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Tao Moon by Ed Wyatt (see page 5)
Weems Gallery, Albuquerque

www.nmbar.org
Alliance Program:
Guide to Member Benefits

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

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• Quarterly 12-page supplement to the Bar Bulletin

To reserve your space, contact:
Marcia C. Ulibarri, Account Executive
505.797.6058 mulibarri@nmbar.org

Only two issues left before the end of the year!
**JUNE 19TH VIDEO REPLAYS**  
**STATE BAR CENTER, ALBUQUERQUE**

<table>
<thead>
<tr>
<th>Event</th>
<th>Time</th>
<th>Credits</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting for Lawyers</td>
<td>9 a.m.</td>
<td>6.0 General CLE Credits</td>
<td>$209</td>
</tr>
<tr>
<td>Lawyer As Problem Solver: 2007 Professionalism</td>
<td>9 a.m.</td>
<td>1.0 Professionalism CLE Credit</td>
<td>$49</td>
</tr>
<tr>
<td>Section 1031 Tax-Deferred Exchanges</td>
<td>10:15 a.m.</td>
<td>2.2 General CLE Credit</td>
<td>$99</td>
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<tr>
<td>Defending Computer Crime Cases</td>
<td>12:30 p.m.</td>
<td>4.2 General CLE Credits</td>
<td>$189</td>
</tr>
</tbody>
</table>

**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.nmbarcle.org
- **MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

Name ___________________________________________________________  
NM Bar # _________________________________

Street __________________________________________________________________________________________________________

City/State/Zip _____________________________________________________________________________________________________

Phone ____________________________________________________ Fax  ____________________________________________________

E-mail ____________________________________________________________________________________________________________

☐ Purchase Order (Must be attached to be registered)  
☐ Check enclosed $ ____________  
   Make check payable to: CLE

Credit Card # _________________________________ Exp. Date __________________________

Authorized Signature ____________________________________________

[Image of Center for Legal Education logo]
Contribute and announcements to the Bar Bulletin are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

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Henry A. Alaniz, Vice President
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**Layout** – Julie Schwartz

E-mail: jschwartz@nmbar.org

**Account Executive** – Marci C. Ulibarri,

(505) 797-6058 • E-mail: ads@nmbar.org

**Pressman** – Brian Sanchez

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**Mail Handler** – Chris Knowles

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**Professionalism Tip**

With respect to opposing parties and their counsel:

I will not serve motions and pleadings that will unfairly limit the other party’s opportunity to respond.

**Meetings**

**June**

11 Taxation Section Board of Directors, noon, via teleconference

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

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

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

14 Public Law Section Board of Directors, noon, Risk Management Div., Santa Fe

14 Business Law Section Board of Directors, 4 p.m., State Bar Center

**State Bar Workshops**

**June**

13 Common Legal Questions Affecting Seniors 10:30 a.m., Raton Senior Center, Raton

14 Common Legal Questions Affecting Seniors 10:30 a.m., Springer Senior Center, Springer

20 Common Legal Questions Affecting Seniors 10 a.m., Campos Senior Center, Santa Rosa

21 Common Legal Questions Affecting Seniors 10:30 a.m., La Loma Area Senior Center, Anton Chico

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

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

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Cover Artist: Following successful careers as a photojournalist, television art director and graphic designer, Ed Wyatt turned his attention to portraying the dramatic and spiritual quality of the architecture, landscapes and light of the Southwest. Unlike many serigraphs on the market today, Wyatt’s original screen prints are produced and hand-printed on archival paper. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
NOTICES

N.M. Supreme Court 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.

Proposed Revisions to the Rules of Criminal Procedure for the District Courts
The Rules of Criminal Procedure Committee is considering whether to recommend proposed amendments to the Rules of Criminal Procedure and Criminal Forms for the District Courts for the Supreme Court’s consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848
Comments must be received by the clerk on or before June 25 to be considered by the Court. For reference, see the June 4 (Vol. 46, No.23) Bar Bulletin.

N.M. Court of Appeals Notice to Receive Bids
In accordance with the State of New Mexico Procurement Code, the New Mexico Court of Appeals is accepting proposals (bids) from licensed New Mexico attorneys or firms to furnish professional services for indigent persons in abuse and neglect cases on appeal. Bidders would be appointed to act as respondent’s attorneys in abuse and neglect cases on appeal. Payment for services is based on the type of pleading filed (brief, memorandum in response to summary calendar notice, etc.). Bids are to be sealed and marked “BID” on the envelope. Bids, together with a description of the bidder’s appellate experience, must be received by the clerk by 5 p.m., June 25. Send bids to the attention of Gina M. Maestas, Chief Clerk, New Mexico Court of Appeals, PO Box 2008, Santa Fe, NM 87504.

First Judicial District Court
Criminal Bench and Bar Brown-Bag Meeting
The 1st Judicial District Court Criminal Bench and Bar will have a brown-bag meeting at noon, June 12, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim in the Criminal Division, (505) 827-5047.

Family Law Brown-Bag
The 1st Judicial District Court will host its family law brown-bag meeting at noon, June 12, in the Grand Jury Room, second floor, Steve Herrera Judicial Complex, Santa Fe. This meeting will be with Family Court Services. For more information or to suggest agenda items to be discussed, contact Elege Simons Harwood, (505) 988-5600, or esimonsharwood@simonsfirm.com. Provide one dollar, name and State Bar number and receive 1.0 general CLE Credit.

Fifth Judicial District Nominating Commission Announcement of Meeting and Solicitation of Additional Applications
The 5th Judicial District Nominating Commission will reconvene at the Eddy County Courthouse, 102 N. Canal, Carlsbad, at 9 a.m., July 3, 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.

The chair of the 5th Judicial District Nominating Commission solicits additional applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/application.php; or call Sandra Bauman, (505) 277-4700, to receive an application by e-mail, fax or mail. The deadline for new applications is 5 p.m., June 22. Applications received after that date will not be considered.

U.S. District Court for the District of New Mexico
CM/ECF Noticing and Printed Copies
Beginning June 1, attorneys who have an active CM/ECF account but have not entered their primary e-mail address will no longer receive printed copies of documents and the corresponding NEF. The Court will only print and mail documents to pro se parties and other individuals exempted from the mandatory e-filing requirements. Visit http://www.nmcourt.fed.us for more information.

Destruction of Exhibits and Tapes
Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases with exhibits, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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<tr>
<th>District Court</th>
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<tr>
<td>1st Judicial District Court (505) 827-4687</td>
<td>Exhibits in criminal, civil, children’s courts, domestic, incompetency/mental health, adoption and probate cases, 1976–1990</td>
<td>May be retrieved through July 29</td>
</tr>
</tbody>
</table>
STATE BAR NEWS
Annual Meeting
According to its bylaws, the State Bar is required to hold an annual meeting of its members. As part of this year's annual meeting, which will be held at the Inn of the Mountain Gods in Mescalero, the State Bar will conduct a CLE session on discussion topics from 3 to 4:45 p.m., July 12. Possible discussion topics include non-partisan judicial elections, reciprocity, tort reform and electronic filing. Members who have suggestions on other possible topics or who are interested in speaking to a specific topic or moderating a discussion, should contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.

Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., July 2, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
Civil Legal Services
Commission Appointment
The Board of Bar Commissioners will make one appointment to the Civil Legal Services Commission for a three-year term. The commission meets as needed, approximately five to six times a year in Santa Fe, in addition to optional site visits with providers. Members wishing to serve on the commission should send a letter of interest and brief resume by June 26 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Casemaker Training and Technology Workshop
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. Training on using Casemaker will be held from 3 to 4 p.m., June 22, at the State Bar Center. Seating is limited. Call (505) 797-6000 to reserve a seat. Immediately following the training, a hands-on troubleshooting session will be held from 4:15 to 5:15 p.m.

Family Law Section
Annual Meeting
According to its bylaws, the Family Law Section is required to hold an annual meeting of its members. The meeting will take place at noon, July 14, during the State Bar’s annual meeting at the Inn of the Mountain Gods, Mescalero. All section members are encouraged to attend. Lunch will be served to those who R.S.V.P. by June 29 to Elgie Simons Harwood, esimonsharwood@simonsfirm.com or (505) 988-5600.

Paralegal Division
Monthly Brown-Bag CLE for Attorneys and Paralegals
The Paralegal Division invites members of the legal community to bring a lunch and attend Water Law in New Mexico, presented by Attorney at Law William D. Teel. The program will be held from noon to 1 p.m., June 13, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff. For more information, contact Cheryl Passalaqua, (505) 872-7469 or Evonne Sanchez, (505) 222-9356.

Senior Lawyers Division
Annual Meeting
The Senior Lawyers Division will hold its annual meeting at 5 p.m., July 13, during the State Bar's annual meeting at the Inn of the Mountain Gods, Mescalero. Any suggested agenda items should be sent to Chair Terrence Revo, terrencerevo@revolaw.com or (505) 293-8888. A reception with the Young Lawyers Division will follow at 5:30 p.m. All senior lawyers who will be at the convention are encouraged to join the SLD and YLD for the reception.

Solo and Small Firm Practitioners Section
Annual Meeting and CLE
The Solo and Small Firm Practitioners Section will hold its annual meeting at 1:15 p.m., June 15, in conjunction with the 2007 Tax Symposium: Matters Affecting Federal and State Tax Practice. E-mail agenda items to Chair Dean Cross, dcg@claw-nm.com, or call (505) 526-2101. Standard fee: $189; Taxation Section members, government, legal services attorneys and paralegals: $179. Lunch and a post-CLE reception are included. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbarcle.org; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

UNM
School of Law Summer Library Hours
<table>
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<th>Day</th>
<th>Hours</th>
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<td>Monday–Thursday</td>
<td>8 a.m. to 9 p.m.</td>
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<tr>
<td>Friday</td>
<td>8 a.m. to 6 p.m.</td>
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<td>Saturday</td>
<td>9 a.m. to 6 p.m.</td>
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<tr>
<td>Sunday</td>
<td>Noon to 9 p.m.</td>
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Reference
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<th>Hours</th>
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<td>Monday–Friday</td>
<td>9 a.m. to 6 p.m.</td>
</tr>
<tr>
<td>Saturday</td>
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</tr>
<tr>
<td>Sunday</td>
<td>Noon to 4 p.m.</td>
</tr>
</tbody>
</table>

OTHER BARS
N.M. Defense Lawyers Association
Quarterly Luncheon
The N.M. Defense Lawyers Association’s quarterly luncheon will be held June 14 at the Flying Star on Silver in Albuquerque. The guest speaker is Superintendent of Insurance Morris “Mo” Chavez. For more information, visit www.nmdla.org.

Taxation Section
Annual Meeting and CLE
The Taxation Section will hold its annual meeting at 1:15 p.m., June 15, in conjunction with the 2007 Tax Symposium: Matters Affecting Federal and State Tax Practice. E-mail agenda items to Chair Dean Cross, dcg@claw-nm.com, or call (505) 526-2101. Standard fee: $189; Taxation Section members, government, legal services attorneys and paralegals: $179. Lunch and a post-CLE reception are included. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbarcle.org; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Young Lawyers Division
Annual Meeting and Reception
The Young Lawyers Division will hold its annual meeting from 10 a.m. to noon, July 14, during the State Bar’s annual meeting at the Inn of the Mountain Gods, Mescaler. Agenda items should be sent to Chair Erika Anderson, eanderson@nm.net, or (505) 982-8405. YLD members are also invited to attend a reception from 5:30 to 7 p.m., July 13, co-hosted by YLD and the Senior Lawyers Division.
OTHER NEWS
American Inns of Court Writing Competition

Judges, lawyers, professors, students, scholars and other authors are invited to participate in the Warren E. Burger Writing Competition by submitting an original, unpublished essay of 10,000–25,000 words on a topic of their choice addressing issues of legal excellence, civility, ethics and professionalism.

The winning entry will be decided by a panel of judges comprised of Dean Stephen Gillers, New York University School of Law; Professor Geoffrey C. Hazard, University of Pennsylvania Law School; Professor Robert M. Wilcox, University of South Carolina School of Law; and Professor Nancy J. Moore, Boston University School of Law.

The author of the winning submission will receive a cash prize of $5,000 and the winning essay will be published in the South Carolina Law Review.

Complete rules may be downloaded at www.innsofcourt.org. Click Awards and then Burger Writing Prize. Deadline for submissions is June 15.

N.M. Center on Law and Poverty 2007 Statewide Legal Services Training

The N.M. Center on Law and Poverty is holding its annual Statewide Legal Services Conference, a training which addresses poverty law issues. This conference will be of interest to those who work in the system of civil legal service providers as a professional or volunteer or to those who do pro bono work in this area.

The conference will be held June 27–28 at the State Bar Center, Albuquerque. The keynote address will be delivered by Attorney General Gary King. Sessions will feature N.M. Supreme Court Chief Justice Edward Chávez, Sarah Singleton, and professors from the UNM School of Law: Michael B. Browde, Mario Occhialino and Nathalie Martin. Topics include professionalism and ethics training, consumer law, family law, bankruptcy, predatory lending, immigration law, housing and more.

The registration fee for the two-day conference is $90.00 for public interest lawyers; $115 for attorneys working for other non-profit organizations or for state government; $200 for private attorneys; and $30 for students (scholarships may be available). To learn more and to register for the event, go to www.nmpovertylaw.org and click on “Training;” call Stacey Leaman, N.M. Center on Law and Poverty, (505) 255-2840; or e-mail stacey@nmpovertylaw.org. CLE credit is pending.

We Want to Hear from You

The Bar Bulletin accepts Letters to the Editor.
Submit letters to notices@nmbar.org.

The editorial policy of the State Bar may be found on the Web at www.nmbar.org under Publications/Media, Bar Bulletin.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
Final Decisions

Jennie Deden Behles, Albuquerque (Disciplinary No. 12-2005-500): The New Mexico Supreme Court ordered an indefinite suspension for a minimum of three years for trust account violations; the suspension was deferred in favor of supervised probation with conditions to include: (a) a demonstration by the attorney that she is personally supervising the operation of her trust account and recordkeeping; (b) the completion of two random audits; and (c) the payment of costs associated with discipline.

Charges Filed

Charges were filed against an attorney for allegations of failing to communicate with clients; failing to provide accountings and to return unearned portions of retainers after clients terminated representation; failing to refund remainder of money held in trust to a client; and failing to cooperate in the investigations conducted by the office of disciplinary counsel.

Charges were filed against an attorney for allegations of failing to competently represent a client; failing to keep a client reasonably informed about the status of a matter; failing to explain a matter to the extent necessary to permit a client to make an informed decision regarding the representation; and making a false statement of material fact to a tribunal.

Petitions for Reinstatement Filed

Petitions for reinstatement filed 0

Formal Reprimands

Total number of attorneys formally reprimanded 1

F. Douglas Moeller (Disciplinary No. 07-206-510): Attorney formally reprimanded for using threatening language toward an opposing party after a hearing; said conduct disrupted a tribunal and was prejudicial to the administration of justice, in violation of Rule 16-305(C) and Rule 16-804(D), respectively, of the Rules of Professional Conduct.

Informal Admonitions

Total number of attorneys admonished 0

Letters of Caution

Total number of attorneys cautioned 7

Complaints Received

<table>
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<th>Allegations</th>
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<td>Conflict of Interest</td>
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<tr>
<td>Neglect and/or Incompetence</td>
<td>60</td>
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<tr>
<td>Misrepresentation or Fraud</td>
<td>13</td>
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<tr>
<td>Relationship with Client or Court</td>
<td>15</td>
</tr>
<tr>
<td>Fees</td>
<td>6</td>
</tr>
<tr>
<td>Improper Communications</td>
<td>5</td>
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<tr>
<td>Criminal Activity</td>
<td>0</td>
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<tr>
<td>Personal Behavior</td>
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<tr>
<td>Other</td>
<td>20</td>
</tr>
<tr>
<td>Total number of complaints received</td>
<td>137</td>
</tr>
</tbody>
</table>

Attorneys were cautioned for the following conduct:

1. failing to communicate with client and failing to promptly respond to client's request for a refund and for the return of the client's file;
2. failing to alert clients to extended delays in their cases due to attorney's personal issues and failing to make arrangements with other attorneys to address client needs;
3. including language in fee agreement that indicated that fees were to be forfeited to attorney's firm in the event of attorney's withdrawal from client's case;
4. failing to communicate the basis (or rate) of the attorney's fee before or within a reasonable time after commencing representation;
5. failing to amend a complaint to sue the correct parties;
6. accepting representation of a spouse in a divorce case where attorney conducted an initial interview with opposing spouse but did not elicit confidential information; and
7. failing to comply with Rule 16-702(E) of the Rules of Professional Conduct with respect to permissible fee information in attorney advertisements.
CONGRATULATIONS TO THE
2007 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

DISTINGUISHED BAR SERVICE AWARD
Charles J. Vigil

DISTINGUISHED BAR SERVICE AWARD—NON LAWYER
John B. Arango
Karen Duprey
Bonita Ortiz
Amanda Wang

DISTINGUISHED BAR SERVICE AWARD—NON LAWYER
John B. Arango
Karen Duprey
Bonita Ortiz
Amanda Wang

OUTSTANDING ADVOCACY FOR WOMEN AWARD
Melissa M. Ewer

OUTSTANDING CONTRIBUTION TO PEOPLE WITH DISABILITIES AWARD
Sandy H. Knight

OUTSTANDING JUDICIAL SERVICE AWARD
Judge Nan G. Nash

OUTSTANDING LOCAL BAR AWARD
Chaves County Bar Association

OUTSTANDING PROGRAM AWARD
Albuquerque Bar Association
Law Day Program

OUTSTANDING SECTION AWARD
Natural Resources, Energy, and Environmental Law

OUTSTANDING YOUNG LAWYER OF THE YEAR AWARD
Diandra D. Benally
Carlos Fierro

PROFESSIONALISM AWARD
Justice Pamela B. Minzner

QUALITY OF LIFE—LAWYER AWARD
Leslie McCarthy Apodaca

QUALITY OF LIFE—LEGAL EMPLOYER AWARD
Long, Pound & Komer, P.A.

ROBERT H. LAFOLLETTE PRO BONO AWARD
Laurie A. Hedrich

SETH D. MONTGOMERY DISTINGUISHED JUDICIAL SERVICE AWARD
Judge David W. Bonem

FIFTY YEAR PRACTITIONERS
William I. Buhler
David F. Cargo
Judge Thomas A. Donnelly
William R. Hendley
Paul A. Kastler
Edwin E. Piper, Jr.
Alfonso G. Sanchez
Kendall O. Schlenker
Walter F. Wolf, Jr.

The State Bar of New Mexico will present the awards at a special reception at 6 p.m., July 13, during the Annual Meeting at the Inn of the Mountain Gods, Mescalero. All members are invited and welcome to attend. For a detailed list of programs/events and to register for the annual meeting, see the insert in the March 26 (Vol. 46, No. 13) Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.
<table>
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<td>11</td>
<td>Settling Uninsured and Underinsured Motorist Claims</td>
<td>Albuquerque</td>
<td>5.0 G, 1.0 E</td>
<td>National Business Institute</td>
<td></td>
<td>(717) 835-8525</td>
</tr>
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<td>11</td>
<td>When Politics Tip the Scales of Justice</td>
<td>Albuquerque</td>
<td>2.0 E</td>
<td>National Business Institute</td>
<td></td>
<td>(800) 672-6253</td>
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<td>(800) 672-6253</td>
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<td>National Business Institute</td>
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<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>11–13</td>
<td>Business Planning with S Corps, Parts 1 and 2</td>
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<td>Property Taking Through Eminent Domain</td>
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<td>(717) 835-8525</td>
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<td>12</td>
<td>Tsunami on the Horizon–Ethics of Transnational Law</td>
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<td>Alphabet Soup: Employment Laws for Beginners</td>
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<td>13</td>
<td>Experts–Discovery and Work-Product Issues</td>
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<td>Medical Records, Medical Experts and Medical Literature</td>
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<td>Sales and Use Tax</td>
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G = General    E = Ethics    P = Professionalism    VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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<th>Event Title</th>
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<tr>
<td>19</td>
<td>Estate Planning for Retirement Benefits</td>
<td>Teleseminar</td>
<td>Center for Legal Education of NMSBF&lt;br&gt;(505) 797–6020&lt;br&gt;www.nmbar.org</td>
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<td>20</td>
<td>Surprising Legal Ethics Outcomes</td>
<td>Teleconference</td>
<td>TRT&lt;br&gt;(800) 672-6253&lt;br&gt;www.trtcle.com</td>
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<td>21</td>
<td>Ethical Standards and Government Lawyering</td>
<td>Teleconference</td>
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<td>22</td>
<td>Animal Law 2007: Tort Claims, Class Action, Regulation, and Civil Rights</td>
<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;(505) 797–6020&lt;br&gt;www.nmbar.org</td>
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<td>23</td>
<td>Finance the Basics</td>
<td>Lorman Education Services</td>
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<td>24</td>
<td>Getting Ready For Your Client's Deposition</td>
<td>Telephone Seminar</td>
<td>NMDLA&lt;br&gt;(505) 797-6021&lt;br&gt;www.nmdla.org</td>
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<td>25</td>
<td>Scientific Evidence–Practical Solutions to Real World Problems</td>
<td>Teleconference</td>
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<td>26</td>
<td>Picking the Right Cases–When to Say No</td>
<td>Teleconference</td>
<td>TRT&lt;br&gt;(800) 672-6253&lt;br&gt;www.trtcle.com</td>
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WRITS OF CERTIORARI
AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

EFFECTIVE JUNE 11, 2007

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

NO. 30,444 State v. Gonzalez (COA 25,756) 6/1/07
NO. 30,441 State v. William F. (COA 26,968) 5/30/07
NO. 30,440 State v. Emmons (COA 25,823) 5/30/07
NO. 30,438 State v. Reyes (COA 25,970) 5/29/07
NO. 30,436 Carrillo v. Hatch (12-501) 5/24/07
NO. 30,434 State v. Mendoza (COA 26,574) 5/22/07
NO. 30,433 State v. Troutner (COA 27,335) 5/22/07
NO. 30,432 Sanchez v. King (COA 27,293/27,343) 5/22/07
NO. 30,431 Montoya v. King (COA 27,343/27,293) 5/22/07
NO. 30,426 State v. Garcia (COA 27,351) 5/18/07
NO. 30,425 Computer One v. Grisham (COA 25,732) 5/18/07
NO. 30,424 Fiser v. Dell (COA 25,862) 5/18/07
NO. 30,423 Roark v. Farmers Group (COA 26,400/24,287) 5/18/07
NO. 30,422 State v. Cummings (COA 27,353) 5/17/07
NO. 30,421 State v. Luna-Zamora (COA 25,592) 5/17/07
NO. 30,419 State v. Yazzie (COA 27,169) 5/16/07
NO. 30,417 Albin v. Bakas (COA 26,134) 5/16/07
NO. 30,416 Dzula v. Dzula (COA 27,030) 5/16/07
NO. 30,414 State v. De La Pena (COA 26,107) 5/15/07
NO. 30,413 State v. Benally (COA 26,853) 5/15/07
NO. 30,412 State v. Martinez (COA 27,148) 5/15/07
NO. 30,382 State v. Collins (COA 25,941) 5/15/07
NO. 30,410 State v. Salas (COA 26,577) 5/14/07
NO. 30,409 State v. Benavidez (COA 25,460) 5/14/07
NO. 30,408 State v. VanDyke (COA 27,089) 5/14/07
NO. 30,407 State v. Soto (COA 25,473) 5/14/07
NO. 30,406 Valdez v. Yates (COA 25,305) 5/14/07
NO. 30,404 Sandoval v. PERA (COA 27,561) 5/14/07
NO. 30,403 State v. Vacca (COA 27,175) 5/11/07
NO. 30,399 State v. Fitzgerald (COA 26,333) 5/10/07
NO. 30,398 State v. Padilla (COA 26,830) 5/10/07
NO. 30,397 State v. Madrid (COA 27,040) 5/10/07
NO. 30,394 State v. Bryan (COA 27,178) 5/9/07
NO. 30,393 State v. Santiesteban (COA 27,178) 5/8/07
NO. 30,391 Hamberg v. Sandia (COA 26,559) 5/8/07
NO. 30,390 State v. Morales (COA 27,020) 5/7/07
NO. 30,360 Britton v. Rogers (COA 26,172) 5/7/07
NO. 30,349 Franklin v. Coyote Canyon Rehabilitation Ctr. (COA 27,159) 4/13/07
Response filed 5/25/07
NO. 30,346 State v. Owens (COA 27,093) 4/12/07
Response filed 5/21/07
NO. 30,341 Dalimer v. Lohman (COA 25,752/25,753) 4/4/07

NO. 30,331 Fleming v. NM Public Defender (COA 27,423) 4/3/07
Response filed 5/22/07
NO. 30,321 State v. Salas (COA 27,083) 3/29/07
Response filed 5/15/07
NO. 30,319 Smith v. Janecka (12-501) 3/26/07
Response filed 5/23/07
Response due 6/7/07 by extn
Response filed 4/30/07

CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

(Parties preparing briefs)

NO. 28,954 State v. Schoonmaker (COA 23,927) 1/21/05
NO. 29,581 Carrillo v. Qwest (COA 25,833) 1/19/06
NO. 29,649 State v. Garcia (COA 26,118) 3/3/06
NO. 29,890 State v. Granville (COA 25,005) 8/22/06
NO. 29,881 State v. Carpenter (COA 25,999) 8/22/06
NO. 29,909 State v. Quintana (COA 25,107) 8/25/06
NO. 29,951 State v. Cardenas (COA 26,238) 8/29/06
NO. 29,947 State v. Padilla (COA 25,380) 8/31/06
NO. 29,786 Case v. Hatch (12-501) 9/6/06
NO. 30,000 State v. Romero (COA 25,005/25,007) 10/3/06
NO. 30,016 State v. Ochoa (COA 24,720) 10/12/06
NO. 30,035 Blanchet v. Dial Oil (COA 26,951) 10/27/06
NO. 30,044 State v. O’Kelly (COA 26,292) 11/13/06
NO. 30,057 Romero v. Board of Commissioners (COA 24,147/24,180) 11/29/06
NO. 29,799 Albuquerque Commons v. City of Albuquerque (COA 24,425) 11/29/06
NO. 29,791 Albuquerque Commons v. City of Albuquerque (COA 24,026/24,027/24,042) 11/29/06
NO. 30,089 Stockham v. Farmers Insurance (COA 26,057) 12/4/06
NO. 30,123 State v. Ortiz (COA 26,045) 12/14/06
NO. 30,100 State v. Hitchcock (COA 26,001) 12/14/06
NO. 30,125 State v. Castillo (COA 26,051) 12/14/06
NO. 30,127 State v. Armendariz (COA 24,448) 12/14/06
NO. 30,131 State v. Vargas (COA 24,880) 12/14/06
NO. 30,129 Heath v. La Mariana Apts. (COA 24,991) 1/2/07
NO. 30,118 Sedillo v. Department of Public Safety (COA 25,914) 1/2/07
NO. 30,140 State v. Jimenez (COA 25,056) 1/2/07
NO. 30,165 Ferrell v. Allstate Insurance Company (COA 26,058) 1/23/07
NO. 30,180 State v. Funderburg (COA 25,591) 1/30/07
NO. 30,169 Cook v. Anding (COA 27,139) 1/30/07

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

NO. 30,193 State v. Hand (COA 25,931) 2/1/07
NO. 30,162 McNeill v. Burlington (COA 25,469) 2/9/07
NO. 30,196 State v. Esquivel (COA 26,622) 2/9/07
NO. 30,199 State v. Stephen F. (COA 24,077) 2/16/07
NO. 30,093 Rodriguez v. Calderon (12-501) 2/28/07
NO. 30,148 Cook v. Anding (on reconsideration) (COA 27,139) 3/7/07
NO. 30,232 State v. Watts (COA 26,738) 3/26/07
NO. 30,225 State v. Montoya (COA 26,067) 3/26/07
NO. 30,258 State v. Ellis (COA 26,263) 3/26/07
NO. 30,267 State v. Ortiz (COA 27,113) 4/2/07
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NO. 30,272 State v. McClaugherty (COA 24,409) 4/2/07
NO. 30,287 State v. Montoya (COA 26,483) 4/9/07
NO. 30,245 Garcia v. Lloyd’s of London (COA 25,985) 4/9/07
NO. 30,259 State v. Cummings (12-501) 4/10/07
NO. 30,289 State v. Contreras (COA 25,526) 4/16/07
NO. 30,263 State v. Downey (COA 25,068) 4/16/07
NO. 30,209 Varoz v. Varoz (COA 25,935) 4/20/07
NO. 30,301 State v. Moreland (COA 25,831) 4/20/07
NO. 30,318 State v. Trujillo (COA 25,898) 4/20/07
NO. 30,278 Sanders v. FedEx (COA 25,577) 4/20/07
NO. 30,293 State v. Campbell (COA 24,899) 4/24/07
NO. 30,342 Brown v. Janecke (12-501) 4/24/07
NO. 30,288 State v. Cortez (COA 25,406) 5/11/07
NO. 30,343 Moya v. City of Albuquerque (COA 26,382) 5/11/07
NO. 30,351 State v. Bounds (COA 25,448) 5/11/07
NO. 30,370 State v. Trudelle (COA 25,476) 5/24/07
NO. 30,292 Peters Corp. v. N.M. Banquest Investors Corp. (COA 25,276) 5/24/07
NO. 30,380 State v. Rowell (COA 26,429) 6/4/07
NO. 30,381 State v. Bomboy (COA 26,687) 6/4/07

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:
(Submission = date of oral argument or briefs-only submission)

NO. 29,218 Montoya v. Ulibarri (12-501) 4/10/06
NO. 29,286 State v. Gutierrez (COA 25,279) 5/22/06
NO. 29,712 Smith v. City of Santa Fe (COA 24,801) 6/12/06
NO. 29,624 Maes v. Audubon Indemnity Ins. Group (COA 25,598) 8/15/06
NO. 29,513 State v. Grogan (COA 25,699) 9/12/06
NO. 29,344 State v. Hughey (on rehearing) (COA 24,732) 11/14/06
NO. 29,725 McMinn v. MBF Operating Acquisition Corp. (COA 25,006) 11/27/06
NO. 29,257 State v. Kirby (COA 24,845) 12/12/06
NO. 29,857 State v. Lucero (COA 24,891) 12/12/06
NO. 29,803 State v. Lopez (COA 24,566) 1/22/07
NO. 29,938 Cruz v. FTS Construction (COA 25,708) 1/23/07

Petition for Writ of Certiorari Denied:

NO. 30,297 Payne v. LeMaster (12-501) 5/21/07
NO. 30,300 Enriquez v. Hatch (12-501) 5/21/07
NO. 30,363 State v. Bounds (COA 25,448) 5/21/07
NO. 30,364 State v. Black (COA 27,123) 5/21/07
NO. 30,361 State v. Jose G. (COA 25,776) 5/21/07
NO. 30,372 State v. Tablon (COA 27,277) 5/24/07
NO. 30,371 State v. Klatt (COA 26,862) 5/24/07
NO. 30,376 State v. Barreras (COA 25,927) 5/24/07
NO. 30,369 State v. Trujillo (COA 26,278) 5/24/07
NO. 30,366 State v. Garcia (COA 26,718) 5/24/07
NO. 30,252 State v. Brownd C. (COA 26,196) 6/4/07
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Kristie E. Bair
1140 Turner Dr., NE
Albuquerque, NM 87123
(505) 883-0175
(505) 883-0179 (telecopier)

Lisa Roybal Beairsto
formerly known as Lisa M. Beairsto
Office of the District Attorney
845 North Motel Blvd.,
Second Floor, Ste. D
Las Cruces, NM 88007
(505) 524-6370
(505) 647-8537 (telecopier)
lbeairsto@da.state.nm.us

Adam Harrison Bell
Office of the City Attorney
800 Municipal Dr.
Farmington, NM 87401
(505) 599-1120
(505) 599-1119 (telecopier)
abell@fmtn.org

Matthew Jude Bradburn
1412 Sixth St., NW
Albuquerque, NM 87102
(505) 242-6255
(505) 244-1436 (telecopier)
bbadburnlaw@gmail.com

Jay Barton Burnham
Office of the City Attorney
800 Municipal Dr.
Farmington, NM 87401
(505) 599-1120
(505) 599-1119 (telecopier)
jburnham@fmtn.org

Andrea U. Calve
14300 Statler Blvd., #103
 Ft. Worth, TX 76155
(214) 551-5104
Andrea.Calve@sba.gov

Jill Andrea Conrad
Williams and Works
1439 S. Dewey Ave.
Bartlesville, OK 74003
(918) 213-4177
jillconrad@cableone.net

William Cooke
Office of the City Attorney
800 Municipal Dr.
Farmington, NM 87401
(505) 599-1120
(505) 599-1119 (telecopier)
wcooke@fmtn.org

Ruben S. Cortez
1535 Gulf
Hobbs, NM 88240
(505) 881-2782
(505) 298-8778 (telecopier)
arlyn@agcrow.com

John F. Dietz
Risley Law Firm, P.C.
2800 N. Hutton Ave.
Farmington, NM 87402
(505) 326-1776
(505) 326-1134 (telecopier)
john@risleylaw.net

Charles W. Durrett
Charles W. Durrett, P.C.
PO Box 760
2403 Tres Lagos
Alamogordo, NM 88311-0760
(505) 437-1840
(505) 434-5259 (telecopier)
charles@durrettattorneys.com

Lisa K. Durrett
Lisa K. Durrett, P.C.
PO Box 760
2301 First St.
Alamogordo, NM 88311-0760
(505) 437-1840
(505) 434-5259 (telecopier)
jburrettlawfirm@gmail.com

Judith M. Espinosa
PO Box 30064
Albuquerque, NM 87190-0064
(505) 476-2250
(505) 476-2257 (telecopier)
judy1abq@yahoo.com

Linda Fischer
938 Sugarberry Way
Fort Myers, FL 33905
lindafischer5211@aol.com

Augusto S. Garay, Jr.
(404) 579-5968
Augustogaray@msn.com

Eileen Gauna
University of New Mexico
MSC11-6070
1 University of New Mexico
Albuquerque, NM 87131-0001
(505) 277-7776
(505) 277-4165 (telecopier)
gauna@law.unm.edu

Lucia Annalisa Gillard
formerly known as Lisa Gillard Gmuca
1640 N. Spyglass Way
Flagstaff, AZ 86004
(928) 526-2404

Hon. Jane Shuler Gray
Fifth Judicial Court
102 North Canal, Ste. 345
Carlsbad, NM 88220
(505) 887-7101
(505) 885-2458 (telecopier)

Eric L. Hiser
Jorden, Bischoff & Hiser, P.L.C.
7272 E. Indian School Rd.,
Ste. 360
Scottsdale, AZ 85251
(480) 885-3930
(480) 885-2458 (telecopier)

Samuel A. Hurtado
PO Box 72702
Albuquerque, NM 87195-2702

William H. Hyde
212 Norris Pl.
Casselberry, FL 32707
(407) 754-9582
whyde7@hotmail.com

Casey L. Irwin
PO Box 735
Walsenburg, CO 81089-0735
(719) 980-4220

Katherine H. Judson
Office of the Public Defender
505 Central Ave., NW
Albuquerque, NM 87102
(505) 841-5100
(505) 841-5006 (telecopier)
kate.judson@state.nm.us

Patrick M. Macias
Ragghianti Freitas, L.L.P.
874 4th St.
San Rafael, CA 94901-3246
(415) 453-9433
(415) 453-8269 (telecopier)
pmacias@rfhlaw.com

Richard S. Mackenzie
1127 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-9823
(505) 982-8239 (telecopier)
rmlaw202@aol.com

Alan H. Maestas
Maestas & Baker
224 Cruz Alta, Ste. H
Taos, NM 87571-5947
(505) 753-0509
(505) 737-0510 (telecopier)
alamaestas5601@msn.com

David A. Maestas
Battelle
PO Box 999
Richland, WA 99352-0999
(509) 375-4360
(509) 375-2592 (telecopier)
david.maestas@pnl.gov

Tania Maestas
Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6024
(505) 827-6989 (telecopier)
Tamaestas@ago.state.nm.us

W. Ann Maggiore
Butt, Thornton & Baehr, P.C.
PO Box 3170
4101 Indian School Rd., NE,
Ste. 300S
Albuquerque, NM 87190-3170
(505) 884-0777
(505) 889-8870 (telecopier)
wamaggiore@btblaw.com

Alan M. Malott
Malott - Rios Law Firm
3602 Campus, NE
Albuquerque, NM 87106-1314
(505) 268-6500
(505) 268-8708 (telecopier)
alan@malottlaw.com
<table>
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<tr>
<td>Gina R. Manfredi</td>
<td>Office of the District Attorney</td>
<td>520 Lomas Blvd., NW</td>
<td>NM</td>
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<tr>
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<td></td>
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<tr>
<td>Ramona Villagomez Manglona</td>
<td>PO Box 502852</td>
<td>Saipan, MP 96950-2852</td>
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<tr>
<td></td>
<td>(670) 236-9746 (telecopier)</td>
<td><a href="mailto:rvmanglona@pticom.com">rvmanglona@pticom.com</a></td>
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<td>Paul A. Mapes</td>
<td>819 Regency Ct.</td>
<td>Walnut Creek, CA 94597</td>
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<td></td>
<td>(925) 933-4484 (telecopier)</td>
<td><a href="mailto:paulmapes@att.net">paulmapes@att.net</a></td>
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<td>Robert G. Marcotte</td>
<td>PO Box 1188</td>
<td>Albuquerque, NM 87103-1188</td>
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<tr>
<td></td>
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<td><a href="mailto:attymarcus@cs.com">attymarcus@cs.com</a></td>
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<td>Sharon A. Marinuzzi</td>
<td>c/o 10016 Gutierrez Rd., NE</td>
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<td>City of Albuquerque</td>
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<td>Marilyn Mason-Plunkett</td>
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<tr>
<td>Brian J. McAuliffe</td>
<td>114 South Maple Ave.</td>
<td>Martinsburg, WV 25401</td>
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<td>Scott Powers McClure</td>
<td>King &amp; Spalding, L.L.P.</td>
<td>1700 Pennsylvania Ave., NW</td>
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<td><a href="mailto:smclure@kslaw.com">smclure@kslaw.com</a></td>
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<tr>
<td>Anna E. McDowell</td>
<td>Beall &amp; Biehler, P.A.</td>
<td>(Of Counsel)</td>
<td></td>
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<tr>
<td></td>
<td>10831 Wolf Creek Rd., SE</td>
<td>Albuquerque, NM 87123</td>
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<tr>
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<td>(505) 264-8518 (telecopier)</td>
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<td></td>
<td></td>
<td><a href="mailto:mcclure@kslaw.com">mcclure@kslaw.com</a></td>
<td></td>
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</tr>
<tr>
<td>Robert L. McIntyre</td>
<td>PO Box 9992</td>
<td>Albuquerque, NM 87119-9992</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>(505) 842-5007 (telecopier)</td>
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<tr>
<td></td>
<td></td>
<td><a href="mailto:roblaw72@hotmail.com">roblaw72@hotmail.com</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rockford, IL 61101-1140</td>
<td>(815) 987-4444 (telecopier)</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td><a href="mailto:john.mckenzie@usdoj.gov">john.mckenzie@usdoj.gov</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Susan Fleisher McKnight</td>
<td>Fidelity National Title Ins. Co.</td>
<td>500 Marquette Ave., NW</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(505) 257-1760 (telecopier)</td>
<td>(505) 257-2895 (telecopier)</td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td><a href="mailto:susan.mcknight@fnf.com">susan.mcknight@fnf.com</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Julie Ann Meade</td>
<td>Office of the Attorney General</td>
<td>PO Drawer 1508</td>
<td></td>
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</tr>
<tr>
<td></td>
<td>Santa Fe, NM 87504-1508</td>
<td>(505) 827-6993 (telecopier)</td>
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<tr>
<td></td>
<td></td>
<td><a href="mailto:julmeade@ago.state.nm.us">julmeade@ago.state.nm.us</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mary Helen Medina</td>
<td>Host International, Inc.</td>
<td>12582 Misty Creek Lane</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fairfax, VA 22033-1508</td>
<td>(703) 474-0800 (telecopier)</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td><a href="mailto:dnnlaw@hotmail.com">dnnlaw@hotmail.com</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regina Ann Mescall</td>
<td>Office of the District Attorney</td>
<td>520 Lomas Blvd., NW</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Albuquerque, NM 87102-2118</td>
<td>(505) 841-7085 (telecopier)</td>
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<td></td>
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<tr>
<td></td>
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<td><a href="mailto:rmescall@da2nd.state.nm.us">rmescall@da2nd.state.nm.us</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gregory Paul Miller</td>
<td>Cabrera Services</td>
<td>5301 Montano Plaza Dr., NW</td>
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<td></td>
<td>Albuquerque, NM 87120</td>
<td>(505) 250-3978 (telecopier)</td>
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<td></td>
<td></td>
<td><a href="mailto:gmiller@cabraservices.com">gmiller@cabraservices.com</a></td>
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<tr>
<td>Hon. Melissa Miller-Byrnes</td>
<td>Las Cruces Municipal Court</td>
<td>PO Box 20000</td>
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<td></td>
<td>135 E. Griggs Ave.</td>
<td>(505) 541-2224 (telecopier)</td>
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<tr>
<td></td>
<td>Las Cruces, NM 88004-9002</td>
<td><a href="mailto:melissab@las-cruces.org">melissab@las-cruces.org</a></td>
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<td><a href="mailto:gmiller@cabraservices.com">gmiller@cabraservices.com</a></td>
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<td>Lori L. Millet</td>
<td>Eclipse Aviation Corporation</td>
<td>2503 Clark Carr Loop, SE</td>
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<td></td>
<td>Albuquerque, NM 87106</td>
<td>(505) 724-1613 (telecopier)</td>
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<td><a href="mailto:lori.medrano@eclipseaviation.com">lori.medrano@eclipseaviation.com</a></td>
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<tr>
<td>Kenneth Covington Meeks</td>
<td>Deer Valley Resort</td>
<td>241 Market St., Box 438</td>
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<tr>
<td></td>
<td>Carlton, OR 87111</td>
<td>(435) 655-0241 (telecopier)</td>
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<td></td>
<td><a href="mailto:lori@taxgypsies.com">lori@taxgypsies.com</a></td>
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PROPOSED REVISIONS TO THE RULES FOR COURTS OF LIMITED JURISDICTION

The Committee on Rules for Magistrate and Municipal Courts is considering proposed revisions to the Rules for those courts. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before July 2, 2007, to be considered by the Court.

2-103. Rules and forms.
A. Rules. Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations prescribed by the administrative office of the courts. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments shall be submitted to the director of the administrative office of the courts and shall not become effective until approved by [him] the director.

B. Forms. Forms used or distributed by [in] the magistrate courts shall be [substantially in the form approved by the supreme court] submitted to the director of the administrative office of the courts and shall not become effective until approved by the director. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.

6-103. Rules and forms.
A. Rules. Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations prescribed by the administrative office of the courts. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments shall be submitted to the director of the administration office of the courts and shall not become effective until approved by [him] the director.

B. Forms. Forms used or distributed by [in] the magistrate courts shall be [substantially in the form approved by the supreme court] submitted to the director of the administrative office of the courts and shall not become effective until approved by the director. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.

8-103. Rules; forms; fees.
A. Rules.
(1) Each municipal court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law or these rules. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court.

(2) To be effective any rule promulgated by a municipal court and any amendments thereto shall be filed with the clerk of the court and made readily available to members of the public.

B. Forms. Forms used or distributed by [in] the municipal courts shall be [substantially in the form approved by the [s]Supreme [e]Court. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.

C. Costs or fees prohibited. No costs or fees of any kind shall be collected by any court for any filing or proceeding under Rule 8-105 or 8-106.

2-601. Conduct of trials.
A. Continuances. Continuances shall be granted for good cause shown at any stage of the proceedings.

B. Evidence. Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. At his own expense and for the purpose of preserving testimony, a party may cause a record, as defined in Rule 2-109, to be made. The trial shall be conducted expeditiously, but each party shall be permitted to present his position amply and fairly.

C. Oath of witnesses. The magistrate shall administer the following oath to each witness: “You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury?”

D. Competence of court interpreter. Any party in interest or the court on its own motion may question the interpreter under oath as to the interpreter’s fitness, competence or impartiality. If the judge finds that the interpreter is incompetent, partial or otherwise unfit, the interpreter shall be prohibited from acting as an interpreter during the hearing.

Committee commentary.—This rule is meant to operate in reference to the Court Interpreters Act, Sections 38-10-1 to 38-10-8 NMSA 1978.

6-601. Conduct of trials.
A. Continuances. Continuances shall be granted for good cause shown at any stage of the proceedings.

B. Evidence. Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. The trial shall be conducted expeditiously, but each party shall be permitted to present the position of that party amply and fairly.

C. Oath of witnesses. The court shall administer an oath or affirmation to each witness substantially in the following form: “Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth and nothing but the truth, under penalty of perjury?”
D. Record of proceedings. With prior approval of the judge, a party in a magistrate court proceeding or any person with a claim arising out of the same transaction or occurrence giving rise to the magistrate court proceeding may, at the party’s or person’s expense, make a record of the testimony in the magistrate court proceeding. Any person causing a record of testimony to be made pursuant to this rule shall make a copy of the transcription available to all parties in the magistrate court proceeding.

E. Use at trial. A record of the testimony of a witness may only be used in the magistrate court in:

(1) civil proceedings when permitted by the Rules of Civil Procedure for the Magistrate Courts; and

(2) criminal proceedings if it is admissible under the Rules of Evidence.

F. Form of record.

(1) If the record is a stenographic or voice to print real time transcript, the court reporter shall transcribe the record prior to use in the magistrate court.

(2) If the record is an audiotape or videotape recording made pursuant to this rule, the person seeking to use the record in the magistrate court pursuant to this rule shall be responsible for having available appropriate playback equipment and an operator.

(3) If only part of the record of the proceedings is offered in evidence, any adverse party may require the offeror to offer any other part relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

G. Copies. At the request of any party to the proceeding or the deponent, a person who makes an audio or video record of testimony in the magistrate court shall:

(1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and

(2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

H. Definition. As used in this rule, “record” means:

(1) stenographic notes which must be transcribed prior to use pursuant to this rule;

(2) a realtime voice-to-print recording which must be transcribed prior to use pursuant to this rule;

(3) a statement of facts stipulated to by the parties; or

(4) any audio or video recording.

I. Competence of court interpreter. Any party in interest or the court on its own motion may question the interpreter under oath as to the interpreter’s fitness, competence or impartiality. If the judge finds that the interpreter is incompetent, partial or otherwise unfit, the interpreter shall be prohibited from acting as an interpreter during the hearing.

Committee Commentary

This rule is meant to operate in reference to the Court Interpreters Act, Sections 38-10-1 to 38-10-8 NMSA 1978.

6-401. Bail.

A. Right to bail. The court shall not deny bail before conviction to a person charged with an offense within the court’s trial jurisdiction. Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed pursuant to Paragraph C of this rule, unless the court determines that such release will not reasonably assure the appearance of the person as required. A private complainant, complaining witness or alleged victim shall not be permitted to post bond for a defendant in the case. If the court determines that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph C of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of ten percent (10%) of the amount set for bail or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law [Chapter 59A, Article 51 NMSA 1978] provided such paid surety also executes a bail bond for the full amount of the bail set;

(2) the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 6-401A; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 6-401B or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

B. Factors to be considered in determining conditions of release. The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including:

(a) the person’s character and physical and mental condition;

(b) the person’s family ties;

(c) the person’s employment status, employment history and financial resources;

(d) the person’s past and present residences;

(e) the length of residence in the community;

(f) any facts tending to indicate that the person has strong ties to the community;

(g) any facts indicating the possibility that the person will commit new crimes if released;

(h) the person’s past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release; and
(5) any other facts tending to indicate the person is likely to appear.

C. Additional conditions; conditions to assure orderly administration of justice. The court, upon release of the defendant or any time thereafter, may enter an order, that such person’s release be subject to:

(1) the condition that the person not commit a federal, state or local crime during the period of release; and
(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

(a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;
(c) a condition that the person maintain or commence an educational program;
(d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;
(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
(g) a condition that the person comply with a specified curfew;
(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;
(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;
(j) a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;
(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;
(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

D. Explanation of conditions by court. The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person’s conduct;
(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person’s arrest; and
(c) the consequences of intimidating a witness, victim or informant or otherwise obstructing justice; and
(3) unless the defendant is released on personal recognizance, set forth the circumstances which requires that bail be set.

E. Detention. Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, § 1 of the New Mexico Constitution.

F. Review of conditions of release. A person for whom conditions of release are imposed or bail is set by the magistrate court and who after twenty-four (24) hours from the time of transfer to a detention facility continues to be detained as a result of his inability to meet the conditions of release or bail set, shall, upon application, be entitled to have a hearing to review the conditions imposed or amount of bail set. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set. A person who is ordered released on a condition which requires that he return to custody after specified hours, upon application, shall be entitled to have a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the court imposing the conditions.

G. Amendment of conditions. The court ordering the release of a person on any condition specified in this rule may amend its order at any time to increase or reduce the amount of bail set or impose additional or different conditions of release. If such amendment of the release order results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of Paragraph F of this rule shall apply.

H. Return of cash deposit. If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, when the conditions of the appearance bond have been performed and the defendant for whom bail was required has been discharged from all obligations, the clerk shall return to the [defendant, his personal representatives or assigns the sum which has been deposited] favor as indicated in the cash receipt.

I. Petition to district court. A person charged with an offense which is not within magistrate court trial jurisdiction and who has not been bound over to the district court may file a petition at any time after his arrest with the clerk of the district court for release pursuant to this rule. Jurisdiction of the magistrate court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may proceed in accordance with Rule 5-401 of the Rules of Criminal Procedure for the District Courts. Any bail set or condition of release imposed by the magistrate court shall continue in effect pending determination of conditions of release by the district court. If, after forty-eight (48) hours from the time the petition is filed, the district court has not taken any action on the petition, the court shall be deemed, at that time, to
have continued any bail set or condition of release imposed by
the magistrate court.

J. Release from custody by designee. Any or all of the
provisions of this rule, except the provisions of Paragraphs E,
F and G of this rule, may be carried out by responsible persons
designated in writing by the presiding judge of the magistrate
district. The designated responsible person must utilize the form
of receipt authorized by the Supreme Court. No person shall be
qualified to serve as a designee if such person or such person’s
spouse is:

(1) related within the second degree of blood or marriage to
a paid surety who is licensed to sell property or corporate bonds
within this state; or

(2) employed by a jail or detention facility unless designated
in writing by the presiding judge of the magistrate district in which
the jail or detention facility is located.

K. Evidence. Information stated in, or offered in connection
with, any order entered pursuant to this rule need not conform to
the Rules of Evidence.

L. Forms. Instruments required by this rule shall be
substantially in the form approved by the [Supreme Court.

M. Judicial discretion. Action by any court on any matter
relating to bail shall not preclude the statutory or constitutional
disqualification of a judge.

8-401. Bail.

A. Right to bail. The court shall not deny bail before
conviction to a person charged with an offense within the court’s
trial jurisdiction. Pending trial, any person bailable under Article
2, Section 13 of the New Mexico Constitution, shall be ordered
released pending trial on his personal recognizance or upon the
execution of an unsecured appearance bond in an amount set by
the court, subject to any release conditions imposed pursuant to
Paragraph C of this rule, unless the court determines that such
release will not reasonably assure the appearance of the person as
required. A private complainant, complaining witness or alleged
victim shall not be permitted to post bond for a defendant in the
case. If the court determines that release on personal recognizance
or upon execution of an unsecured appearance bond will not
reasonably assure the appearance of the person as required or
will endanger the safety of any other person or the community, in
addition to any release conditions imposed pursuant to Paragraph
C of this rule, the court shall order the pretrial release of such
person subject to the first of the following types of secured bonds
which will reasonably assure the appearance of the person as
required and the safety of any person and the community:

(1) the execution of a bail bond in a specified amount
executed by the person and secured by a deposit of cash of ten
percent (10%) of the amount set for bail or secured by such
greater or lesser amount as is reasonably necessary to assure
the appearance of the person as required. The cash deposit may
be made by or assigned to a paid surety licensed under the Bail
Bondsmen Licensing Law [Chapter 59A, Article 51 NMSA 1978]
provided such paid surety also executes a bail bond for the full
amount of the bail set;

(2) the execution of a bail bond by the defendant or by
unpaid sureties in the full amount of the bond and the pledging
of real property as required by Rule 8-401A; or

(3) the execution of a bail bond with licensed sureties
as provided in Rule 8-401B or execution by the person of an
appearance bond and deposit with the clerk of the court, in cash,
of one-hundred percent (100%) of the amount of the bail set, such
deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially
in the form approved by the [Supreme Court.

B. Factors to be considered in determining conditions
of release. The court shall, in determining the type of bail and
which conditions of release will reasonably assure appearance
of the person as required and the safety of any other person
and the community, take into account the available information
concerning:

(1) the nature and circumstances of the offense charged,
including whether the offense is a crime of violence or involves
a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including:
(a) the person’s character and physical and mental
condition;
(b) the person’s family ties;
(c) the person’s employment status, employment history
and financial resources;
(d) the person’s past and present residences;
(e) the length of residence in the community;
(f) any facts tending to indicate that the person has
strong ties to the community;
(g) any facts indicating the possibility that the person
will commit new crimes if released;

(h) the person’s past conduct, history relating to drug or
alcohol abuse, criminal history and record concerning appearance
at court proceedings; and

(i) whether, at the time of the current offense or arrest,
the person was on probation, on parole, or on other release pending
trial, sentencing, appeal or completion of an offense under federal,
state or local law;

(4) the nature and seriousness of the danger to any person
or the community that would be posed by the person’s release; and

(5) any other facts tending to indicate the person is likely
to appear.

C. Additional conditions; conditions to assure orderly
administration of justice. The court, upon release of the
defendant or any time thereafter, may enter an order, that such
person’s release be subject to:

(1) the condition that the person not commit a federal, state
or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following
conditions the court finds will reasonably assure the appearance
of the person as required, the safety of any other person and the
community and the orderly administration of justice:

(a) a condition that the person remain in the custody
of a designated person who agrees to assume supervision
and to report any violation of a release condition to the court, if
the designated person is able reasonably to assure the court that
the person will appear as required and will not pose a danger to
the safety of any other person or the community;

(b) a condition that the person maintain employment,
or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence
an educational program;

(d) a condition that the person abide by specified
restrictions on personal associations, place of abode or travel;

(e) a condition that the person avoid all contact with
an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(j) a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

D. Explanation of conditions by court. The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person’s conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person’s arrest; and

(c) the consequences of intimidating a witness, victim or informant or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance, set forth the circumstances which requires that bail be set.

E. Review of conditions of release. A person for whom conditions of release are imposed or bail is set by the municipal court and who after twenty-four (24) hours from the time of transfer to a detention facility continues to be detained as a result of his inability to meet the conditions of release or bail set, shall, upon application, be entitled to have a hearing to review the conditions imposed or amount of bail set. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set. A person who is ordered released on a condition which requires that he return to custody after specified hours, upon application, shall be entitled to have a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the court imposing the conditions.

F. Amendment of conditions. The court ordering the release of a person on any condition specified in this rule may amend its order at any time to increase or reduce the amount of bail set or impose additional or different conditions of release. If such amendment of the release order results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of Paragraph E of this rule shall apply.

G. Return of cash deposit. If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, when the conditions of the appearance bond have been performed and the defendant for whom bail was required has been discharged from all obligations, the clerk shall return to the [defendant, his personal representatives or assigns the sum which has been deposited] payor as indicated in the cash receipt.

H. Release from custody by designee. Any or all of the provisions of this rule, except the provisions of Paragraphs E and F of this rule, may be carried out by responsible persons designated in writing by the presiding judge of the municipal court. The designated responsible person must utilize the form of receipt authorized by the Supreme Court. No person shall be qualified to serve as a designee if such person or such person’s spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the presiding judge of the municipal court.

I. Evidence. Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the Rules of Evidence.

J. Forms. Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

K. Judicial discretion. Action by any court on any matter relating to bail shall not preclude the statutory or constitutional disqualification of a judge.

6-703. Appeal.

A. Right of appeal. A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk’s office. The three (3) day mailing period set forth in Rule 6-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the magistrate court clerk’s office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

B. Notice of appeal. An appeal from the magistrate court is taken by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the magistrate court:

(a) a copy of the notice of appeal which has been endorsed by the clerk of the district court; and

(b) unless the appeal has been filed by the state, a
political subdivision of the state or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. Content of the notice of appeal. The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. Service of notice of appeal. At the time the notice of appeal is filed in the district court, the appellant shall:

1. serve each party or each party’s attorney in the proceedings in the magistrate court with a copy of the notice of appeal in accordance with Rule 5-103 of the Rules of Criminal Procedure for the District Courts; and

2. file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. Docketing the appeal. Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. Record on appeal. Within fifteen (15) days after the appellant files a copy of the notice of appeal in the magistrate court pursuant to Paragraph B of this rule, the magistrate court shall file with the clerk of the district court the record on appeal taken in the action in the magistrate court. For purposes of this rule, the record on appeal shall consist of:

1. a title page containing the caption of the case in the magistrate court and the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

2. a copy of all papers and pleadings filed in the magistrate court;

3. a copy of the judgment or final order sought to be reviewed with date of filing; and

4. any exhibits.

The magistrate court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. Correction or modification of the record. If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the magistrate court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. Conditions of release. At the time of the entry of the judgment and sentence, the magistrate court shall review the conditions of release pending appeal to assure the conditions are sufficient to secure the appearance of the defendant and the judgment of the magistrate court. The magistrate court may utilize the criteria listed in Paragraph B of Rule 6-401 NMRA, and may also consider the fact of defendant’s conviction and the length of sentence imposed. The conditions of release shall be included on the judgment and sentence. A defendant released pending trial shall continue on release pending an appeal to the district court under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions are necessary to assure the defendant’s appearance or to assure that the defendant’s conduct will not obstruct the orderly administration of justice. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. If the court determines that the previously imposed conditions are not sufficient to assure the appearance of the defendant or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release to assure the appearance of the defendant or the orderly administration of justice. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial. Upon filing of the notice of appeal, the bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the bond until remand to the magistrate court.

I. Review of terms of release. If the magistrate court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the magistrate court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the magistrate court.

J. Trial de novo appeals. Trials upon appeals from the magistrate court to the district court shall be de novo.

K. Notice; trial de novo appeals. In trial de novo appeals, the clerk of the district court shall give notice to all parties of the time and date set for a trial de novo not less than ten (10) days prior to the date set for trial. If the defendant is represented by counsel, the clerk shall give written notice to the defendant and the defendant’s counsel. Notice to the defendant shall be mailed to the defendant’s last known address.

L. Disposition; time limitations. [The district court shall try a trial de novo appeal within six (6) months after the filing of the notice of appeal. Any appeal pending in the district court six (6) months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the magistrate court for enforcement of its judgment.] The time for trial in the district court on a de novo appeal shall be within six (6) months after the filing of the notice of appeal or the events described in Rule 5-604(B)(2), (3), (4) or (8) of the Rules of Criminal Procedure for the District Courts. Any appeal pending without disposition upon expiration of the time for trial shall be dismissed and the cause remanded to the magistrate court for enforcement of its judgment.

M. Extension of time. The time limit specified in Paragraph L of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause to extend the time period for trial. The petition shall be filed within the six (6) month period, except that it may be filed within ten (10) days after the expiration of the six (6) month period if it is based on exceptional circumstances beyond the control of the party or trial court which justify the failure to file the petition within the six (6) month period. A party seeking an extension of time shall promptly serve a copy on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for the objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the six (6) month period, it shall fix the time limit within which the defendant must be tried. No other extension of time shall be allowed.

N. Procedure on appeal. Unless there is a conflict with this
rule or Rules 6-702, 6-704 or 6-705 of these rules, the Rules of Criminal Procedure for the District Courts shall govern the procedure on appeal from the magistrate court.

O. Disposal of appeals. The district court shall dispose of appeals by entry of a judgment or order disposing of the appeal. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

1. fifteen (15) days after entry of the order disposing of the case;
2. fifteen (15) days after disposition of a motion for rehearing; or
3. if a notice of appeal is filed, upon final disposition of the appeal.

P. Remand. Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate court for enforcement of the district court’s judgment.

Q. Appeal. Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 of the Rules of Appellate Procedure.

R. Return of record. After final determination of the appeal, the clerk of the district court shall return the record on appeal to the magistrate court clerk.

8-703. Appeal.
A. Right of appeal. A party who is aggrieved by the judgment or final order of the municipal court may appeal, as permitted by law, to the district court of the county within which the municipal court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the municipal court. The three (3) day mailing period set forth in Rule 8-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the municipal court, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the municipality or against a defendant who is represented by a public defender or court appointed counsel.

B. Notice of appeal. An appeal from the municipal court is taken by:

1. filing with the clerk of the district court a notice of appeal with proof of service; and
2. promptly filing with the municipal court:
   a. a copy of the notice of appeal which has been endorsed by the clerk of the district court; and
   b. unless the appeal has been filed by the municipality or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. Content of the notice of appeal. The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. Service of notice of appeal. At the time the notice of appeal is filed in the district court, the appellant shall:

1. serve each party or each party’s attorney in the proceedings in the municipal court with a copy of the notice of appeal in accordance with Rule 5-103 of the Rules of Criminal Procedure for the District Courts; and
2. file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. Docketing the appeal. Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. Record on appeal. Within fifteen (15) days after the appellant files a copy of the notice of appeal in the municipal court pursuant to Paragraph B of this rule, the municipal court shall file with the clerk of the district court the record on appeal taken in the action in the municipal court. For purposes of this rule, the record on appeal shall consist of:

1. a title page containing the caption of the case in the municipal court and the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;
2. a copy of all papers and pleadings filed in the municipal court;
3. a copy of the judgment or final order sought to be reviewed with date of filing; and
4. any exhibits.

The municipal court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court.

Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. Correction or modification of the record. If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the municipal court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. Conditions of release. At the time of the entry of the judgment and sentence, the municipal court shall review the conditions of release pending appeal to assure the conditions are sufficient to secure the appearance of the defendant and the judgment of the municipal court. The municipal court may utilize the criteria listed in Paragraph B of Rule 8-401 NMRA, and may also consider the fact of defendant’s conviction and the length of sentence imposed. The conditions of release shall be included on the judgment and sentence. A defendant released pending trial shall continue on release pending an appeal to the district court under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions are necessary to assure the defendant’s appearance or to assure that the defendant’s conduct will not obstruct the orderly administration of justice. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. If the court determines that the previously imposed conditions are not sufficient to assure the appearance of the defendant or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release to assure the appearance of the defendant or
the orderly administration of justice. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial. Upon filing of the notice of appeal, the bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the bond until remand to the municipal court.

I. Review of terms of release. If the municipal court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the municipal court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the municipal court.

J. Trial de novo appeals. Trials upon appeals from the municipal court to the district court shall be de novo.

K. Notice; trial de novo appeals. In trial de novo appeals, the clerk of the district court shall give notice to all parties of the time and date set for a trial de novo not less than ten (10) days prior to the date set for trial. If the defendant is represented by counsel, the clerk shall give written notice to the defendant and the defendant’s counsel. Notice to the defendant shall be mailed to the defendant’s last known address.

L. Disposition; time limitations. [The district court shall try a trial de novo appeal within six (6) months after the filing of the notice of appeal. Any appeal pending in the district court six (6) months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the municipal court for enforcement of its judgment.] The time for trial in the district court on a de novo appeal shall be within six (6) months after the filing of the notice of appeal or the events described in Rule 5-604 (B) (2), (3), (4) or (8) of the Rules of Criminal Procedure for the District Courts. Any appeal pending without disposition upon expiration of the time for trial shall be dismissed and the cause remanded to the municipal court for enforcement of its judgment.

M. Extension of time. The time limit specified in Paragraph L of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause to extend the time period for trial. The petition shall be filed within the first (6) month period, except that it may be filed within ten (10) days after the expiration of the first (6) month period if it is based on exceptional circumstances beyond the control of the party or trial court which justify the failure to file the petition within the sixth (6) month period. A party seeking an extension of time shall promptly serve a copy on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for the objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the six (6) month period, it shall fix the time limit within which the defendant must be tried. No other extension of time shall be allowed.

N. Procedure on appeal. Unless there is a conflict with this rule or Rules 8-702, 8-704 or 8-705 of these rules, the Rules of Criminal Procedure for the District Courts shall govern the procedure on appeal from the municipal court.

O. Disposal of appeals. The district court shall dispose of appeals by entry of a judgment or order disposing of the appeal. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

1. fifteen (15) days after entry of the order disposing of the case;
2. fifteen (15) days after disposition of a motion for rehearing; or
3. if a notice of appeal is filed, upon final disposition of the appeal.

P. Remand. Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the municipal court, the district court shall remand the case to the municipal court for enforcement of the district court’s judgment.

Q. Appeal. Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 NMRA of the Rules of Appellate Procedure.

R. Return of record. After final determination of the appeal, the clerk of the district court shall return the record on appeal to the municipal court clerk.

6-105. Assignment and designation of judges.

A. Assignment. In those courts which have a presiding magistrate, the presiding magistrate shall assign cases among the judges of the court as equitably as possible on a random basis. Once a judge is assigned to hear a case that judge shall have sole responsibility for the case and no other judge may take any action on the case except:

1. at arraignment or first appearance;
2. in cases where the judge has been reassigned because the assigned judge has been recused, is excused, is sick or otherwise unavailable and another judge has been assigned; or
3. with the approval of the assigned judge and all of the parties.

A-B. Procedure for replacing a magistrate upon excusal or recusal; Reassignment.

1. Courts with presiding magistrates. In magistrate courts which have a presiding magistrate, upon receipt of a notice of excusal or upon recusal, the magistrate or clerk of the magistrate court shall give written notice to the parties to the action.

(a) Recusal. [Within ten (10) days after service of a notice of excusal or notice of recusal, the parties or their counsel may agree to another judge of the magistrate district to try the case. If the parties fail to agree upon a new judge, the presiding magistrate of the district shall assign another magistrate to try the case.] Upon recusal, the presiding magistrate of the court shall assign another magistrate judge to preside over the case.

(b) Excusal. Upon the filing of a notice of excusal, the judge or clerk of the court shall give written notice to the parties to the action. Upon the filing of a notice of excusal, the parties or their counsel may agree to another judge of the magistrate district to preside over the case and this agreement shall be contained...
in the notice of excusal. [If the parties fail to agree upon a new
judge, the presiding magistrate of the district shall, by random
selection, assign another magistrate to try the case.]

(c) Reassignment. If the parties fail to agree on a judge,
the presiding judge shall, within ten (10) days, randomly reassign
the case unless the presiding judge determines that there are other
justifiable reasons to assign a case to a particular judge and the
reason is included in the notice of reassignment.

(d) Certification to district court. If all magistrates in the
district have been excused or have recused themselves, within ten
(10) days after service of the last notice of excusal or recusal, the
presiding magistrate shall certify that fact by letter to the district
court of the county in which the action is pending and the district
court shall designate another magistrate to conduct any further
proceedings. The district court shall send notice of its designation
to the parties or their counsel, to the excused or recused magistrate
and to the designated magistrate.

(2) Other courts. In magistrate [districts] courts which
do not have a presiding magistrate, upon receipt of a notice of
excusal or upon recusal, the magistrate shall give written notice
to the parties to the action.

(a) Recusal. [Within ten (10) days after service of the notice
of excusal or recusal, the parties or their counsel may agree to
another judge of the magistrate district to try the case.] Upon
recusal, another judge of the magistrate district shall
be randomly assigned to preside over the case.

(b) Excusal. Upon the filing of the notice of excusal,
the parties or their counsel may agree to another judge of the
magistrate district to preside over the case. This agreement shall
be contained in the Notice of Excusal. Upon excusal, another
magistrate judge of the magistrate district shall be randomly
assigned to preside over the case.

(c) Certification to district court. [If the excursion or recused
magistrate has not received notice of such an agreement within
ten (10) days after service of the notice of excursion or recusal,]
If all magistrates in the magistrate district have recused
themselves or been excused, within ten (10) days after filing of
the last notice of recusal or excusal, the magistrate of the court
where the action was first filed shall certify that fact by letter to
the district court [the excursion or recused magistrate shall certify
that fact by letter to the district court] of the county in which the
action is pending and the district court shall designate another
magistrate to conduct any further proceedings. The district court
shall send notice of its designation to the parties or their counsel,
to the excused magistrate and to the designated magistrate.

(C) Assignment out-of-district. If a criminal proceeding is
filed against a judge or an employee of the magistrate district
in which a criminal proceeding is pending, no judge of the
magistrate district may hear the matter without written agreement
of the parties. If within ten (10) days after the proceeding is filed,
the parties have not filed a stipulation designating a judge to
preside over the matter, the clerk shall request the district court
to designate a judge. The district court shall send notice of its
designation to the parties or their counsel and to the magistrate
court.

D. Reassignment to multiple cases. The district judge may
designate a magistrate from another magistrate district to sit in
actions arising in a particular magistrate district for a specific
period of time.

E. Subsequent proceedings. All proceedings shall be
conducted in the original magistrate court, except that with the
consent of all parties and the assigned judge, proceedings may
be held in another magistrate court in the same judicial district
in which the original magistrate court is located. The clerk of
the original magistrate court shall continue to be responsible for
the court file and shall perform such further duties as may be
required. Within five (5) days after assignment or designation of
a new judge, the clerk shall make a copy of the court file for the
designated judge.

F. [Parties agreement on trial] Unavailability of judge.
At any time during the pendency of the proceedings if
the assigned judge is unavailable, the assigned judge may designate
another judge of the magistrate district to hear any matter that is
not dispositive of the case or the parties may agree on another
judge to hear any matter, including the merits of the case. The
agreement is subject to the approval of the assigned judge and
the judge agreed upon by the parties. If another judge is agreed
upon to hear the merits of the case, the case shall be reassigned
to that judge.

6-106. Excusal; recusal; disability.

A. Definition of parties. “Party” as used in this rule [shall be]
means the defendant, the state, a municipality, a county or person
filing the complaint or an attorney representing the defendant, or
the state, county, municipality or other party.

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

C. Limitation on excusals. No party shall excuse more
than one judge. A party may not excuse a judge after the party
has requested that judge to perform any discretionary act other
than conducting an arraignment or first appearance, setting
initial conditions of release or a determination of indigency. No
defendant may be excused from conducting an arraignment or first
appearance or setting initial conditions of release. Any excusal
of a judge scheduled to hear a preliminary hearing must be filed
at least four (4) days prior to the hearing.

D. Excusal procedure. A party may exercise the statutory right
to excuse the judge before whom the case is pending by filing with
the clerk of the court a notice of excusal. The notice of excusal
must be signed by a party and filed within ten (10) days after the
later of:

(1) arraignment or the filing of a waiver of arraignment; or
(2) service on the parties by the court of notice of assignment
or reassignment of the case to a judge.

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

F. Recusal procedure. No magistrate shall sit in any action
in which the judge’s impartiality may reasonably be questioned
under the provisions of the Constitution of New Mexico or the
Code of Judicial Conduct, and the judge shall file a certificate of
recusal in any such action. Upon receipt of notification of recusal
from a judge, the clerk of the magistrate court shall give written
notice to each party. Upon recusal, another judge shall be assigned
or designated to conduct any further proceedings in the action in
the manner provided by Rule 6-105 NMRA.

G. Failure to recuse. If a party believes that the judge’s
impartiality may reasonably be questioned under the provisions of
the Constitution of New Mexico or the Code of Judicial Conduct,
the party may file a notice of facts requiring recusal. The notice
shall specifically set forth the constitutional grounds alleged. Upon receipt of the notice, the judge may file a certificate of recusal in the action or enter an order finding that there are not reasonable grounds for recusal. If within ten (10) days after the filing of notice of facts requiring recusal, the judge fails to file a certificate of recusal in the action, any party may certify that fact by letter to the district court of the county in which the action is pending with a copy of the notice of recusal. No filing fee shall be required for the filing of a letter certifying grounds for recusal described in Paragraph F of this rule. The parties’ certification to the district court shall be filed in the district court not less than five (5) days after the expiration of time for the magistrate court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the magistrate court finding the grounds alleged in the notice of recusal do not constitute reasonable grounds for recusal, whichever date is earlier. A copy of the letter shall also be filed with the magistrate court. The district court shall make such investigation as the court deems warranted and enter an order in the action, either prohibiting the magistrate court judge from proceeding further or finding that there are insufficient grounds to reasonably question the magistrate judge’s impartiality under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct.

H. Stay. If a letter is filed with the district court and magistrate court certifying the issue of recusal to the district court pursuant to Paragraph G of this rule, the magistrate court judge may enter a stay of the proceedings pending action by the district court. If the magistrate court judge fails to stay the proceedings, the party filing the letter in the district court may petition the district court for a stay of magistrate court proceedings. The district court may grant a stay of the proceedings for not more than fifteen (15) days after the filing of a letter certifying a recusal issue to the district court. Unless a stay is granted, the magistrate court judge shall proceed with the adjudication of the merits of the proceedings.

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

9-102A. Certificate of excusal or recusal.
[For use with Municipal Court Rule 8-106]

STATE OF NEW MEXICO
[COUNTY OF ________________________ ]
[CITY OF ________________________ ]

v. __________________________________________, Defendant

9-102B. Certificate of excusal or recusal.
[For use with Municipal Court Rule 8-106]

STATE OF NEW MEXICO
[COUNTY OF ________________________ ]
[CITY OF ________________________ ]

v. __________________________________________, Defendant

USE NOTE
1. Each party must be served with a copy of this notice. See Rule 6-209, 7-209 and 8-208 NMRA. See Criminal Form 9-221 for the certificate of service and affidavit of service.

9-102. Certificate of excusal or recusal.
[For use with District Court Rule 5-106
[Magistrate Court Rule 6-106]
Metropolitan Court Rule 7-106
[Municipal Court Rule 8-106]]

STATE OF NEW MEXICO
[COUNTY OF ________________________ ]
[CITY OF ________________________ ]

No. [STATE OF NEW MEXICO]
[COUNTY OF ________________________ ]
[CITY OF ________________________ ]

v. ________________________ , Defendant

USE NOTE
1. Each party must be served with a copy of this notice. See Rule 6-209 NMRA. See Criminal Form 9-221 for the certificate of service and affidavit of service.
CERTIFICATE OF EXCUSAL OR RECUSAL

I hereby certify that I have recused myself from presiding in the above case.

I request that another judge be designated according to law.

Date ________________________ Judge ________________________

USE NOTE
1. Each party must be served with a copy of this notice. See Rule 8-208 NMRA. See Criminal Form 9-221 for the certificate of service and affidavit of service.

9-103. Notice of excusal.
[For use with District Court Rule 5-106
[Magistrate Court Rule 6-106
[Municipal Court Rule 7-106]]

STATE OF NEW MEXICO
[COUNTY OF __________]
[CITY OF __________] COURT

No. [STATE OF NEW MEXICO]
[COUNTY OF __________]
[CITY OF __________] v.

________________________, Defendant

NOTICE OF EXCUSAL
The undersigned hereby notifies the court that the Honorable ________________________ is excused from presiding over the above-captioned case.

Dated this __________ day of __________, __________.

Party or attorney for the party

OPTIONAL STIPULATION
By our signatures below we stipulate that the Honorable ________________________ be assigned to preside over the above-captioned case.

Dated this __________ day of __________, __________.

Party or attorney for the party

USE NOTES
1. The parties must stipulate to a statutorily authorized judge.
2. If the parties agree to request a different judge, the court must be informed of the agreement when the notice of excusal is filed. See Rule 6-105 NMRA.
3. Each party must be served with a copy of this notice. See Rule 6-209 NMRA. See Criminal Form 9-221 for the certificate of service and affidavit of service.

9-212A. Bench warrant.
[For use with [Magistrate Court Rule 6-207, Metropolitan Court Rule 7-207 [and
Municipal Court Rule 8-206]]

STATE OF NEW MEXICO
[COUNTY OF __________]
[CITY OF __________]

No. [STATE OF NEW MEXICO]
[COUNTY OF __________]
[CITY OF __________] v.

________________________, Defendant

DOB: ______________________
Address: ____________________
S.S.# ______________________

BENCH WARRANT
THE (STATE OF NEW MEXICO) (MUNICIPALITY OF __________)

TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:
YOU ARE HEREBY COMMANDED to arrest the above-named defendant and bring the defendant before this court to answer the following charges checked below unless released as indicated in the return:

(check applicable box and describe facts below)
[ ] failure to appear as ordered by this court on __________;
[ ] failure to appear as required by a subpoena issued by this court for ____________:
[ ] The defendant was released upon receipt of the fine and court failure to appear at first offender program on ________;

[ ] The defendant failed to appear either on a traffic citation (other than a citation issued for a violation listed in Section 66-8-122 or 66-8-125 NMSA 1978) or a citation issued by an official authorized by law and may be released on a plea of guilty and payment of $____________ plus a $100 bench warrant fee;¹

OR [ ] The defendant failed to pay fines and the defendant may be released upon payment of the outstanding fine and court costs in the amount of $________ plus a $100 bench warrant fee;¹

OR [ ] The defendant may be released on bond in the amount of $ ________. The bench warrant fee will be collected on appearance.

**THIS WARRANT MAY BE EXECUTED:**

[ ] in any jurisdiction;
[ ] anywhere in this state;
[ ] anywhere in this county;
[ ] anywhere in this city.

The clerk of this court shall cause this warrant to be entered into a law enforcement information system²:

[ ] maintained by the state police.

[ ] __________________ (identify other law enforcement information system).

Date __________________ Judge __________________

**RETURN**

The defendant was arrested and taken into custody on the _____ day of ______. The defendant was released on bond in the amount set forth above.

[ ] The defendant was released upon receipt of the fine and court costs set forth above. I have caused this warrant to be removed from the law enforcement information system identified in this warrant.

Signature __________________________
Title ______________________________

**USE NOTES**

¹A $100 bench warrant fee is assessed in the metropolitan court pursuant to Section 34-8A-12 NMSA 1978 and in the magistrate court pursuant to Section 35-6-5 NMSA 1978.

²All metropolitan court and magistrate court felony misdemeanor and driving while under the influence of intoxicating liquor or drugs warrants must be entered into a law enforcement information system.

________________________________________
[NEW MATERIAL]

9-212C. Bench warrant.
[For use with Magistrate Court Rule 6-207 and Municipal Court Rule 8-206]

STATE OF NEW MEXICO
[COUNTY OF __________________]
[CITY OF __________________]

[STATE OF NEW MEXICO]
[COUNTY OF __________________]
[CITY OF __________________]

v.

____________________________;

Defendant
DOB: ______________________
Address: ____________________
S.S.# __________________________

BENCH WARRANT

THE (STATE OF NEW MEXICO) (MUNICIPALITY OF ________) TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:

YOU ARE HEREBY COMMANDED to arrest the above-named defendant and bring the defendant before this court to answer the following charges checked below unless released as indicated in the return:

(check applicable box and describe facts below)

[ ] failure to appear as required by a subpoena issued by this court;
[ ] failure to appear as required by a subpoena issued by this court;
[ ] failure to appear in accordance with the conditions of release imposed by this court;
[ ] conditions of release previously imposed should be revoked or reviewed;
[ ] failure to pay fines or costs previously imposed by order entered _____________________________ (date);
[ ] failure to comply with conditions of probation as set forth in an order entered _____________________________ (date);
[ ] failure to appear at first offender program on __________;
[ ] other __________________;

(set forth any additional essential facts underlying issuance of this warrant)

________________________________________
[check and complete, if applicable]

1. BOND: The defendant may be released on bond in the amount of $____________. The bench warrant fee will be collected upon appearance.

2. PAYMENT: The defendant failed to appear either on a traffic citation (other than a citation issued for a violation listed in Section 66-8-122 or 66-8-125 NMSA 1978) or a citation issued by an official authorized by law and may be
The defendant was released upon receipt of the fine and court costs in the amount of $________ plus a $100 bench warrant fee.

3. PAYMENT: The defendant failed to pay fines and costs as ordered by the court and defendant may be released upon payment of the outstanding fine and court costs in the amount of $________ plus a $100 bench warrant fee.

THIS WARRANT MAY BE EXECUTED: [ ] in any jurisdiction; [ ] anywhere in this state; [ ] anywhere in this county; [ ] anywhere in this city.
The clerk of this court shall cause this warrant to be entered into a law enforcement information system:
[ ] maintained by the state police.
[ ] _______________ (identify other law enforcement information system).

Date ____________________
Judge ____________________

RETURN
The defendant was arrested and taken into custody on the ______ day of ____________, ________.
[ ] The defendant was released on bond in the amount set forth above.
[ ] The defendant was released upon receipt of the fine and court costs set forth above.
I have caused this warrant to be removed from the law enforcement information system identified in this warrant.

Signature ____________________
Title ____________________

USE NOTES
1. A $100 bench warrant fee is assessed in the metropolitan court pursuant to Section 34-8A-12 NMSA 1978 and in the magistrate court pursuant to Section 35-6-5 NMSA 1978.
2. All magistrate court felony misdemeanor and driving while under the influence of intoxicating liquor or drugs warrants must be entered into a law enforcement information system.
3. The warrant may be executed in “any jurisdiction” only if it is a felony warrant.
4. If the court checks alternative 1, it must also check alternative 3. If the court checks alternative 3, it may but is not required to check alternative 1.

3. PAYMENT: The defendant failed to pay fines and costs as ordered by the court and defendant may be released upon payment of the outstanding fine and court costs in the amount of $________ plus a $100 bench warrant fee.

3. PAYMENT: The defendant failed to pay fines and costs as ordered by the court and defendant may be released upon payment of the outstanding fine and court costs in the amount of $________ plus a $100 bench warrant fee.

9-312. Cash bond receipt and conversion after arrest on bench warrant.
[For use in the magistrate[ ] metropolitan and municipal] court[s]]
STATE OF NEW MEXICO
[COUNTY OF ________________]
[CITY OF ________________]  
No. ____________________  
[STATE OF NEW MEXICO]  
[COUNTY OF ________________]  
[CITY OF ________________]

DEFENDANT: ______________________________________, Defendant

CASH BOND RECEIPT
AND
CONVERSION AFTER ARREST ON BENCH WARRANT
Defendant information:
Arrest date: ____________________
Social security number: ____________________
Mailing address: ____________________
City, state & zip code: ____________________
Address (physical): ____________________
City, state & zip code: ____________________

Bond information:
Amount posted: ____________________
Bond posted by: ____________________
Date of birth: ____________________
Social security number: ____________________
Person paying bond’s mailing address: ____________________
City, state & zip code: ____________________

PERSON OTHER THAN DEFENDANT PAYING BOND:
(check applicable alternative and sign)
[ ] I agree ____________________
[ ] I do not agree ____________________
That the cash I have posted may be used to pay any fines, fees or costs that the court may order the defendant to pay after the defendant’s release from custody.

Signature of person posting cash ____________________
Title ____________________

BOND RECEIVED BY:
Signature of clerk or bail designee ____________________
Title ____________________
Date ____________________

COURT EMPLOYEE RECEIVING PAYMENT:
Signature ____________________
Title ____________________
Date ____________________

USE NOTE
1. Complete if person posting bond cash is not the defendant.
[NEW MATERIAL]
9-312A. Cash receipt.
[For use in the magistrate and municipal courts]
STATE OF NEW MEXICO
[COUNTY OF______________________]
[CITY OF_______________________] COURT

No. ________________________________, Defendant

CASH RECEIPT

Defendant information:
Arrest date: __________________________
Date of birth: __________________________
Mailing address: __________________________
City, state & zip code: __________________________
Address (physical) (if different from mailing address):
City, state & zip code: __________________________
(include current mailing address in case a refund is due) to be filled in only if $10,000 or more is tendered in cash; required by Internal Revenue Service
Social Security number of Defendant: __________________________

Complete if person posting cash is not Defendant
Cash information:
Date cash posted: __________________________
Amount posted: __________________________
Cash posted by: __________________________
Mailing address of person paying cash: __________________________
City, state & zip code: __________________________
(include current telephone number or contact information in case a refund is due)
PERSON OTHER THAN DEFENDANT PAYING CASH:

I understand that the cash I have posted will be used to pay any fines, fees or costs that the defendant owes if the court has ordered that the defendant may only be released upon the payment of such fines, fees and costs and that if this is so I will not be entitled to a refund, regardless of what I have checked below. If the court has not ordered that the defendant will only be released upon payment of fines, fees, and costs, [ ] I agree [ ] I do not agree that the cash I have posted may be used to pay any fines, fees or costs that the court may order the defendant to pay after the defendant’s release from custody.

Signature of person posting cash (required)

DEFENDANT: (If the defendant has been arrested on a failure to pay warrant, the defendant’s signature is not required.)
(This alternative may be used only when the defendant has failed to appear, the bench warrant authorizes release on payment of fines and fees, and the person posting the cash has checked the “I agree” box above.)
[ ] I plead guilty to the charges. I ask the court to use the cash for payment of fines, fees and costs instead of requiring me to appear before the court.
(This alternative may be used only when the bench warrant authorizes release of the defendant on bond, instead of payment of fines and fees.)
[ ] I agree to appear in the ________________ court on _______, ______, ______ at ________ [a.m.] [p.m.]

Signature of defendant

CASH RECEIVED BY:

Signature of clerk or bail designee

Date

COURT EMPLOYEE RECEIVING PAYMENT:

Signature

Date

[NEW MATERIAL]
2-308. Offer of settlement.

A. Offer of settlement. Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until thirty (30) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant’s costs, excluding attorney fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant shall pay the costs, excluding attorney fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.
2-805. Mediation.

A Purpose. The purpose of mediation programs in the magistrate courts is the early, efficient, cost-effective and informal resolution of disputes.

B. Administration. Mediation shall be administered by a court. Mediators shall be volunteers who have been (1) certified by the Administrative Office of the Courts as qualified to conduct mediations in the magistrate courts and (2) approved by the local presiding judge.

C. Order required. All referrals to mediation require a written court order. When the court orders mediation, notice shall be provided and the parties shall appear and mediate in good faith. Nothing in the rules governing the mediation programs shall be construed to discourage or prohibit parties from stipulating to private alternative dispute resolution.

D. Immunity. Persons certified by the Administrative Office of the Courts to serve as mediators under these rules are appointed to serve as arms of the court and as such are immune from liability for conduct within the scope of their appointment.

E. Confidentiality. Mediation proceedings shall be held in private and shall be confidential as provided by law.

F. Report to the court. No report of the content of mediation shall be made to the court. The mediator shall inform the court by written report of the result of the mediation session. If the mediation process is successful, the mediator shall reduce the agreement to writing on a form to be signed by the parties.

G. Costs. If a party fails to appear as ordered by the court for mediation, and the other party or parties appear, the court may, after a hearing, assess costs against a party who fails to appear as ordered for a mediation to reimburse the party or parties who did appear for attorney fees or lost wages.
JERROLD CAMPOS,
Petitioner,
versus
ERASMO BRAVO, Warden,
Respondent.
No. 29,752 (filed: April 5, 2007)

ORIGINAL PROCEEDING ON CERTIORARI
JAY W. FORBES, District Judge

TIMOTHY LEE ROSE
GARY C. MITCHELL, P.C.
Ruidoso, New Mexico
for Petitioner

GARY K. KING
Attorney General
MARGARET MCLEAN
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

{1} Asserting that it is unknown whether
the jury used a lesser-included offense
of second-degree murder as the predicate
felony to support his conviction, Petitioner
Jerrold Campos seeks a writ of habeas corpus
to set aside this felony-murder
conviction under the collateral-felony doctrine.

At Campos’s trial, the jury instructed
the defendant to consider either
aggravated battery or
aggravated burglary as the predicate felony.

It is settled law in New Mexico that
aggravated battery cannot be used as a predicate felony to felony murder.

When it returned its verdict finding Campos guilty of felony murder, the jury did not indicate which predicate felony it used to convict Campos. Because Campos did not preserve the issue and raise it on direct appeal, we review the issue for fundamental error. We conclude that it was error for aggravated battery to be used as one of the two alternative predicates for felony murder and that the error was per se fundamental. Therefore, we reverse the district court’s denial of a writ of habeas corpus.

I. BACKGROUND

{2} In 1999, Campos was convicted of
felony murder for the killing of Kendrick Rudolph, two counts of intimidation of a witness, and several misdemeanor crimes. For the felony-murder conviction, the State relied on the predicate felonies of aggravated battery (with a deadly weapon and, alternatively, aggravated burglary). The verdict form returned by the jury finding Campos guilty of murder did not identify which predicate the jury used. Campos’s convictions were appealed directly to this Court and we affirmed in an unpublished decision. State v. Campos, No. 25,715, slip op. ¶ 2 (N.M. Mar. 5, 2001). Over three years later, Campos petitioned the Fifth Judicial District Court for a writ of habeas corpus, amending his petition a couple of weeks thereafter. In his amended petition, Campos asserted that his conviction of felony murder must be vacated because it violates the collateral-felony doctrine. In response, the State argued that Campos could not raise this issue on habeas because he could have raised it on appeal, but did not. The district court held a hearing on December 14, 2004.

{3} At the hearing, Campos’s habeas counsel asserted that all involved at every level either missed or were silent about the fact that New Mexico’s collateral-felony doctrine clearly precludes aggravated battery from being used as a predicate for felony murder. See State v. Campos, 1996-NMSC-043, ¶ 23, 122 N.M. 148, 921 P.2d 1266 (precluding all forms of aggravated battery and aggravated assault from being used as predicates to felony murder). Relying on State v. Crain, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095, counsel also suggested that, in this case, use of aggravated burglary violated the collateral-felony doctrine since Campos’s underlying assaultive conduct was the sole basis for the aggravated burglary instruction. See NMSA 1978, § 30-16-4(C)(1963) (providing for aggravated burglary when, without authorization, a person enters a structure with the intent to commit a felony therein and commits a battery upon a person while inside or upon entering or leaving). Finally, Campos’s habeas counsel asserted that even if aggravated burglary was a legitimate predicate, Campos’s conviction must be vacated because there is no way to know which predicate the jury used and at least one is certainly invalid.

{1} The same attorney represented the State at trial and during the habeas proceeding. At the habeas hearing, the prosecutor candidly admitted that “it wasn’t a mistake on [his] part—[he] set it up on purpose this way.” The prosecutor used aggravated battery as one of the predicates “on purpose because [he] wanted [this Court] to reexamine the felony-murder rule.” We do not approve of the tactic of purposely setting up a conviction that has a clear possibility of being illegal in the hopes that this Court will overturn its clear precedent. Under our Rules of Professional Conduct, a prosecutor shall not pursue charges not supported by probable cause. Rule 16-308(A) NMRA. The same rule does not allow a prosecutor to pursue a crime that is clearly invalid under our precedent. Moreover, “[i]t is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” State v. Cummings, 57 N.M. 36, 39, 253 P.2d 321, 323 (1953) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); see also State v. Cooper, 2000-NMCA-041, ¶ 15, 129 N.M. 172, 3 P.3d 149 (“The sole duty of a prosecutor is to see that justice is done.”).
After holding a hearing, the district court entered a “decision” on January 11, 2005, stating: “The Court finds the State’s position is correct in this matter and does not feel it necessary to restate that position and denies the Writ.” A final order denying relief was not entered until March 20, 2006, over a year later. Soon thereafter, Campos petitioned this Court for a writ of certiorari, which we granted. See Rule 5-802(H)(2) NMRA.

II. A HABEAS PETITIONER MAY ASSERT A CLAIM IF THERE IS FUNDAMENTAL ERROR EVEN IF THE ISSUE COULD HAVE BEEN RAISED ON APPEAL

We first address the State’s argument that Campos is precluded from raising this issue in a habeas petition. The purpose of the writ of habeas corpus is to protect a person from being erroneously deprived of his or her rights. Clark v. Tansy, 118 N.M. 486, 490, 882 P.2d 527, 531 (1994). Thus, rarely are principles of finality applied with the same force in habeas proceedings as they are in ordinary litigation. Id. In the words of the United States Supreme Court, “[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.” Sanders v. United States, 373 U.S. 1, 8 (1963); see also Sobota v. Cox, 355 F.2d 368, 369 (10th Cir. 1966) (per curiam) (“A fundamental principle of law in [habeas corpus proceedings] is that the rule of res judicata does not apply.”).

At the district court level, the State asserted that Campos was precluded from raising this issue now because he did not raise it on direct appeal. In its briefing to this Court, however, the State appears to contend that the issue was raised on direct appeal, but denied and, therefore, cannot be relitigated. Although both assert Campos cannot raise his claim in a habeas petition, our review under each theory is distinct.

When the State asserts that a habeas petitioner’s claim is barred because the same claim was already addressed on appeal, but was denied, the habeas claim is not barred if “it is grounded in facts beyond the record previously presented on appeal, and if the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges.” Duncan v. Kerby, 115 N.M. 344, 346, 851 P.2d 466, 468 (1993) (quoted authority omitted). When the State asserts that a habeas petitioner’s claim is barred because the petitioner failed to raise the issue on appeal, a different rule applies. “A habeas corpus petitioner will not be precluded . . . from raising issues . . . that could have been raised on direct appeal either when fundamental error has occurred, or when an adequate record to address the claim properly was not available on direct appeal.” Id. (citation omitted).

After reviewing the briefs in Campos’s direct appeal and our resulting decision, we conclude that Campos never raised the collateral-felony issue on appeal. See Garcia v. Mora Painting & Decorating, 112 N.M. 596, 601, 817 P.2d 1238, 1243 (Ct. App. 1991) (taking judicial notice of briefs filed in another case). Regarding the use of different predicate felonies in support of his felony-murder conviction, the thrust of Campos’s argument on appeal was that he did not receive sufficient notice of the predicates to be used because he was not actually charged with those crimes. Nowhere in his brief-in-chief, nor in his reply brief, did Campos assert that his felony-murder conviction violated the collateral-felony doctrine. As a result, on the issue of the predicate felonies used to support his conviction of felony murder, our decision only addressed whether Campos received sufficient notice. Campos, No. 25,715, slip op. at 3-4. Because Campos never raised this issue on appeal and because the record on appeal was clearly adequate to address Campos’s current claim, we determine only whether Campos’s conviction constitutes fundamental error. In conducting such a review, we first determine if error occurred; if so, we next determine whether that error was fundamental. See State v. Barber, 2004-NMSC-019, ¶ 13, 135 N.M. 621, 92 P.3d 633.

III. ERROR OCCURRED AT CAMPOS’S TRIAL BECAUSE THE AGGRAVATED-BATTERY ALTERNATIVE WAS LEGALLY INADEQUATE UNDER THE COLLATERAL-FELONY DOCTRINE

A. Using Aggravated Battery as the Predicate to Felony Murder Violated the Collateral-Felony Doctrine

In New Mexico, our felony-murder statute serves to elevate second-degree murder to first degree when the murder occurs during the commission of a dangerous felony. See State v. Ortega, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). In concert with the general trend in America of limiting its reach, New Mexico has placed five limitations on felony murder. See State v. O’Kelly, 2004-NMCA-013, ¶¶ 22-24, 135 N.M. 40, 84 P.3d 88. One of the limitations is the collateral-felony doctrine, which precludes the State from using a lesser-included offense of second-degree murder as the predicate to felony murder. Id. ¶ 24 (citing Campos, 1996-NMSC-043, ¶ 19).

The collateral-felony doctrine derived from our concern “that the prosecution may be able to elevate improperly the vast majority of second-degree murders to first-degree murders by charging the underlying assaultive act as a predicate felony for” felony murder. Campos, 1996-NMSC-043, ¶ 19. Thus, the doctrine requires the predicate felony to be collateral to the murder, which, in turn, precludes the State from using a lesser-included offense of second-degree murder as a predicate felony. See id. ¶¶ 10, 19. Moreover, applying the strict elements test “in the abstract,” see State v. Vallesjos, 2000-NMCA-075, ¶¶ 13, 129 N.M. 424, 9 P.3d 668, it is clearly not possible to commit second-degree murder without also committing some form of aggravated assault or aggravated battery. Thus, aggravated assault and aggravated battery may never be used as predicate felonies to felony murder even though some statutory elements of those two crimes differ from second-degree murder. Campos, 1996-NMSC-043, ¶ 23. Ultimately, the doctrine’s purpose “is to further the legislative intent of holding certain second-degree murders to be more culpable when effected during the commission of a felony—thereby elevating them to first-degree murders —while maintaining the important distinction between the classes of second- and first-degree murders.” Id. ¶ 22.

Analysis under the collateral-felony doctrine is not to be confused with a double jeopardy analysis. First, under a collateral-felony analysis we consider whether the predicate felony is a lesser-included offense of second-degree murder. Under a double jeopardy analysis, we consider whether the predicate offense is a lesser-included offense of first-degree murder. Id. ¶ 22 n.3. Furthermore, when the collateral-felony doctrine is violated, the defendant’s felony-murder conviction is vacated, whereas when double jeopardy is violated, the conviction of the predicate felony is vacated. See id. Finally, when two charges violate double jeopardy because the conduct underlying each is “unitary,” the collateral-felony doctrine is not necessarily violated. See id. ¶¶ 25, 48 (holding that first-degree criminal sexual penetration was a proper predicate felony under the collateral-felony doctrine notwithstanding...
the fact that double jeopardy was violated because the conduct was “unitary”). As was stated in Vallegos, “[t]he two doctrines are distant cousins if anything, and one acts at one’s peril in drawing superficial parallels between the two.” 2000-NMCA-075, ¶ 12. Double jeopardy is not at issue in this case.

12. Since it is not possible to commit second-degree murder without also committing some form of aggravated battery, Campos’s conviction of felony murder would be legally void if the jury used aggravated battery with a deadly weapon as the predicate felony. We mean what we said in Campos: all forms of aggravated assault and aggravated battery will “always be deemed to be non-collateral.” 1996-NMSC-043, ¶ 23. On certiorari, the State concedes as much, stating in its answer brief: “If . . . the only predicate felony for the felony murder charge was aggravated battery, the collateral felony doctrine would clearly apply.” However, since the predicate felonies were submitted to the jury as alternates and we do not know which the jury relied upon, we are left with the question of whether aggravated burglary was an appropriate predicate and, if so, whether this cured any error.

B. Using Aggravated Burglary Based on Campos's Underlying Assaultive Conduct Did Not Violate the Collateral-Felony Doctrine

13. To be guilty of aggravated burglary, a defendant must, without authorization, enter a structure with the intent to commit a felony therein, and either: (1) be armed with a deadly weapon, (2) arm himself with a deadly weapon while inside, or (3) commit a battery upon a person while inside, or while entering or leaving. § 30-16-4. At Campos’s trial, the jury instruction stating the elements of aggravated burglary relied upon the battery prong, not on either of the deadly weapon prongs. Thus, Campos argues that “since the basis for the predicate felony of Aggravated Burglary involved the underlying assaultive conduct, it too would violate the collateral-felony doctrine.”

14. Because this argument is answered by Campos and State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807, we disagree. In Duffy, after killing an elderly woman while snatching her purse, the defendant was convicted of felony murder predicated on robbery. Id. ¶¶ 1-2. Among other things, the defendant argued that the collateral-felony doctrine was violated “because the robbery . . . was the same act that caused [the victim’s] death.” Id. ¶ 23. We stated in Duffy that Campos requires us to “look, not to the nature of the act, but rather to whether the legislature intended that a particular felony should be able to serve as a predicate to felony murder.” Id. (emphasis added) (citing Campos, 1996-NMSC-043, ¶ 22). Because it is “possible to commit murder without also committing robbery,” it was clear to us that the legislature did not intend to prohibit robbery from being used as the predicate to felony murder. Id. ¶ 25. Thus, notwithstanding the fact that the same conduct underlay each charge, we upheld the defendant’s conviction of felony murder. Id. ¶ 28. Similarly, in Campos the defendant’s conduct underlyng his conviction of criminal sexual penetration (CSP) and felony murder was “unitary.” Campos, 1996-NMSC-043, ¶ 48. Nevertheless, since it is not a lesser-included offense of second-degree murder, we held that CSP was properly used as a predicate for felony murder. Id. ¶ 25.

15. It is possible to commit second-degree murder without ever committing some form of aggravated burglary. Even in the situation, as here, where the factor raising simple burglary to aggravated burglary is the conduct underlying a second-degree murder, the fact remains that two elements of burglary—whether aggravated or not—never contained in second-degree murder are: (1) the unauthorized entry of a structure, and (2) the intent to commit a felony therein. See NMSA 1978, § 30-16-3 (1971). Simple burglary is collateral to second-degree murder and does not violate the collateral-felony doctrine. As such, it is irrelevant that the element raising simple burglary to aggravated burglary in this case was that of Campos’s underlying murderous battery. Thus, aggravated burglary was correctly used as a predicate to felony murder.

16. Finally, we note that Campos’s reliance on Crain is misplaced. The issue in Crain was whether the defendant’s right to be free from double jeopardy was violated when he was convicted of three statutory provisions for conduct that was “unitary.” 1997-NMCA-101, ¶¶ 15-17. As discussed above, the collateral-felony doctrine is an issue distinct from double jeopardy and case must be taken not to conflate the two.

C. Error Occurred Because One of the Alternatives Was Legally Inadequate

17. Campos asserts that even if aggravated burglary was a valid predicate in this case, his felony-murder conviction must be vacated because the aggravated-battery predicate was clearly not valid. According to the State, since substantial evidence supports the valid predicate felony of aggravated burglary, no error occurred and we should uphold Campos’s conviction of felony murder. See State v. Salazar, 1997-NMSC-044, ¶ 32, 123 N.M. 778, 945 P.2d 996. Error occurred at Campos’s trial because one of the alternative bases for his conviction was legally inadequate. See State v. Olguin, 120 N.M. 740, 741, 906 P.2d 731, 732 (1995). Had Campos preserved this issue and raised it on direct appeal, we would undoubtedly have vacated his conviction and remanded for a new trial. However, as noted, our review here is for fundamental error. We recognize in State v. Cunningham that not affording more scrutiny for fundamental error “would eliminate the preservation of error requirement of our appellate jurisprudence. It would also compromise the intent embodied in Rule 12-216, which makes fundamental error an exception to the general rule requiring preservation of error.” 2000-NMSC-009, ¶ 18, 128 N.M. 711, 998 P.2d 176.

IV. THE ERROR WAS PER SE FUNDAMENTAL

18. Fundamental error consists of error that goes to: (1) the foundation of a defendant’s rights, (2) the foundation of the case, or (3) a right essential to the defense of an accused, “which no court could or ought to permit him to waive.” State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942). Over the years, the doctrine has evolved such that a conviction will only be reversed if the defendant’s guilt is so questionable that upholding a conviction would “shock the conscience,” or where, notwithstanding the apparent culpability of the defendant, “substantial justice” has not been served. See State v. Osborne, 111 N.M. 654, 662-63, 808 P.2d 624, 632-33 (1991). Substantial justice has not been served when a fundamental unfairness within the system has undermined judicial integrity. See Cunningham, 2000-NMSC-009, ¶ 21.

19. We start with the premise that “[i]t is fundamental error to convict a defendant of a crime that does not exist.” State v. Maestas, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933 (citing State v. Johnson, 103 N.M. 364, 371, 707 P.2d 1174, 1181 (Ct. App. 1985)). Because a conviction violating the collateral-felony doctrine is a legal nullity, it would be fundamental error to uphold such a conviction. However, in this
case the jury was instructed on alternatives—one legally adequate, the other legally inadequate. Relying on *Yates v. United States*, 354 U.S. 298, 312 (1957), overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978), we stated in *Olguin* that “a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate.” *Olguin*, 120 N.M. at 741, 906 P.2d at 732. We reaffirm this principle yet, at the same time, note also that before reversal is required on the ground that one of the alternatives is legally inadequate, *Yates* insists that it also be “impossible to tell which ground the jury selected”—something that was not mentioned in *Olguin*. *Yates*, 354 U.S. at 312. In this case, without the jury returning a special verdict detailing which theory of felony murder it relied upon, it is simply impossible for us to determine which ground the jury selected.

{20} A similar situation is found in *Mosley v. State*, 682 So.2d 605 (Fla. Dist. Ct. App. 1996). In *Mosley*, the trial court instructed the jury that it could find the defendant guilty of attempted manslaughter if it determined that the defendant acted intentionally or with culpable negligence. *Id.* at 606. The culpable negligence instruction was in error because it would have permitted the jury to find the defendant guilty of attempted involuntary manslaughter, a nonexistent crime in Florida. See *id.* The State argued that the error was not fundamental because no evidence or argument was presented on the culpable negligence theory. *Id.* Nonetheless, and notwithstanding the fact that there was evidence adduced at trial showing that the defendant acted intentionally, the appellate court could not determine beyond a reasonable doubt that the jury did not rely upon the erroneous instruction. *Id.* at 607. In fact, the court adopted a bright-line rule: “When jurors are given an instruction that would permit them to find the defendant guilty of a crime that does not exist, the error is fundamental and is per se reversible, and the case must be remanded for retrial.” *Id.*

{21} In this case there was plenty of evidence showing that Campos was guilty of the valid predicate felony, aggravated burglary. That said, we simply cannot say beyond a reasonable doubt that the jury did not rely upon the invalid predicate. Doing so would be tantamount to directing a verdict finding Campos guilty of felony murder—something we are loathe to do. Since we have no idea whether Campos was convicted of a valid crime, substantial justice was not served at Campos’s trial; fundamental error results. We reverse the district court, grant Campos a writ of habeas corpus, vacate his conviction of felony murder, and remand for a new trial should the State elect to retry Campos using a valid predicate felony.

V. CONCLUSION

{22} Campos is not precluded from raising his argument for the first time in a petition for a writ of habeas corpus. Because an adequate record was available to Campos on appeal, we review for fundamental error. We cannot say for certain that the jury did not rely on the legally invalid predicate of aggravated battery; thus, fundamental error occurred. We reverse the district court and grant Campos a writ of habeas corpus.

{23} **IT IS SO ORDERED.**

**EDWARD L. CHÁVEZ,**

Chief Justice

*WE CONCUR:*

**PATRICIO M. SERNA,** Justice

**RICHARD C. BOSSON,** Justice

*MINZNER,* Justice (specially concuring).

{24} I concur in the majority opinion. I write separately in order to express my concern that the concept and term “fundamental error” may not be exactly the same when reviewing for fundamental error in the context of a habeas proceeding as when reviewing for fundamental error in the context of a direct appeal. Our cases do not make this point directly or clearly, but *Duncan v. Kerby*, 115 N.M. 344, 346, 851 P.2d 466, 468 (1993), suggests a difference.

{25} In *Duncan*, Justice Frost indicated that “[a] habeas corpus petitioner will not be precluded, however, from raising issues in habeas corpus proceedings that could have been raised on direct appeal either when fundamental error has occurred, [State v.] *Gillihan*, 86 N.M. [439], 440, 524 P.2d [1335], 1336 ([1974]), or when an adequate record to address the claim properly was not available on direct appeal.” 115 N.M. at 546, 851 P.2d at 468. Yet he went on to quote an Idaho case, in which a special concurrence made the point that “‘[w]hen a post-conviction application makes a substantial showing that due process or another fundamental right has been abridged—and the application is supported by facts ill-suited for development in the original trial—it should be addressed on its merits.’” *Id.* (quoting *State v. Darbin*, 708 P.2d 921, 931 (Idaho Ct. App. 1985) (Burnett, J., specially concurring). This Court then said: “We adopt this rationale.” *Duncan*, 115 N.M. at 346, 851 P.2d at 468.

{26} In *Gillihan*, this Court said that post-conviction proceedings were not available as a substitute for an appeal or to correct trial error. 86 N.M. at 440, 524 P.2d at 1336. Yet, we said “this holding will not apply to grounds constituting fundamental error or to situations in which the prisoner’s mental capacities preclude an intelligent waiver.” *Id.*

{27} Finally, in *State v. Garcia*, we said post-conviction proceedings ordinarily are not to be used to correct trial error “even though the errors relate to constitutional rights. It is only where there has been a denial of the substance of fair trial that the validity of the proceeding may be attacked collaterally.” 80 N.M. 21, 23, 450 P.2d 621, 623 (1969).

{28} These various pronouncements by this Court leave me in doubt concerning the scope of the principle and concept of fundamental error as it applies in habeas proceedings. Nevertheless, as the majority opinion makes clear, Petitioner is being held in prison on a conviction that is legally void. See Maj. Op., ¶ 12. As a consequence, whatever the scope of review under the principle and concept of fundamental error, he is entitled to the relief he sought. See NMSA 1978, § 44-1-1 (1884) (describing those who are entitled to the writ of habeas corpus as including every person imprisoned or restrained unlawfully).

**PAMELA B. MINZNER,**

Justice

*I CONCUR:*

**PETRA JIMENEZ MAES,** Justice
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-022

Topic Index:
Administrative Law and Procedure: Due Process; Hearings; and Notice
Attorneys: Fees, General
Constitutional Law: Due Process; Equal Protection; and Vague or Overbroad

IN RE: APPLICATION OF ELLIOT B. OPPENHEIM
FOR ADMISSION TO THE BAR
No. 29,655 (filed: February 9, 2007)

RAY TWOHIG
RAY TWOHIG, P.C.
Albuquerque, New Mexico
for Petitioner

SARAH M. SINGLETON
ANDREW S. MONTGOMERY
MONTGOMERY & ANDREW, P.A.
Santa Fe, New Mexico
for Board of Bar Examiners

OPINION

RICHARD C. BOSSON, JUSTICE

{1} Petitioner Elliot Oppenheim (“Oppenheim”) petitions this Court to review the State Board of Bar Examiners’ (“the Board”) denial of his application for admission to the New Mexico Bar (“the Bar”). The Board found that Oppenheim failed to carry his burden of establishing that he was a person of good moral character. See Rule 15-103(C) NMRA. In his petition, Oppenheim challenges the findings of the Board and the adequacy of the administrative procedures used by the Board in conducting its investigation and hearings; the constitutionality of the good moral character standard; and the Board’s assessment of its attorney fees against him. We hold that the administrative procedures were adequate and the good moral character standard is constitutional. We therefore accept the Board’s recommendation against Oppenheim’s admission to the Bar. However, we reject the assessment of attorney fees against the applicant.

BACKGROUND

{2} Oppenheim’s background, as developed in the record over the nearly seven years of proceedings on his two applications for admission to the Bar, is replete with instances of dishonesty and unprofessional conduct on which the Board legitimately based its recommendation. We consider the facts developed in connection with both applications because the Board was entitled to consider what, if anything, had changed since it denied Oppenheim’s first application.

{3} Oppenheim was born in New York in 1947, and received a medical degree from the University of California at Irvine in 1973. He was licensed to practice medicine in the States of California and Washington beginning in 1974.

{4} Beginning in 1978, Oppenheim used his medical license to procure cocaine for his own use and for distribution to another. Oppenheim was convicted in 1980 of two felony counts: one of acquiring a controlled substance (cocaine) by misrepresentation, fraud, and deception in violation of 21 U.S.C. § 843(a)(3), and one of distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1). He received a three-year suspended sentence, was placed on probation for three years, and was ordered to undergo psychiatric treatment and to perform 600 hours of community service. He successfully completed his sentence in 1982.

{5} Oppenheim’s Washington medical license was revoked in 1980 on the basis that he had been convicted of “a crime involving moral turpitude, dishonesty and corruption in the course of his practice as a physician.” His Drug Enforcement Administration registration and hospital privileges were also revoked. His California medical license was revoked on similar grounds in 1981.

{6} In 1981, Oppenheim’s medical license was conditionally reinstated in Washington, although his hospital privileges were not restored. In May of 1991, the Medical Disciplinary Board summarily suspended Oppenheim’s medical license based on charges that (a) he had not appropriately treated a patient with emotional and mental problems, resulting in her hospitalization; and (b) he had incorrectly intubated an unconscious patient, shortly after which the patient died. In June of 1981 the suspension was conditionally stayed upon Oppenheim’s stipulation that the state could prove the facts with which he had been charged.

{7} In December 1991, the Medical Disciplinary Board charged Oppenheim with numerous acts of dishonesty in connection with his testimony as an expert witness in courts throughout the country, including New Mexico. Oppenheim was charged with affirmatively misrepresenting and failing to disclose adverse facts affecting his credibility as a witness, including his criminal convictions and license revocations. Oppenheim’s lack of candor in these cases resulted in dismissal of several suits at or on the eve of trial. One court informed him that it would refer his testimony to the disciplinary board, the Washington attorney general’s office, and the district attorney for investigation of allegations of perjury, fraud, and violation of the Consumer Protection Act.

{8} Oppenheim failed to appear at his disciplinary hearing, informing the Medical Disciplinary Board by letter that he had chosen not to renew his license but was protesting the disciplinary hearings against him. The Medical Disciplinary Board proceeded to hear the evidence against him and, in early 1993, entered extensive, substantive findings of fact. The Medical Disciplinary Board concluded that Oppenheim had committed multiple acts of (a) moral turpitude, dishonesty, or corruption relating to the practice of his profession; (b) misrepresentation or fraud in the conduct

1In his second application, Oppenheim disclosed some but not all of these statutory violations.
2Oppenheim’s second application omits the conditional nature of this reinstatement.
3Oppenheim’s second application states that his license was reinstated and does not disclose that he stipulated to the agreed facts.
4Oppenheim’s second application represents that his case was never heard on the merits.
of his profession; (c) failure to comply with a disciplinary order or assurance of discontinuance; and (d) other aggravating factors. On the basis of these findings and conclusions, the Medical Disciplinary Board revoked Oppenheim’s Washington medical license, barred him from applying for reinstatement for at least 20 years, imposed a $43,000 fine, and ordered him to make restitution to the lawyers and litigants he had harmed.

9 Later in 1993, Oppenheim and the Medical Disciplinary Board stipulated to an agreed order relating to his financial obligations under the Board’s prior order, including the fine and the restitution obligations. The order established a payment schedule and provided that a portion of the amount due would be waived if he timely made all other payments, but it also provided that any attempt by Oppenheim to discharge his financial obligations in bankruptcy would result in the full unpaid balance becoming due immediately.

10 Oppenheim declared bankruptcy in 1995. Among the $386,651 in liabilities that he sought to discharge were unpaid fines and restitution obligations of $50,250 owed to the Washington Medical Disciplinary Board. The Washington attorney general has informed Oppenheim that his debt to that Board was not discharged in bankruptcy. Oppenheim has not paid the debt and no longer feels any obligation to pay it.

11 Even before his medical license was revoked, Oppenheim indicates that he had decided he no longer wanted to be a doctor, so he went to law school and received his J.D. from the Detroit College of Law in 1995, and an L.M. in health law from Loyola University in 1996. Oppenheim applied for admission to the Washington State Bar in 1996. In November of 1996, the Character and Fitness Committee of the Washington State Bar Association ("the Washington Committee") conducted a full hearing, reviewing evidence of the events described above. The Washington Committee took note of "repeated instances of dishonesty, fraud and deception evidenced by false sworn testimony in judicial proceedings."

12 The Washington Committee also reviewed records of twenty-one civil lawsuits to which Oppenheim had been a party, above and beyond the cases in which he had testified as an expert witness, the professional disciplinary proceedings, the bankruptcy proceeding, and two marriage dissolution proceedings. A number of these lawsuits involved allegations that Oppenheim had intentionally or negligently converted property of another, that he had taken property or embezzled funds, or that he had committed acts of dishonesty, harassment, or "unclean hands." In one of these suits, Oppenheim was sanctioned for filing a frivolous claim against his former wife to recover property that he did not own and had not listed as an asset in his bankruptcy proceeding.

13 The Washington Committee commented that Oppenheim’s demeanor during the hearing left it with "serious reservations concerning his forthrightness and candor." It later became clear that Oppenheim had lied in his testimony to the Washington Committee, testifying that he was "never an expert," although he had been deposed and testified to expert physician opinions in two lawsuits, one only four weeks earlier. Based on the evidence before it, the Washington Committee concluded that Oppenheim had failed to show that he was of good moral character, and it declined to recommend his admission to the Washington Bar.

14 In 1997, less than a year after being denied admission to the Washington Bar, Oppenheim applied for admission to the New Mexico Bar. Oppenheim was represented by Briggs Cheney from that time through January 2002. Claude Jack represented him from April to approximately August 2002. In November 2002, Oppenheim wrote letters to the Disciplinary Board of the New Mexico State Bar and the Board of Bar Examiners complaining that Jack had charged him $20,000, had provided him nothing of value, had been "floridly dishonest," and had engaged in unethical conduct. He claimed that unless Jack refunded his fees, he would not be able to afford another attorney’s retainer and would be forced to withdraw his Bar application. The Disciplinary Board found insufficient evidence to support Oppenheim’s allegations against Jack. After Jack submitted an affidavit attesting that his fees were less than $14,200 and the total amount billed was only $15,000, Oppenheim admitted that his contrary allegations were inaccurate. The Character and Fitness Panel later found that Oppenheim’s actions reflected a substantial lack of candor and lack of judgment, and raised serious questions about his ability and willingness to work with professionals.

15 In 1999, Oppenheim became intimately involved with a married woman who had been separated from her husband for over a year. Oppenheim rendered legal assistance to this woman in petitioning for a divorce by obtaining and preparing the divorce papers for her. The Panel later found that by doing so Oppenheim had demonstrated a "serious lack of substantive respect for observance of the rule and the spirit of the law and the legal profession."

16 In early 2001, Oppenheim was sharing a house with Claudia Upton, a woman he had met in law school. Upton obtained a temporary restraining order requiring Oppenheim to vacate the house immediately, and the sheriff served the order on Oppenheim the night of February 18. Oppenheim did not comply with the order and was arrested the next day and charged with a misdemeanor for violating the order. The Panel found that his failure to comply with the court’s order was unlawful and without legal justification, and indicated a lack of respect for the rule of law.

17 Oppenheim and Upton became involved in acrimonious litigation over the house and some personal property as well as allegations of domestic violence. Upton filed for bankruptcy in July of 2002, listing Oppenheim as a creditor. Oppenheim responded by writing letters to state and federal law enforcement agencies, Upton’s mortgage lender, her employer, and her bankruptcy attorney, in which Oppenheim accused Upton of fraud and criminal acts. Oppenheim also threatened to inform the Texas State Bar if Upton’s bankruptcy attorney did not immediately withdraw from representing Upton. Upton moved for sanctions against Oppenheim for violation of the automatic stay in the bankruptcy court. Oppenheim then consented to an agreed

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order resolving the motion for sanctions, under which Oppenheim was ordered to cease any further communication in any manner regarding Upton, whether individually or through any third party; Upton agreed to convey three pieces of jewelry to Oppenheim; and Oppenheim relinquished any remaining claim in the bankruptcy. The Panel later found that Oppenheim had deliberately and wrongfully withheld information from both the Board and Mr. Twohig relating to the motion for sanctions and the ensuing agreed order.

{18} Oppenheim has been involved in several civil disputes brought by or against his medical-legal consulting business known as coMEDco. One such action, brought by New York attorney Craig Snyder, involved coMEDco’s consulting fees. The action was settled, but the Panel later found that Oppenheim’s disclosure of the matter on his bar application was incomplete and misleading. In his application, Oppenheim stated that under the settlement agreement Snyder agreed to pay Oppenheim $13,000 in fees, but Oppenheim did not disclose the entirety of the agreement which provided that Snyder would pay Oppenheim “the lesser of $13,000 or 10% of any recovery.” Another case involved a fee dispute with Marvin Cohen, who alleged that Oppenheim had obtained his credit card information and charged him $1,500 for work that was never performed. Oppenheim claimed he had consulted with two attorneys representing Cohen, but both attorneys denied that he had ever spoken with them, and the Panel later found that he had not.

{19} Oppenheim held himself out publicly as both a physician and a lawyer, long after his medical license had been revoked and without ever having obtained a law license. For example, sometime in 2000, Oppenheim posted an advertisement on his website for coMEDco representing that he was a physician and a lawyer. He disavowed responsibility for this misrepresentation and said he did not know how it occurred. Oppenheim also authored a magazine article, published in September of 2000, representing that he had “worked” as a physician for twenty years, then becoming a lawyer,” and that he was a “[p]hysician and attorney.” These representations he blamed on the magazine’s editors. Similarly, a personal advertisement represented that Oppenheim “was a physician for nearly twenty years and then became a lawyer,” and invited the reader to view his coMEDco website. These representations Oppenheim blamed on Ms. Wright and Ms. Upton, claiming that the two of them had “doctored” the document. The Panel found that Oppenheim had deliberately or negligently presented himself to the public as a physician and a lawyer without plausible excuse, indicating a serious lack of respect for observance of the rule and spirit of the law and the legal profession.

PROCEEDINGS ON OPPEINHERM’S SECOND APPLICATION

{20} Oppenheim’s first application and the record of proceedings on that application, though not challenged at that time, are part of the record here. The record on Oppenheim’s first application is replete with instances of failure to disclose material information on his application. Indeed, at the end of those proceedings, Oppenheim himself acknowledged:

I know that you turned up a bunch of very unfavorable information at the end of this hearing. I suppose I should have read my own CV and should have prepared that better. Obviously I did not disclose fully and thoroughly and candidly and, yet again, I find myself apologizing for that. I am ashamed and humiliated. I should read my own CV and should have come forward with that information. . . . And I am sure that you’re going to deny this application, and I think that that’s just. The evidence supports that, but maybe the next time it won’t.

Oppenheim challenged those proceedings “collaterally” during the administrative hearing on his second application.

{21} Oppenheim filed his second application for admission in September of 2000, and filed several supplements to that application during the course of the Board’s proceedings. The Character and Fitness Panel ultimately conducted three evidentiary hearings on this application, but before doing so, the Panel granted three successive continuances of earlier hearing dates, all at Oppenheim’s request. The Board gave Oppenheim prior notice of the subject, purpose, time, and place of the hearings.

{22} The Board periodically assessed Oppenheim pursuant to Rule 15-105(A)(3) NMRA what the Board deemed to be its reasonable expenses, including attorneys fees and costs, in connection with its investigation and hearing on Oppenheim’s application. Oppenheim partially paid these amounts, but disputed that he was obligated to pay them.

{23} After the three hearings on Oppenheim’s second application, the Character and Fitness Panel recommended that Oppenheim be denied admission to the Bar. The Panel made Findings of Fact, Conclusions of Law and a Recommended Decision, which were adopted unanimously by the Board at its November 19, 2005 meeting. The Board also made additional Findings of Fact and Conclusions of Law.

{24} The Board concluded that Oppenheim’s conduct over a long period of time and in a wide variety of situations gave it substantial pause and concern that his admission to the Bar could be detrimental to the integrity of the Bar, the administration of justice, and the public interest. The Board took note of the past record, summarized in the Board’s findings from the 1998 proceedings, of conduct by Oppenheim calculated to “deceive, mislead, and victimize the public.”

{25} The Board observed that the issue for purposes of the present proceeding was whether Oppenheim had carried his burden of proving good moral character and rehabilitation sufficient to overcome the doubts raised by his past misconduct. The Board emphasized that the applicant “must demonstrate not only by words but also by deeds that he or she can undertake the practice of law without endangering the public or the reputation of the profession.” The Board concluded that Oppenheim had not carried this burden, but, to the contrary, he continued to engage in a pattern of deliberate deception and withholding of material information. The Board also determined that Oppenheim was obligated to pay the Board’s reasonable attorney’s fees and costs attendant to the hearings on his application for admission and found that the fees billed by the Board’s counsel at a reduced $75.00 per hour rate were necessary and reasonable. Finally, the Board recommended that Oppenheim not be permitted to reapply for admission to the Bar for at least five years.

STANDARD OF REVIEW

{26} This Court exercises its constitutional power of superintending control when it establishes and enforces standards of qualification for admission to the Bar. N.M. Const. art. VI, § 3; In re Treinen, 2006-NMSC-013, ¶ 6, 139 N.M. 318, 131 P.3d 1282. It is up to this Court to vindicate New Mexico’s “compelling interest in the calibre and integrity of persons which it allows to practice within its boundaries.” In re Adams, 102 N.M. 731, 732, 700 P.2d 194, 195 (1985). The most recent case
setting forth the standard of review for denials of admissions to the Bar was Nall v. Board of Bar Examiners, 98 N.M. 172, 646 P.2d 1236 (1982). In that case we stated as follows:

The Board’s decision is a recommendation to the New Mexico Supreme Court. The Supreme Court has the ultimate responsibility to grant or withhold an admission to practice law. Therefore, we are not bound by the Board’s findings; although, the Board’s findings are accorded great weight. This Court must independently examine and weigh the evidence and then pass upon its sufficiency. A particular case must be judged on its own merits, and an ad hoc determination in each instance must be made by this Court.

Id. at 175, 646 P.2d at 1239 (cited authority omitted). We take this opportunity to bring the standard of review articulated by Nall in line with recent developments in our standard of review in the disciplinary context. In In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905, we noted that “[b]ecause the hearing committee directly observes witness testimony, it is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence.” Id. ¶ 15. Therefore, “we view the hearing committee’s role much the same as any other fact finder that should be given deference on questions of fact.” Id. ¶ 16.

[27] The Board occupies a position in the bar admissions context parallel to that of the hearing committee in the disciplinary context, and thus we should accord a similar level of deference to the Board’s findings of fact. Because the Board directly observes witness testimony and is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence, we will defer to the Board on matters of weight and credibility, viewing the evidence in the light most favorable to the Board’s decision and resolving all conflicts and reasonable inferences in favor of that decision. See id. However, we are not bound by the Board’s legal conclusions and recommendations and will independently review such matters under a de novo standard. Id. ¶ 18.

[28] Despite the limitation on our discretion to weigh the evidence, we nevertheless retain our authority to independently decide whether the evidence is sufficient to deny an applicant admission to the bar. See id. ¶ 27 (noting that this Court retains its discretion to independently decide whether a given set of facts, viewed in the light most favorable to the decision below, warrant disciplinary sanctions). We emphasize that “no person applying for admission on motion has, under our rules, an absolute right to be admitted. [The applicant] must satisfy this court that he is qualified in all respects so as to meet the high standards of the New Mexico Bar.” Lucius v. State Bd. of Bar Exam’rs, 84 N.M. 382, 385, 503 P.2d 1160, 1163 (1972) (quoting Rask v. Bd. of Bar Exam’rs, 75 N.M. 617, 625, 409 P.2d 256, 262 (1966)).

[29] Based on our review of the record, giving the required deference to the findings below, we find that the Board’s Findings of Fact and Conclusions of Law were supported by substantial evidence. We agree with the Board’s determination that Oppenheim has not carried his burden to show that he is of good moral character and fit to practice law in this state.

**ADEQUACY OF ADMINISTRATIVE PROCEDURES**

[30] Most of the evidence of Oppenheim’s past misconduct is uncontested. Oppenheim’s main strategy to address his less than complimentary record is to claim that he is fully rehabilitated. In support of this claim, Oppenheim relies heavily on the testimony of his therapist, Ned Siegel, a clinical psychologist. Yet, Dr. Siegel repeatedly and unequivocally denied that he had any special qualification to opine on Oppenheim’s character and fitness, or that he was any better “than a man on the street” at predicting whether Oppenheim’s past misconduct is uncontested. Oppenheim also offered his own testimony in support of his rehabilitation, claiming that he “come[s] from good stock” and that he has demonstrated his motivation by “beating on this door for a long time.” However, the moral character of Oppenheim’s parents and his persistence in trying to obtain his license to practice law have little bearing on his own good moral character as required for admission to the Bar. See, e.g., In re Ayala, 112 N.M. 109, 110, 812 P.2d 358, 359 (1991) (per curiam) (“The mere passage of time or a statement that one wishes to resume a legal career will not suffice as a basis for reentry into the profession.”)). Oppenheim’s other witnesses supported his application “primarily by describing his candor and forthrightness, his honesty, his dedication and his kindness.”

Overall, however, Oppenheim presented little in the way of concrete acts or conduct that demonstrate his rehabilitation. See In re Alaya, 112 N.M. at 110, 812 P.2d at 359 (A candidate for reinstatement “bears a heavy burden and must demonstrate not only by words but also by deeds that he or she can undertake the practice of law without endangering the public or the reputation of the profession.”). The facts show the opposite—repeatedly conduct evidencing a lack of candor, honesty, or respect for the law.

[31] The bulk of Oppenheim’s arguments to this Court focus on alleged deficiencies in the administrative process and not on the factual background discussed above. Oppenheim claims that the Board frequently engaged in “trial by ambush,” failing to provide him with notice of the charges against him. Rule 15-301(C) sets forth the notice requirements for character and fitness hearings. That provision reads:

**Hearings.** The board may hold a hearing on the qualifications of any applicant. The hearing may be held by a committee of the board consisting of not less than three members of the board. The chair of the board or any member of the board appointed by the chair shall chair the committee. The applicant shall be advised of the nature of the subject and purpose of the hearing and may cross-examine witnesses, be represented by counsel and present evidence in the applicant’s behalf. A record shall be made of all committee hearings.

[32] The Board fully complied with the rule, giving Oppenheim adequate advance notice of the subject, purpose, time, and place of every session of the hearing and granting him continuances of hearing dates when he requested them. See Lucius, 84 N.M. at 386, 503 P.2d at 1164 (holding that applicant was not denied procedural due process where the Board afforded him “a full hearing with ample opportunity to present evidence and testimony in his behalf” and, in addition, the “opportunity to present documentary evidence . . . in his original application and his additional statement”). Further, most, if not all, of the issues were first raised by Oppenheim himself, by his answers to questions presented in his application for admission to the Bar or supplements thereto; the Board simply investigated these issues as it is required to do. Cf. Willner v. Comm. on Character & Fitness, 373 U.S. 96 (1963) (holding
applicant was denied due process when committee relied on ex parte statements in denying applicant’s admission and did not apprise applicant of its reasons for denial at any point in the proceedings). The record shows that the Board afforded adequate due process, and in fact went to great lengths to assure that Oppenheim knew what issues were being considered and was given every opportunity to provide an explanation. The Board ordered discovery even though no discovery was required, granted several continuances at Oppenheim’s request, and conducted three evidentiary hearings.

CONSTITUTIONALITY OF THE
GOOD MORAL CHARACTER
STANDARD

{33} Oppenheim argues that the standard of “good moral character” is unconstitutionally vague, claiming that the requirements for good moral character “are not established or itemized as a matter of law, and thus their proof is a virtual impossibility.” However, the U.S. Supreme Court has squarely rejected that contention, noting that long usage has given well-defined contours to the good moral character requirement and that all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and the U.S. Supreme Court require similar qualifications. See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159-60 (1971).

{34} Significantly, Rule 15-103, which sets forth the necessary qualifications for admission to the Bar including the good moral character standard, was amended on September 1, 2005 to include specific factors that should be considered in evaluating character and fitness of applicants. Although this amendment was not in effect at the time of Oppenheim’s application, Oppenheim states that “he welcomes consideration of his present character and fitness under the specific criteria established in Rule C(4).” Oppenheim then goes on to list “key points” that emerge when those criteria are applied. While it is true that his felony conviction occurred when he was much younger, that is about the only factor that weighs in his favor, despite his representations to the contrary in his Reply Brief. He entirely fails to address the criteria that greatly outweigh the limited evidence of his rehabilitation. Indeed, Oppenheim’s record is notable for the number of criteria that constitute grounds for further investigation: (a) unlawful conduct; (c) misconduct in employment; (d) acts involving dishonesty, fraud, deceit or misrepresentation; (e) acts which demonstrate disregard for the rights or welfare of others; (g) abuse of legal process, including filing of vexatious or frivolous lawsuits; (h) neglect of financial responsibilities and neglect of professional obligations; (i) violation of an order of a court; (l) denial of admission to the bar in another jurisdiction on character and fitness grounds (which occurred less than a year before he applied for admission to the New Mexico Bar); and (n) making of false statements, including omissions, on bar applications in this state or any other jurisdiction.

Indeed, fully 10 of the 14 criteria listed as warranting investigation by the Board are present in Oppenheim’s background —and many are not in the distant past, as Oppenheim claims.

{35} Oppenheim further asserts that the evidence of his rehabilitation is “substantial”; his positive social contributions since the conduct are “very substantial”; his candor in the admissions process was “excellent”; and any omissions were “immaterial.” These characterizations are less than credible. The only evidence Oppenheim produced of his rehabilitation was testimony from his psychologist; he provided little, if any, evidence of positive social contributions; both the Washington Board and New Mexico Board found that his candor in the admissions process was lacking; and he made several omissions that were highly material. Thus, even when we apply the more specific criteria contained in the amendment to Rule 15-103 to him, Oppenheim still falls far short of meeting the standards for character and fitness.

{36} Oppenheim compares himself to the applicant in Schware v. Board of Bar Examiners of the State of N.M., 353 U.S. 232 (1957), a man whose denial of admission to the Bar was reversed by the United States Supreme Court when that denial was predicated on the applicant’s former membership in the Communist Party. The Schware Court discussed the good moral character standard and proper and improper factors to be considered in determining whether an applicant meets that standard.

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Id. at 238-39 (footnote and cited authority omitted). Oppenheim’s suggestion that he is somehow similar to the applicant in Schware misrepresents the facts, to say the least. Far from being based on “invidious discrimination” or pervasive societal bias, the Board’s decision was based on Oppenheim’s repeated deceitful, unlawful, and unprofessional behavior. The requirements of honesty, professionalism, and compliance with the law most certainly have a rational connection with Oppenheim’s fitness to practice law; Oppenheim did not meet these qualifications. Indeed, two other professional boards in the State of Washington agreed, revoking Oppenheim’s medical license and denying his admission to the Washington Bar.

{37} Oppenheim also argues that the rules requiring proof of good moral character violate his right to equal protection. His theory is that the Court’s rules impermissibly differentiate between lawyers applying for admission to the Bar and those applying for readmission through the disciplinary process. The U.S. Supreme Court has ruled, however, that regulations governing admission to the Bar do not contravene the Equal Protection Clause of the Fourteenth Amendment provided that they have a rational connection with an applicant’s fitness or capacity to practice law. Schware, 353 U.S. at 238-39; see also Conn. v. Gabbett, 526 U.S. 286, 291-92 (1999) (holding that liberty component of Fourteenth Amendment’s Due Process Clause “includes some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable government regulation”). This Court has followed that authority. See In re Adams, 102 N.M. at 732, 700 P.2d at 195 (noting that while standards of qualification must be rationally related to applicant’s fitness or ability to practice law, this Court
has previously rejected challenges of those standards based on equal protection and due process clauses of state and federal constitutions; Lucius, 84 N.M. at 386, 503 P.2d at 1164 (“There is no evidence that the standards set forth in Schwabe . . . , in either content or operational effect, operate to arbitrarily deprive Petitioner of due process of law, or to discriminate against Petitioner in a manner which would violate his right to equal protection of the law.”).

{38} More fundamentally, Oppenheim has not shown any difference in the way the Court’s rules treat bar applicants and attorneys in disciplinary proceedings. Under the Court’s rules, the decision whether to admit an applicant to the Bar is highly dependent on the facts in that applicant’s background, resulting in “an ad hoc determination in each instance.” Nall, 98 N.M. at 175, 646 P.2d at 1239. Whether to permit an attorney to continue or resume the practice of law in the disciplinary context is likewise based on the merits of each case. In re Treinen, 2006-NMSC-013, ¶ 11. The basic question in either context is whether an individual’s practice of law will endanger the public or the reputation of the profession. Rule 15-103(C)(1); In re Treinen, 2006-NMSC-013, ¶ 11; see also In re Adams, 102 N.M. at 732, 700 P.2d at 195. Although Oppenheim argues that he should be treated the same as four individuals who were readmitted after being disciplined, he fails to show that they and he are similarly situated, and thus fails to show dissimilar treatment.

{39} Finally, Oppenheim argues that the Court’s rules impermissibly impose the burden of proving good moral character on the applicant. He acknowledges this Court’s determination in Nall that the burden of proof is properly on the applicant. Moreover, he does not specify a basis in any constitutional provision, or any other law, for concluding that Nall was wrong in its allocation of the burden of proof. Instead, Oppenheim relies on a law review article discussing the “variability and contextual nature of moral behavior” and the difficulties of predicting future conduct “based on one or two prior acts committed under vastly different circumstances.” Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 560 (1985). Professor Rhode ultimately concludes that “abandoning the enterprise has much to commend it. In essence, the bar would cease monitoring character for purposes of admitting attorneys or of disciplining nonprofessional abuses.” Id. at 589. We do not agree.

{40} While it is true that the future cannot be predicted with certainty, that is no reason to abandon the character and fitness inquiry. The Board is charged with safeguarding the state’s interest in the integrity of the legal profession, see In re Adams, 102 N.M. at 732, 700 P.2d at 195, and it must do the best it can to make determinations about an applicant’s moral character based on the evidence available to it. In this case as in most, the Board looked to Oppenheim in the first instance to present information bearing on his character. It was not unconstitutional for the Board to expect him to do so. See Nall, 98 N.M. at 175-76, 646 P.2d at 1239-40 (reaffirming that standards of qualification must have rational connection with applicant’s fitness or capacity to practice law, but that burden of proving good moral character is properly on the applicant); Lucius, 84 N.M. at 386, 503 P.2d at 1164 (rejecting due process challenge of Board’s character and fitness standards); see also Willner, 373 U.S. at 107 (Goldberg, J., concurring) (“While the vast majority of candidates are approved without difficulty, in exceptional cases, such as this, either information supplied by the applicant himself or material developed in the course of the committee’s investigation gives rise to questions concerning the applicant’s moral character.”).

{41} While we accept the Board’s recommendation that Oppenheim not be granted admission to the Bar, we decline to accept the Board’s recommendation setting a five-year limit on when Oppenheim may reapply for admission. We prefer not to specify any period of time by which Oppenheim could or could not reapply, but instead leave it to the specific facts and circumstances of any future case. In the event of another application that the Board feels may be premature, the Board can certainly bring the matter to this Court’s attention at that time.

ASSessment of attorney fees

{42} The Board found that Oppenheim was obligated to pay attorney fees and costs pursuant to Rule 15-105(A)(3) and assessed the total amount of $40,756.39. The Board determined that these costs and fees were reasonable and incurred in connection with the investigation and hearing of his application, noting in particular that the Board’s counsel’s fees were billed at the reduced rate of $75.00 per hour.

{43} Oppenheim challenges the Board’s authority to assess charges for its attorney fees incurred in connection with the investigation and hearing on his applications for admission. While Oppenheim acknowledge the Court’s rules expressly authorize the Board to assess “reasonable additional expenses to be determined by the Board of Bar Examiners, in connection with any investigations or hearings,” Rule 15-105(A)(3), he asserts that “unitimized expenses for attorney fees do not fit within the intent of this rule.” Oppenheim contends that “there is no rule or policy establishing that attorney fees for the Board’s own counsel are appropriate.” We agree.

{44} Along with standard application fees, Rule 15-105(A) allows the Board to assess “reasonable additional expenses to be determined by [the Board], in connection with any investigations or hearings.” The Rules governing Admission to the Bar do not provide any specific guidance as to what “additional expenses” may include. However, the Rules Governing Discipline list the types of costs that are permissible in a disciplinary proceeding against attorneys already admitted to practice. We find this list instructive as to the types of costs that are typically assessed in proceedings involving the fitness of both licensed attorneys and those seeking a license to practice law.

{45} This Court, or the Disciplinary Board in the case of formal reprimands, has the authority to assess “all costs incurred in a disciplinary proceeding” against an attorney who is determined to have violated the Rules of Professional Conduct. Rule 17-106(B) NMRA. These costs include, but are not limited to, “the cost of depositions, exhibits, transcripts, witnesses and the expenses of hearing committee members and members of the Disciplinary Board who participate in the proceedings.” Id. Further, “the expenses and costs of an investigation which were incurred in the handling of a disciplinary proceeding” may also be assessed against the attorney. Id. This Rule provides guidance in terms of what types of costs might be properly included in an assessment for a character and fitness hearing. The costs of a disciplinary hearing do not include legal fees for disciplinary counsel. Subsection (A) of that same rule provides that the annual salaries of disciplinary counsel are paid out of the annual disciplinary fees collected from all licensed attorneys. There is no analogous provision for the Board of Bar Examiner’s counsel in a character and fitness hearing.

{46} By way of an analogy, the recoverable costs set forth in Rule 17-106(B) for the Disciplinary Board are similar to the costs that are recoverable by a prevailing party in a civil suit. See Rule 1-054(D) NMRA. The
Rules of Civil Procedure expressly exclude attorney fees from such recoverable costs. Rule 1-054(D)(1). As a general proposition, attorney fees are not recoverable costs absent some express provision to that effect. See N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (reiterating that New Mexico follows American Rule that absent statutory or other legal authority, parties are responsible for their own attorney fees); Devous v. Wyo. State Bd. of Med. Exam'rs, 845 P.2d 408, 418-19 (Wyo. 1993) (citing the American Rule and declining to interpret “costs” of disciplinary proceedings as allowed by medical disciplinary statutes and rules to include attorney fees).

{47} By way of another helpful analogy, we observe that Rule 15-302(B) NMRA, governing applications for reinstatement after voluntary withdrawal or suspension for nonpayment of bar fees expressly allows the Board to assess “attorneys fees,” in addition to expenses and costs of the Board in connection with investigations and hearings. Thus, consistent with the general rule, attorney fees are recoverable when specifically authorized. In the absence of such express authority, the rules do not envision assessment of attorney fees, and Rule 15-105(A)(3) falls within that general proposition. Accordingly, we reject the Board’s assessment of attorney fees and remand this matter back to the Board to modify its assessment of reasonable expenses consistent with this Opinion.

CONCLUSION

{48} Accepting the Board’s recommendation, we hold that Petitioner has not carried his burden of demonstrating fitness for admission to the Bar.

{49} IT IS SO ORDERED.

RICHARD C. BOSSON,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
OPINION

PATRICIO M. SERNA, JUSTICE

{1} A district judge position in the Fifth Judicial District sits vacant because of a perceived conflict between our Governor’s constitutional authority to appoint judges from a list of qualified and recommended nominees and the Fifth Judicial District Nominating Commission’s discretion in recommending qualified nominees to the Governor. We are thus confronted with two critically important competing interests, which we must reconcile in order to comply with both the spirit and letter of our Constitution. The suit comes to us as an original proceeding in mandamus, in which the Governor petitioned this Court for a Writ of Mandamus to issue against the Fifth Judicial District Nominating Commission to require it to “convene . . . to actively solicit, accept and evaluate applications from qualified lawyers and send more than one nominee to the Governor for consideration for appointment to fill the vacancy” in the Fifth Judicial District.

{2} We hereby grant the Governor’s Petition in part and remand to the Commission to expeditiously develop and implement guidelines for the active solicitation of additional qualified applicants to fill the vacancy in the Fifth Judicial District. We further direct the Commission to make a good faith effort to submit at least two names to the Governor, after utilizing the solicitation process, in order to discharge its intertwined constitutional duties to actively solicit qualified applicants and to recommend, in its discretion, additional names to the Governor so that the Governor has before him a bona fide choice.

I. FACTS

{3} The material facts in this case are undisputed. On November 7, 2006, Dean Suellyn Scarnecchia (“Dean”), Chair of the Judicial Nominating Commission, advised Governor Bill Richardson (“the Governor”) that the Fifth Judicial District Nominating Commission (“the Commission”) would meet on January 8, 2007, to consider applications to fill the judicial vacancy created by the retirement of Judge Jay Forbes (“Judge Forbes”) of the Fifth Judicial District. On November 15, 2006, the Governor received a letter from Judge Forbes, dated November 9, 2006, advising that he would retire effective December 31, 2006. On December 14, 2006, the Governor received from the Dean the applications of five attorneys for the judicial vacancy in the Fifth Judicial District. The five applicants were Denise A. Madrid Boyea, James Richard Brown, Matthew T. Byers, Bennie George Davis, and Raymond L. Romero.

{4} The Commission convened on January 8, 2007, in Carlsbad, to consider the five applicants. Following its meeting, the Dean sent a letter to the Governor, which he received on January 10, 2007, recommending “the following one (1) candidates (in alphabetical, unranked order) for this position: James Richard Brown.” The Governor previously appointed James Richard Brown (“Brown”) to a newly created district judge position in the Fifth Judicial District; however, Brown lost his subsequent general election. On January 11, 2007, the Governor sent a letter to the Dean requesting, pursuant to Article VI, Section 36 of the New Mexico Constitution, that the Commission reconvene and submit additional names.

{5} The Commission reconvened on January 29, 2007, in Carlsbad and met for less than forty-five minutes. The Dean informed the Governor that the Commission had reviewed the original list of five applicants to “determine if any additional names from that pool should be nominated” and that “[t]he Commission voted not to nominate any additional names from the applicant pool,” as no other applicant garnered a majority vote.

{6} On January 30, 2007, the Governor wrote to the Dean stating “[t]he commission is unlawfully usurping the executive’s constitutional authority to make judicial appointments” and that “[t]here is no legitimate basis for the commission to send me only one name.” Therefore, the Governor “demand[ed] that the commis-
the other four additional names.

- On February 5, 2007, requesting “a detailed explanation of the . . . Commission’s decision not to send me more names, including the specific criteria applied to evaluate each applicant, the interviewing process, and the specific reasons why each of the other four applicants were not recommended to me” as well as “a detailed description of the voting procedure you employed as you are relying on the fact that the Commission reached a majority vote for only one applicant on both occasions.” The Dean responded on February 9, 2007, providing the information requested, including a description of the Commission’s voting procedures, as well as the Minutes of both the January 8, 2007, and January 29, 2007, Commission meetings.

- On February 22, 2007, the Governor petitioned this Court for a Writ of Mandamus to issue against the Commission to require it to “convene . . . to actively solicit and evaluate applications from qualified lawyers and send more than one nominee to the Governor for consideration for appointment to fill the vacancy created by the retirement of Judge Forbes.”

II. ANALYSIS

- This Court exercises original jurisdiction in mandamus, pursuant to Article VI, Section 3 of our Constitution, which provides in pertinent part: “The supreme court shall have original jurisdiction in . . . mandamus against all state officers, boards and commissions . . .; it shall also have power to issue writs of mandamus . . . and to hear and determine the same.” See State v. Kirkpatrick, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). “Mandamus is a drastic remedy to be invoked only in extraordinary circumstances.” State ex rel. Shell W. E&P Inc. v. Chavez, 2002-NMCA-005, ¶ 8, 131 N.M. 445, 38 P.3d 886 (quoting Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763).

- Indeed, mandamus “lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law.” Id. (quoting Brantley Farms, 1998-NMCA-023, ¶ 16). We have long recognized that mandamus is ordinarily “‘the proper remedy to compel the performance of an official act by a public officer.’” Laumbach v. Bd. of County Comm’rs of San Miguel County, 60 N.M. 226, 233, 290 P.2d 1067, 1070 (1955) (quoting Horen v. Garcia, 48 N.M. 507, 510, 153 P.2d 514, 515 (1944)).

- The issue before us is whether the Commission has a constitutional duty to actively solicit qualified applicants so as to make a good faith effort to provide the Governor with a list of more than one recommended nominee. If the Commission’s actions at issue here are purely discretionary, mandamus will not lie “to correct or control the judgment or discretion of a public officer in matters committed to his care in the ordinary discharge of his duties.” State ex rel. Four Corners Exploration Co. v. Walker, 60 N.M. 459, 463, 292 P.2d 329, 331 (1956). We are guided by the same standard we have employed since the very first days of our Statehood:

- “It is . . . well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. Id. at 463, 292 P.2d at 331-32 (citing State ex rel. Walker v. Hinkle, 37 N.M. 444, 24 P.2d 286 (1933); State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027 (1925); State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921); State v. Marron, 18 N.M. 426, 137 P. 845 (1913)).

- A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. Id. at 463, 292 P.2d at 332.

[1] We must construe our Constitution in order to determine whether mandamus properly lies. We begin with a description of the judicial nominating and appointment system set forth in our Constitution. Under our merit selection system, the governor fills judicial vacancies, defined in Article VI, Section 34 of our Constitution, by appointment, selecting from a list of names recommended by either the “Appellate judges nominating commission,” N.M. Const. art. VI, § 35, the “District court judges nominating committee,” N.M. Const. art. VI, § 36 (stating that “[e]ach and every provision of Section 35 of Article 6 of this constitution shall apply to the ‘district judges nominating committee’ except those regarding the composition of the committee), or the “Metropolitan court judges nominating committee,” N.M. Const. art. VI, § 37 (stating that “[e]ach and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee” except those regarding the composition of the committee). The Constitution states in pertinent part:

Upon the occurrence of an actual vacancy in the office of [district judge], the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

N.M. Const. art. VI, § 35 (emphasis added). In order to make its recommendation to the governor, each commission has a constitutional duty to “actively solicit, accept and evaluate applications from qualified lawyers for the position of [district judge].”

[2] After receiving the initial list, the Constitution authorizes the governor to request additional names from the commission:

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those

[1] Although Sections 36 and 37 of Article VI of our Constitution refer to nominating “committees,” for the sake of consistency, we refer to all judicial nominating bodies as “commissions.”
persons for appointment to the judicial office.

Id. (emphasis added).

{13} The Constitution then sets forth the time frame pursuant to which the governor must make his appointment: “The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of [district judge] within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office.” Id. (emphasis added).

The Constitution further makes provision for circumstances under which “the governor fails to make the appointment within that period or from those nominations.” Id. (emphasis added). In such cases, “the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court.” Id. (emphasis added).

{14} In the instant case, the Commission submitted to the Governor one name, former Judge Brown, whereupon the Governor exercised his constitutional right to request “additional names.” See id. The Commission reconvened, reviewed the five original applicants, and decided not to recommend any additional applicants to the Governor, as no other applicant garnered a majority vote of the Commission. The Governor, citing his constitutional prerogative to make the ultimate choice as to whom should fill judicial vacancies, demanded that the Commission reconvene and send him additional names. When the Dean, as Chair of the Commission, declined to reconvene the Commission, citing a lack of legal basis to do so, the Governor petitioned this Court that a Writ of Mandamus issue against the Commission to actively solicit and evaluate more applicants and to submit to the Governor more than one name.

{15} In interpreting Sections 35 and 36 of Article VI for the first time, we are faced with a question of constitutional proportions, in which the parties highlight the inherent conflict they perceive between the Governor’s right to choose from a list of qualified and recommended applicants and the Commission’s discretion in recommending qualified applicants to the Governor. We do not, however, believe this conflict is intractable, nor do we believe that it requires either the Governor or the Commission to compromise the critically important constitutional interests at stake. Our reading of Sections 35 and 36, in the context of their history and purpose, leads us to conclude that a solution is available in which both interests can be preserved and reconciled in such a way as to comply with both the spirit and letter of our Constitution.

See Bd. of County Comm’rs of Bernalillo County v. McCallah, 52 N.M. 210, 215-16, 195 P.2d 1005, 1008 (1948) (“It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities and subtle niceties to control and thereby destroy what the framers of the Constitution intended.”) (quoting State ex. rel. Ward v. Romero, 17 N.M. 88, 100, 125 P. 617, 621 (1912)).

{16} We address first the Governor’s constitutional authority to fill judicial vacancies. For most of our state’s history, our Constitution required partisan election of the entire judiciary, N.M. Const. art. VI, § 4, 12 (1911, prior to 1988 amendment); N.M. Const. art. VI, § 28 (1965, prior to 1988 amendment), with the governor filling judicial vacancies by appointment, N.M. Const. art. VI, § 28 (1965, prior to 1988 amendment); art. XX, § 4 (1911, prior to 1988 amendment). The Governor’s choice was virtually unconstrained, except for certain constitutional requirements such as age, education, and residency of appointees. N.M. Const. art. VI, §§ 8, 14 (1911, prior to 1988 amendment); N.M. Const. art. VI, § 28 (1965, prior to 1988 amendment). In 1988, the Constitution was amended to institute a merit selection system, in which the governor now fills judicial vacancies by appointment from a list of applicants who are evaluated on a variety of merit-based factors and recommended by a judicial nominating commission. N.M. Const. art. VI, §§ 35-37. The appointed judge is then subject to one partisan election in the next general election, after which he or she is subject to nonpartisan retention election, requiring a fifty-seven percent supermajority to be retained in office. N.M. Const. art. VI, § 33. In designing the merit selection system, the drafters envisioned limiting the pool from which the governor could appoint based on the merit of the applicants. The drafters did not, however, envision nor intend to foreclose the governor’s choice altogether. Indeed, the drafters were cognizant of populist concerns that moving away from partisan election to a merit selection system would divest voters almost entirely of their long-standing role in the judicial selection process. Therefore, the drafters vested the governor, as the elected representative of the people of the State of New Mexico, with ultimate authority in selecting the individual to fill a judicial vacancy. Our reading of Sections 35 and 36 strives to give effect to these populist concerns.

See In re Generic Investigation into Cable Television Servs., 103 N.M. 345, 348, 707 P.2d 1155, 1158 (1985) (“In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers.”). If we allow the Commission’s decision to prevail, in a very real sense, the Commission, and not the Governor would exercise the ultimate choice as to whom should serve the Fifth Judicial District as its judge. We cannot sanction such a result, which is at variance with the history and spirit of our Constitution.

{17} Such a result would also be discordant with the constitutional text itself. Section 35, the provisions of which apply equally to Section 36, states clearly that the commission shall provide the governor with “the names of persons qualified for the judicial office and recommended for appointment” and, after receiving “the commission nominations,” allows the governor to request “additional names.” N.M. Const. art. VI, § 35 (emphasis added). Within thirty days of receiving the commission’s “final nominations,” the governor must “appoint[] one of the persons nominated by the commission.” Id. (emphasis added). While rules of statutory construction, which apply equally to constitutional construction, establish that the use of plurals is without significance, NMSA 1978, § 12-2A-5(A) (1997); see State v. Isaac M., 2001-NMCA-088, ¶ 5, 131 N.M. 235, 34 P.3d 624, Section 35 goes beyond the mere use of plurals to

The Commission adopted the Rules Governing Nominating Commissions on April 19, 1997. Pursuant to Section 4 of the Rules, nominating commissions evaluate applicants based on the following criteria: physical and mental ability to perform the tasks required; impartiality; industry; integrity; professional skills; community involvement; social awareness; collegiality; writing ability; decisiveness; judicial temperament; and speaking ability. N.M. Const. art. VI, add. § 4.

Indeed, the Rules recognize unequivocally that “the New Mexico Constitution vests the Governor with the authority to appoint judges and that the commission does not select the judges, [so] the commission should strive to recommend a list of two or more names for each position to the Governor.” N.M. Const. art. VI, add. § 8(C).
state with unambiguous specificity that the governor must “appoint[,] one of the persons nominated by the commission.” N.M. Const. art. VI, § 35 (emphasis added). In this way, Section 35 evinces a clear intent that the governor, as representative of the people, will have before him more than one name from which he can make a bona fide choice with respect to whom shall fill the judicial vacancy. See McCulloh, 52 N.M. at 215-216, 195 P.2d at 1008. This language is particularly telling in light of the Governor’s historical power to appoint judges and the drafter’s populist concerns in creating our merit selection system. We find inapposite the Commission’s contention that if the Governor fails to appoint Brown, the Chief Justice of this Court must do so. Regardless of who makes the ultimate appointment, Section 35 envisions that person will have a list of names from which to make an actual choice.

{18} Parallel to the Governor’s right to have a list of qualified and recommended applicants from which to exercise a bona fide choice, we are equally sensitive to the Commission’s right to exercise its discretion in recommending such qualified applicants to the Governor. It is the Commission alone that decides who to recommend to the Governor. We will neither trammel upon, nor diminish in any way, that core function reposed in the Commission by our Constitution.

{19} The Commission does not, however, possess unbridled discretion but rather determines, based on a variety of factors and by a majority vote, see N.M. Const. art. VI, add. §§ 4, 8(B), which applicants are “qualified for the judicial office” and “submit[s] to the governor the names of [such] persons,” both qualified and recommended. N.M. Const. art. VI, § 35. As an integral part of its exercise of discretion in recommending qualified applicants to the Governor, the Commission has a concomitant duty, imposed by the Constitution, to “actively solicit, accept and evaluate applications from qualified lawyers for the position of [district judge].” Id. This pivotal provision immediately follows the provision establishing the composition of the Commission and immediately precedes those provisions setting forth the details and time frame under which (i) the Commission must evaluate and recommend applicants; (ii) the Governor may request more names; and (iii) the Governor must appoint one of them. The placement of this pivotal provision demonstrates the overarching and ongoing nature of the Commission’s duty.

{20} In this case, the Governor exercised his constitutional right to request more names from the Commission. Thereupon, the Commission reconvened but considered only the original list of five applicants, four of whom the Commission had already decided, in exercising its discretion, not to recommend for judicial office. The Commission did not renew its announcement of the judicial vacancy in the Fifth Judicial District, nor do anything else to discharge its duty to “actively solicit . . . qualified lawyers.” We respectfully disagree with the Commission and the dissent that this duty applies only to the initial announcement that the judicial vacancy exists and does not apply to the Commission’s duty to reconvene and consider submitting additional names to the Governor, if he so requests. Dissent ¶¶ 34-35. If we adopted such an interpretation, we would, in effect, be dictating the exercise of the Commission’s discretion by requiring the Commission to recommend an applicant it already determined should not be recommended, thus sanctioning an unrealistic and irrational reading of the provision. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (“[O]ur construction must not render the [Constitution’s] application absurd, unreasonable, or unjust.”) (quoting Aztec Well Servicing Co. v. Prop. & Cas. Ins. Guar. Ass’n, 115 N.M. 475, 479, 853 P.2d 726, 730 (1993)).

{21} While the initial announcement, application, and evaluation process runs on a strict thirty-day time frame, Section 35 directs the Commission to act “promptly” in submitting “additional names” to the Governor. The Governor’s deadline for appointment only begins to run once he receives “the final nominations” from the Commission. These distinct time frames evince an intent that the Commission has a reasonable time within which to complete the substantial process of soliciting and evaluating additional qualified applicants; reevaluating, in the Commission’s discretion, the original applicants; and sending a final list of recommended applicants to the Governor. The Constitution thus envisions that the Commission will, in good faith, utilize such a process to allow the Governor to have before him a bona fide choice of qualified and recommended applicants.

{22} We acknowledge that the type of active solicitation of qualified applicants we describe here has not become part of the established custom of past commissions, nor of the Commission which is party to this suit. We intend no disparagement of past commissioners, nor of the present Commission, for following over fifteen years of custom. Nonetheless, this is the Court’s first opportunity to address this question in a formal manner, and in doing so, we are bound to follow the letter and spirit of the Constitution, whether or not consistent with custom. In interpreting Sections 35 and 36 for the first time, we conclude that the Commission failed to discharge its constitutional duty of active solicitation which is inextricably intertwined with its constitutional duty to make all reasonable efforts to provide the Governor with additional names upon request. We, therefore, respectfully disagree with the dissent’s contention that the Governor “can identify within the text no express obligation that the Commission failed to perform.” Dissent ¶ 30. When the Governor requested additional names so that he could discharge his constitutional authority to appoint a judge, from among a pool of qualified applicants recommended by the Commission, the Commission was constitutionally duty bound to actively solicit additional qualified applicants. Nevertheless, the Commission only considered the original five applicants at its second meeting and again determined that it could only recommend Brown. Because the Commission failed to discharge its constitutional duty of active solicitation, the Governor is left with no choice and is thus precluded from discharging his constitutional authority to select and appoint a qualified and recommended person to fill the vacancy in the Fifth Judicial District.

{23} Some may perceive this conflict as creating a constitutional impasse. However, our reading of Sections 35 and 36 reveals a system designed to deal with precisely the situation we confront here, and today we breathe life into that constitutional design. Based on the text, history, and purpose of Sections 35 and 36, we have a system in which the Governor’s choice in judicial appointment is tempered and limited by the Commission’s discretion in determining which qualified applicants should be recommended for judicial office. However, the Governor also has a constitutional right to request that the Commission expand that pool to other qualified persons. The only way the Commission can do so is by discharging its constitutional duty to actively solicit qualified applicants. Our reading of Sections 35 and 36, unlike that of the dissent, thus avoids rendering mere surplusage the constitutional provision mandating active solicitation by the Commission. See
Block v. Vigil-Giron, 2004-NMSC-003, ¶ 9, 135 N.M. 24, 84 P.3d 72. The drafters never had in mind, nor can we sanction, a reading of Sections 35 and 36 in which the Commission would expand the pool only to applicants the Commission had already decided, by a majority vote, should not be recommended. See Rowell, 121 N.M. at 114, 908 P.2d at 1382. Ultimately, the fundamental purpose of Sections 35 and 36 was to create a judicial selection system based on the merit of the applicants. In the past, the importance of active solicitation, indeed the constitutional mandate to actively solicit qualified applicants, may have been overlooked, but this mandate shall henceforth require adherence thereto.\(^4\)

III. CONCLUSION

{24} We, therefore, hold that mandamus lies and, accordingly, grant the Governor’s Petition in part. We remand to the Commission to expeditiously develop and implement guidelines to discharge its constitutional duty to actively solicit additional qualified applicants to fill the vacancy in the Fifth Judicial District. We further direct the Commission to make a good faith effort to submit at least two names to the Governor, after utilizing the solicitation process, in order to discharge its intertwined constitutional duties to actively solicit qualified applicants and to recommend, in its discretion, additional names to the Governor so that the Governor has before him a bona fide choice.

{25} **IT IS SO ORDERED.**

PATRICIO M. SERNA, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

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

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

{26} I respectfully dissent from the proposed result and from much of the analysis in the majority opinion. I disagree with my colleagues that we have the authority to do what the Governor has requested. The Governor has asked us to order the Fifth Judicial District Nominating Commission to convene a third time and to send him an additional qualified nominee for the existing vacancy in the Fifth Judicial District. In addition, or perhaps alternatively, he asks us to direct the Commissioners to reconvene to satisfy their obligation to solicit additional applicants or make a further investigation “into the qualifications of pending candidates.”

{27} The majority opinion appears to concede our inability to order the Commission to send more than one name. With that concession, for the reasons that follow, I agree. The majority, to its credit, seeks to identify a resolution to the conflict between the Governor’s interpretation of his power and the Commission’s interpretation of its responsibilities under the New Mexico Constitution. The majority would order the Commission to reconvene, because when the Governor requested additional names, the Commission was required by the constitution “to actively solicit additional qualified applicants.” Maj. Op. ¶ 22. With this conclusion, I do, respectfully, disagree.

{28} Because the text of the constitution is important, I have included it as an appendix to this opinion. Other than those who have served on nominating commissions or applied for consideration by a nominating commission, few New Mexico citizens will have read the entire text of the relevant constitutional amendment, and the text as a whole is important. The Governor relies on our power to issue a writ of mandamus, which I believe is more limited than does the majority, and which in any event depends on the clarity of the obligations established by the constitution.

{29} “This Court exercises constitutionally invested original jurisdiction in mandamus against all State officers, boards and commissions.” *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974); accord N.M. Const. art. VI, § 3. In the past, we have exercised our original jurisdiction in mandamus when one branch of government interferes with the authority of another branch of government. See *State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55.

Such an exercise may be appropriate when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

Id. The Governor contends all these factors are present in this case. The Governor further asserts that mandamus is defined to include an order directing the restoration of rights or privileges of which the claimant asserts he has been illegally deprived. See *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977). The Governor maintains this Court should “restore” his right to choose a judicial appointee. Ultimately, the Governor argues that the action of the Commission in sending only one name, if sustained in this proceeding, effectively precludes his having a choice of appointee and “ewiscerate[s his] appointive authority.”

He argues that: mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, even though the officer be required to exercise judgment before acting. A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.

*State ex rel. Reynolds v. Bd. of County Comm’rs*, 71 N.M. 194, 198-99, 376 P.2d 976, 979 (1962) (quoting *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 331-32 (1956)) (internal citations omitted). The Governor contends the Commission’s failure or refusal to reopen the application process and actively solicit additional candidates, or to reassess the additional four applicants not selected for recommendation when he exercised his constitutional right to request additional nominees, also infringes upon his appointment power.

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\(^4\)The constitutional mandate that commissions actively solicit qualified applicants signals the urgency of creating standing commissions with terms, a responsibility reserved to the Legislature. Further, standing commissions may indeed avoid inconsistent voting on applicants, an issue alluded to in this suit.
The Governor’s reliance on his appointment power is misplaced. The Constitution provides that the Governor may request additional names, and the Commission shall submit “such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment” to the Governor. N.M. Const. art. VI, § 35 (emphasis added). The Commission did not make such a finding when it reconvened.

The Commission was acting within the text of the amendment when it determined to recommend only one name initially and to send no additional name or names after the Commission reconvened. The Governor asks us to “compel the performance of an act which the law specially enjoins as a duty resulting from an office.” N.M.S.A. 1978, § 44-2-4 (1884). Yet he can identify within the text no express obligation that the Commission failed to perform. The Commission performed its express constitutional obligation when its Chair announced the vacancy, initiated the application process, conducted interviews, evaluated the candidates, voted on who should be recommended to the Governor, and sent him the list. See N.M. Const. art. VI, add. §§ 2, 4, 6-9. In fact, the Commission’s duty, as mandated by the Constitution, is to submit only “the names of persons qualified for the judicial office and recommended . . . to that office” which must be determined “by a majority of the commission.” N.M. Const. art. VI, § 35 (emphasis added). I think a majority of this Court agrees that we cannot compel the Commission to send more than one name. At the heart of the Commission’s obligations is the responsibility to provide the Governor a list from which he can choose without fear of choosing badly. That is what I believe the Legislature and the people of this State intended.

According to Section 4 of the Judicial Nominating Commission Rules, the commissioners must evaluate candidates on the basis of the constitutional requirements and specifically enumerated evaluative criteria including physical and mental ability to perform the tasks required, impartiality, industry, integrity, professional skills, community involvement, social awareness, collegiality, writing ability, decisiveness, judicial temperament, and speaking ability. N.M. Const. art. VI, add. § 4. These factors indicate that the constitutional duty and authority of the Commission is discretionary and not ministerial, making mandamus inappropriate. In fact, the Commission would have been acting outside the bounds of its authority and duty had it simply sent the Governor additional names of candidates it had already determined, by a majority vote, were unqualified for appointment.

The majority’s decision to require the Commission to reconvene and solicit further candidates seems to me equally inappropriate. The deliberate balance of power which the 1988 amendment to the Constitution tried to achieve, as expressed in the text, is not facilitated by the majority’s decision. Prior to 1988, the Governor had virtually unfettered discretion to appoint whomever he chose for judicial vacancies. The Legislature chose when it enacted the 1988 amendment to limit the Governor’s appointment power in the judicial nomination process, to strike a balance of power between a judicial nominating commission and the Governor, and it elected not to include a requisite number of names to be sent to the Governor from each commission.

The majority offers three reasons for its decision to require the Fifth Judicial District Nominating Commission to reconvene. First, it suggests we have an obligation to protect the Governor’s power of appointment. Maj. Op. ¶ 16. Second, the majority relies on the use of the plural within Section 35, in reference to the Commission’s obligations, the Governor’s power of appointment, and the obligation of the Chief Justice if the Governor does not appoint in a timely fashion. Id. ¶ 17. Finally, the majority opinion relies on placement of the obligation of the Commission to solicit applications within Section 35, in the second full paragraph, “demonstrating the overarching and ongoing nature of the Commission’s duty.” Id. ¶ 19.

With respect, none of the three reasons offered by the majority seem compelling, and none of them justify diminishing the discretion of each nominating commission. As the majority acknowledges, id. ¶ 17, “the use of plurals is without significance.” Further, the majority opinion relies on the “clear intent that the governor, as representative of the people, will have more than one name from which he can make a bona fide choice with respect to whom shall fill the judicial vacancy.” Id. I think we must determine what the Legislature intended, and practices of the nominating commissions since 1988, as well as the text of Section 35 that make the scope of the Governor’s power unclear. It is worth noting that the Governor has two appointments to the Commission who can argue for his preference(s) during the voting process, if he directs them to do so. Finally, the placement of the second paragraph of Section 35 seems to me to emphasize a duty of soliciting applicants prior to the date the Commission convenes. That language is not repeated after the reference, in the last paragraph, to the Governor’s right to solicit more names.

For these reasons, I do not think the majority has made a case for the result it reaches. One could say that the majority opinion grants half of the relief the Governor has requested, in an effort to support the greater likelihood that he will achieve the ultimate goal of receiving at least one additional name. Yet, we do not seem to have the power or authority to issue a writ of mandamus under our existing cases to compel the commissioners to act in accordance with the Governor’s petition. I would deny the writ. My colleagues being of a different view, I respectfully dissent.

PAMELA B. MINZNER,
Justice

APPENDIX A

§35. Appellate Judges Nominating Commission

There is created the “appellate judges nominating commission”, consisting of: the chief justice of the supreme court or the chief justice’s designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the University of New Mexico School of Law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties
be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. Any person appointed shall serve until the next general election. That person’s successor shall be chosen at such election and shall hold the office until the expiration of the original term.

N.M. Const. art. VI, §35

§36. District Court Judges Nominating Committee

There is created the “district court judges nominating committee” for each judicial district. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the “district judges nominating committee” except that: the chief judge of the district court of that judicial district or the chief judge’s designee from that district court shall sit on the committee; there shall be only one appointment from the court of appeals; and the citizen members and state bar members shall be persons who reside in that judicial district.

N.M. Const. art. 6, §36.

§37. Metropolitan Court Judges Nominating Committee

There is created the “metropolitan court judges nominating committee” for each metropolitan court. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee except that: no judge of the court of appeals shall sit on the committee; the chief judge of the district court of the judicial district in which the metropolitan court is located or the chief judge’s designee from that district court shall sit on the committee; the chief judge of that metropolitan court or the chief judge’s designee from that metropolitan court shall sit on the committee only in the case of a vacancy in a metropolitan court; and the citizen members and state bar members shall be persons who reside in the judicial district in which that metropolitan court is located.

N.M. Const. art. 6, § 37.
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You are a talented, experienced law office administrator wanting to “downsize” to about 20-25 hours per month. We are a single lawyer office needing more hands. Keep checkbooks, maintain administrative files, help with mailings. Send letter of inquiry, resume, to debrah@lynnmckeever.com.

Request for Applications
City of Albuquerque
Legal Secretary Position
LEGAL SECRETARY: Legal secretary position available in the Trial Division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Associate’s degree in Business Administration or related field, plus three (3) years of secretarial experience to include two (2) years as a Legal Secretary. Related education and experience may be interchangeable. Apply online at www.cabq.gov. Application deadline is June 15, 2007.

Request For Proposals
General Counsel Services
Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA)
The Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA) invites law firms and attorneys with offices located in the Greater Albuquerque area, to submit proposals in accordance with the specifications contained in the Request for Proposals (“RFP”). Services will be required in the following areas of law: Area of Law, % Effort: Real Estate and Condemnation, 30%; Contracts and Agreements, 30%; Environmental / Water Law, 10%; Inter-governmental Affairs, 10%; Personnel and Administration, 10%; Construction Law, 10%. It is also estimated that about 30-40 hours per month are required to perform these services. A copy of the Scope of Services and complete RFP can be obtained from the AMAFCA office located at 2600 Prospect, NE, Albuquerque, NM 87107, or via AMAFCA’s website at www.amafca.org. Proposals must be submitted to AMAFCA in six (6) copies by 2:00 p.m. (local time) on July 10, 2007.AMAFCa reserves the right to reject any or all proposals and to waive any informality or technicality in any proposal. /s/ John P. Kelly, P.E., Executive Engineer, Albuquerque Metropolitan Arroyo, Flood Control Authority. Bar Bulletin: June 11 and 18, 2007.

Litigation Paralegal
Castle Meinhold & Stawiarski seeks experienced paralegal for its residential foreclosure and creditor bankruptcy practice in its new Albuquerque office. Excellent opportunity for committed, hard working individual. Certification preferred, but experience may be substituted for certification. Two years minimum legal experience required. Benefits include health, dental, retirement. Salary is dependent on experience. Qualified candidates only. Fax resume, salary requirements and recent writing sample to 505-848-9516.

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Licensed in multiple states experienced in Federal and State courts. Offers his services to help those in need of extra skills and help in litigation, employee law, as well as toxic torts, environmental, insurance coverage, charitable contributions, equitable distribution, and creditor bankruptcy practice in its new Albuquerque office.

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New Office Space
Near Jefferson/McCloud intersection; one large, two small offices with large conference room, easy access to I-25. Call Sue @ 883-8787.

Professional Office
Furnished, professional office located in the residential/business district of NOB Hill. $500/month. Call 235-0262.

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