, 10 P.3d 115 (discussing the application of the requisite lodestar method to a Section 1988 case). An award based on a lodestar may be increased by a multiplier if the lower court finds that a greater fee is more reasonable after the court considers the risk factor and the results obtained. Goldberger, 209 F.3d at 47. The lodestar provides an objective basis for valuing the attorney’s services, a helpful prelude to calculating a fee that serves the purpose of the class action fee award: “to compensate the attorney for the reasonable value of services benefiting [sic] the unrepresented claimant.” Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), limited on other grounds as recognized by Bryant v. Sprang, 203 F.3d 238, 242-43 (3d Cir. 2000).

{35} The lodestar method has been extensively criticized, however, for deficiencies that outweigh its benefits. Task Force Report I, 108 F.R.D. at 246-49; Fed. Judicial Ctr., Moore’s Federal Practice: Manual for Complex Litigation § 14.121, at 188 (4th ed. 2004) (hereinafter Manual for Complex Litigation) (“In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation.”). Among these problems are the burden the lodestar method imposes on the judicial system and the lack of flexibility in a court’s rewarding counsel for the risk of going to trial. In re GM Trucks, 55 F.3d at 821; Task Force Report I, 108 F.R.D. at 246, 248. Moreover, use of the lodestar has the potential to create conflict between a class and its counsel, In re GM Trucks, 55 F.3d at 820-21, because this use leads to inefficiency and resistance to expeditious settlement by attorneys who want to raise their fees by billing more hours. Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091, 1096 (D.N.M. 1999) [hereinafter Ramah I]; Task Force Report I, 108 F.R.D. at 248.

{36} The Third Circuit led the movement toward use of the lodestar method for common fund cases in Lindy Brothers. Task Force Report I, 108 F.R.D. at 242-43; see Lindy Bros., 847 F.2d at 167. Some courts will choose to use the lodestar method in common fund cases when it is difficult to determine the value of the common fund, particularly where it is easier to calculate the hours expended and hourly rate than it is to determine an appropriate percentage to award. In re GM Trucks, 55 F.3d at 821. The lodestar method is also used when the percentage method will result in a fee award that is unusually large or unusually small. See Manual for Complex Litigation § 14.121, at 189-90. See generally In re Copley, 1 F. Supp. 2d at 1410-12 (comparing the advantages and disadvantages of each method).

{37} The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient and prompt resolutions of class actions and because it reflects more accurately the realities of litigation economics in the marketplace. See, e.g., In re Cendant, 243 F.3d at 734; Rosenbaum v. MacAllister, 64 F.3d 1439, 1445 (10th Cir. 1995); Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 853 (10th Cir. 1993); Ramah I, 50 F. Supp. 2d at 1107-08; Union Fidelity, 781 So. 2d at 189 (stating that “the decision whether to apply [the percentage of] the common-fund approach or the lodestar approach is within the trial court’s discretion” even though the preferred method is the percentage of the common fund method); see Gottlieb, 43 F.3d at 483 (discussing Uselton’s implied preference for the percentage method). In using the percentage method, the Tenth Circuit also takes a “hybrid” approach by combining the percentage method with the reasonableness factors derived from a statutory fee case, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), abrogated on other grounds, Blanchard v. Bergeron, 489 U.S. 87, 92-93 (1989), which used the lodestar method. Gottlieb, 43 F.3d at 482-83. The Eleventh Circuit uses only the percentage method to award fees from a common fund. Camden I Condo. Ass’n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991). In contrast, the Fifth Circuit uses only the lodestar method. Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 850 (5th Cir. 1998).

{38} The United States Supreme Court has not directly addressed the discretion of the lower courts in choosing a method to award fees based on the common fund doctrine. The only guidance provided by the Court can be found in Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984). There, the Court recognized the difference between the lodestar method applied in statutory fee cases and the percentage method as applied to the common fund doctrine: “Unlike the calculation of attorney’s fees under the ‘common fund doctrine,’ where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [Section] 1988 reflects the amount of attorney time reasonably expended on the litigation.” Id.

{39} Our extensive review of the case law addressing each method leads us to believe that there are advantages and disadvantages to each method, depending on the circumstances of each case. Because the district court is in a better position to assess the circumstances of each case, we join the majority of jurisdictions and hold that the choice of method is within the district court’s discretion.

{40} Microsoft relies on Burke v. Arizona State Retirement System, 77 P.3d 444 (Ariz. Ct. App. 2003), to contend that “[a] trial court’s decision to apply the percent-of-recovery method over the lodestar method is commonly held to be a question of law.” We disagree. Burke clearly states that “whether the common fund doctrine applies is . . . a question of law.” 77 P.3d at 447 (emphasis added); see Edwards, 920 P.2d at 756 (concluding as a matter of law that the common fund doctrine applied because the facts gave rise to unjust enrichment concerns). We do not equate this proposition with Microsoft’s assertion that the district court’s choice of method is a matter of law. As discussed earlier, the Agreement provided that the fee would be awarded on the basis of the common fund doctrine. In light of our ruling that the district court has discretion to choose the method used in applying the common fund doctrine, we are not persuaded by the cases Microsoft cites. See Bryant, 203 F.3d at 244 (addressing counsel’s argument that the lower court erred as a matter of law because it allegedly proceeded on the legal misunderstanding that a statutory fee provision precluded a common fund fee award); Edwards, 920 P.2d at 758 (“We therefore hold that a trial court applying the common fund doctrine
has the discretion to determine whether to apply the percentage of the fund method or the modified lodestar method in order to calculate attorney’s fees.”); Kuhnlein v. Dep’t of Revenue, 662 So. 2d 309, 312 n.4, 315 (Fla. 1995) (rejecting, in a 4-3 decision, the percentage approach as a matter of law and noting that “[t]he abuse-of-discretion standard would have applied if we had accepted the percentage approach and we were deciding whether the percentage picked by the trial judge was within the boundaries of reasonableness”). Microsoft also cites to Ketchum v. Moses, 17 P.3d 735, 738-39 (Cal. 2001) (addressing mandatory fees available by statute), and Serrano v. Priest, 569 P.2d 1303, 1316 (Cal. 1977) (addressing fees available under the private attorney general doctrine). Because neither case applies the common fund doctrine, these cases do not affect our holding that the choice of method is within the district court’s discretion.

41 Microsoft also argues that the percentage method should not have been used because the fees have been shifted: they will be paid by Microsoft and not paid proportionally by the Class members. Therefore, Microsoft reasons that there is no “true” common fund. See Burke, 77 P.3d at 450 (declining to apply the common fund doctrine because the fee spreading element was not present); cf. NARAL, 1999-NMSC-028, ¶ 20 (noting that the common fund exception is consistent with the American rule because the fees are deducted from the recovery and “a losing litigant is no better or worse off as a result of the common fund doctrine’s application” (alteration, internal quotation marks, and citation omitted)). Whether a true common fund exists could be relevant when determining if the common fund doctrine applies; however, this was not the question before the district court. As we noted earlier, the common fund doctrine is applied in this case pursuant to a contract and not as an equitable exception. See Montoya, 110 N.M. at 129, 793 P.2d at 259. Microsoft agreed to pay attorney fees to be determined by the district court on the basis of the common fund doctrine. The court was obligated to enforce the terms of the contract by applying the common fund doctrine. See Friedman v. Microsoft Corp., 141 P.3d 824, 831 (Ariz. Ct. App. 2006) (concluding that the court properly applied fee-spreading principles when the parties agreed to calculate attorney fees using the common fund doctrine, though recognizing that the case, like ours, was a fee-shifting, not a fee-spreading, case). “[W]e will not rewrite a contract to create an agreement for the benefit of one of the parties that, in hindsight, would have been wiser.” Watson Truck & Supply Co. v. Males, 111 N.M. 57, 60, 801 P.2d 639, 642 (1990); see Waters, 190 F.3d at 1300 (“Defense counsel, having reaped the benefits of their bargain in settling the class action suit, cannot expect the court to renegotiate on their behalf the terms of an agreement concluded after arms-length negotiations.”). Once the parties agreed to use the common fund doctrine, cases relating to whether the doctrine applies become inapplicable. See Weinberger, 925 F.2d at 520, 526 (concluding that the district court should not be divested of authority to use the lodestar when there is no common fund); Burke, 77 P.3d at 449 (noting that the defendant had not conceded “that fees either would be or should be awarded under the common fund doctrine”); see also In re Cendant, 243 F.3d at 734 (concluding that the percentage method was appropriate even though it was not a “traditional common-fund case”).

42 In further support of its contention that the district court should have used the lodestar method, Microsoft cites to three state district court cases and asserts that “every other court that has addressed contested fee applications in virtually identical Microsoft settlements has used the lodestar method.” We are not persuaded by this argument for three reasons. First, the standard for review of a fee application is the same regardless of whether the application is contested or not. Cf. In re S.D. Microsoft Antitrust Litig., 2005 SD 113, ¶¶ 69-70, 707 N.W.2d 85, 109 (stating that the value of the benefit to the class is measured by the face value of the voucher settlement when the fee application is unopposed and by the value of the vouchers that are actually redeemed or claimed by class members when the fee application is opposed). As discussed earlier, the court has a duty to protect class interests and ensure that the fee is reasonable, even when the fee application is unopposed. See Strong, 137 F.3d at 849-50 (discussing the court’s obligation to examine the fee application when the defendant is paying fees from its own funds and does not oppose the fee application); In re GM Trucks, 55 F.3d at 819-20; Weinberger, 925 F.2d at 520, 524. Second, under South Dakota law, the district court was required to use the lodestar method to calculate the fee. See In re S.D. Microsoft Litig., 2005 SD 113, ¶ 30. Moreover, a comparison of the resulting percentages of the face value in Microsoft settlements from other states demonstrates that the fee awarded is about the same regardless of the method used. See 1 Conte, supra, § 2:6, at 77 (discussing the consistency of fee awards, regardless of the method used to determine the amount).

43 When comparing resulting percentages, the relative size of the settlement is important. Generally, a reasonable percentage of a common fund decreases as the size of the fund increases. See In re Prudential, 148 F.3d at 339 (stating that the rationale for this inverse relationship rests on the belief that an increase in recovery is often “merely a factor of the size of the class and has no direct relationship to the efforts of counsel” (internal quotation marks and citation omitted)); 1 Conte, supra, § 2:9, at 128 (noting that “[d]eviations from the normal range of percentage fees are appropriate when . . . the fund recovered is extraordinarily large”). In common funds up to about $50 million, fees in complex class actions are usually 20% to 30% of the recovery. 1 Conte, supra, § 2:8, at 106-07. Cases with recoveries ranging from $50 million to $75 million have resulted in fee awards of about 11% to 19%. Goldberger, 209 F.3d at 52. In recoveries of $75 million to $200 million and more, fees range from 6% to 10%. 1 Conte, supra, § 2:9, at 134-35; see id. at 130 n.3 (listing cases with recoveries over $100 million resulting in fee awards ranging from 5.5% to 9%). With this principle in mind, we compare the fee awards in other Microsoft state cases.

44 Although the district court in Arizona used the lodestar method, its use of a 3.42 multiplier brought the fee award to 18% of the settlement’s face value of $104.6 million. Friedman, 141 P.3d at 828, 834-35 (concluding that 18% of the face value or 33-35% of the estimated actual value to the class, including the cy pres award, was not unreasonable). The fee award in California was $101 million, 9.17% of a $1.1 billion settlement. In re S.D. Microsoft Litig., 2005 SD 113, ¶ 67; cf. In re Cendant, 243 F.3d at 737 (comparing, inter alia, three cases with recoveries of $1.8 billion to $3.16 billion, with fees ranging from 5% to 8.275%).

45 In state cases that were uncontested, Microsoft agreed to pay fees in amounts between 8.32% and 20%. See In re S.D. Microsoft Litig., 2005 SD 113, ¶ 67 (comparing the percentage of face value in different states); id. ¶ 93 (Meierhenry, J., dissenting) (quoting the lower court’s comparison of cases in other states). In comparison, the district court in our case awarded 19.365%
of the face value. In light of the relative size of the settlement in our case and the percentages of face value awarded in “virtually identical” cases, we cannot conclude that the district court abused its discretion by awarding 19.365% of the face value of the settlement. See generally 1 Conte, supra, § 2:32, at 240-50 (chart comparison of fees).

{46} In its reply brief, Microsoft relies heavily on In re S.D. Microsoft Litigation. After more than four years of proceedings, an evidentiary hearing, and review of the reasonableness factors, see In re S.D. Microsoft Litig., 2005 SD 113, ¶¶ 4, 20, 93, the South Dakota district court applied a multiplier of two to award a fee of $2,064,000, which is 22.12% of the face value. Id. ¶ 23, 67. The South Dakota Supreme Court, in a decision split 3-2, reversed the award, remanded for a recalculation of the lodestar, and instructed the district court to forego the use of a multiplier. Id. ¶¶ 43, 51, 74, 80. We are not persuaded by the three-judge majority opinion. First, the parties in the South Dakota case did not agree that the district court would determine the fee on the basis of the common fund doctrine. See id. ¶ 22; see also id. ¶¶ 10, 32 (regarding the provisions of the settlement agreement). Second, South Dakota law requires the district court to use the lodestar method. Id. ¶¶ 30, 34. Third, as noted earlier, we do not agree that a different standard should be applied to fee applications that are opposed by the defendant. See id. ¶¶ 69, 70. We are more persuaded by the two-judge dissenting opinion—“the majority is merely substituting its ruling for that of the trial court.” Id. ¶ 88; see also id. ¶¶ 92 (“The trial court’s decision is not clearly against reason and evidence.”). We agree with the dissent, “[A] judicial mind, in view of the law and the circumstances in this case, could reasonably have reached the conclusion arrived at by the trial court.” Id. ¶ 93 (alteration, internal quotation marks, and citation omitted); see Task Force Report I, 108 F.R.D. at 273 (stating that the Task Force believed the abuse of discretion standard “simply has not been employed,” that “reversible error occurs when a district court errs as a matter of law by utilizing improper standards or procedures in determining fees,” and that “the court of appeals should honor the discretion its standard accords to district judges and exercise restraint in reviewing fee awards”).

b. Propriety of Estimating the Value of the Settlement

{47} Microsoft further contends that the percentage method is not appropriate because “the parties could only estimate the value of the settlement.” In support of its argument, Microsoft relies on Strong: “[S]everal courts have advocated the use of the lodestar method in lieu of the percentage of fund method precisely in the situation where the value of the settlement is difficult to ascertain[.]” 137 F.3d at 852 n.5. Microsoft further asserts that the benefit to the Class “was impossible to quantify . . . with any degree of certainty until after the close of the period within which [C]lass members could apply for vouchers.” See In re GM Trucks, 55 F.3d at 822 (“The problem . . . is not simple, for arguably, any settlement based on the award of certificates would provide too speculative a value on which to base a fee award.”). We are not convinced. We agree that whether the value of the settlement can be ascertained is a significant factor in the lower court’s decision to use one method or the other. See Van Gemert, 444 U.S. at 478-79 (spreading fees when “each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf”). However, “the ultimate choice of methodology will rest within the district court’s sound discretion.” In re GM Trucks, 55 F.3d at 821.

{48} Other jurisdictions have awarded fees on the basis of common funds that could vary depending on the number of class members who take advantage of a right to share in the common fund. See Van Gemert, 444 U.S. at 480. Although valuation of the common fund in our case requires computation, the value to the Class is not difficult to ascertain. Each member has an “undisputed and mathematically ascertainable claim.” See id. at 479; see also In re GM Trucks, 55 F.3d at 821-22 (concluding that the percentage method was appropriate when the settlement included vouchers because “the settlement, though difficult to value, did not award the even more hard-to-value intangible rights that could in some limited circumstances justify using the lodestar method”); cf. Edwards, 920 P.2d at 756 n.9 (noting that the common fund is not applicable where “sophisticated economic analysis would be required” (internal quotation marks and citation omitted)). Vouchers for fixed amounts were made available to each qualifying Class member, pursuant to the Agreement; thus, the value to the Class could be determined. The face value of the settlement was specifically set at $31.5 million, based on Microsoft’s best estimate of the number of qualifying operating systems and software licenses indirectly purchased by members of the Class, a total of 2,769,617, and on the value of the vouchers to each Class member.

{49} Other courts have conducted reasonable estimates of benefit to the class, even when vouchers or coupons were used, and these courts have recommended use of the percentage method based on the estimate. The settlement in In re GM Trucks consisted of $1,000 coupons redeemable for purchase of any new GM truck or Chevrolet light-duty truck built by the defendant. 55 F.3d at 780. Although approval of the settlement was reversed, thus obviating the need for review of the fee award, the court reviewed the primary issues surrounding a fee award in those circumstances. Id. at 819-22. In dicta, the court concluded that the coupon settlement and the separate fee agreement were “more closely aligned with the common fund paradigm than the statutory fee paradigm,” and thus the percentage method was more appropriate, despite the fact that “the nature of the settlement evade[d] the precise evaluation needed for the percentage of recovery method.” Id. at 821. It advised the court below to “make some reasonable assessment of the settlement’s value and determine the precise percentage represented by the attorneys’ fees.” Id. at 822.

{50} The court in O’Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 304-07 (E.D. Pa. 2003), valued the common fund created by a settlement agreement that provided vouchers and limited extended warranties to class members. Id. at 272. The court accepted the face value of the vouchers, id. at 305, and considered four different valuations of the extended warranty before the court determined a reasonable estimate of the settlement’s value. Id. at 305-07. Thus, though the fund “involved a difficult to value non-monetary common fund,” id. at 310, the court based its fee award on a percentage of the common fund’s total estimated value. Id. at 304; see also Wing v. Asarco Inc., 114 F.3d 986, 990 (9th Cir. 1997) (stating that the district court must estimate the total value of the settlement when it is impossible to determine the actual value of the recovery); In re Copley, 1 F. Supp. 2d at 1412 (“The first step in a percentage of the fund analysis is a determination of the value of the fund.”).

{51} Microsoft cites to several cases in support of its assertion that the recovery in this case was difficult to value. None is persuasive because the cases do not
involve the question of estimating value; rather, they merely illustrate the discretion afforded the district court in determining which method, percentage or lodestar, is most appropriate. Three cases are district court opinions in which the courts made a discretionary determination that the lodestar was most appropriate under the particular circumstances of each case. See Charles v. Goodyear Tire & Rubber Co., 976 F. Supp. 321, 324, 325 (D.N.J. 1997) (choosing to use the lodestar method where the benefit to the class included equitable relief and vouchers that could be used for only the defendant’s products and services); Osher v. SCA Realty I, Inc., 945 F. Supp. 298, 302, 307 (D.D.C. 1996) (choosing to use the lodestar method when the benefit to the class consisted of a restructuring of the business entities and the option to select specific types of shares for particular class members); Cooperstock v. Pennwalt Corp., 820 F. Supp. 921, 926 (E.D. Pa. 1993) (choosing to use the lodestar method because the class plaintiffs were only partly responsible for the benefit conferred and had acted only in a monitoring role in the litigation). Each appellate decision cited by Microsoft affirms the lower court’s determination that the percentage of recovery method was not appropriate under the facts of its case. See Strong, 137 F.3d at 846, 848, 850 (affirming the lower court’s use of the requisite lodestar to determine that class counsel was not entitled to the entire fee specifically provided by the settlement agreement); Municipality of Anchorage v. Gallion, 944 P.2d 436, 438, 445, 447 (Alaska 1997) (concluding that the lower court did not err by declining to award fees on the basis of the benefit to the class where the recovery was a restoration of surplus funds in a defined benefit retirement plan). While we agree that the district courts in these cases used the lodestar method, these cases do not stand for the proposition that the lodestar method is the only method that can be used in this type of case. Accordingly, we do not find these cases helpful under the facts of our case.

{52} Although Microsoft argues that the values are difficult to quantify, it did quantify the value of the settlement. Microsoft represented to the court below that the recovery was about $17 million. It posited that 10% of the face value, $3.1 million, was an acceptable estimate of the vouchers that would be claimed and that $14 million was an acceptable estimate of the benefit through the cy pres award. As discussed earlier, the district court did not err by relying on Microsoft’s representations below.

{53} Finally, the Agreement specifically provided that the parties could argue that the benefit to the Class was face value plus notice and administrative expenses and costs, with Microsoft being able to argue any lesser amount. Nothing was mentioned about attorney hours or hourly rates. The fact that each party under the Agreement was expressly allowed to argue its view of the amount of the common fund provides strong support for the view that the parties committed the decisions on method and value to the district court’s discretion, as well as believed that the percentage method could be central to the court’s decision. Otherwise, the Agreement would have been written in different terms.

3. Error in Application of the Percentage Method—Gross Versus Net Recovery

{54} Microsoft next argues that the district court erred in applying the percentage method because the court included the cy pres award, the fee award, and expenses in its calculation of the recovery. Without citation to authority, Microsoft asserts that benefit to class members derives “not from the transaction costs that it took to deliver that benefit and not from the amount that will be paid to the lawyers’ preferred charitable cause.” They contend that “lawyers should not be rewarded in proportion to the extent that they managed to increase the transaction costs of the litigation.”

{55} Our own research has revealed a wide variety of calculations of common funds used to measure the benefit to a class, ranging from net benefit distributed to class members to gross benefit to the class. The gross settlement fund is used by most courts applying the percentage method. 4 Conte & Newberg, supra, § 14:6, at 567; cf. id. n.49 (citing district courts that use net recovery). Moreover, the benefit conferred through a cy pres award is ordinarily considered a part of the benefit to the class. See Nat’l Ass’n of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions, 176 F.R.D. 375, 399 (1997)(including cy pres distributions in the value of a settlement).

{56} The Ninth Circuit has expressly held that the percentage method is not limited to calculations based on net recovery. In a securities class action, an unnamed class member challenged a fee award that was based on gross recovery. Powers v. Eichen, 229 F.3d 1249, 1251 (9th Cir. 2000). The class member argued that under the Private Securities Litigation Reform Act of 1995, the district court erred by awarding attorneys’ fees calculated on a percentage of the gross recovery rather than a percentage of the recovery minus expenses. Id. at 1258; see 15 U.S.C. § 78u-4(a)(6) (2000) (“Total attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.”). The class member contended that the phrase “amount … actually paid to the class” limited the fund value, for purposes of calculating the fee, to the net amount received after expert fees, litigation costs, and other expenses have been subtracted. Powers, 229 F.3d at 1258. Thus, the appellant argued that the fee should be calculated as a percentage of net recovery rather than as a percentage of gross recovery. Id. The court disagreed:

Although the new provision requires reasonable fees and expenses, it does not mandate a particular approach to determining fees. The legislation’s primary purpose was to prevent fee awards under the lodestar method from taking up too great a percentage of the total recovery. The new provision, however, does not eliminate the use of the lodestar approach, nor does it require that fees be based on a percentage of net recovery. It simply requires that the fees and expenses ultimately awarded be reasonable in relation to what the plaintiffs recovered.

Id. (citation omitted).

{57} The court further reasoned that “the choice of whether to base an attorneys’ fee award on either net or gross recovery should not make a difference so long as the end result is reasonable. Our case law teaches that the reasonableness of attorneys’ fees is not measured by the choice of the denominator.” Id. The court stated that “[i]f twenty-five percent of gross is reasonable, perhaps thirty-five percent of net would be reasonable,” and concluded that the district court was not prohibited from calculating the fee award using the gross settlement amount. Id.; see Waters, 190 F.3d at 1296 n.8 (“[W]ether a district court judge considers the total fund or the actual payment will vary according to the circumstances of each case.”).

{58} In a later class action for race discrimination, the Ninth Circuit concluded that the lower court could include attorney fees in
its valuation of a putative common fund created under a consent decree. *Staton*, 327 F.3d at 972-73 (“Under these requirements, the monetary relief for the plaintiff class (including attorneys’ fees) provided for in the consent decree could be converted as described above so as to qualify as a common fund from which class counsel could obtain an award of attorneys’ fees.”). The court disallowed the valuation of injunctive relief in calculating the hypothetical fund but included fees and costs in its recalculation of the common fund. *Id.*; see *id.* at 975 (discussing net versus gross recovery and relying on *Powers* to conclude that “[t]he post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class”); see also *Wing*, 114 F.3d at 987-88, 990 (including a $60.5 million potential recovery on an insurance claim to calculate the value of a common fund totaling $67.5 million). We agree with the Ninth Circuit. An appropriate fee is determined by reasonableness, and reasonableness does not depend on whether the percentage is based on net recovery or gross recovery. [59] Federal district courts have also included attorney fees as part of the estimated recovery when a court is approving uncontested attorney fees in class action settlements. *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 223, 250 & n.28 (D.N.J. 2005) (acknowledging the value to the class of defendants’ agreement to pay fees and expenses and calculating the total estimated recovery including the value of fees and expenses paid by defendants); *Carnegie v. Mut. Sav. Life Ins. Co.*, No. Civ.A.CV-99S3292NE, 2004 WL 3715446, at *37 (N.D. Ala. Nov. 23, 2004) (mem.) (concluding that the request for attorney fees was reasonable whether viewed as less than 19.6% of the aggregate benefits, including fees and expenses, or viewed as 25.2% of the net benefits); see *Lucero*, 117 N.M. at 272, 871 P.2d at 368 (including attorney fees in its calculation of the total

judgment); see also *In re Copley*, 1 F. Supp. 2d at 1415 (comparing the percentage awarded based on different valuations of the common fund); *Chun v. Bd. of Trustees of Employees’ Ret. Sys.*, 106 F.3d 339, 349, 350 (Haw. 2005) (“basing the ascertained common fund on the gross amount available to be paid” to the class members and calculating the fee using five different values for the common fund).

[60] As listed in Microsoft’s brief in chief, the district court determined the value of the common fund by adding the following amounts:

- **Expected benefit to the [C]lass, based on a 10% claims rate:** $3,150,000
- **Expected cy pres distribution:** $14,200,000
- **Attorneys’ fees of approximately 25% of $24,475,179:** $6,100,000
- **Plaintiffs’ counsel’s claimed expenses:** $525,179
- **Settlement administration expenses:** $500,000

Thus, the district court awarded 25% of a common fund valued at $24,475,179. We explain the court’s calculations in a footnote. In exercising its discretion, the district court valued the common fund by relying on representations made by Microsoft below, provisions of the Agreement, and principles of the common fund doctrine as discussed above. Even if we deleted the attorney fees from the denominator, the fees are approximately one-third of the recovery amount Microsoft used in argument below, plus expenses. This percentage is only slightly higher than the percentages considered usual in cases up to $50 million, and the value of this case was considerably less than $50 million. See paragraph 43. We conclude that the district court did not abuse its discretion by estimating the value of the benefit to the Class in this manner. **F. Errors in Application of the Lodestar Method as a Crosscheck**

[61] The district court used the lodestar method to crosscheck the reasonableness of the award calculated as a percentage of recovery. The court used the lodestar provided by Class Counsel of approximately $2 million. Microsoft asserts that the district court erred by automatically accepting Class Counsel’s proffered lodestar because out-of-state Class Counsel’s hourly rates were not defined by market rates in New Mexico and because Class Counsel improperly submitted hours spent both on fee litigation and on work performed for Microsoft cases in other states. Microsoft also contends that Class Counsel failed to provide supporting documentation for $81,201 worth of lodestar.”

[62] Given our conclusion that the district court did not abuse its discretion by using the percentage method, our review of the district court’s use of Class Counsel’s lodestar is limited. When used to crosscheck a percentage award, the lodestar is estimated, using information provided by the fee applicant. *Manual for Complex Litigation* §14.122, at 193; see *Goldberger*, 209 F.3d at 50 (“[W]here used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.”); *O’Keefe*, 214 F.R.D. at 304, 310 (noting that “[t]he Third Circuit also recommends using a less exacting version of the lodestar to cross-check the fee award’s reasonableness” and stating that the types of arguments made by the defendant in regard to the lodestar “lead to the demise of the lodestar method”); *In re Copley*, 1 F. Supp. 2d at 1414 (“[t]aking all of counsel’s claimed hours . . . as legitimate” to conduct a “rough lodestar analysis” and confirm that the award “bears some relation to the work performed by counsel”); *Lachance v. Harrington*, 965 F. Supp. 630, 650-51 (E.D. Pa. 1997) (“It is not necessary to determine with precision what an appropriate lodestar would be. Indeed, one of the primary advantages of using the [percentage] method is to avoid reviewing lodestar figures with a

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1An algebraic equation is used to determine the unknown attorney fees when the fees are included in the common fund. Using the known variables (the numbers for the estimated claims, cy pres award, counsel’s expenses, and settlement expenses), the unknown variable (attorney fees) can be determined. In our case, the relevant equation is $3,150,000 + 14,200,000 + 525,179 + 500,000 + .25x = x$, where the total recovery, or benefit to the Class, including expenses and fees, and .25x being 25% of the total recovery including expenses and fees. The equation is then solved as follows:

\[
\begin{align*}
3,150,000 + 14,200,000 + 525,179 + 500,000 &= x - .25x \\
18,375,179 &= .75x \\
18,375,179 &= 75(x) \\
.75 &= .75x
\end{align*}
\]

Thus, $x = 24,500,238.66$, which is the total recovery. If the fee award is 25% of the total recovery, we use the value we have for $x$: 

$.25(24,500,238.66) = 6,125,059.66$. Thus, it appears that the district court rounded down to reach an even $6.1$ million, the amount of the fee award.
The crosscheck is conducted by dividing the percentage award by Class Counsel’s lodestar. See Manual for Complex Litigation § 14.122, at 193. If the resulting multiplier is not unreasonable in comparison with multipliers in other cases, the percentage of recovery is considered reasonable. See id.

Microsoft relies on Kennedy and Calderon to argue that the district court erred by accepting Class Counsel’s lodestar. As discussed earlier, the New Mexico cases are inapposite because they do not involve class actions. Moreover, we are not convinced that Kennedy’s discussion of a multiplier in a statutory fee case is helpful in using a lodestar to crosscheck a percentage of recovery award. Under federal law, a multiplier based on risk or contingency cannot be used in a statutory fee case. See City of Burlington v. Dague, 505 U.S. 557, 559, 567 (1992) (adopting the position put forth by Justice White’s principal opinion in Pennsylvania v. Del. Valley Citizens’ Council for Clean Air, 483 U.S. 711, 727 (1987), and concluding that an enhancement for contingency is not appropriate under the fee-shifting provisions of the Solid Waste Disposal Act and the Clean Water Act); see also Del. Valley Citizens’ Council, 483 U.S. at 727 (“[I]n the absence of further legislative guidance, we conclude that multipliers or other enhancement of a reasonable lodestar fee to compensate for the risk of loss is impermissible under the usual fee-shifting statutes.”). Moreover, the purpose of the crosscheck by the lodestar method is to compare the resulting multiplier with multipliers from other common fund cases. We discuss multipliers in paragraph 74 of this opinion and conclude that the multiplier used in this case was comparable to other similar common fund cases.

In light of our holding that the district court did not err by calculating the fee award using the percentage method, we conclude that the lower court did not err by using an estimated lodestar provided by Class Counsel. In this regard, we examine briefly Microsoft’s specific arguments regarding Class Counsel’s lodestar.

1. Excessive Out-of-State Hourly Rates

The district court has discretion to determine a reasonable hourly rate that reflects the “prevailing market rates in the relevant community.” Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995) (quoting Blum, 465 U.S. at 895). The judge, familiar with the case and the normal rates in the area, may rely on his own knowledge to supple-

The record reflects that out-of-state counsel has an established national practice in class actions and had extensive experience in litigating similar actions throughout the nation. A nationally established firm brings the significant experience and expertise in large class actions necessary to properly litigate this type of case. See id. (approving the district court’s determination that out-of-state counsel’s higher rates were reasonable for the services rendered). Moreover, the reasonableness and necessity for obtaining out-of-state counsel is illustrated by Microsoft’s substantial use of out-of-state counsel. See Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1313, 1324 (M.D. Fla. 2001) (stating that while local counsel could have handled the case, it was reasonable to retain out-of-state counsel where the defendant found it reasonable to obtain out-of-state counsel).

In addition, we note that Microsoft, in support of its argument regarding hourly rates, cites to cases that do not address the lodestar computation in a class action common fund case. See Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1192, 1203 (10th Cir. 1998) (reviewing a fee that was awarded pursuant to 42 U.S.C. § 1988(b)); Bangerter, 61 F.3d at 1509 (same); Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 138 (8th Cir. 1982) (same); Homans v. City of Albuquerque, 264 F. Supp. 2d 972, 976 (D.N.M. 2003) (same). Thus, these cases do not alter our analysis or conclusion that the district court did not abuse its discretion by using an estimated lodestar, which included hourly rates exceeding those found in New Mexico, to crosscheck its percentage award.

2. Supporting Billing Records

Microsoft argues that the district court erred by accepting Class Counsel’s lodestar because the lodestar included time spent on fee litigation, time spent on work performed in Microsoft cases in other states, and time submitted without supporting billing records. Microsoft also challenges the district court’s automatic acceptance of Class Counsel’s claimed expenses. Microsoft contends that the district court did not address its objections to the claimed expenses and “gave no reason at all for its finding that expenses . . . were reasonable.” Moreover, Microsoft asserts that out-of-state Class Counsel claimed $225,833 in expenses without a “showing that those expenses were reasonably and necessarily incurred in the New Mexico case . . . [and thereby] failed to satisfy their burden of proving that the expenses . . . provided any benefit” to the Class.

We are unpersuaded by Microsoft’s arguments regarding time and expenses for three reasons. First, as discussed earlier, once the percentage method is used in a common fund case, the lodestar is used as a crosscheck, and the lodestar itself is estimated. Second, Microsoft has neglected to cite to any documentary evidence in support of its assertions, other than its expert’s report. Our review of the record has revealed no additional evidence to support Microsoft’s contentions. With regard to time spent on fee litigation, Microsoft’s expert’s report concludes the following, without citation to the billing records:

[In-state Class Counsel’s] affidavit states that his firm’s lodestar does not include work on the attorneys’ fee application. It should not, but the fact is that [Class Counsel] charged $14,851 in fees on work relating to petitioning for fees and expenses, even though the firms intended to exclude such time from the lodestar. It is interesting, however, to contrast the time and fees devoted in a very concentrated effort from November 2 through November 28, 2004 on the attorneys’ fees and costs Application. In one month the . . . attorneys devoted 591 hours or $151,852 . . . to the fee application. That is the equivalent of 22%
of the total lodestar for work the
firm did on the case in almost five
years from January 2000 through
September 2004. The report contains other similar conclu-

sions regarding hours spent on petitioning
for fees and expenses, work performed on
cases in other states, and fees and expenses. See Case v. Unified Sch. Dist. No. 233, 157
F.3d 1243, 1250 (10th Cir. 1998) (“While the parties may submit affidavits from ex-
erts regarding reasonableness of the hours
billed, the practice is not very helpful when
the testimony varies greatly.”). Detailed
billing records were made available to the
court and defense below, but these records
are not included in the appellate record.
Moreover, Microsoft does not cite to the
summary billing and expense records that
can be found in the appellate record. To
the extent that the billing records are necessary
for our review, the record is deficient. See
State v. Rojo, 1999-NMSC-001, ¶ 53, 126
N.M. 438, 971 P.2d 829 (“Where there is a
doubtful or deficient record, every
presumption must be indulged by the
reviewing court in favor of the correct-
ness and regularity of the [district] court’s
judgment.” (internal quotation marks and
citation omitted)); In re Estate of Heather,
113 N.M. 691, 694, 831 P.2d 990, 993 (Ct.
App. 1992) (“This court will not search
the record to find evidence to support an
appellant’s claims.”).
Class Counsel submitted their own
expert report and affidavits that countered
Microsoft’s contentions. Although Mi-
crosoft does not present its argument as
one of substantial evidence to support the
facts (e.g., whether the time allocated was
time spent preparing the fee application,
whether out-of-state counsel’s multi-state
time was beneficial to the New Mexico
Class, or whether claimed expenses were
reasonably incurred), it is clear that sub-
stantial evidence exists in Class Counsel’s
affidavits to support the lower court’s deci-
sion. See Mayeux, 2006-NMCA-028, ¶ 33;
Las Cruces Prof’l Fire Fighters v. City of Las
Cruces, 1997-NMCA-044, ¶ 12, 123
N.M. 329, 940 P.2d 177 (“The question is
not whether substantial evidence exists
to support the opposite result, but rather
whether such evidence supports the result
reached.”); cf. Kennedy, 2000-NMSC-025,
¶¶ 34, 36 (affirming this Court’s reversal of
attorney fees based on a lodestar because
counsel failed to supply the district court
with any time records).
Third, and most importantly, after the
court and Microsoft had the opportunity
to view the detailed billing records, both
parties presented argument regarding these
issues, and the court below resolved the
issue in favor of Class Counsel. See Case,
157 F.3d at 1250 (“More important is the
discretionary determination by the district
court of how many hours, in its experi-
ence, should have been expended on the
specific case, given the maneuverings of
each side and the complexity of the facts,
law, and litigation.”); see also Reeves v.
Wimberly, 107 N.M. 231, 236, 755 P.2d
75, 80 (Ct. App. 1988) (“Upon a doubtful
or deficient record, every presumption is
indulged in favor of the correctness and
regularity of the trial court’s decision, and
the appellate court will indulge in reason-
able presumptions in support of the order
entered.”); Sanchez v. Molycorp, Inc., 103
1985) (“[T]he opinions of an expert even
where unconvinced, are not conclusive on
facts in issue and the fact[-finder may
reject such opinion in whole or in part.”);
Gottlieb, 43 F.3d at 487 (stating that a
decision-maker’s determination about the
particular circumstances of a case is like a
finding of credibility).
In addition, Microsoft argues un-
convincingly, in reliance on New Mexico
cases, that the time “supposedly spent by
the Lerach firm ‘on the overall Microsoft
litigation’” did not confer a specific benefit
on the New Mexico Class. As noted earlier,
New Mexico law regarding attorney fees
paid by individual clients is not helpful in
analyzing attorney fee awards in large
class actions that are national in nature.
Microsoft ignores the apparently common
practice in large class actions of allocating
to each state a percentage of overall time
spent on “virtually identical” cases. See
In re S.D. Microsoft Litig., 2005 SD 113,
¶¶ 37-43 (remanding for recalculation of
fees with instructions to allocate to the
South Dakota litigation one-eighth of the
total hours worked in eight jurisdictions).
Moreover, Class Counsel submitted affida-
vits detailing their justifications for allocat-
ing these expenses to New Mexico. The
district court, as the fact-finder, is entitled
to resolve any conflicts in the evidence.
State v. Casteneda, 97 N.M. 670, 678, 642
P.2d 1129, 1137 (Ct. App. 1982).
Finally, the parties agree that the
district court erred in granting expenses
first claimed by Class Counsel in the fee
application, in the amount of $525,179.
In the reply brief below, Class Counsel
revised their request for reimbursement to
$521,601 and acknowledged that they had
been reimbursed certain expenses after the
fee application was filed. Thus, expenses
awarded by the court below shall be offset
by any payments made by Microsoft after the
fee application was filed.
3. Multiplier of Three
Microsoft asserts that the district
court erred by concluding that a multiplier
of three was an appropriate enhancement
of the lodestar in these circumstances. It
contains that this case was a tag-along
action, “piggybacking” actions from the
federal court and other state courts and as,
such, “[n]either the efforts expended, nor
the risks assumed, nor the results obtained
. . . were exceptional” enough to justify a
multiplier of three. Microsoft asserts that
a proper lodestar would be $1,509,023 and
that this lodestar, enhanced by a multiplier
of 1.5, would produce a reasonable fee of
$2,263,534.
As discussed earlier, use of the
lodestar to crosscheck a percentage award
involves comparing the resulting multiplier
with multipliers from similar cases. The
district court divided its fee award of about
$6 million by Class Counsel’s lodestar of
about $2 million, resulting in a multiplier of
three. Although this multiplier approaches
the high end of multipliers awarded in re-
cent years, see In re Cendant, 243 F.3d at
737-38, 742, we conclude that the district
court did not err when it determined that
the multiplier of three was reasonable. Other
comparable cases have had similar multi-
pliers. See, e.g., In re Infospace, Inc., 330 F.
Supp. 2d 1203, 1215-16 (W.D. Wash. 2004)
(using a multiplier of 3.5 in a “garden vari-
ety securities case that did not present novel
issues of law”); O’Keefe, 214 F.R.D. at 304,
311 (noting that a $4,896,783 award, 15%
of $32,645,220, yields a multiplier of 2.95
using class counsel’s estimated reasonable
hours and 6.08 using [the defendant’s] esti-
ated reasonable hours”; concluding that
neither multiplier seems unreasonable);
Kuhnlein, 662 So. 2d at 315 (conclud-
ing that a multiplier of five is reasonable
“to alleviate the contingency risk factor
involved and attract high level counsel
to common fund cases”); see also In re Cen-
dant, 243 F.3d at 742-43 (concluding that
a multiplier of three would be acceptable
even though the “case was neither legally
nor factually complex[,] . . . did not require
significant motion practice or discovery[,] . . .
and the entire duration of the case from
the filing of the Amended Complaint to
the submission of a Settlement Agree-
ment . . . was only four months”); In re
Prudential, 148 F.3d at 341 (recognizing
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that multipliers ranging from one to four are often awarded in common fund cases). In the related Arizona Microsoft case, the court awarded fees to plaintiffs’ counsel by using a multiplier of 3.42. Friedman, 141 P.3d at 835. We accordingly disagree with the majority in South Dakota’s three-two decision. In re S.D. Microsoft Litig., 2005 SD 113, ¶ 76 (concluding that a multiplier should not be applied, “given the lack of ‘exceptional success’”). To our mind, the majority’s mislabeled view of the benefits of the litigation as well as its seemingly de novo review of the issue of attorney fees is entirely inappropriate. See generally id. ¶¶ 85-94 (Meierhenry, J., dissenting).

{75} We are not persuaded by Microsoft’s assertion that a multiplier of three is not justified by Class Counsel’s risk, efforts, or success because it piggybacked a prior government action. First, Microsoft relies on cases that calculate the fee award using the lodestar method, rather than cases that use the lodestar method as a crosscheck, to support its assertion. See In re Auction Houses Antitrust Litig., No. 00 CIV.0648, 2001 WL 210697, at *1, 3 (S.D.N.Y. Feb. 26, 2001) (amended order) (concluding that a multiplier was not appropriate where there was no risk of non-recovery because an interested party had admitted publicly to the alleged wrongdoing); Goldberger, 209 F.3d at 45, 56 (affirming the district court’s decision not to use a multiplier to calculate a lodestar fee award where corporations related to the defendant pleaded guilty prior to the filing of the class action at issue); City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1095-96, 1103 (2d Cir. 1977) (concluding that a multiplier was not appropriate when the complaints were filed after the government action had been appealed to the United States Supreme Court, remanded for hearings on relief, and a final decree had been entered), abrogated by Goldberger, 209 F.3d at 49-50; In re Bausch & Lomb, Inc. Sec. Litig., 183 F.R.D. 78, 82, 87, 88 (W.D.N.Y. 1998) (using a multiplier of two where the “case did not present any especially novel or difficult issues,” litigation coincided with government action, and news investigations exposed “a serious risk of liability”). Second, the factual circumstances in these cases are not similar enough to our case for us to conclude that the district court abused its discretion. We review now the reasonableness factors used by the district court in awarding fees.

G. Reasonableness of the Award and Rule 16-105

{76} As we discussed earlier, reasonableness is the ultimate question regarding an award of attorney fees. Under either the lodestar method or the percentage method, “the fee awarded must be reasonable.” Gottlieb, 43 F.3d at 482. The attorney bears the burden of proving that his legal services provided a benefit to the client. Calderon, 111 N.M. at 3, 800 P.2d at 1060. In determining the value of an attorney’s legal services, the district court can use its own knowledge and expertise. Id.; Gavin Maloof, 106 N.M. at 415, 744 P.2d at 543. Historically, New Mexico courts have also used the factors now found in Rule 16-105 of the Rules of Professional Conduct to examine the reasonableness of attorney fees. See, e.g., Calderon, 111 N.M. at 2, 800 P.2d at 1059 (addressing the reasonableness of fees awarded on a theory of quantum meruit after a contingency fee agreement was voided); Fryar v. Johnsen, 93 N.M. 485, 486-87, 601 P.2d 718, 719-20 (1979) (addressing the issue of reasonable attorney fees in the context of workers’ compensation cases). These factors are effectively identical to the “Johnson factors” used by the Tenth Circuit, see Ramah Navajo Chap v. Norton, 250 F. Supp. 2d 1303, 1306 (D.N.M. 2002) (hereinafter Ramah II), and are commonly referred to as the “Fryar factors” in New Mexico. See Econ. Rentals, Inc. v. Garcia, 112 N.M. 748, 764, 819 P.2d 1306, 1322 (1991).

1. Rule 16-105

{77} Rule 16-105(A) establishes the following factors to be considered:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer performing the services; and

(8) whether the fee is fixed or contingent.

{78} The factors are not of equal weight, and all of the factors need not be considered. Ramah I, 50 F. Supp. 2d at 1097 (declining to consider “the time and labor involved factor . . . when, in the judgment of the district court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record” (internal quotation marks and citation omitted)). The court below expressly stated that it considered the Rule 16-105 factors, and ample evidence exists in the record to support the court’s decision. See Landavazo v. Sanchez, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) (“Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.”); Brown, 838 F.2d at 455 (“There is ample evidence in the record to support each of the reasons relied upon by the trial judge.”); see also id. at 456 (finding no abuse of discretion where the relevant factors were considered and the evidence in the record supported the court’s determination). We review the relevant factors that were considered by the district court after evidence and argument were presented.

a. Time and Labor, Novelty and Difficulty, and Requisite Skill

{79} This case began more than five years ago and has been vigorously litigated by both parties. Multiple motions and memoranda have been filed. The Class was certified, the certification was appealed, and that appeal was briefed to this Court. In addition, Class Plaintiffs in New Mexico were required to coordinate with attorneys representing similar class actions in other states and federal courts. Further, an indirect purchaser antitrust class action presents novel and complex issues regarding certification, causation, and damages. Moreover, an action against a corporation like Microsoft requires a high level of skill and expertise.

b. Preclusion of Other Employment

{80} The record demonstrates that at specific times during the five-year course of proceedings, Class Counsel would have been precluded from other employment, particularly while preparing for coordination with other jurisdictions, while preparing for class certification and appeal, and while challenging the proposed global settlement.

c. Ordinary Fee for Similar Actions in the Locale

{81} The record contains support for the conclusion that fees awarded in cases recently resolved within New Mexico were
based on percentages of 25%, 30%, and 33.33%. In addition, the Federal District Court of New Mexico has noted that percentages usually range from 20% to 30%. See Ramah I, 50 F. Supp. 2d at 1096.

Moreover, in a class action of this size, relatively infrequent in New Mexico, comparison to similar cases throughout the country is appropriate. The record references studies revealing that fee awards nationwide are often based on 25% to 30%. See Manual for Complex Litigation, § 14.121, at 188; see also, e.g., Edwards, 920 P.2d at 758 & n.14 (adopting 25% as a baseline percentage and permitting modification according to circumstances); Nat’l Ass’n of Consumer Advocates, 176 F.R.D. at 397 (“In the absence of special circumstances, including either an unusually large monetary recovery or a relatively small monetary recovery coupled with very beneficial but difficult to value equitable relief, the courts have recognized percentage benchmarks ranging from 19 percent to 45 percent of the common fund.”).

d. Amount Involved and Results Obtained

On a per capita basis, the New Mexico settlement is the fourth highest nationwide. The face value of the settlement, $31.5 million, represents approximately 25% of the total potential damages quantified by the Class’s experts. Microsoft estimated the value of the settlement, excluding attorney fees and costs, at $17.5 million. The actual value of the settlement is less than face value, due to the nature of the voucher system and the two-step process required to take advantage of the direct benefit to the Class. Members of the Class who purchased an operating system may claim a voucher valued at $13; those who purchased application software may claim a voucher for $6.75. A voucher may be redeemed only after the purchase of computer hardware or a non-custom software application. Products that may be purchased to redeem vouchers are not limited to Microsoft-related products; vouchers may be redeemed for the purchase of any type or brand of hardware or non-custom software. The vouchers are transferable and can be aggregated, within limits. Large-volume users, including New Mexico schools as beneficiaries of the cy pres award, will receive substantial and tangible benefits because the vouchers are transferable and can be aggregated.

e. Time Limitations

As noted by the district court, the risk for Class Counsel was significant when it committed to a case that would be vigorously litigated for years. The proceedings have lasted more than five years. It is not the limit placed on counsel’s time that is significant in a case like the one at hand. Rather, it is Class Counsel’s commitment to represent the Class, despite the probability of years of litigation. If the Agreement had not been reached, the proceedings could have continued for an indeterminate time.

f. Experience, Reputation, and Ability of Class Counsel

In its expert’s report submitted to the court below, Microsoft acknowledged that Class Counsel includes “one of the premier trial attorneys in New Mexico[,] who has extensive experience and recognized expertise in class action litigation . . . on behalf of plaintiffs.” The report also recognized that Class Counsel includes a firm with an established national practice in class actions. A nationally established firm brings the significant experience and expertise in large class actions necessary to properly litigate this type of case. See In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (“[T]he quality of opposing counsel is also important in evaluating the quality of plaintiffs’ counsels’ work.” (internal quotation marks and citation omitted)).

g. Type of Fee Arrangement

Class Counsel accepted the case on a contingent basis. They advanced expenses and worked without payment for five years.

2. District Court’s Consideration of the Factors

After careful consideration, the district court concluded that the majority of the factors weigh in favor of the reasonableness of the fee award. The district court’s application of these factors to our case revealed that experienced and highly skilled attorneys made a significant investment of time and expense in a case with a substantial risk of no payment in order to successfully resolve a complex class action. We cannot say that “the trial court’s decision was clearly against the logic and effect of the facts and circumstances before the court.” In re Estate of Greig, 107 N.M. at 230, 755 P.2d at 74; see Calderon, 111 N. M. at 3, 800 P.2d at 1060 (noting that a district court can rely on its own knowledge and expertise in assessing a reasonable fee); Gavin Maloof, 106 N.M. at 415, 744 P.2d at 543 (declaring that a court may rely on its knowledge of the case and the pleadings filed in assessing a reasonable fee). Thus, we conclude that the district court’s determination of reasonableness based on the Rule 16-105 factors was not an abuse of discretion.

In summary, the district court reached its decision after careful consideration of all pleadings, evidence, and oral argument. The judge presided over the entire course of the consolidated litigation and settlement approval. Our review of the record reveals that the district court’s award was reasonable based on the facts before it; we will not second-guess the court below, nor can we redo the reasonableness analysis based on facts different from those before the court below. Although Microsoft argues that it was Class Counsel’s burden to prove that the expenses they incurred benefitted the Class, Class Counsel adequately rebutted those contentions in their pleadings and at oral argument below, thereby carrying their burden. On appeal, Microsoft carries the burden of showing that the district court erred in concluding that Class Counsel met its burden below. See Martinez v. Sw. Landfills, Inc., 115 N.M. 181, 184-86, 848 P.2d 1108, 1111-13 ( Ct. App. 1993) (discussing the appellant’s burden on appeal). Microsoft has not met this burden.

III. CONCLUSION

We hold that the district court did not abuse its discretion by choosing to use the percentage method to calculate the fee award on the basis of the common fund. We also conclude that the court did not abuse its discretion in awarding expenses, with the proviso that the expenses awarded in the order are offset by any expenses reimbursed after the filing of the fee application. Accordingly, we affirm. In light of our opinion, we do not deem it necessary to rule on the motion to supplement the record with material that we have not referenced.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

LYNN PICKARD, Judge

JONATHAN B. SUTIN, Judge (specially concurring)

SUTIN, Judge (specially concurring).

I concur in the majority opinion’s analyses and results. I write separately only to emphasize a few points in regard to Microsoft’s shortcomings in this case, shortcomings that have made it easier for me to concur as I have in the majority’s analyses and results.

1. Microsoft’s Positions on the Common Fund Doctrine and Use of the Percentage Method

A district court invokes the common fund doctrine in order to supervise the fund
and to place the burden of class counsel’s fees on the class. In doing so, the court has a choice of employing either the percentage method or the lodestar method to determine fees. Where the fee burden is placed on the class, it does not follow that either method must necessarily or logically be the primary determinant of fees. The common fund doctrine appears to have little significance except where equity demands that the class is to bear the burden of attorney fees.

{93} Where, by agreement of the parties, the burden of attorney fees is placed on the defendant and not the class, why would the parties agree, as they did in the present case, that the common fund doctrine would be used to determine fees? And why, after agreeing that the fees it would have to pay were to be determined based on the common fund doctrine, would Microsoft state that (1) because it contractually agreed to pay the fees, “the Settlement Agreement’s reference to the common fund doctrine is superfluous,” (2) there “is no common fund,” and (3) “there is no ‘true’ common fund belonging to the class that could have allowed the district court to spread the burden of paying attorney['] fees to all class members by awarding a percentage of the fund to counsel for their fees?”

{94} Microsoft and its trial attorneys, sophisticated and experienced in class actions, appear to have intentionally agreed to language that is vague, or worse, arguably meaningless or subject to attack. How Microsoft can agree to the wording “based on the common fund doctrine” and agree to ranges of valuation of the common fund, yet later essentially argue that the agreement language is meaningless in addressing the issue of the method of determining fees, is difficult to comprehend. The reasonable and logical view of the language used is that the parties intended there to be a valuation of a “common fund,” giving the court discretion to use the percentage method as the primary method of determining fees, but nevertheless did not intend to rule out the use of the lodestar method as the primary method, leaving open the right of the parties to argue value and which method the court should use as a primary determiner of fees.

2. Valuation of the Fund

{95} The valuation issue concerns the elements that can be included in the valuation of the common fund. Microsoft wants to include only the in-hand amounts received by Class members pursuant to the voucher claims they exercised. Yet (1) Microsoft agreed to the court ascertaining a fund value for attorney fee determination purposes well before the voucher claims were exercised and the in-hand amounts were known and before the court, and (2) Microsoft presented quite different values to the court for its consideration in ascertaining a fund value for attorney fee determination purposes. Again, Microsoft appears to have taken one avenue only to switch and attempt another avenue when it appeared later on to be advantageous to do so. It is difficult to side with Microsoft under these circumstances.

{96} Further, there is adequate, if not plentiful, authority for the court’s inclusion of the cyberpres amount, as well as attorney fees and expenses, in the valuation of the benefit to the Class. Based on the abuse of discretion standard of review we employ, I cannot say that the court abused its discretion in including those items in the valuation.

3. Reasonableness of the Fee

{97} The majority is correct in stating that “[a]n appropriate fee is determined by reasonableness.” Majority Opinion ¶ 58. Reasonableness is judged by whether there is a rational connection between the amount of the fee and the benefit to the class.

{98} Settlement amounts (1) to be paid by a class action defendant to the class (e.g., the value of vouchers expected to be redeemed), (2) to satisfy a financial burden of the class (e.g., attorney fees), and (3) to benefit the public (e.g., cyberpres vouchers), should all be considered a benefit to the class. If other than this broad and accepted view of benefit is intended by the parties, the intent should be made clear in the settlement agreement. Again, Microsoft must take the consequences of a vague settlement agreement. Thus, as in the present case, where there is an agreed-to cyberpres voucher availability, and an agreed-to shifting of the attorney fee burden from the Class to the defendant, without a clearly expressed intent to the contrary each can and should be considered a benefit to the Class for the purposes of determining whether the fee award, based on a valuation of the fund, is reasonable.

{99} Again, I cannot say that the court abused its discretion in awarding the fee, nor can I say that the majority’s analysis of the reasonableness of the fee is defective. The award is neither irrational nor arbitrary. Microsoft has not shown how the law was incorrectly applied to the facts. The valuations of the cyberpres and class voucher amounts are essentially based on Microsoft’s own estimated figures presented to the court. Microsoft has not attacked the 25% figure as arbitrary. And Microsoft does not contest the district court’s methodology by which it first implanted the fee into the common fund only to afterwards derive that fee from the common fund. Nor does Microsoft persuade me that the multiplier of three was irrational or arbitrary in this case.

{100} Because of the broad discretion given to a trial court in measuring the reasonableness of an award of fees based on the benefit to the class, from both the circumstances in this case and fees awarded in similar cases, I am unable to say that the court in the present case abused its discretion. I agree that appellate courts must be vigilant in their oversight role to assure that the fees awarded are reasonable. Majority Opinion ¶¶ 12-13. On the flip-side, however, we must be careful not to substitute our judgment for that of its district court, and we are to reverse the district court only if the court’s ruling “exceeds the bounds of all reason,” is arbitrary or capricious, or is an erroneous application of law. Majority Opinion ¶ 14.

4. Other Microsoft Contract Language Arguments

{101} In its reply brief, Microsoft argues that “under the settlement agreement, if all of the class vouchers had been claimed, class counsel could not have argued that the common fund included its attorney['] fees.” Microsoft bases this belated argument on the following language in the agreement: “[P]laintiffs are free to argue that the value of the ‘common fund’ created by the litigation is any amount up to (but in no case exceeding) Face Value, plus notice and administrative expenses and costs.” In Microsoft’s view, it follows that “there is no basis for including attorney[‘] fees in the value of the recovery simply because fewer than all of the vouchers were claimed.” By footnote, Microsoft indicates that class counsel switched positions between trial and appeal on the issue of whether attorney fees were to be included in the class “recovery.”

{102} Microsoft is in no position to isolate wording in the agreement that might be beneficial to Microsoft after the fact. Microsoft cannot show that the wording on which it relies was intended by the parties to bring about the result Microsoft asserts. The wording of the Settlement Agreement in regard to awarding fees is sufficiently unclear to hold against Microsoft’s interpretations. It was Microsoft’s burden to assure that the language in the agreement was clear.

JONATHAN B. SUTIN, Judge
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New Mexico Legal Aid (NMLA) seeks a respected, experienced, innovative and dynamic leader who is passionate about and has demonstrated commitment to advocate on behalf of low-income people. The new Executive Director must be an experienced attorney knowledgeable in public interest law, federal and state government administration and operations, and have an understanding of the organization and operations of non-profit corporations. NMLA, an equal opportunity employer, is a high quality, non-profit legal services organization that serves the entire state, with offices in Albuquerque, Las Cruces, Santa Fe, Gallup, Roswell, Taos, Silver City, Las Vegas, Mescalero, and Santa Ana, as well as a Migrant unit located in our Las Cruces office. Both our Santa Ana and Mescalero offices serve the Native American population of New Mexico. Our Migrant component serves the State migrant population in the southern part of New Mexico. NMLA has been committed to serving all of New Mexico for over 32 years (as separate programs and since becoming one statewide program in 2003). NMLA is the largest legal services field program in New Mexico, with a unionized staff of over 40 employees and serving almost 5,000 clients per year. Candidates must have at least 10 years legal experience and admittance to or eligibility for admittance to practice in New Mexico. Candidates must also have demonstrated successful experience in grant development, management and fundraising, and be skilled in personnel and financial management, program planning, development and administration. Preference will be given to candidates with at least 3 years of legal services management experience or comparable experience with another legal advocacy organization. Compensation is competitive and based on experience. Excellent benefits. Applications should include a cover letter expressing in detail why the candidate is interested in the position of Executive Director of NMLA as well as what the candidate believes he/she can contribute to the future of the organization and its client community, a resume, and names and contact information for three references. The position of Executive Director will be physically located in Albuquerque, New Mexico. Our office in Albuquerque is located on 6th & Copper NW in the downtown business area. Position is opened until filled. Please forward your application to either the physical and/or email address to: Gloria A. Molinar, NMLA Search Committee, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001, gloria@nmlegalaid.org.

Personal Injury / Medical Practice Paralegal

Personal Injury or Medical Practice paralegal with minimum of 10 years experience. Must be computer savvy and have trial participation experience. If you don’t have these qualifications, don’t apply. Send resume to Revo Law Firm, 10400 Academy NE, Ste. 200, ABQ, NM 87111.

Assistant Trial Attorney - Cibola County

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

Legal Assistant

Legal Assistant needed for Santa Fe, NM Plaintiffs Civil Litigation firm. Bi-lingual preferred. 3 yrs. Civil Litigation exp., knowledge of Word Perfect and MS Office required, and must be familiar with state & federal court rules. Salary negotiable. Send resume, with cover letter to: Personnel, Madison Harbour & Mroz, P.A., P.O. Box 25467, Albuquerque, NM 87125 or fax to 242-7184.

Legal Secretary

Downtown insurance defense firm seeking legal secretary with 3 yrs. litigation experience. Strong work ethic, positive attitude and clerical and organizational skills required. MSWord. Good benefits. Salary DOE. Send resume and salary requirements to: Personnel, Madison Harbour & Mroz, P.A., P.O. Box 25467, Albuquerque, NM 87125 or fax to 242-7184.

Experienced Legal Assistant

Experienced Legal Assistant needed for a fast-paced plaintiffs’ firm. Must be organized, self-motivated, and able to work independently. Previous legal experience required, specifically in the preparation of pleadings and correspondence, state and federal court filings, and calendaring. Must be computer literate and have experience with MS Word and Outlook Email. Fax or email resume with salary requirements to Cindy Wade at Gaddy & Jaramillo, (505) 254-9366; cindy@gaddyfirm.com

Experienced Santa Fe Paralegal

Small collegial Santa Fe firm needs a bright, energetic, mature, meticulous and experienced (5+ years) Paralegal. Very substantial client contact. Excellent writing, communication and organizational skills required. Computer intensive, informal non-smoking office. Paralegal Certificate desirable. Recent law firm experience required. Our firm offers a fun small office workplace. Competitive Compensation Pkg. $45,000 (salary plus monthly bonus), 100% paid Medical/Hosp; parking; paid holidays; sick and personal leave. All responses are confidential. Resume with cover letter please to P.O. Box 4817, Santa Fe, NM 87502-4817.
Court Administrator 3 Position
The Fifth Judicial District Court of Chaves, Eddy and Lea Counties is recruiting for a Court Administrator 3 to be located in Roswell, NM. This is an unclassified position and serves at the pleasure of ten district judges and directs and manages all administrative operations of the three counties. Directly supervises a Deputy Court Administrator 2, Court Financial Manager, Director of Family Drug Court, Information Technology Technician and the 3 District Court Clerk’s of Chaves, Eddy and Lea Counties. Administers an appropriated budget of over 5 million dollars. Qualifications include a Bachelor’s Degree in business or public administration or in a related field with 7 years of court or judicial experience including 3 years of supervisory experience. Fellowship with Institute of Court Management desirable. Experience may substitute for education at the rate of one year of experience equals 30 semester hours. Education may not substitute for supervisory experience. Salary is $80,616 to $83,749. Excellent benefits. A complete job description is available upon request. Resumes must be received by Friday, February 9, 2007, in the office of the Hon. Gary L. Clingman, Chief Judge, Fifth Judicial District Court, 100 N. Main, Box 6-C, Lovington, NM 88260. Visit our website at www.fifthdistrictcourt.com for further information. The judicial branch of New Mexico state government is an equal opportunity employer.

Receptionist/Legal Secretary
Full-time on ¾ time receptionist/legal secretary needed with a minimum of 2 years experience for a small firm just west of the downtown area. Must be a self-starter and be organized. Because of the size of firm, must be willing to do a variety of duties as needed. Benefits provided and a very pleasant work environment. Must be proficient with WordPerfect and Excel. Salary D.O.E. Please fax resume with references to Office Manager at 842-8200, or mail to Office Manager, 116 14th Street, S.W., Albuquerque, NM 87102

Legal Assistant
Hatch, Allen & Shepherd, P.A. a busy general civil litigation firm is seeking an experienced full time legal assistant to join our team. Applicant must have experience in Microsoft Word, heavy tape transcription and the ability to draft legal documents required. A minimum of 5 years in medical malpractice, and/or insurance defense, experience preferred. We offer a great work environment and competitive salary, Generous insurance and 401k benefits. Please fax resume to Gayle Nissen at (505) 341-3434 or mail to PO Box 30488, Albuquerque, NM 87190-0488

Paralegal
Experienced Family Law Paralegal (min. 2 years), full-time with fun, fast paced, downtown law firm. Must be organized, self-motivated, and work independently. Spanish Speaker, a plus. Salary DOE and 401K. Send resume with cover letter, salary requirements, and references to: 505-244-8731 or E-mail to mary@newmexlaw.com.

Positions Wanted

Paralegal/Legal Assistant
Experienced paralegal/legal assistant seeking employment Santa Fe/Albuquerque 265-5484

Consulting

Forensic Psychiatrist
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, and expert testimony; CV and case listings available upon request. Contact Dr. Kelly at 1-866-317-7959 or by email at forensicpsychiatry@comcast.net

Accounting Services
15 years experience in the legal field. Advanced client costs, trust fund accounting, fee distribution, retirement plan administration, A/R, A/P, Payroll and all P/R taxes and NMGRT. Available for monthly reconciliations and/or large one-time projects. Please call for a consultation: Cindy Hoke @ 254.4665 or email cahoke@swcp.com

Services

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

Office Space

Downtown Albuquerque
620 Roma Avenue N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

For Sale
Office condo. 2950SF. 8338 Comanche NE, Suits C&D. Call Cheng Wei @ The Pinon Agency. (505) 296-5000.

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

Attractive Shared Office Space
Attorneys - Uptown location, 2539 Wyoming, NE. Large furnished private office. Shared reception area, secretary, conference room, DSL, copier, fax, $390 plus shared costs. Contact Crystal Pritchard or Burton Broxterman 296-4821.

Share Office Space
Office space available in N.E. Heights (vicinity of Eubank and Comanche). Share space with five other sole practitioners. Includes usual amenities. Call Walter Reardon at (505) 293-7000.

Los Alamos Office Space
Prime downtown shared suite in the Community Bank building. Conference room, reception area, copier, Internet access, electric utility, janitorial, microwave, refrigerator, and copier availability included. Two offices, 120 sq. ft. and 150 sq. ft., available to rent together or separately. Available for monthly or “office-for-a-day” rental. Contact Lynn at (505) 661-4916 or finnegan@los-alamos.net

Downtown Offices
Up to three (3) offices with secretarial areas available in downtown area (4th Street & I-40). Rent includes receptionist; use of conference room; high speed internet connection; phone system; runner 3 days a week; free parking for staff and clients; use of copy machine; and employee lounge. Janitorial and utilities included in rent. Contact Jerry at 505-243-6721 or gabischof@dcbf.net

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

Attractive Office Available
One attractive office available in the downtown historic Hudson House. Rent includes telephone, equipment, access to fax, copier, conference rooms, parking, library and reference materials. Referrals and co-counsel opportunities. For more info., call the offices of Leonard DelLayo at 243-3300, ask for Jodi.
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Bar Bulletin - January 29, 2007 - Volume 46, No. 5 43
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Public Information Pamphlets

Members can now order Public Information Pamphlets from the State Bar.

- Label or stamp with name or law firm to increase visibility.
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Complete and return this form to: State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019, Attn: Veronica Cordova; or call (505) 797-6039.

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