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Special Insert:
IOLTA News

www.nmbar.org
Join us for this full day special event as we explore the key lessons of advocacy coming from The Negotiator’s Fieldbook, a brand new ABA bestseller co-edited by Professor Andrea Schneider of Marquette University Law School. Schneider will be joined by Professor Joanne Lipo Zovic also of Marquette University Law School. Together, Schneider and Zovic will extract the most notable highlights from the book in an effort to turn theory into better everyday practice. Each attendee will receive a complimentary copy of this new ABA bestseller – a $79.95 value.

8:00 a.m. Registration
8:30 a.m. Keys To Effective Advocacy
9:30 a.m. Assertiveness--Making Your Case
         Persuasively
10:15 a.m. Break
10:30 a.m. Assertiveness (continued)
           Noon        Lunch (provided at the State Bar Center)
1:00 p.m.  Empathy--What Are They Actually Saying
           And Why?
2:30 p.m.  Break
2:45 p.m.  Flexibility & Finding An Agreement
4:00 p.m.  Adjourn

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 #______________________________
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City/State/Zip _______________________________________________________________________________
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E-mail _______________________________________________________________________________________
Purchase Order (Must be attached to be registered) Check enclosed $__________ Make check payable to: CLE
Credit Card # ___________________________ Exp. Date ________________
Authorized Signature ____________________________________________________________
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☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ________  Make check payable to: CLE
Credit Card # ________________________  Exp. Date ________________
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23RD ANNUAL FAMILY LAW INSTITUTE
Caring For the Child: What’s Best for Children in a Family Law Case?

Friday and Saturday, October 19-20, 2007 • State Bar Center, Albuquerque
10.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Co-Sponsor: Family Law Section

FRIDAY OCTOBER 19, 2007
8:25 a.m. Introductory Remarks
Elege Simons Harwood, Esq., Simons & Slattery LLP
Chair, Family Law Section

8:30 a.m. A Child’s View
Screening of video “Voices of Children”
Barbara Ellen Handschu, Esq., Attorney at Law, Mayerson Stutman LLP, Buffalo, New York; Past-President, American Academy of Matrimonial Lawyers; Founding Diplomate, American College of Family Trial Lawyers; Founding Fellow, International Academy of Matrimonial Lawyers

10:00 a.m. Break

10:15 a.m. Discussion of Joint Legal Custody
Peter M. Walzer Esq., Founding Partner, Walzer & Melcher LLP; President, Southern California Chapter, American Academy of Matrimonial Lawyers; Immediate Past Chair, State Bar of California Family Law Section Executive Committee

12:15 p.m. Lunch (provided at the State Bar Center)

1:15 p.m. Update on Guardian Ad Litem Statute
Gerard J. Lavelle, Esq., Offices of Gerard J. Lavelle

2:15 p.m. Break

2:30 p.m. Ins and Outs of CSED
Elizabeth Price, Esq., Regional Managing Attorney New Mexico Human Services Department

3:30 p.m. Various Avenues Available In A Custody Case
Carol Herrera, Family Court Services, First Judicial District Court
Mercedes Reisinger-Marshall, PhD, Board Certified Forensic Examiner, Family Court Clinic, Albuquerque
Theresa Miller, PhD, Private Custody Evaluator, Albuquerque
Louis R. Levin, PhD, Clinical Psychologist, Santa Fe

5:00 p.m. Adjourn and Reception (State Bar Center Lobby)

SATURDAY OCTOBER 20, 2007
8:30 a.m. Using Divorce and Child Development Research to Develop Age-Appropriate Parenting Plans
Moderator: Elege Simons Harwood
Joan B. Kelly, Ph.D., Clinical and Research Psychologist
Assistant Clinical Professor, UC San Francisco; Distinguished Author of Surviving the Breakup: How Children and Parents Cope with Divorce; Founder and former Executive Director, Northern California Mediation Center; Past President, Northern California Mediation Association; President, California Dispute Resolution Institute; Past President, Academy of Family Mediators

10:30 a.m. Break

10:45 a.m. Using Divorce and Child Development Research to Develop Age-Appropriate Parenting Plans (continued)
Joan B. Kelly, Ph.D. (continued)

11:45 a.m. Ethics Presentation – title pending (1.0 E)
Professor Antoinette Sedillo Lopez, UNM School of Law Chair, New Mexico Legal Aid Board of Directors
Maria Garcia-Geer, Esq., Gerwissel & Levy PA
Hon. Raymond Z. Ortiz, First Judicial District Court

12:45 p.m. Lunch (provided at the State Bar Center)

1:45 p.m. Professionalism Presentation – title pending (1.0 P)
Antoinette Sedillo Lopez, Maria Garcia-Geer and Hon. Ray Ortiz

2:45 p.m. Adjourn

Friday and Saturday, October 19-20, 2007 • State Bar Center, Albuquerque
10.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Co-Sponsor: Family Law Section

Standard Fee $309  •  Family Law Section Member, Government, Legal Services Attorney, Paralegals $299
2007 EMPLOYMENT & LABOR LAW INSTITUTE

Friday, October 12, 2007 • State Bar Center, Albuquerque

6.0 General CLE Credits

Co-Sponsor: Employment & Labor Law Section

☐ Standard Fee $169  ☐ Employment & Labor Law Section Member, Government, Legal Services Attorney, Paralegal $159

8:30 a.m.  Registration
9:00 a.m.  EEOC v. BCI Coca Cola: The “Cats Paw” Theory of Liability
T. Harold Pinkley, Esq., Miller & Martin, LLC, Nashville, TN
10:00 a.m.  Break
10:15 a.m.  Employee Conduct Outside the Workplace: A Question of Control and Consequence
Ben Feuchter, Esq., Keleher & McLeod, P.A.
Lynn E. Mostoller, Keleher & McLeod, P.A.
11:00 a.m.  Employment Law: A View from the Bench: Employment Jury Instructions
Hon. Linda M. Vanzi, 2nd Judicial District Court

Noon  Lunch (provided at the State Bar Center)

1:00 p.m.  Employment Law Update
S. Charles Archuleta, Esq., Keleher & McLeod, P.A.
Carlos M. Quinones, Esq., Quinones Law Firm

2:00 p.m.  Break
2:15 p.m.  Labor Law Update
Private Sector
Danny Jarrett, Esq., Noeding & Jarrett, P.C.
Public Sector
K. Lee Peifer, Esq., University of New Mexico

3:00 p.m.  Adjourn

TUESDAY, OCTOBER 16TH VIDEO REPLAYS

Defending Computer Crime Cases
4.2 General Credits
8:30 a.m. – 12:45 p.m.
☒ $139

Road and Access Law
3.0 General Credits
9:00 a.m. – 12:00 p.m.
☒ $109

How To Prepare and Defend A Medical Malpractice Case
3.0 General Credits
1:00 p.m. – 4:00 p.m.
☒ $109

Order in the Court
(excerpt from 2007 Annual Meeting of Employment and Labor Law Section)
1:30 p.m. – 2:30 p.m.
☒ $49

Independence of the Judiciary
(excerpt from 2007 Annual Meeting of Employment and Labor Law Section)
1:00 p.m. – 3:00 p.m.
1.0 General Credit

FOUR WAYS TO REGISTER

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

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Credit Card # ____________  Exp. Date ____________
Authorized Signature __________________________
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• Professionalism Tip •

With respect to the public and to other persons involved in the legal system:
I will be mindful of my commitment to the public good.

Meetings

October

8 Taxation Section Board of Directors, noon, via teleconference
9 Criminal Law Section Board of Directors, noon, State Bar Center
10 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
11 Public Law Section Board of Directors, noon, Risk Management Division
11 Business Law Section Board of Directors, 4 p.m., State Bar Center
12 Employment and Labor Law Section Annual Meeting, noon, State Bar Center

State Bar Workshops

October

17 Lawyer Referral for the Elderly Workshop 10 a.m., Mora Senior Center, Mora
18 Lawyer Referral for the Elderly Workshop 10 a.m., Las Vegas Senior Center, Las Vegas
24 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center
25 Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
26 Lawyer Referral for the Elderly Workshop 1:15 p.m., Meadowlark Senior Center, Rio Rancho

Cover Artist: Jack Atkins (www.jackatkins.com) paints the Southwest’s intense desert light, its spectacular vistas, and the people and things that create its sense of place. This fourth-generation New Mexican uses vivid colors and dramatic compositions to tell the story of this area’s underlying sense of drama and history. Atkins’ paintings are in a contemporary realist style. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
Proposed Revisions to the Uniform Jury Instructions For Criminal Cases

The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court’s consideration. To comment on the proposed amendments, send written comments to:

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

Comments must be received by the clerk on or before Oct. 15 to be considered by the Court. For reference, see the Sept. 24 (Vol. 46, No. 39) Bar Bulletin.

Second Judicial District Court
National Adoption Day

The 2nd Judicial District Court, Children’s Court Division, will be celebrating National Adoption Day on Nov. 17. Clients having an adoption pending in Bernalillo District Court are invited to participate. Contact Nancy Sandstrom in Judge M. Monica Zamora’s office, (505) 841-7392.

U.S. Tenth Circuit Court of Appeals Rule Amendments

Effective Jan. 1, 2008, the 10th Circuit Court of Appeals will amend its local rules. In addition, there is one change to the Federal Rules of Appellate Procedure which will take effect on Dec. 1. Interested parties are invited to submit comments on the proposed changes to the clerk of court. The comment period will extend through the close of business Oct. 10. Comments may be submitted in writing to Clerk of Court, 10th Circuit Court of Appeals, 1823 Stout Street, Denver, CO 80257; or via e-mail to 10th_Circuit_Clerk@ca10.uscourts.gov. Below is a link to a memo regarding the proposed rules changes as well as links to

Destruction of Exhibits and Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court 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 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.

1st Judicial District Court
(505) 476-0196
Exhibits in criminal, civil, children’s court, domestic, incompetency/mental health and probate cases, 1973–1991
May be retrieved through Nov. 2

2nd Judicial District Court
(505) 841-7596/5452
Exhibits in criminal cases, 1977–1989
Exhibits in domestic cases, 1960–1991
May be retrieved through Oct. 18
May be retrieved through Nov. 29
both redlined and non-redlined versions of the proposed amendments:

**U.S. District Court for the District of New Mexico**

**Entry of Appearance Changes**

Beginning Oct. 1, attorneys will no longer be able to self-associate to parties during the filing process in CM/ECF, except for the filing of initiating documents. All attorneys participating in a case who were not appointed by the Court or who do not appear in the initiating document, must file an entry of appearance. See D.N.M.LR-Civ.83.4 and D.N.M.LR-Cr.44.1. For more information, visit the Court’s Web site, www.nmcourt.fed.us.

### STATE BAR NEWS

#### 2007 Section Elections

Section elections have begun. Members of any of the 19 State Bar practice sections interested in obtaining a position on any of the boards of directors should visit www.nmbar.org and select Divisions/Sections, Committees, Sections, Section Elections to view the open positions and contact information for the nomination committee chair. Candidates should be prepared to submit a three-to-five sentence biography.

### Appellate Practice Section

#### Annual Meeting

The Appellate Section will hold its annual membership meeting at 1 p.m., Oct. 18, at the Office of the State Engineer located in the Concha Ortiz y Pino Building, 130 South Capitol St., Santa Fe (across from the Bataan Building). The legal conference room is on the second floor, and there is parking immediately behind the building. Contact Chair Caren Friedman, cfe@appel latecounsel.info or (505) 466-6418, to place an item on the agenda.

### Attorney Support Group

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

### Board of Bar Commissioners Election Notice

Notice is hereby given that the 2007 election of six commissioners for the State Bar of New Mexico will be held Nov. 30 as provided for in Supreme Court Rule 24-101, Rules Governing the New Mexico Bar and the State Bar of New Mexico Bylaws, Article IV. Five positions are three-year terms, and one position is a one-year term.

Nominations to the office of State Bar commissioner shall be by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is the respective district. Members of the State Bar may nominate and sign for more than one candidate. Expiring terms, the nomination petition and more information are available in the Sept. 17 (Vol. 46, No. 38) issue of the Bar Bulletin or on-line at www.nmbar.org.

Nomination petitions are to be mailed to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 and must be received by 5 p.m., Oct. 19, to allow for the reproduction of the ballots.

### Casemaker and Excel Training

Plan to attend a one-hour Casemaker training (1.0 general CLE credit) from 2:30 to 3:30 p.m., Oct. 18, at the State Bar Center. Casemaker is free online legal research offered to active State Bar members and Paralegal Division members.

A Basic Excel class will be held in the Computer Lab from 3:45 to 4:45 p.m. sponsored by the Technology Committee. This program does not offer CLE credit.

Call (505) 797-6000 to register. Indicate which program you wish to attend.

### Committee on Women and The Legal Profession

#### Lunch Meeting

The Committee on Women and the Legal Profession will host a meeting from noon to 1:30 p.m., Oct. 11, in the second floor conference room at the Flying Star Cafe, 723 Silver Ave. SW, Albuquerque. The meeting will feature Judge Rosie Allred and Judge Sandra Engel, both of the Bernalillo County Metropolitan Court. This meeting is part of a series of lunches featuring members of the State Bar who will share their experiences with the demands of practicing law while balancing the needs of raising a family. The meeting is open to everyone, and all are invited to attend. Lunch is ordered off the restaurant menu with payment made directly to Flying Star. The Committee has arranged for coffee, iced tea, fountain drinks and gratuity to be covered for all who attend the luncheon, but advance reservations are requested. To confirm attendance no later than Oct. 8, R.S.V.P. to Patty Galindo, pmsgalindo@comcast.net.

### Employment and Labor Law Section

#### Annual Meeting and CLE

The Employment and Labor Law Section will hold its annual meeting at noon during lunch, Oct. 12, in conjunction with the 2007 Employment and Labor Law Institute at the State Bar Center. The meeting will consist of a review of the year’s accomplishments, discussion of goals for the upcoming year and an overview of the 2007 section board election. Agenda items should be sent to Chair Charles Archuleta, sca@keleher-law.com, or call (505) 346-4646. The cost of the CLE program is $169; $159 for section members, government attorneys and paralegals. Lunch will be provided and attendees will earn 6.0 general CLE credits.

To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

### Health Law Section

#### Annual Meeting and CLE

The Health Law Section will hold its annual meeting at 12:45 p.m., Oct 18, in conjunction with the 2007 Health Law Symposium. All section members are encouraged to attend. Agenda items are to be sent to Chair George Koinis, gfkoinis@swcp.com (505) 244-4110.

The cost of the CLE program is $179; and $169 for section members, government and legal services attorneys and paralegals. See the CLE At-A-Glance insert in the Sept. 17 (Vol. 46, No. 38) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.
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 Mistake People Make in Probate Cases (Oh the Trouble I’ve Seen), presented by the Honorable Merri Rudd, Bernalillo County probate judge. The program will be held from noon to 1 p.m., Oct. 10, 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.

Prosecutors Section Annual Meeting

The Prosecutors Section will hold its annual membership meeting at noon, Nov. 15, at the State Bar Center. Lunch will be provided to those who R.S.V.P. by Nov. 13 to membership@nmbar.org. Contact Chair Stephen Kovach, skovach@da.state.nm.us, to place an item on the agenda.

Young Lawyers Division Dismas House Project

The Young Lawyers Division is sponsoring the 2nd Annual Tools for Success Program for Dismas House, a transitional home with a family atmosphere for nonviolent parolees who are transitioning back into society. YLD is seeking volunteer attorneys to provide training sessions to Dismas House residents on Oct. 17 on Restoration of Driver’s License. Contact Briana Zamora, bhzamora@btblaw.com, to volunteer.

Hispanic National Bar Association Breakfast at the HNBA

Join the Hispanic National Bar Association for its Breakfast at the HNBA CLE series on Representing the Immigrant Client: Criminal Proceedings and Implications for Legal Status. Included is a presentation from the Honorable Chief Judge Martha Vázquez, of the U.S. District Court for the District of New Mexico. The program will include both criminal and civil issues arising from the representation of immigrant clients and will include presentations from various speakers, including one of New Mexico’s leading immigration attorneys, Mary Ann Romero, Esq., and the Chief Pretrial Probation Officer for the United States District Court Anita Chavez.

The Breakfast at the HNBA will be held from 9 a.m. to noon, Oct. 19, at The Lodge at Santa Fe. General CLE credits (2.7) are included.

Registration fees: general, $150; government/public interest, $100; HNBA members, $125; and law students, $50.

For additional information, contact HNBA Region XV President Chuck García, charles.garcia@PNMResources.com or (505) 241-4939.

N.M. Criminal Defense Lawyers Association CLE Program

The New Mexico Criminal Defense Lawyers Association will present I Saw What You Did Last Legislature, a DWI Defense Seminar, (6.75 general CLE credits) from 8:30 a.m. to 5:30 p.m., Oct. 19, at the UNM School of Law. The seminar will be moderated by Ousama Rasheed, Esq. Register at www.nmcdla.org, e-mail nmcdladir@aol.com, or call (505) 992-0050.

N.M. Defense Lawyers Association Annual Meeting

The New Mexico Defense Lawyers Association will hold its annual meeting on Oct. 18 at the National Hispanic Cultural Center, Albuquerque. Mouse Clicks Instead of Papercuts: Technology in Trial Preparation and Ethics and Voir Dire in Jury Selection will be presented by Kevin C. Schiferl, Esq., of Locke Reynolds, Indianapolis. A judges panel, consisting of the Honorable John W. Pope, the Honorable Robert H. Scott and the Honorable Leslie C. Smith, will present Professionalism in the Courtroom: Dos and Don’ts of Voir Dire (3.0 general, 1.0 professional and 1.0 ethics CLE credits available). The Outstanding Civil Defense Lawyer of the Year Award will be presented to Thomas A. Sandenaw, Jr., and the Distinguished Service Award will be presented to Sarah Bradley. Register for a full or half day. For full details, visit www.nmcdla.org.

UNM School of Law 2005-2006 Student Writing Competitions

The UNM Law School is pleased to announce the winners of the 2005-2006 Student Writing Competitions. Thirty-eight entries were judged by 22 lawyers. The three winning papers have a money prize. The winners are as follows:

Helen S. Carter Prize
Timothy Atler
“Tolerated Terror”

Don G. McCormick Prize
Margaret Romero
“Killing with Kindness”

Raymond W. Schowers Prize
S. Meredith Morris
“On Miranda and Misinterpretation”

Thesis Honors
Richard Cravens
David Meilleur
Brandt Milstein
Ocean Tama Y Sweet
Carlos Ruiz de la Torre

For the first time this year, UNM Law graduate Chris Lee, of the Rodey Law Firm, coordinated the judging of the papers. In addition to fellow lawyers at Rodey, attorneys from the Modrall and the Sutin firms reviewed the papers and selected the winners. Lee took over this role from Jeff Crossdell.

This year’s judges were Kim Bell, Sandi Beerle, Susan Bisong, Jason Bousliman, Suzanne Wood Bruckner, Sue Chappell, Jeff Crossdell, William (Dooley) Gilchrist, Helen Hecht, Chris Holland, Wade Jackson, Andrew Knight, Chris Lee, David Lee, Joan Marsan, Victor Montoya, Brian Nichols, Todd Rinner, Andrea Robeda, Amanda Sanchez, Travis Steele and Chris Wolpert.
Corinne Wolfe Children's Law Center Regional Cross-Training

A day-long program, Engaging Families and Preserving Connections: Best Practices in Children's Court, will take place in five locations this fall:

- Albuquerque Oct. 12,
- Roswell Oct. 26,
- Gallup Nov. 2,
- Santa Fe Nov. 9, and
- Las Cruces Nov. 30.

This program will focus on foster parent and youth participation in court proceedings, open adoption, and mediated post-adoption contact agreements. Sponsors include the Supreme Court’s Court Improvement Project; the Children, Youth & Families Department and the Corinne Wolfe Children’s Law Center, UNM Institute of Public Law. For more information, visit http://ipl.unm.edu/childlaw or call (505) 277-9170.

Databases Available to Bar Members

The Law Library provides public access to a comprehensive database of U.S. Supreme Court records and briefs covering 1832-1978. Topics include the Court’s interpretation of the Constitution and its amendments, states’ rights and national sovereignty, business and labor law, civil rights and gender law, and much more.

Mexican American Law Student Association Annual Golf Tournament

The Mexican American Law Student Association is sponsoring its 8th Annual Golf Tournament Oct. 13 at the UNM Championship Golf Course. The tournament is MALSA’s primary fundraiser and its proceeds help support Hispanic and other minority students in New Mexico from high school through law school. To register for the tournament or to help sponsor, visit lawschool.unm.edu and click on “Upcoming Events/8th Annual MALSA Golf Tournament.”

Student Bar Association Annual Fund-Raising Auction

The UNM School of Law Student Bar Association invites the legal community to its annual auction to be held at the law school at 6 p.m., Oct. 9. The auction is one of the primary means of support SBA receives in order to function as a professional organization. The SBA provides support to students for law-related travel, professional development training and social events. The continued support of alumni and other attorneys from throughout the state is much appreciated. Call (505) 277-2342 for additional information and to donate money or auction items.

Software Tutorials for State Bar Members and Support Staff

Free software tutorials for State Bar members and their support staff will be offered every Friday at the State Bar Center Computer Lab through the end of the year (excluding Nov. 16 and Nov. 23). Only one space is available for each tutorial, but all seven will be available every Friday. Space will be reserved on a first-come first-serve basis. Each tutorial is 3½ to 4 hours in length and participants are encouraged to start by 9 a.m. to provide ample time to finish.

PowerPoint

Participants learn the fundamentals of PowerPoint at their own pace in a relaxed learning environment. Topics include creating presentations; entering or formatting text; viewing the presentation; creating text boxes, auto shapes, animations, and charts; importing spreadsheets; and more.

Call (505) 797-6039 or e-mail vcordova@nmbar.org to reserve a spot. Leave your name, phone number, e-mail address, the date you wish to attend, and the title of the program you are interested in so confirmation can be sent.

State Bar Center Computer Lab

Provided by the Law Office Management Committee
Equal Access to Justice
2006–2007 Annual Campaign Report

Equal Access to Justice is a 501(c)(3) organization composed of private attorneys who raise money from the private bar to fund access to justice in New Mexico. Donations from New Mexico attorneys help to fund: New Mexico Legal Aid, New Mexico Center on Law and Poverty, Law Access New Mexico and DNA-People’s Legal Services. Equal Access to Justice promotes these four civil legal service providers and conducts fundraising from the private bar on their behalf. Equal Access to Justice has a Campaign Director who coordinates campaign activities and administers financial recordkeeping. Equal Access to Justice has completed the first year of a three year transition to become a part of the State Bar of New Mexico Foundation. The statement below is an unaudited annual campaign report from March 31, 2006 to April 1, 2007 for the donors of Equal Access to Justice.

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<th>NET REVENUE</th>
<th>$ 15,410</th>
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<td>(reserved for 07-08 campaign start-up)</td>
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<table>
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<th>ADMINISTRATIVE EXPENSE and NET REVENUE RATIO</th>
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<td>OPERATING EXPENSE RATIO</td>
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<tr>
<td>PROGRAM SERVICES RATIO</td>
<td>70% (60% is non-profit standard)</td>
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Equal Access to Justice Board of Directors
James J. Mason, President, Charles M. Purcell, Vice-president, Ruth M. Schifani, Treasurer Secretary, Bryan Biedscheid, Jason Burnette, Russell Elliott, Robert Desiderio, Levon Henry, Joseph M. Holmes, Thomas W. Olson, Kim Posich, Ruth O. Pregenzer, Conrad Rocha, Timothy M. Sheehan, William Strouse, Kate Mulqueen, Campaign Director
New Admittees Sworn In to State Bar

Sept. 27 will be remembered as a special day to the 188 men and women who were sworn in to the State Bar at Kiva Auditorium. The tradition was once again repeated with . . .

Family . . .

Signing the Roll of Attorneys . . .

Presentations to the Court . . .

Clerk's Certificate of Admission
September 27, 2007
See page 18
In Memoriam

Preface To Remarks By Chief Justice and Associate Justices September 27, 2007

New Attorney Swearing In Ceremony

Today’s ceremony will be dedicated to the memory of Justice Pamela B. Minzner. Our distinguished colleague passed away on August 31, 2007, after a valiant battle with cancer. Justice Minzner was a professor at the University of New Mexico School of Law, and served as a Judge on the New Mexico Court of Appeals for 10 years and as a Justice on the New Mexico Supreme Court since 1994. She also served a term as Chief Justice, the first female Chief Justice in the history of New Mexico.

As is the tradition, to conclude the ceremony you will hear from each member of the New Mexico Supreme Court. Today those remarks will center around our true friend and dear colleague, Pam Minzner. These remarks will be published in Volume 141 of the New Mexico Reports, and Volume 141 will be dedicated to her memory. We know you will draw inspiration from our fond memories of Justice Pamela Minzner.

For New Mexico Reports, Volume 141

Membership and Communications Director Chris Morganti (left) answers questions and provides information about the State Bar.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Duration</th>
<th>Type</th>
<th>Sponsor</th>
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<td>Oct 8</td>
<td>Ethical Standards and Government Lawyering</td>
<td>2.0 E</td>
<td>TRT</td>
<td>Center for Legal Education of NMSBF</td>
<td>Las Cruces</td>
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<td>Professionalism—Practicing Law Without Fear</td>
<td>1.0 E, 1.0 P</td>
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<td>Las Cruces</td>
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<td>Oct 10</td>
<td>Quarterly Estate and Gift Planning Update</td>
<td>1.0 G</td>
<td>TRT</td>
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<td>4th Annual Elder Law Seminar</td>
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<td>Success as a Lawyer: What It Means and How to Achieve It and Judicial Elections</td>
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<td>How to Prepare and Defend a Medical Malpractice Case</td>
<td>3.0 G</td>
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<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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**Notes:**
- G = General
- E = Ethics
- P = Professionalism
- VR = Video Replay
- Programs have various sponsors; contact appropriate sponsor for more information.
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<th>16</th>
<th>Defending Computer Crime Cases</th>
<th>17</th>
<th>Scientific Evidence—Practical Solutions to Real World Problems</th>
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<td>Teleconference TRT 2.0 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>State Bar Center Health Law Section ABA Health Law Section ABA Commission on Women in the Profession Center for Legal Education of NMSBF 5.2 G, 1.2 E (505) 797–6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>Internet—Things Lawyers Should Know About It</td>
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<td>Buying and Investing in Distressed Assets: An Interdisciplinary Guide to a Troubled Market</td>
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<td>Order in the Court [Excerpt from 2007 Annual Meeting]</td>
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<td>Design Law for NM Architects and Engineers</td>
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<td>Albuquerque Halfmoon, L.L.C. 6.0 G (715) 835-5900</td>
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<td>16</td>
<td>Road and Access Law</td>
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<td>Ethics and Voir Dire in Jury Selection and Professionalism in the Courtroom: Judges Panel</td>
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<td>National Hispanic Cultural Center NMDA 1.0 E, 1.0 P (505) 797-6021 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>17</td>
<td>Ethics for Tax Professionals Satellite Broadcast Edward Jones 1.8 E (800) 441-2018</td>
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<td>Mouse Clicks Instead of Paper Cuts: Technology in Trial Preparation</td>
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<td>Arbitration—Theory and Practice</td>
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<td>When Politics Tip the Scales of Justice Teleconference TRT 2.0 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></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 October 8, 2007**

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<td>30,672</td>
<td>State v. Urioste</td>
<td>(COA 27,106) 9/27/07</td>
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<td>30,671</td>
<td>State v. Gomez</td>
<td>(COA 27,213) 9/26/07</td>
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<td>State v. Anaya</td>
<td>(COA 27,112) 9/26/07</td>
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<td>State v. Carver</td>
<td>(COA 27,679) 9/26/07</td>
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<td>Jones v. NM Human Services Dept.</td>
<td>(COA 27,848) 9/26/07</td>
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<td>State v. Anaya</td>
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<td>State v. Gomez</td>
<td>(COA 27,213) 9/26/07</td>
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<td>State v. Fernandez</td>
<td>(COA 26,262) 9/24/07</td>
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<td>State v. Hubble</td>
<td>(COA 26,452) 9/24/07</td>
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<td>Garcia v. Country Commissioners</td>
<td>(COA 26,340) 9/24/07</td>
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<td>Gonzalez v. Ulibarri</td>
<td>(12-501) 9/21/07</td>
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<td>30,660</td>
<td>State v. Chavez</td>
<td>(COA 27,274) 9/21/07</td>
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<td>State v. Heredia</td>
<td>(12-501) 9/20/07</td>
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<td>State v. Nick R.</td>
<td>(COA 27,145) 9/19/07</td>
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<td>30,657</td>
<td>Durham v. Guest</td>
<td>(COA 26,123) 9/19/07</td>
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<td>30,656</td>
<td>State v. Pacheco</td>
<td>(COA 24,154) 9/19/07</td>
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<td>State v. Belanger</td>
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<td>(COA 26,226) 9/17/07</td>
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<td>(COA 26,493) 9/12/07</td>
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<td>Vallejos v. State</td>
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<td>NM Public Schools v. Gallagher</td>
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<td>State v. Shirley</td>
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<td>State v. Tafoya</td>
<td>(COA 25,920) 9/6/07</td>
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<td>Sutphin v. LeMaster</td>
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<td>State v. Kincaid</td>
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<td>30,624</td>
<td>Duran v. Martin</td>
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### Certiorari Granted but not yet Submitted to the Court:

(Parities preparing briefs)

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<td>State v. Cardenas</td>
<td>(COA 26,238) 8/29/06</td>
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<td>State v. O’Kelly</td>
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<td>State v. Armendariz</td>
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Submission Date

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Slip Opinions for Published Opinions may be read on the Court’s Web site:  
Clerk's Certificate of Admission

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<td>Richard Harris Lilley, Jr.</td>
<td>2000 2nd Street South, Ste.12 Arlington, VA 22204-1959</td>
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<tr>
<td>Regina Kuang Rong Liou</td>
<td>8649 West Payson Road Tolleson, AZ 85353-7632</td>
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<tr>
<td>Orlando R. Lopez</td>
<td>1615 Broadway Street San Antonio, TX 78215-1823</td>
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<tr>
<td>Walter Merrill Lowney</td>
<td>10448 Chandler Drive, NW Albuquerque, NM 87114-5627</td>
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<tr>
<td>Elaine Patricia Lujan</td>
<td>2276 Don Felipe Road, SW Albuquerque, NM 87105-6563</td>
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<tr>
<td>Jose Vicente Lujan</td>
<td>80 East Rio Salado Parkway, Suite 305 Tempe, AZ 85281-9104</td>
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<tr>
<td>Steven Robert Maher</td>
<td>631 West Morse Boulevard, Suite 200 Winter Park, FL 32789-3775</td>
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<tr>
<td>Joseph Voy Marchman, II</td>
<td>909 North Guadalupe St., #2 Carlsbad, NM 88220-5611</td>
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<tr>
<td>Lawrence M. Marcus</td>
<td>Cadigan Law Firm, P.C. PO Box 7718 707 Broadway Boulevard, NE, Suite 301 (87102) Albuquerque, NM 87194-7718 (505) 830-2076 (888) 830-2076 (505) 830-2385 (telex)</td>
<td></td>
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</tr>
<tr>
<td>Daniel Marquez</td>
<td>3204 Opitz Road Anthony, NM 88021-8962</td>
<td></td>
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### Clerk Certificates

<table>
<thead>
<tr>
<th>Name</th>
<th>Address 1</th>
<th>Address 2</th>
<th>Contact Information</th>
</tr>
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<tr>
<td>Dakota Martin</td>
<td>4932 Butte Place, NW</td>
<td>Albuquerque, NM 87120-4400</td>
<td></td>
</tr>
<tr>
<td>Mollie C. McGraw</td>
<td>3683 Ascencion Circle</td>
<td>Las Cruces, NM 88012-7676</td>
<td></td>
</tr>
<tr>
<td>Timothy H. McLaughlin</td>
<td>PO Box 51</td>
<td>Prewitt, NM 87045-0051</td>
<td></td>
</tr>
<tr>
<td>David Meilleur</td>
<td>116 Harvard Drive, SE #15</td>
<td>Albuquerque, NM 87106-3558</td>
<td></td>
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<tr>
<td>Tiffany Mercado</td>
<td>720 Vassar Drive, NE</td>
<td>Albuquerque, NM 87106-2724</td>
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<tr>
<td>C. Paige Messec</td>
<td>301 Central Avenue, NE, #107</td>
<td>Albuquerque, NM 87102-3887</td>
<td></td>
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<tr>
<td>Christopher R. Mills</td>
<td>2020 North McKinley Street</td>
<td>Hobbs, NM 88240-3435</td>
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<tr>
<td>James Scott Newton</td>
<td>135 Cottonwood Canyon Road</td>
<td>La Luz, NM 88337-9336</td>
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<tr>
<td>Kelcey C. Nichols</td>
<td>2840 Pueblo Bonito</td>
<td>Santa Fe, NM 87607-2533</td>
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<tr>
<td>Eric D. Norvell</td>
<td>1826 Aliso Drive, NE</td>
<td>Albuquerque, NM 87110-4904</td>
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<tr>
<td>Cody E. O’Brien</td>
<td>12019 Flat Rock Court, NW</td>
<td>Albuquerque, NM 87114-4257</td>
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<tr>
<td>Erin O’Connell</td>
<td>1408 Wellesley Drive, NE</td>
<td>Albuquerque, NM 87106-1135</td>
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<tr>
<td>Kenneth Kyuhan Oh</td>
<td>243 Florida Avenue, NW, #1</td>
<td>Washington, D.C. 20001-1864</td>
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<tr>
<td>Sandra Lizeth Olives</td>
<td>126 Fountain Oaks Circle, #188</td>
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<tr>
<td>Kelly P. O’Neill</td>
<td>3817 Tracy Street, NE</td>
<td>Albuquerque, NM 87111-4024</td>
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<tr>
<td>Brendan O’Reilly</td>
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<tr>
<td>Charles S. Parnall</td>
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<tr>
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</tr>
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<td>Charles James Piechota</td>
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<tr>
<td>Aaron Javier Piñon</td>
<td>4801 Lang Avenue, NE, #200</td>
<td>Albuquerque, NM 87199-4475</td>
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<tr>
<td>Julie Kay Reagan</td>
<td>216 Sangre de Cristo</td>
<td>Cedar Crest, NM 87008-9525</td>
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<tr>
<td>Carol Kirk Rodriguez</td>
<td>1832 Calle Barberita, NW</td>
<td>Albuquerque, NM 87107-5650</td>
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<tr>
<td>Amanda M. Romero</td>
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<td>Santa Fe, NM 87505-5563</td>
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<tr>
<td>Anthony Roybal-Mack</td>
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<td>Albuquerque, NM 87104-2199</td>
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<tr>
<td>Renee Ruybal</td>
<td>317 Rincon Court, NW</td>
<td>Albuquerque, NM 87105-1664</td>
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<tr>
<td>R. Joaquin Sanchez</td>
<td>5013 San Luis Place, NW</td>
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<tr>
<td>Sara N. Sanchez</td>
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<td>Joshua L. Smith</td>
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<td>Deming, NM 88030-9344</td>
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<td>Nicholas S. Soleyn</td>
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<tr>
<td>Lucy Boyadjian Solimon</td>
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<tr>
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<td>Iris A. Thornton</td>
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## Clerk Certificates

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<thead>
<tr>
<th>Name</th>
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<th>Phone Numbers</th>
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<td><strong>Katherine A. Wray</strong></td>
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<td>(505) 841-5100 (505) 841-6953 (telecopier)</td>
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</table>
Grantee Focus: Advocacy Inc. “there” for Grandma

Eleanor came to Advocacy, Inc. with three young grandsons. One mother was missing and the other in prison; the fathers were absent, deceased or unknown.

CYFD referred Eleanor to Advocacy—finding the boys living on the street, not attending school and eating out of trash cans. Advocacy helped Eleanor obtain legal guardianship in 2006.

Eleanor and the boys regularly attend our monthly dinners, accessing our support services. Advocacy connected her with family counseling, speech therapy, food, and other partner services.

Eleanor reports, “The boys are doing great with near perfect attendance in their elementary school. Grades are better, they’re in after school activities and behavior has improved.” Gio is an honor student, enrolled in dance class and learning to play the recorder; Mike is a gifted math student; and, Dom at six has developed a great sense of humor. All diagnosed with ADHD, they now take medication and regularly see their family doctor, school counselor and a therapist outside of school.

“Parenting as a grandparent is tough and scary. Once you see their faces you just have to (do it), and it becomes comfortable. I love them,” she says. “Advocacy is there for me.”

Beth Collard, Director of the NM Guardianship Project

CCV Board OKs $300K for 2008 IOLTA Grants

At its August meeting, the Directors of the Center for Civic Values approved a staff recommendation to provide funding of $300,000 for the 2008 grant cycle. This brings the budget to its highest level since 1992. “We’re doing what we can to help narrow the gap between the needs of the poor and the funding that is available to them,” says Board Chair David Berlin.

New Mexico nonprofits that provide civil legal services for the poor, law-related education for the public or improvements in the administration of justice are eligible to apply. Applications will be available online at civicvalues.org on October 1 and are due November 1.

Other key changes include: (1) removal of language from the criteria that favored funding of programs over operations; and, (2) cooperation between IOLTA and the State Bar’s Pro Hac Vice fund, which will use nearly identical forms to make the application process simpler for potential grantees. This change will allow programs that apply to both entities to certain financial documents only to IOLTA, which will make them available to the State Bar, if needed.
National News and Notes

Missouri Passes Mandatory Rule

Missouri will become the 33rd state to adopt mandatory IOLTA, pursuant to an order issued by the Supreme Court of Missouri on August 21, 2007. The court approved revisions to Missouri’s IOLTA rule that will require attorneys who handle client trust funds to participate in the IOLTA program beginning January 1, 2008. The revisions adopted by the court also include an IOLTA interest rate comparability requirement. Under that provision, lawyers will be required to place their IOLTA accounts at a financial institution that pays those accounts the highest interest rate or dividend generally available at the institution to other, non-IOLTA customers when the IOLTA accounts meet the same minimum balance or other requirements. The Missouri Lawyer Trust Account Foundation expects that both rule changes will increase IOLTA revenues in the state.

From the ABA’s Commission on IOLTA

Honor Roll of Financial Institutions

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

1st National Bank in Las Cruces
AmBank
Bank 1st
Bank of Albuquerque
Bank of the Rio Grande
Bank of the Southwest at T or C
Century Bank of Santa Fe
Charter Bank
**Citizens Bank of Las Cruces
City Bank NM
Community Bank of Santa Fe
Compass Bank
First Community Bank
First Financial Credit Union
First National Bank in Alamogordo
First National Bank of Artesia
First National Bank in Las Vegas
First National Bank of New Mexico
First National Bank in Roswell
First National Bank of Santa Fe
**First Savings Bank of Alamogordo
Four Corners Community Bank
Grants State Bank
Ironstone Bank
Lea County State Bank
Los Alamos National Bank
Mesilla Valley Bank
My Bank
New Mexico Educators Federal Credit Union
Peoples Bank
Pinnacle Bank of Gallup
Pioneer Bank
Portales National Bank
**Roswell National Bank
State National Bank
Sunrise Bank of Albuquerque
The Bank of Clovis
Union Savings Bank
US New Mexico Federal Credit Union
Valley Bank of Commerce
Valley National Bank
VectraBank
Wells Fargo Bank New Mexico
Western Bank of Alamogordo
Western Bank of Clovis
Western Commerce Bank

** We extend a warm welcome to the latest financial institutions to join the IOLTA Honor Roll!
Thanks for Your Interest!

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

Advocates for Community & Environment
Amavalise V. Jaramillo
Arlon L. Stoker LLC
Baker Law Office LLC
Barbara Buck
Barbara Rowe
Bleus & Associates LLC
Catron Catron & Pottow PA
Cervantes Law Firm PC
Charles J. McElhinney Trust Account
Charles P. Reynolds Attorney
Comeau Maldegen Templeman & Indall LLP
Daniel M. Faber
Daniel R. Lindsey, PC Trust Account
Darlan Gathtings
David A. Archuleta Trust Account
David R. Lee Attorney Trust Account
Davis Miles PLLC
Diane Webb Attorney at Law PC
Donald D. Vigil PC Trust Account
Edward Bustamante
Edward Justin Pennington
Erin Sumrall Van Soelen
Garrett Law Office Trust Account
Hawk Law PA
Herb Kraus Attorney at Law
Houston Ross Attorney at Law Trust Account
Ilyse D. Hahs Brooks
Jalynn M. Clayton Attorney at Law Trust
James E. Fitting
James T. Roach Trust Account
Jeff C. Lahann Attorney at Law
Jill L. Marron Attorney at Law
John G. Travers Attorney at Law LLC
John M. Greacen Trust Account
John P. Cosentino
John P. Faure PA
John V. Nilan LLC
John W. Higgins IOLTA
Joseph K. Daly
Joshua D. Boone Attorney at Law
Joshua Mann
Joshua R. Simms PC
Jud A. Cooper Trust Account
Jurgens & With PA Trust Account
K. Jan Peterson Attorney at Law
Karen L. Solomon
Kenneth R. Boiarsky PC
Kirby Alan Wills Client Trust Account
Law Office of J. Miles Hanisee LLC
Luebben Johnson & Barnhouse LLP
Lynn Mckeever Legal Advisor
Michelle Warren Law LLC
Narvaez Law Firm PA
Patricia Toler Attorney at Law
Peter A. Keys Trust
Peter A. Keys Trust
Quinones Law Firm
Ray Sage Law Firm PC
Sherry Jean Tippett
Sheryl L. Saavedra LLC
Smith Moore & Berenson LLC
Susan C. Little & Associates PA
Szantho Law Firm PC
The Hon. Grace B. Duran
The Krupnik Law Firm
The Law Offices of Michael C. Ross LLC Trust Account
Thompson Rose & Hickey PA
Timothy A. Vollman
Timothy L. Rose
Vera Ockenfels
Vigil Law Firm
Witter Tidmore Attorney at Law PC

IOLTA Grant Committee

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

CCV Appointees
John P. Hays, Esq.
Kathy Silva

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

“"We have become more convinced than ever of the legal and moral obligation to provide adequate legal counsel to all our citizens. It is shocking that we have celebrated the 200th anniversary of the United States Constitution without yet assuring equal access to justice in our land.”

Benjamin L. Cardin
United State Senator, Maryland
If you’re an attorney in private practice with a trust account that isn’t enrolled in IOLTA, you’re missing out on one of the easiest ways available to help your fellow citizens. Participation is easy and free! PLEASE complete the form below and take it to your financial institution today.

Authorization to Financial Institutions

I hereby direct any financial institution in which I maintain or the firm maintains a pooled client trust account reflected on the reserve side of this form to convert the account automatically and without further documentation to an interest-bearing IOLTA account subject to Rule 16-115(D) of the Rules of Professional Conduct, and to:

a) REMIT interest or dividends, net of any service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution’s standard accounting practice, at least quarterly, to the Center for Civic Values which shall hold such funds as trustee;

b) TRANSMIT with each remittance to the Center for Civic Values a report showing the name of the lawyer or law firm for whom the remittance is sent, the earnings period and the rate of interest applied;

c) TRANSMIT to the depositing lawyer or law firm at the same time a statement showing the amount paid to the Center, the rate of interest applied, and the average account balance of the period for which the report is made; and,

d) REPORT on any required IRS Forms W-9 and 1099 that the Center for Civic Values, taxpayer identification number 85-6018573, is the recipient of the interest.

**LAWYER/LAW FIRM** Please Print or Type

Lawyer/Law Firm Name

Account Name/Account Number

Authorized Account Signatory Date

Signatory’s Printed Name

Address

City, State Zip

Phone/Extension, Fax, E-Mail

Contact Name

**FINANCIAL INSTITUTION** Please Print or Type

Financial Institution Name

Address

City, State, Zip

Phone/Extension, Fax, E-Mail

Contact Name

NOTE TO FINANCIAL INSTITUTIONS:
Remit interest by mail to IOLTA, PO Box 2184, Albuquerque NM 87103-2184, or remit interest by electronic transfer to IOLTA account #00-0108-410051 at Bank of America, PO Box 25500, Albuquerque NM 87125.
NO. 07-8300-23


ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Evidence Committee to adopt amendments to Rules 11-803, 11-804, and 11-902 NMRA and to adopt new Rule 11-807 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring, Justice Pamela B. Minzner not participating;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 11-803, 11-804, and 11-902 NMRA of the Rules of Evidence hereby are APPROVED;

IT IS FURTHER ORDERED that new Rule 11-807 NMRA hereby is ADOPTED;

IT IS FURTHER ORDERED that the amendments of Rules 11-803, 11-804, and 11-902 NMRA and adoption of new Rule 11-807 NMRA of the Rules of Evidence shall be effective for cases filed on or after November 1, 2007; and

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

DONE at Santa Fe, New Mexico, this 28th day of August, 2007.

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

(not participating)

11-803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

A. Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

B. Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

C. Then existing mental, emotional or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant’s will.

D. Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

E. Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

F. Records of regularly conducted activity. A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Paragraph K of Rule 11-902 NMRA or Paragraph L of Rule 11-902 NMRA, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

G. Absence of entry in records kept in accordance with the provisions of Paragraph F. Evidence that a matter is not included in the memoranda, reports, or data compilations, in any form, kept in accordance with the provisions of Paragraph F, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

H. Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth

1. the activities of the office or agency,
2. matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or
3. in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

I. Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to requirements of law.

J. Absence of public record or entry. To prove the absence of a record, report, statement or data compilation, in any form, or
the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 11-902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

K. Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

L. Marriage, baptismal and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

M. Family records. Statements of fact concerning personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like.

N. Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

O. Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

P. Statements in ancient documents. Statements in a document in existence twenty (20) years or more the authenticity of which is established.

Q. Market reports, commercial publications. Market quotations, tabulations, lists, directories or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

R. Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

S. Reputation concerning personal or family history. Reputation among members of a person’s family by blood, adoption or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history.

T. Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries or of customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which it is located.

U. Reputation as to character. Reputation of a person’s character among associates or in the community.

V. Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

W. Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[As amended effective November 1, 2007.]

Committee Commentary

The added language to Paragraph F is taken from a similar change in 2000 to federal rule 803(6). The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming but non-substantive foundation witnesses. Corresponding changes have been made to Rule 11-902 NMRA.

Eliminating the identical “catch-all” exception in Paragraph X of this rule and Subparagraph (5) of Paragraph B of Rule 11-804 NMRA and combining them in new rule 11-807 NMRA, with no intended change in meaning, tracks the 2000 amendments to the corresponding federal rules.

11-804. Hearsay exceptions; declarant unavailable.

A. Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant:

1. is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

2. persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

3. testifies to a lack of memory of the subject matter of the declarant’s statement; or

4. is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

5. is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under Subparagraphs (2), (3) or (4) of Paragraph B, the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

B. Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony
is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

(2) **Statement under belief of impending death.** A statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.**
   - A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry or other similar fact of personal or family history even though declarant had no means of acquiring personal knowledge of the matter stated; or
   - a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

(5) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

[As amended, effective April 1, 1976; December 1, 1993; January 1, 1995; as amended by Supreme Court Order 07-8300-23 effective November 1, 2007.]

**Committee Commentary**

Eliminating the identical “catch-all” exception in Subparagraph (5) of Paragraph B of this rule and Paragraph X of Rule 11-803 NMRA and combining them in new rule 11-807 NMRA, with no intended change in meaning, tracks the 2000 amendments to the corresponding federal rules.

The new exception added to Subparagraph (5) of Paragraph B is taken verbatim from federal rule 804(b)(6), which was adopted in 1997, and reflects a substantial body of state and federal case law. See, e.g., *State v. Romero*, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (2004). It would lessen a party’s ability to benefit from intentionally making a witness unavailable.

**NEW RULE**

11-807. Residual exception.

A statement not specifically covered by Rule 11-803 NMRA or Rule 11-804 NMRA but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that

A. the statement is offered as evidence of a material fact;
B. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
C. the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

[Approved effective November 1, 2007.]

**Committee Commentary**

This new “catch-all” hearsay exception provision applies to Rule 11-803 NMRA and Rule 11-804 NMRA and replaces the redundant provisions previously repeated in both of those rules.

11-902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

A. **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Panama Canal Zone, or the trust territory of the Pacific islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

B. **Domestic public documents not under seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in Paragraph A hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

C. **Foreign public documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position

(1) of the executing or attesting person, or
(2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

D. **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph A, B or C of this rule or complying with any statute or any Supreme Court rule.

E. **Official publications.** Books, pamphlets or other publications purporting to be issued by public authority.

F. **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.
G. **Trade inscriptions and the like.** Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

H. **Acknowledged documents.** Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

I. **Commercial paper and related documents.** Commercial paper, signatures thereon and documents relating thereto to the extent provided by general commercial law.

J. **Presumptions under statutes.** Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.

K. **Certified Domestic Records of Regularly Conducted Activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Paragraph F of Rule 11-803 NMRA if accompanied by a written declaration of its custodian or other qualified person, certifying that the record

  1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

  2) was kept in the course of the regularly conducted activity; and

  3) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

L. **Certified Foreign Records of Regularly Conducted Activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Paragraph F of Rule 11-803 NMRA if accompanied by a written declaration by its custodian or other qualified person certifying that the record

  1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

  2) was kept in the course of the regularly conducted activity; and

  3) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

[Amended effective November 1, 2007.]

**Committee Commentary**

New Paragraphs K and L incorporate the provisions added to the federal rule on self-authentication that were added to the federal rules in 2000, setting forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 11-803(F) NMRA. The notice requirements are intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Rules of Appellate Procedure Committee to adopt amendments to Rules 12-213, 12-302, 12-305, 12-306, and 12-502 of the Rules of Appellate Procedure hereby are APPROVED;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 12-213, 12-302, 12-305, 12-306, and 12-502 of the Rules of Appellate Procedure hereby are ADOPTED;

IT IS FURTHER ORDERED that new Rule 12-305.1 NMRA of the Rules of Appellate Procedure hereby is ADOPTED;

IT IS FURTHER ORDERED that the amendments of Rules 12-213, 12-302, 12-305, 12-306, and 12-502 NMRA and adoption of new Rule 12-305.1 NMRA of the Rules of Appellate Procedure shall be effective for cases filed on or after November 1, 2007;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the above-referenced amendments and adoption of new Rule 12-305.1 NMRA by publishing the same in the Bar Bulletin and the NMRA.

DONE at Santa Fe, New Mexico, this 28th day of August, 2007.

Chief Justice Edward L. Chávez
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Richard C. Bosson
Justice Pamela B. Minzner
(not participating)


A. Brief in chief. The brief in chief of the appellant, under appropriate headings and in the order herein indicated, shall contain:

(1) a table of contents, which shall list each section heading and the page on which that section begins. The appellant may raise issues in addition to those raised in the docketing statement or statement of the issues unless the appellee would be prejudiced.

(a) When the transcript of proceedings is an audio recording, following the listing of section headings, the table of contents shall include either a statement of the name of the manufacturer and model of the device used in citing references to the transcript, together with a statement of how many counters or units are on one side of a tape when that tape is played on the device (e.g., Sony BM-25 with 730 counters per tape side), or a statement that the transcript citations conform to the official log.

(b) When the transcript of proceedings is a digital or other electronic recording, following the listing of section headings, the table of contents shall include a statement that references to the recorded transcript are by elapsed time from the start of the recording (e.g., “Tr. 10:25” indicates a point occurring ten minutes and twenty-five seconds after the start of the recording)

(c) If the brief exceeds the page limitations contained in subparagraph (2) of Paragraph F of this rule, following any statement regarding the method of citing the transcript, the table of contents shall include a statement of compliance as required by Paragraph G of this rule.

(2) a table of authorities, arranged in separate headings for each type of authority cited, listing cases alphabetically (New Mexico decisions separately from decisions from other jurisdictions), statutes and other authorities, with page references;

(3) a summary of proceedings, briefly describing the nature of the case, the course of proceedings and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review. Such summary shall contain citations to the record proper, transcript of proceedings or exhibits supporting each factual representation. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(4) an argument which, with respect to each issue presented, shall contain a statement of the applicable standard of review, the contentions of the appellant and a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings or exhibits relied on. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(5) a conclusion containing a precise statement of the relief sought.

B. Answer brief. The answer brief of the appellee shall conform to the requirements of the brief in chief, except that a summary of proceedings shall not be included unless deemed necessary.

C. Reply brief. The appellee may file a brief in reply to the answer brief. Such brief shall conform to the requirements of Subparagraphs (1), (2) and (4) of Paragraph A, and shall reply only to arguments or authorities presented in the answer brief.

D. Supplemental briefs and authorities.

(1) Except for those briefs specified in this rule, no briefs may be filed without prior approval of the appellate court.

(2) When pertinent and significant authorities come to the attention of counsel after counsel’s brief has been filed, or after oral argument but before decision, counsel shall promptly advise the appellate court clerk, by letter and without argument, with a copy to all counsel, setting forth the citations and attaching a copy thereto, if available. The letter shall refer either to the page of the
brief or to a point argued orally to which the citations pertain.

E. **Citations.** All authorities shall be cited in accordance with Rule 23-112 NMRA.

F. **Length, preparation and service of briefs.** The requirements of Rule 12-305 NMRA apply to briefs.

1. **Body of the brief defined.** The body of the brief in chief, answer brief, amicus brief, or reply brief consists of headings, footnotes, quotations and all other text except the cover page, caption, table of contents, table of authorities, signature blocks and certificate of service.

2. **Page limitation.** Except by permission of the court, or unless it complies with Subparagraph (3) of Paragraph F of this rule, the body of a brief in chief, answer brief or amicus brief shall not exceed thirty-five (35) pages. Except by permission of the court, or unless it complies with Subparagraph (3) of Paragraph F of this rule, the body of the reply brief shall not exceed fifteen (15) pages.

3. **Type-volume limitation.** Except by permission of the court, the body of a brief in chief, answer brief, or amicus brief shall not exceed eleven thousand (11,000) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or one thousand two hundred (1,200) lines, if the party uses a monospaced type style or typeface, such as Courier. The body of a reply brief shall not exceed four thousand four hundred (4,400) words, if the party uses a proportionally-spaced type style or typeface, or four hundred eighty (480) lines, if the party uses a monospaced type style or typeface.

4. **Attachments prohibited.** No documents shall be attached to briefs.

5. **Service.** Briefs shall be served in accordance with Rule 12-307 NMRA.

G. **Statement of compliance.** Pursuant to Sub-subparagraph (c) of Subparagraph (1) of Paragraph A of this rule, if a brief exceeds the page limitations of Subparagraph (2) of Paragraph F of this rule, then the brief shall contain a statement that it complies with the limitations of Paragraph F of this rule. If the brief is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the brief. If the brief is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the brief. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

H. **Time of filing.** Unless otherwise ordered by the appellate court or as these rules prescribe, Rule 12-210 NMRA governs the time and order of filing briefs.

I. **Cross-appeals.** In cross-appeals, the brief in chief, the answer brief and the reply brief shall comply with this rule. The party who first files a notice of appeal or, if both parties file on the same day, the plaintiff in the proceedings below, shall be the appellant. The appellant’s brief in chief shall be filed as provided in Rule 12-210 NMRA. The appellee’s answer brief and brief in chief on cross-appeal shall be filed simultaneously as separate documents and shall be filed within forty-five (45) days after service of the brief in chief of the appellant in cases assigned to the general calendar and within twenty (20) days after such service in cases assigned to the legal calendar. The appellant’s reply brief and answer brief to the brief in chief on cross-appeal shall be filed simultaneously as separate documents within forty-five (45) days after service of the answer brief and brief in chief on cross-appeal in cases assigned to the general calendar and within twenty (20) days after such service in cases assigned to the legal calendar.

A cross-appellant may file a reply brief within twenty (20) days after service of the answer brief responding to cross-appellant’s brief in chief.

**Commentary for 2007 Amendments**

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule allow practitioners to exceed the traditional page limitations for a brief if the brief complies with the type-volume limitations set forth in the new Subparagraph (3) of Paragraph F of the rule. Specifically, briefs in chief, answer briefs, and amicus briefs that exceed the traditional thirty-five (35) page limit may not contain more than eleven thousand (11,000) words or one thousand two hundred (1,200) lines in the body of the brief, depending on whether a proportionally-spaced or monospaced type style or typeface is used. See Subparagraph (1) of Paragraph F for a definition of the body of the brief. Similarly, if the body of the reply brief exceeds the traditional fifteen (15) page limit, the body of the brief may not contain more than four thousand four hundred (4,400) words or four hundred eighty (480) lines, again depending on whether a proportionally-spaced or monospaced type style or typeface is used. If a proportionally-spaced type style or typeface is used, the word-count limit applies. If a monospaced type style or typeface is used, the line-count limit applies. In either case, if the traditional page limit is exceeded, a statement of compliance must be included as provided by Paragraph G of this rule to show that the brief complies with the applicable type-volume limitation. For the definition and related discussion of proportionally-spaced type style or typeface, see Rule 12-305(C)(1) NMRA and commentary. For the definition and related discussion of monospaced type style or typeface, see Rule 12-305(C)(2) NMRA and commentary.
filing by the attorney’s client of an address at which service may be made on the client or otherwise conditioned by the appellate court. Proof of service by the withdrawing attorney shall be made on all other parties.

D. Notice. Notice of withdrawal or substitution of counsel shall be given to all parties either by withdrawing counsel or by substituted counsel and proof of service filed with the appellate court clerk. If an attorney ceases to act in a cause for a reason other than withdrawal with consent, upon motion of any party, the appellate court may require the taking of such steps as it may be advised to insure that the cause will proceed with promptness and dispatch.

E. Nonadmitted counsel in civil cases.

(1) Counsel not admitted to practice law in New Mexico, but who are admitted to practice law and in good standing in another state or territory, may, upon compliance with Rule 24-106 NMRA sign briefs, motions and other papers, and may orally argue before the appellate court, only in association with counsel admitted to practice law and in good standing in New Mexico. New Mexico counsel shall sign the first paper filed in the appellate court, and New Mexico counsel’s name and address shall appear on all subsequent papers filed. Unless excused by the appellate court, New Mexico counsel shall also be present in person in all proceedings.

(2) Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. Such affidavit shall be filed with the first paper filed in the appellate court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel will be deemed admitted subject to the other terms and conditions of this subsection. Proof of service of the affidavit shall be made as provided in Rule 12-307 NMRA. A separate motion and order are not required for the participation of nonadmitted counsel, unless nonadmitted counsel has not previously complied with Rule 5-108 NMRA.

(3) For good cause shown, the appellate court may revoke the privilege granted herein of any nonadmitted counsel to appear in any proceeding.

(4) New Mexico residents not admitted to practice law in this state may not appear as counsel, except pro se.

12-305. Form of papers prepared by parties.

A. Scope. This rule applies to briefs, motions, applications, petitions and all other papers, except exhibits, prepared by parties or their counsel and filed in the appellate court.

B. General requirements. All papers shall be:

(1) clearly legible;
(2) typewritten or printed on good quality white paper, eight and one-half by eleven (8 1/2 x 11) inches in size, with left, right, top and bottom margins of one (1) inch;
(3) paginated with consecutive page numbers at the bottom;
(4) stapled at the upper left-hand corner; and
(5) signed in accordance with Paragraph A of Rule 12-302, with the signature block containing the name, address and telephone number of counsel filing the paper, or, if the party is not represented by counsel, the name, address and telephone number of the party filing the paper.

C. Minimum size for type style or typeface. Except for handwritten documents, all papers shall be typed or printed using either a proportionally-spaced or monospaced type style or typeface.

(1) A proportionally-spaced type style or typeface, such as Times New Roman, must include serifs and must be fourteen (14) point or larger. A proportionally-spaced type style or typeface varies the horizontal spacing of each character based on its relative shape.

(2) A monospaced type style or typeface, such as Courier, may not contain more than ten (10) characters per inch. A monospaced type style or typeface allots the same amount of horizontal space for each character, whatever the relative shape of the characters.

D. Spacing. All papers shall be double-spaced, except that information required by Paragraph E of this rule, cover page, table of contents, table of authorities, headings, subheadings, footnotes, quotations, signature blocks and addresses contained in a certificate of service may be single-spaced.

E. Caption. The front page of all papers shall show:

(1) the name of the appellate court;
(2) the parties to the appeal and their status below and on appeal, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., John Doe, Plaintiff-Appellee v. Richard Roe, Defendant-Appellant);
(3) the docket number in the appellate court if one has been assigned; and
(4) the title of the paper being filed.

F. Cover page. The front cover of a docketing statement, statement of the issues or brief shall also show:
(1) the county or administrative body in which the case was filed or tried, except for briefs filed in the Supreme Court pursuant to Rule 12-502 NMRA;
(2) the name of the trial judge or administrative officer, except for briefs filed in the Supreme Court pursuant to Rule 12-502 NMRA; and
(3) the name, mailing address and telephone number of counsel filing the document, or, if a party is not represented by counsel, the name, address and telephone number of the party.

G. Captions in appeals under the Children’s Code. In appeals concerning children involved in litigation under the provisions of the Children’s Code, the captioning shall conform to the following practice:
(1) in criminal appeals involving a child adjudicated as a delinquent offender under Article 2 of the Children’s Code, the caption should identify the child by the child’s first name and the first initial of the child’s last name, and the status of the child on appeal should be listed as “Child-Appellant” or “Child-Appellee”, as the case may be;
(2) in criminal appeals involving a child adjudicated as a serious youthful offender or youthful offender and sentenced as an adult under Article 2 of the Children’s Code, the caption should identify the child by the child’s full first and last name, and the status of the child on appeal should be listed as “Defendant-Appellant” or “Defendant-Appellee”, as the case may be;
(3) in civil appeals involving a child who is the subject of an abuse and neglect proceeding or a termination of parental rights proceeding under Article 4 of the Children’s Code, the caption should identify the child and the child’s parents by their first names and the first initial of their last names, and should name any guardian ad litem;
(4) in all other appeals involving a child under the provisions of the Children’s Code, the caption should identify the child, and the child’s parents when necessary, by their first names and the first initial of their last names, and should name any guardian ad litem.

[As amended, effective November 1, 2007.]

Commentary for 2007 Amendments

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule move the formatting requirements for transcripts and records proper to new Rule 12-305.1 and otherwise restate the formatting requirements for all other papers filed with the appellate courts. Of particular note are the new minimum type style or typeface requirements set forth in Paragraph C of this rule. For example, except for handwritten papers, all papers filed with the Court must now use a proportionally-spaced or monospaced type style or typeface.

A proportionally-spaced type style or typeface allots a different amount of space to each letter based on the particular size and shape of that letter. Proportional fonts use less space and, therefore, less paper to print. A commonly used proportionally-spaced type style is Times New Roman. A monospaced type style or typeface look like typewritten text because each letter uses the same amount of space on the page regardless of its size or shape. A commonly used monospaced type style is Courier.

If a proportionally-spaced type style or typeface is used, it must include serifs and it must be fourteen (14) point or larger. If a monospaced type style or typeface is used, it may not contain more than ten (10) characters per inch. If the practitioner is not sure whether a particular type style or typeface is proportionally-spaced or monospaced, the rule provides guidance by stating that Times New Roman is a proportionally-spaced type style and Courier is a monospaced type style. The selection of a particular proportionally-spaced or monospaced type style is a matter of personal preference, but the choice must comply with the requirements of Paragraph C of this rule. Moreover, the choice will determine the applicable minimum type-volume limitations for set forth in these rules if the practitioner chooses to exceed the traditional page limitations set forth in these rules. See Rule 12-213(F)(3) NMRA and Rule 12-502(D)(3) NMRA.

12-305.1. Form of transcripts of proceedings and records proper.

A. Preparation of transcripts of proceedings and records proper. Copies of stenographic transcripts of proceedings shall be reproduced from the original transcript by any duplicating or copying process that produces a clear black image on white paper or shall be typed or printed on white paper. The format of transcripts of proceedings shall comply with the provisions of Paragraphs B and C of this rule. Transcripts and records proper shall be bound and paginated with consecutive page numbers at the bottom.

B. Cover page. The front cover shall show:
(1) the name of the appellate court;
(2) the parties to the appeal and their status below and on appeal, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., John Doe, Plaintiff-Appellee v. Richard Roe, Defendant-Appellant);
(3) the county or administrative body in which the case was filed or tried;
(4) the name of the trial judge or administrative officer;
(5) the title of the paper being filed; and
(6) the name, mailing address and telephone number of all counsel or, if a party is not represented by counsel, the name, mailing address and telephone number of the party.

C. Caption in appeals under the Children’s Code. In appeals concerning children involved in litigation under the provisions of the Children’s Code, the captioning shall conform to the following practice:
(1) in criminal appeals involving a child adjudicated as a delinquent offender under Article 2 of the Children’s Code, the caption should identify the child by the child’s first name and the first initial of the child’s last name, and the status of the child on appeal should be listed as “Child-Appellant” or “Child-Appellee”, as the case may be;
(2) in criminal appeals involving a child adjudicated as a serious youthful offender or youthful offender and sentenced as an adult under Article 2 of the Children’s Code, the caption should identify the child by the child’s full first and last name, and the status of the child on appeal should be listed as “Defendant-Appellant” or “Defendant-Appellee”, as the case may be;
(3) in civil appeals involving a child who is the subject of an abuse and neglect proceeding or a termination of parental rights proceeding under Article 4 of the Children’s Code, the caption should identify the child and the child’s parents by their first names and the first initial of their last names, and should name any guardian ad litem.
(4) in all other appeals involving a child under the provisions of the Children’s Code, the caption should identify the child, and the child’s parents when necessary, by their first names and the first initial of their last names, and should name any guardian ad litem.
the status of the child on appeal should be listed as “Defendant-Appellant” or “Defendant-Appellee”, as the case may be;

3. in civil appeals involving a child who is the subject of an abuse and neglect proceeding or a termination of parental rights proceeding under Article 4 of the Children’s Code, the caption should identify the child and the child’s parents by their first names and the first initial of their last names, and should name any guardian ad litem;

4. in all other appeals involving a child under the provisions of the Children’s Code, the caption should identify the child, and the child’s parents when necessary, by their first names and the first initial of their last names, and should name any guardian ad litem.

12-306. Number of copies of papers.

A. Scope of rule. This rule governs the number of copies of briefs, motions and other papers to be filed in the appellate court unless otherwise provided by these rules or by the appellate court.

B. Copy; definition. As used in this rule, “copy” includes the original.

C. Papers filed in the Supreme Court. The following numbers of copies of papers shall be filed in the Supreme Court:

1. notices of appeal in cases in which the notice of appeal is originally filed in the Supreme Court: one (1);
2. statement of the issues: three (3);
3. motions for extension of time or page limits and responses thereto: one (1);
4. briefs in chief, answer briefs and reply briefs: seven (7);
5. motions to amend papers and responses thereto: one (1);
6. motions for rehearing and briefs in support thereof and responses thereto: six (6);
7. petitions for writs of certiorari and responses thereto: seven (7);
8. all other motions, responses and briefs in support thereof or opposition thereto: four (4);
9. all other papers: seven (7).

D. Papers filed in the Court of Appeals. One (1) copy of all motions, briefs and other papers shall be filed in the Court of Appeals, except for briefs in chief, answer briefs and reply briefs, when six (6) copies shall be filed.

12-502. Writs of Certiorari to the Court of Appeals.

A. Scope of rule. This rule governs petitions for the issuance of writs of certiorari seeking review of decisions of the Court of Appeals and of actions of the Court of Appeals pursuant to Rule 12-505 NMRA of these rules.

B. Time. The petition for writ of certiorari shall be filed with the Supreme Court clerk within twenty (20) days after final action by the Court of Appeals and served immediately on respondent. The petition shall be accompanied by the docket fee or a free process order. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the Court of Appeals shall be the filing of its decision with the Court of Appeals clerk unless timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing that was timely filed.

C. Petition.

1. Cover. The cover of the petition shall show the names of the parties, with the plaintiff, petitioner or party initiating the proceeding in the trial court or administrative body listed first (e.g., State of New Mexico, Plaintiff-Respondent v. John Doe, Defendant-Petitioner), and the name, mailing address and telephone number of counsel filing the petition, or, if a party is not represented by counsel, the name, mailing address and telephone number of the party.

2. Contents. The petition shall contain a concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

   a. the date of entry of the decision and any order on motion for rehearing thereon;
   b. the questions presented for review (the Court will consider only the questions set forth in the petition);
   c. the facts material to the questions presented;
   d. the basis for granting the writ, specifying where applicable:

      i. any decision of the Supreme Court with which it is asserted the decision of the Court of Appeals is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from that part of the Supreme Court decision showing the alleged conflict;
      ii. any decision of the Court of Appeals with which it is asserted the decision from which certiorari is sought is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from that part of the prior Court of Appeals decision showing the alleged conflict;
      iii. what significant question of law under the Constitution of New Mexico or the United States is involved; or
      iv. the issue of substantial public interest that should be determined by the Supreme Court;
   e. a direct and concise argument amplifying the reasons relied upon for granting the writ, including specific references to the briefs filed in the Court of Appeals showing where the questions were presented to the Court of Appeals; and
   f. a prayer for relief, including whether the case should be remanded to the Court of Appeals for consideration of issues not raised in the petition if the relief requested is granted.

3. Attachments. The petition shall have attached a copy of the decision of the Court of Appeals and, if decided on the summary calendar, a copy of any calendaring notices. If a motion for rehearing was filed, the motion and the order of the Court of Appeals on the motion shall be attached.

D. Length limitations. Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:
1. Body of the petition defined. The body of the petition consists of headings, footnotes, quotations and all other text except any cover page, table of contents, table of authorities, signature blocks and certificate of service.

2. Page limitation. Unless the petition complies with Subparagraph (3) of Paragraph D of this rule, the body of the petition shall not exceed ten (10) pages; or

3. Type-volume limitation. The body of the petition shall not exceed three thousand one hundred fifty (3,150) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or three hundred forty-two (342) lines, if the party uses a monospaced type style or typeface, such as Courier.

E. Statement of compliance. If the body of the petition exceeds the page limitations of subparagraph (2) of Paragraph D of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (3) of Paragraph D of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (1) of Paragraph D of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

F. Conditional cross-petition. Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition for writ of certiorari, to be considered only if the Court grants the petition. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by all other provisions of this rule, except as provided in this paragraph.

G. Response. A respondent may file a response to the petition within fifteen (15) days of service of the petition or within fifteen (15) days of the granting of the petition. The response shall comply with Paragraphs D and E of this rule. No other response may be submitted.

H. Notice to Court of Appeals. A copy of the petition for a writ of certiorari shall be delivered by the Supreme Court clerk to the Court of Appeals clerk who shall deliver the record of the cause to the Supreme Court on request, and recall any previously issued mandate.

I. Briefs. In the event the writ of certiorari is issued, additional briefs may be filed only as directed by the Supreme Court.

J. Oral argument. Oral argument shall not be allowed unless directed by the Supreme Court.

K. Service. Service of any paper shall be made and proof thereof accomplished in accordance with Rule 12-307 NMRA.

L. Copies. If the petition for writ of certiorari has been filed pro se by a petitioner adjudged indigent, only the original petition shall be filed. In all other cases, copies shall be filed in accordance with Rule 12-306 NMRA.

Commentary for 2007 Amendments

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule allow practitioners to exceed the traditional page limitations for a petition, conditional cross-petition, or response if the pleading complies with the type-volume limitations set forth in the new Subparagraph (3) of Paragraph D of the rule. Specifically, petitions, conditional cross-petitions, and responses that exceed the traditional ten (10) page limit may not contain more than three thousand one hundred fifty (3,150) words or three hundred forty-two (342) lines in the body of the petition, depending on whether a proportionally-spaced or monospaced type style or typeface is used. See Subparagraph (1) of Paragraph D for a definition of the body of the petition. If a proportionally-spaced type style or typeface is used, the word-count limit applies. If a monospaced type style or typeface is used, the line-count limit applies. In either case, a statement of compliance must be included as provided by Paragraph E of the rule to show that the pleading complies with the applicable type-volume limitation. For the definition and related discussion of proportionally-spaced type style or typeface, see Rule 12-305(C)(1) NMRA and commentary. For the definition and related discussion of monospaced type style or typeface, see Rule 12-305(C)(2) NMRA and commentary.
Certiorari Denied, No. 30,586, September 7, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-120

GILBERT ARMÍJO and MARIA CASAUS, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, versus WAL-MART STORES, INC., a Delaware corporation, SAM’S CLUB, an operating segment of Wal-Mart Stores, Inc., Defendants-Appellants.

No. 26,122 (filed: June 12, 2007)

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
TIMOTHY L. GARCIA, District Judge

SHANE YOUTZ
YOUTZ & VALDEZ, P.C.
Albuquerque, New Mexico

CHARLES R. PEIFER
CERIANNE L. MULLINS
PEIFER, HANSON & MULLINS, P.A.
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RODNEY BRIDGERS
FRANKLIN D. AZAR & ASSOCIATES, P.C.
Denver, Colorado
for Appellees

OPINION
LYNN PICKARD, Judge

{1} Defendants, Wal-Mart Stores, Inc. and Sam’s Club, bring this interlocutory appeal of an order certifying a class of former and current hourly employees of Defendants’ stores throughout New Mexico who claimed they worked off the clock without compensation or missed rest breaks. On appeal, Defendants contend that the district court applied the wrong legal standard in determining whether class certification should be granted. Relatedly, Defendants appear to argue that the district court abused its discretion in granting class certification.

We conclude that the district court did not apply an incorrect legal standard in granting class certification. We do, however, agree with Defendants’ assertion that the district court did not correctly define the class and therefore modify the definitions accordingly. In all other respects, we affirm the district court.

BACKGROUND


{3} Below, the district court identified four factual scenarios presented by Plaintiffs giving rise to the putative class action against Defendants. In the first, Plaintiffs allege that Defendants failed to compensate employees for missed rest breaks and that Defendants forced employees to miss rest breaks. In the second, Plaintiffs claim that Defendants failed to compensate employees for missed meal breaks and that Defendants forced employees to miss meal breaks. In the third, Plaintiffs assert that Defendants failed to provide breaks to night employees who had already clocked out. Lastly, Plaintiffs assert that Defendants required or encouraged employees to work off the clock without compensation.

{4} Plaintiffs assert that Defendants’ alleged wrongful practices can be proved using common proof. Defendants have uniform written corporate policies that apply to all hourly employees. According to Defendants’ policies, the number of breaks provided to each employee is
An employee who works three to six hours is entitled to one fifteen-minute break. An employee who works more than six hours is entitled to two fifteen-minute breaks. Similarly, whether or not an employee is entitled to a meal break depends on the number of hours worked. Employees who work more than six consecutive hours are entitled to a thirty-minute meal period.

Defendants’ policies further provide that supervisors and management may not ordinarily require employees to work during scheduled breaks and meal periods and that if an employee does work during a meal or rest break, he or she must be compensated and provided an additional meal or rest break. Defendants’ policies also provide that no employee should perform work off the clock without compensation. Plaintiffs allege that each hourly employee is made aware of Defendants’ policies during an orientation process.

Defendants’ employees are issued identification badges that are swiped into time clocks at Defendants’ stores whenever employees begin or end their shifts. Employees also clock in and out for meal breaks, which are unpaid. Prior to February 2001, employees were required to clock in and out for rest breaks as well, but are no longer required to do so. Unlike meal breaks, rest breaks are paid.

Defendants’ payroll records include “Time Clock Archive Reports” and “Time Clock Exception Reports.” The “Archive Reports” are generated by each of Defendants’ stores and are based on employees’ time-clock swipes. The report shows the hours worked each day by each hourly employee. The “Exception Reports” identify irregular patterns of time-clock swipes that deviate from Defendants’ policies regarding shift length and rest and meal breaks. The patterns are characterized in a number of different ways, including short shift, long shift, too many breaks, too few breaks, etc. In situations when an employee’s recorded time is inaccurate because the employee forgot to clock in or out or was otherwise unable to clock in or out of the time clock, the employee is supposed to submit a “Time Adjustment Request” form, which indicates what changes should be made to the employee’s recorded time. These changes are entered into the payroll records by a personnel manager.

Plaintiffs argue that it is possible to rely on Defendants’ payroll reports and records to show that employees missed rest and meal breaks. According to Plaintiffs, statistical analysis will be employed to demonstrate the difference between earned and used breaks for all of the employees of Defendants in New Mexico. Plaintiffs also rely on an internal audit report prepared by Defendants in July 2000, which is known as the “Shipley Audit.” See Iliadis, 904 A.2d at 740. According to Plaintiffs, the audit was conducted to determine if Defendants’ stores were complying with Defendants’ policies regarding scheduling and staffing of employees. The audit revealed numerous failures by Defendants’ stores to comply with Defendants’ rest and meal break policies. See id. at 740-41. The audit warned that “Wal-Mart may face several adverse consequences as a result of staffing and scheduling not being prepared appropriately.”

In addition to missed rest and meal breaks, Plaintiffs assert that employees are required to work off the clock. According to Plaintiffs, employees working the night shift in Defendants’ stores are often unable to leave the stores at the end of their shift because opening the doors triggers an alarm. Some of these employees continue working after finishing their shift until a manager comes to deactivate the alarm and let the employees leave. Plaintiffs also assert that there are instances during other shifts where employees do work after their shifts and during meal breaks without compensation.

Although it is not apparent whether Plaintiffs argued this below, Plaintiffs assert that off-the-clock work can be demonstrated by comparing employee time records with other records kept by Defendants, including those that monitor use of cash registers by employees or that otherwise indicate that a particular employee is performing work. Additionally, Plaintiffs contend that off-the-clock work by night shift employees can be proved by comparing alarm system records with employee clock-out times. When the doors are locked at night at Defendants’ stores, an alarm is activated. Unless it is an emergency, employees cannot leave the store at night until the doors are unlocked and the alarm is deactivated. Records are kept of when these store alarms are activated and deactivated. According to Plaintiffs, such records could be cross referenced with the time records of night employees at Defendants’ stores.

Plaintiffs assert that Defendants operate in a highly-centralized fashion. Plaintiffs claim that Defendants utilize a pyramid-like management structure. This structure, according to Plaintiffs, allows senior management to dictate corporate directives to store managers. It also allows senior management to monitor compliance with corporate directives on a daily basis. As such, senior management is able to keep close tabs on labor costs and can exert pressure on store managers to keep labor costs down. Additionally, Plaintiffs allege that Defendants’ management bonus program creates disincentives for managers to enforce policies relating to rest and meal breaks and off-the-clock work by rewarding those managers who are able to keep labor costs down.

Contrary to Plaintiffs’ assertions, Defendants maintain that their operations within New Mexico are decentralized. According to Defendants, each store is separately managed by salaried store managers and assistant managers. These managers have authority for daily decisions regarding staffing, scheduling, and payroll. Additionally, payroll and time records are maintained by each individual store. Each store is also responsible for its own hiring and for the orientation of newly hired employees. Moreover, stores themselves are divided into departments, which are managed by different department managers. Defendants maintain that the decentralized nature of their operations will make it difficult to establish that the corporate-wide policy alleged to exist by Plaintiffs was uniformly implemented in stores throughout New Mexico.

According to Defendants, employees are responsible for clocking in and out of work and must alert management of any discrepancies between hours worked and hours compensated. Defendants maintain that employees may fail to record their time properly for a number of reasons, including forgetting to clock in or out, broken time clocks, no time clocks, or habitual failure
to clock in or out. It is the employee’s responsibility on such occasions to fill out a “Time Adjustment Request” form with the necessary corrections to the employee’s hours worked.

{14} Defendants also assert that employees are expected to manage their own time, including taking breaks when proper. According to Defendants, there are a number of different reasons why an employee might not take a rest or meal break. Defendants maintain that such reasons are not necessarily tied to corporate-wide policies or procedures, but are instead individual to each employee.

{15} After a three-day evidentiary hearing and one day of argument by counsel, the district court granted Plaintiffs’ motion for class certification. The district court also concluded that Plaintiffs could proceed under Section 50-4-26(B)(2) of the Minimum Wage Act, which allows one or more employees to maintain an action for violations of the Act on behalf of other employees who are similarly situated. The district court detailed its ruling in a thirty-page order. In certifying the class, the district court rejected Plaintiffs’ proffered class definition and instead certified three different subclasses, one under Rule 1-023 NMRA and two under the Minimum Wage Act. One subclass deals with missed rest breaks, while the other two deal with situations where employees worked off the clock without compensation. The district court did not certify a class involving meal break claims, it did not certify a class of all Defendants’ employees, and it did not certify a Rule 1-023 class dealing with off-the-clock claims. Defendants subsequently filed a motion to permit interlocutory appeal.

{16} The district court granted Defendants’ motion to permit interlocutory appeal of the class certification and, in doing so, identified two issues for review: (1) whether the court applied the correct legal standard in determining that this case should be certified as a class action under Rule 1-023 and (2) whether the court applied the correct legal standard in determining that this case should be certified as a collective action under Section 50-4-26(B). This Court subsequently granted Defendants’ application for interlocutory appeal.

STANDARD OF REVIEW

{17} We “review de novo the initial decision of whether the correct legal standard has been applied” by the district court in determining whether to certify a class. Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39; see Murken v. Solv-Ex Corp., 2006-NMCA-064, ¶ 22, 139 N.M. 625, 136 P.3d 1035. “Within the confines of Rule 1-023, the district court has broad discretion whether or not to certify a class.” Brooks, 2004-NMCA-134, ¶ 7. To the extent that the district court has applied the correct legal standard to the facts, its decision to certify a class will be affirmed when supported by substantial evidence. Id.; see Berry v. Fed. Kemper Life Assurance Co., 2004-NMCA-116, ¶ 25, 136 N.M. 454, 99 P.3d 1166.

DISCUSSION

{18} Defendants raise three issues on appeal: (1) the district court applied a “novel and erroneous” legal standard in reviewing the evidence presented for class certification; (2) the district court misapplied New Mexico law in determining that Plaintiffs satisfied the elements of Rule 1-023; and (3) the district court erred as a matter of law in concluding that Plaintiffs are “similarly situated” to the employees they seek to represent in a collective action under Section 50-4-26(B)(2) of the Minimum Wage Act.

{19} As an initial matter, Plaintiffs argue that Defendants’ brief in chief raises issues not originally identified as issues by the district court when it granted Defendants’ motion to permit interlocutory appeal. Plaintiffs therefore assert that it is inappropriate for this Court to consider Defendants’ contention that the district court abused its discretion in granting class certification. Although we agree that Defendants appear to present an additional issue not specifically identified by the district court when it permitted Defendants to apply for interlocutory appeal, we do not perceive the additional issue to be wholly unrelated to the issues identified by the district court. We observe that when a “court misapprehends the law, the court abuses its discretion.” Smart v. Carpenter, 2005-NMCA-056, ¶ 6, 139 N.M. 524, 134 P.3d 811; see LaBalbo v. Hymes, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993) (stating that “[t]he trial court may abuse its discretion by applying the incorrect standard for a preliminary injunction or incorrect substantive law, resting issuance of the injunction on clearly erroneous findings of fact; or applying the standards in a manner that results in an abuse of discretion”). Thus, to the extent that the district court relied on an erroneous legal standard in certifying the class, as Defendants contend, it abused its discretion in granting certification. Additionally, we note on interlocutory appeal, “our scope of review may extend beyond the question posed.” In re Adoption of Begay, 107 N.M. 810, 814, 765 P.2d 1178, 1182 (Ct. App. 1988). As such, we decline Plaintiffs’ request that we refrain from considering the propriety of the district court’s decision to grant class certification. Thus, after discussing the applicable standard of review, we will address each of Defendants’ issues in turn.

The district court’s approach in determining whether class certification was appropriate

{20} Initially, we note that because the federal rule is essentially identical to New Mexico’s Rule 1-023, “[w]e may look to federal law for guidance in determining the appropriate legal standards to apply under these rules.” Romero v. Philip Morris, Inc., 2005-NMCA-035, ¶ 35, 137 N.M. 229, 109 P.3d 768 (citation omitted). Compare Rule 1-023, with Fed. R. Civ. P. 23. Below, the district court observed that the parties disagreed as to the proper legal standard to be applied in determining whether Plaintiffs’ motion for class certification should be granted. After considering both parties’ arguments, the court stated that it believed that both parties had incorrectly stated the proper standard and that the correct standard was as follows:

In the Tenth Circuit, the allegations set forth in the Plaintiffs’ complaint are controlling at the class certification stage. Under the Tenth Circuit standard, this Court must accept Plaintiffs’ allegations and all exhibits, affidavits, documents and evidence presented which support a granting of certification. The Court must rigorously analyze all the factual evidence supporting Plaintiffs’ claims and
only grant certification where all of the Rule 23 prerequisites have been completely satisfied. In addition, where Defendants present additional uncontested evidence which is material to the certification of Plaintiffs’ claim(s), then the Court is not prevented from considering such additional evidence as part of the requirement to rigorously analyze the facts and prerequisites for certification. Contradicted or conflicting evidence presented by the Defendants, however, must not be considered against Plaintiffs in the certification analysis. Such an analysis would be an improper weighing of the evidence. (Citations omitted.) Defendants contend that this standard is erroneous for two reasons. First, it allows the district court to accept as true all of Plaintiffs’ evidence, regardless of whether Defendants have presented evidence that disputes, refutes, or otherwise demonstrates that Plaintiffs’ evidence is not credible. Second, it allows the district court to ignore all of Defendants’ evidence unless such evidence is undisputed. Contrary to Defendants’ arguments, we do not believe that the district court’s description of the applicable standard was sufficiently erroneous to be reversible, because while it was inartfully stated, the district court actually applied the correct standard, as will be seen below. {21} In determining whether class certification is appropriate, a district court must engage in a “rigorous analysis” to decide whether the requirements of Rule 1-023 are met. Romero, 2005-NMCA-035, ¶ 39. At this stage, “it is essential for the court to understand the substantive law, proof elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met.” Brooks, 2004-NMCA-134, ¶ 31; see Romero, 2005-NMCA-035, ¶ 38 (“The district court’s rigorous analysis often involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”) (internal quotation marks and citation omitted)). If it is possible to make such a determination simply on Plaintiffs’ pleadings, then the court may do so. Brooks, 2004-NMCA-134, ¶ 9. If necessary, however, the court “may probe behind the pleadings and forecast what kind of evidence may be required or allowed at trial.” Id.; see Romero, 2005-NMCA-035, ¶ 38. {23} As recognized by Plaintiffs, the rigorous analysis required of the district court involves a close and careful examination of whether the requirements of Rule 1-023 are met and does not involve an examination of the actual merits of Plaintiffs’ claims. See Brooks, 2004-NMCA-134, ¶ 9. We disagree with Defendants’ assertion that J.B. ex rel. Hart v. Valdez, 186 F.3d 1280 (10th Cir. 1999), contradicts the district court’s own formulation of the standard. According to the Tenth Circuit, at the class certification stage, the district court “should accept the allegations contained in the complaint as true.” Id. at 1290 n.7. The court should not, however, blindly accept any “conclusory allegations which parrot Rule 23 requirements.” Id. (quoting 3 Alba Conte & Herbert Newberg, Newberg on Class Actions § 7.26 (3d ed. 1992)). In the present case, the district court recognized that it had to engage in a rigorous analysis to determine whether Plaintiffs satisfied the requirements of Rule 1-023. The court was careful, however, to explain that the rigorous analysis would not involve an examination of the merits of the claims. As such, we believe that what the district court meant in its challenged language was that the court accepted Plaintiffs’ factual allegations about the merits as true and declined to examine evidence proffered by Defendants that disputed such allegations. Such an approach is consistent with class action law within New Mexico and the Tenth Circuit. See, e.g., J.B. ex rel. Hart, 186 F.3d at 1290; Brooks, 2004-NMCA-134, ¶ 9. {24} Although we do not believe that the district court necessarily misstated the applicable standard for determining whether class certification is appropriate, we are concerned enough about the articulation of the standard that we review the court’s determination that class certification was appropriate to decide whether the court actually applied the correct legal standard. As we shall discuss later in the opinion, the district court’s written opinion granting class certification indicates that the court did carefully consider the evidence proffered by Defendants in support of their assertion that class certification was inappropriate. Thus, we cannot say that any possible misarticulation of the proper standard in one paragraph of the district court’s thirty-page opinion warrants a reversal of the certification. Of course, if the district court believes that we have misunderstood and that Defendants are correct in their analysis of the district court’s opinion, the district court is free to, and should, decertify the class. **Class action certification under Rule 1-023** {25} Class certification is appropriate under Rule 1-023 when “all four prerequisites of Rule 1-023(A) and at least one of the requirements of Rule 1-023(B) are met.” Brooks, 2004-NMCA-134, ¶ 10. “Failure to establish any one requirement is a sufficient basis for the district court to deny certification.” Id. {26} Rule 1-023(A) lists four prerequisites for class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Id. ¶ 11. The district court is also required to find that the requirements of Rule 1-023(B)(1), (2), or (3) are met. See Salcido v. Farmers Ins. Exch., 2004-NMCA-006, 46 Bar Bulletin - October 8, 2007 - Volume 46, No. 41 35
¶ 21, 134 N.M. 797, 82 P.3d 968. In the present case, the district court concluded that each of the four prerequisites listed in Rule 1-023(A) was met. The court also concluded that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy,” as required by Rule 1-023(B)(3).

{27} On appeal, Defendants argue that the district court erred as a matter of law in concluding that the typicality prerequisite in Rule 1-023(A) was established by Plaintiffs. Defendants further assert that individual questions of fact or law predominate and that a class action is not a superior manner in which to try the issues raised in the present case. Thus, according to Defendants, the district court also erred in concluding that Rule 1-023(B)(3) was met. Finally, Defendants argue that the district court’s subclass definitions are legally erroneous. We conclude that the district court did not apply an incorrect legal standard or otherwise abuse its discretion in deciding to grant Plaintiffs’ motion for class certification. We do, however, modify the subclass definitions created by the court.

a. Typicality

{28} “The typicality requirement of Rule 1-023(A)(3) is used to gauge in general how well the proposed class representative’s case matches the class factual allegations and legal theories.” Berry, 2004-NMCA-116, ¶ 43. As we previously recognized in Berry, the fit between the class representative’s case and the factual allegations and legal theories of the class need not be perfect. Id. “If the alleged unlawful conduct affects both the named plaintiff and the class members, varying fact patterns in individual claims will not usually defeat typicality unless the variation is so great that there is a conflict created between the named parties and the class.” Id. In determining whether the typicality prerequisite is met we ask “whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.” 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3.13, at 327 (4th ed. 2002) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)).

{29} In the present case, the district court concluded that the typicality prerequisite was met because the “interests and legal theories being pursued by the named Plaintiffs appear to be clearly aligned with those of the representative class members.” One of the named Plaintiffs, Gilbert Armijo, was an hourly employee who missed rest breaks during his tenure as an employee in the tire and lube division of Defendants’ Espanola Wal-Mart. The second named Plaintiff, Maria Casaus, was an hourly employee who worked nights as a forklift driver at Defendants’ Farmington Sam’s Club store. She claims that she missed rest breaks and that she also worked off the clock on numerous occasions.

{30} In determining whether the typicality requirement was met, the district court acknowledged Defendants’ assertions that the named Plaintiffs’ work environments were unique and that some of their claims may have factual differences. The court noted, however, that such differences did not change the fact that the basic factual elements of the named Plaintiffs’ claims were similar to that of the rest of the class. The court further stated that any of the alleged individual variations between “subclass member[s] would not prevent the named Plaintiffs from advancing the common claims and interests of the subclass members.” We agree with the district court that these factual variations do not render the named Plaintiffs’ claims atypical of the class.

{31} Although the named Plaintiffs’ positions and job duties differ from one another and from other members of the class, we fail to see how these differences make the named Plaintiffs’ claims with respect to missing rest breaks and working off the clock “significantly different from the claims and defenses of any class members.” Salcido, 2004-NMCA-006, ¶ 26; see Aguinaga v. John Morrell & Co., 602 F. Supp. 1270, 1279 (D. Kan. 1985) (“The named plaintiffs need not be in a position identical to that of every member of the putative class.”). Moreover, although Defendants present evidence disputing the existence of an oral or written contract, we believe that such evidence goes to the merits of Plaintiffs’ case, not whether the typicality requirement is satisfied. See Salcido, 2004-NMCA-006, ¶ 28. Lastly, we observe that the district court’s order indicates that it considered the Defendants’ arguments and evidence regarding typicality and nonetheless concluded that the prerequisite was met. On these facts, we cannot say that the district court abused its discretion in determining that the named Plaintiffs’ claims were typical of the class.

b. Predominance

{32} If the district court determines that the four prerequisites to a class action described in Rule 1-023(A) are met, it must then determine whether “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” Rule 1-023(B)(3). This is known as the predominance requirement. Romero, 2005-NMCA-035, ¶ 9. Although not defined in Rule 1-023(B)(3), the predominance requirement “brings into primary focus the plaintiffs’ proposed methods of proof at trial of the elements of their claims. Id.; Berry, 2004-NMCA-116, ¶¶ 46, 50. “The predominance test expressly directs the court to make a comparison between the common and individual questions involved in order to reach a determination of such predominance of common questions in a class action context.” 2 Alba Conte & Herbert Newberg, Newberg on Class Actions § 4.24, at 154 (4th ed. 2002). “A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.” 2 Conte & Newberg, supra § 4.25, at 172. Additionally, “the fact that those individual issues might take some time to resolve does not defeat predominance because courts have a number of methods for dealing with individual issues in class litigation.” Miller v. Farmer Bros. Co., 64 P.3d 49, 56 (Wash. Ct. App. 2003); see Berry, 2004-NMCA-116, ¶ 48 (“[P]redominance is not determined by a simple quantitative measure of the time that may be spent on common rather than individual issues, though that calculation can be a factor properly taken into account.”).

{33} In the present case, although the district court recognized that some individual issues raised by Defendants may later prove problematic, it nonetheless
concluded that Plaintiffs had adequately satisfied the predominance requirement of Rule 1-023(B)(3). We observe, however, that “[a]lthough the district court identified some of the crucial liability issues that would require individual determinations, it did not identify Plaintiffs’ required proof or how the individual issues related to that proof.” Brooks, 2004-NMCA-134, ¶ 36. As we previously observed in Brooks, such omissions are not necessarily fatal to the court’s decision to certify the class, but “we nevertheless remind the district courts that given the highly deferential standard under which we review class certification, and the inherent complexities of the issue, the court should be as specific as possible in its findings of fact and conclusions of law.” Id. Thus, when deciding whether class certification is appropriate, district courts should identify the essential elements of each of Plaintiffs’ claims and which facts support the court’s decision that certification should be granted. Id.; see Collins v. Anthem Health Plans, Inc., 880 A.2d 106, 118-19 (Conn. 2005) (identifying a three-step analysis to determine whether the predominance requirement is met: (1) review elements of the plaintiffs’ claims; (2) determine whether elements can be proved with common proof or whether individualized proof is required; and (3) “weigh the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate”). Although the district court did not do this in the present case, we believe that the record is sufficient and the district court’s order is detailed enough such that we can properly ascertain whether the district court abused its discretion in certifying the class. We hold that it did not.

(34) Plaintiffs’ claims under the subclass certified under Rule 1-023 include breach of contract and unjust enrichment. In order to prove breach of contract, Plaintiffs will be required to prove that (1) Defendants were contractually obligated to provide rest breaks for their employees; (2) a missed rest break constitutes breach of that contract; and (3) the breach resulted in damages to the employees. See Brooks, 2004-NMCA-134, ¶¶ 37-38. Although Defendants dispute whether they were contractually obligated to provide breaks, we agree with Plaintiffs’ assertions that whether a contract actually exists is a question that is common to the class. Defendants have a written policy regarding rest breaks that is applicable to all of its hourly employees. Additionally, Plaintiffs assert that the substance of Defendants’ policies is communicated to employees during orientation. It therefore appears that the question of whether Defendants are contractually obligated to provide rest breaks to its hourly employees—whether through oral or written contract—is a question common to the class and certainly one that will predominate the litigation. See Braun v. Wal-Mart Stores, Inc., No. 19-CO-01-9790, 2003 WL 22990114, at *7-8 (D. Minn. Nov. 3, 2003).

(35) We disagree with Defendants’ assertions that the determination of whether a contract exists will necessarily involve individualized inquiries of each class member. We note that it is not readily apparent from the record whether Plaintiffs rely on the employee handbook as evidence of a contract or whether representations made during orientation sessions constitute the basis for the contract claim or both. As previously discussed, Plaintiffs assert (and Defendants apparently do not dispute) that the written handbook is applicable to all hourly employees. Whether or not the handbook can actually be considered a contract will be a question common to the class. See id. (“[T]he [p]laintiffs allege that all four elements of such a contractual obligation are present: (1) the terms are written and definite in form; (2) the terms were communicated to Wal-Mart’s employees; (3) the offer was accepted by the employees; and (4) consideration was given by the employees by continuing to work for the company.”).

(36) We recognize that alleged oral representations may present a different problem at trial. We observe, however, that Plaintiffs allege that the handbook policies are conveyed to newly hired employees at orientation sessions. To the extent that these orientation sessions are uniform in the sense that the same general information is conveyed to all employees regardless of the store, it may be possible for Plaintiffs to demonstrate the existence of an oral contract by common proof. See Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 355, 360 (Tex. App. 1999) (concluding that predominance was met based upon the plaintiffs’ allegations that all employees were subject to the same orientation process and handbook), modified on other grounds by Nissan Motor Co. v. Fry, 27 S.W.3d 573, 590 (Tex. App. 2000). But see Basco, 216 F. Supp. 2d at 602-03 (holding that individual issues predominated where the plaintiffs would be required to prove the terms of and breach of oral contracts); Lopez, 93 S.W.3d at 557 (holding that “[b]ecause each orientation session was conducted by different Wal-Mart personnel at different stores, proof of an oral contract with each class member will require a determination of the terms of the contract through offer and acceptance,” individualized questions will predominate). We caution, however, that to the extent that Defendants are able to demonstrate that orientation sessions are significantly different from store to store, individualized issues may likely predominate with respect to Plaintiffs’ breach of contract claim. At this point, however, although Defendants claim that orientation sessions are run by different employees at each store, Defendants have not presented evidence to suggest that the actual content of the orientation sessions—presumably a presentation of the applicable policies and procedures for hourly employees—is so materially different from store to store that predominance of common questions cannot be established.

(37) Moving on to the second element of Plaintiffs’ breach of contract claim, we believe that the question of whether a missed break constitutes a breach of contract is also an issue common to the class. See Vignaroli v. Blue Cross of Iowa, 360 N.W.2d 741, 744-45 (Iowa 1985) (holding that the question of whether the written terms of an employment manual were violated was a question common to the class). Although Defendants assert that employees have individualized reasons for missing breaks that will predominate the litigation, we believe that the key issues with respect to this element are whether a missed break constitutes a breach of contract and whether an employee can waive his or her contractual right to a break without compensation. Such issues are common to the class.

(38) We likewise conclude that common issues predominate Plaintiffs’ unjust
enrichment claim. See Braun, 2003 WL 22990114, at *10. To prevail on their unjust enrichment claim, Plaintiffs must demonstrate that (1) Defendants have benefitted from the missed breaks of their employees “(2) in a manner such that allowance of [Defendants] to retain the benefit would be unjust.” Ontiveros Insulation Co., Inc. v. Sanchez, 2000-NMCA-051, ¶ 11, 129 N.M. 200, 3 P.3d 695. The question as to whether a missed break confers a benefit on Defendants appears to be a common question. Likewise, whether Defendants’ retention of that benefit without compensation to Plaintiffs is unjust also appears to be a common question.

{39} Additionally, although Defendants assert that they may have affirmative defenses against individual class members, we do not believe that this is reason enough to require the district court to deny class certification. See Berry, 2004-NMCA-116, ¶¶ 65-66. Moreover, as recognized by the district court, Defendants have not demonstrated that these individualized factual issues are sufficiently widespread to deny class certification at this point. See id. ¶ 66. We further note that the predominance of common issues relating to Plaintiffs’ breach of contract and unjust enrichment claims will not be defeated solely because there may be individual questions as to damages, so long as common issues of liability predominate. See 2 Conte & Newberg, supra § 4.25, at 159-60; accord Pitts v. Am. Sec. Ins. Co., 550 S.E.2d 179, 188 (N.C. Ct. App. 2001) (“[W]hen a plaintiff establishes an issue of law common to all class members, the possibility of individualized damages is a collateral matter.”).

{40} We further observe that the district court’s order granting class certification indicates that the district court was aware of the individual issues raised by Defendants. Indeed, the court identified eight different factual issues raised by Defendants in support of their argument that individual questions predominated over any questions common to members of the class:

1) the factual hiring procedure and basis for the formation of any employment contract; 2) the employee’s reasons for missed breaks or staying locked inside a specific store during night shifts; 3) the varied amount of any damages suffered by each employee claiming harm; 4) the variety of defenses available to Defendants based upon the facts of each event establishing a compensable claim; 5) the knowledge or consent of different managers to any improper computerized payroll activity and other alleged activities occurring in each store; 6) the various types of pressure or persuasion used by different managers to cause employee(s) to miss a rest break or work “off the clock”; 7) the reasons an employee failed to mitigate any damages by addressing the claim(s) directly with Defendants under the existing policies or procedures; and 8) the inability to cross-examine witnesses where actions or decisions rely upon individual factual issues.

The court expressed concern about some of these issues, particularly damage calculations, but nonetheless determined that common issues predominated. The court noted that the overarching issue in the present case was whether Defendants implemented policies and procedures that resulted in Plaintiffs being forced or coerced to miss breaks and/or work off the clock. With respect to the damages issue, the court recognized that it has various judicial methods to deal with damages without denying class certification on liability issues. The district court concluded that to the extent that the issues raised by Defendants actually present individual questions and these questions ultimately predominate over common questions, the court may decide to decertify the class.

{41} We remain unconvinced that the district court applied an incorrect legal standard or otherwise abused its discretion in concluding that predominance was met under Rule 1-023(B)(3). We observe that the district court did consider Defendants’ evidence regarding individual issues, but was simply not persuaded that such issues would predominate. Moreover, the court recognized that should individual issues with respect to damages pose a problem, it has methods to deal with such a problem. Such methods include:

(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001) (footnote omitted), superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers’ Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006). We further observe that the court took it upon itself to create subclasses and rejected Plaintiffs’ proffered class definition on the grounds that it was too broad and presented individual issues that could not be dealt with on a class-wide basis.

{42} Finally, we recognize that while courts should engage in rigorous analysis in determining whether predominance is satisfied, “there is more than a kernel of truth in the view that in some complex cases [*4]decisions as to whether class action status should be allowed seem to rest, more than many other judicial determinations, on judicial philosophy, rather than on precedent or statutory language.” Romero, 2005-NMCA-035, ¶ 50 (quoting How v. Microsoft Corp., 656 N.W.2d 285, 288 (N.D. 2003)). To the extent that the district court’s determination that predominance was met presents a close question, our cases, while noting that this principle has been tempered, affirm the principle that it is proper to err in favor of approving the class. Id. (citing In re Workers’ Comp., 130 F.R.D. 99, 103 (D. Minn. 1990)); Berry, 2004-NMCA-116, ¶ 34. We therefore hold that the district court did not abuse its discretion in concluding that the predominance requirement of Rule 1-023(B)(3) was met.

C. Superiority

{43} The second requirement of Rule 1-023(B)(3) is that the proposed “class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This is known as the superiority requirement. See Romero, 2005-NMCA-035, ¶ 9. As part of this requirement, Rule 1-023(B)(3) provides that
the district court should consider several factors in determining whether a class action is the superior method of adjudication, including the following:

(1) “the interest of members of the class in individually controlling the prosecution or defense of separate actions,” (2) “the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,” (3) “the desirability or undesirability of concentrating the litigation of the claims in the particular forum,” and (4) “the difficulties likely to be encountered in the management of a class action.”

Murken, 2006-NMCA-064, ¶ 23, 139 N.M. 625, 136 P.3d 1035 (quoting Rule 1-023(B)(3)).

{44} In the present case, while not explicitly addressing each of the four factors described above, the district court concluded that the superiority requirement was met because judicial economy and resources would be preserved by allowing the suit to proceed as a class action. Defendants argue that the district court erred in concluding that superiority was established by Plaintiffs because individual issues will predominate and because individual actions brought by the Department of Labor or by individual employees are superior. We hold that the district court did not err as a matter of law or otherwise abuse its discretion in concluding that the superiority requirement was met.

{45} “Although the dismissal of a class action because of management difficulties is generally disfavored, dismissal is warranted where individual issues predominate to make the class action unmanageable, even if no alternative remedy exists.” Brooks, 2004-NMCA-134, ¶ 34 (citation omitted). Having already concluded that the district court did not abuse its discretion in concluding that common questions predominate, we reject Defendants’ contention that the predominance of individual issues precludes a finding of superiority. See id. ¶ 33 (“If predominance is met, courts generally find that the class action is superior and will grant certification, even if the case presents difficulties in management, unless the problems are insurmountable.”).

Moreover, we note that to the extent that individual issues may present a problem with respect to manageability, we defer to the district court’s discretion to certify the class. See id. ¶ 34 (“The [district] court’s discretion is paramount when it determines whether a class action is manageable.”).

{46} Additionally, we disagree with Defendants’ contention that individual actions or actions by the Department of Labor are superior to a class action. Although the Minimum Wage Act does allow for suits by individual employees or the Department of Labor for violations of its provisions, see § 50-4-26(A)(2), (B)(1), we observe that Plaintiffs’ claims under the Rule 1-023 certified subclass do not involve violations of the Minimum Wage Act, but are instead claims alleging breach of contract and unjust enrichment. Additionally, given the potential size of the class, we fail to see how individual actions would be superior to a class action. Finally, we note that Defendant does not argue that any of the other factors listed in Rule 1-023(B)(3) should serve as a bar to certifying the class. See Murken, 2006-NMCA-064, ¶ 28 (indicating several factors that courts consider in determining superiority). We therefore conclude that the district court did not abuse its discretion in concluding that the superiority requirement of Rule 1-023(B)(3) was met.

Collective actions under Section 50-4-26(B)(2) of the Minimum Wage Act

{47} The Minimum Wage Act “establishes a floor below which employers cannot pay employees wages and also requires the payment of time and a half for work in excess of a forty-hour workweek.” N.M. Dep’t of Labor v. Echostar Commc’ns Corp., 2006-NMCA-047, ¶ 1, 139 N.M. 493, 134 P.3d 780 (citing §§ 50-4-22(A), (C)). Among other enforcement methods, the Act permits a collective action by employees on behalf of “themselves and other employees similarly situated.” Section 50-4-26(B)(2). As recognized by Defendants, the Act does not define the term “similarly situated,” and there is no appellate decision in New Mexico regarding the standard. The Federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219 (2000), however, contains a similar provision allowing for similarly situated employees to maintain a collective action for violations of FLSA’s provisions. See § 216(b). We will therefore look to federal cases construing § 216(b) of the FLSA for guidance. See Garcia v. Am. Furniture Co., 101 N.M. 785, 788-89, 689 P.2d 934, 937-38 (Ct. App. 1984).

{48} While there is little federal circuit law defining “similarly situated” for the purposes of a collective action under FLSA, “[f]ederal district courts have adopted or discussed at least three approaches” to the issue. Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001). Under the first approach, known as the “two-tiered” or “ad hoc” approach, “a court typically makes an initial notice stage determination of whether plaintiffs are similarly situated.” Id. (internal quotation marks and citation omitted). At this initial stage, all that is required are “substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.” Vaslakiv v. Storage Tech. Corp., 175 F.R.D. 672, 678 (D. Colo. 1997) (internal quotation marks and citation omitted); see Thiessen, 267 F.3d at 1102. At the second stage, which typically follows discovery and/or a motion to decertify the class, the court must revisit its initial determination, only now under a stricter standard of “similarly situated.” Thiessen, 267 F.3d at 1102-03. Under this stricter analysis, the court should consider several factors in determining whether the putative class members are similarly situated, including the following: (1) whether the class members have disparate factual and employment settings, (2) whether the available defenses to the claims are individual to each class member, and (3) whether there are any fairness or procedural considerations relevant to the action. Id. at 1103. After considering the above factors, the court must then decide whether the suit may continue as a collective action.

{49} The second approach evaluates whether the putative collective action meets all of the requirements of a Rule 23 class action in order to determine whether the “similarly situated” requirement is met. Thiessen, 267 F.3d at 1103; see, e.g., Shusman v. Univ. of Colo., 132 F.R.D. 263, 265 (D. Colo. 1990); St. Leger v. A.C. Nielsen Co., 123 F.R.D. 567, 568-69 (N.D. Ill. 1988). Lastly, under the third approach, courts apply the “pre-[1966] version of Rule 23, which allowed for ‘spurious’ class actions.” Thiessen, 267 F.3d at 1103; see

While the Tenth Circuit has recognized that “there is little difference in the various approaches”—as all three involve consideration of similar factors and allow district courts discretion in deciding whether to allow a collective action to proceed—it nonetheless concluded that the ad hoc approach was the proper standard. Thiessen, 267 F.3d at 1105. The court noted that Congress could have chosen to apply Rule 23 standards to collective actions, but instead settled on the “similarly situated” standard. Thiessen, 267 F.3d at 1105. For that reason, the court concluded that “[t]o now interpret this ‘similarly situated’ standard by simply incorporating the requirements of Rule 23 (either the current version or the pre-[ ] 1966 version) would effectively ignore Congress’ directive.” Thiessen, 267 F.3d at 1105. We likewise acknowledge that had the legislature wanted to apply Rule 1-023 standards to collective actions under the Minimum Wage Act, it could have done so. Cf. Cochrell v. Mitchell, 2003-NMCA-094, ¶ 29, 134 N.M. 180, 75 P.3d 396 (“If the legislature had wanted to mandate an element of the sale price to be a certain level, whether the full appraised value or the taxable value or some percentage of either, it could have easily so provided.”). Thus, for the same reasons espoused by the Tenth Circuit in Thiessen, we conclude that the two-tiered/ad hoc approach is the proper standard to apply to collective actions under Section 50-4-26(B)(2) of the Minimum Wage Act.

In the present case, both parties apparently agree that the two-tiered approach is the correct approach in determining whether Plaintiffs are similarly situated under Section 50-4-26(B)(2). The parties disagree, however, on whether the evidence should be evaluated under the less stringent notice stage analysis or whether the case has progressed such that the stricter second stage analysis is appropriate. It is not readily apparent which approach the district court adopted in determining whether Plaintiffs are similarly situated for the purposes of a collective action under the Minimum Wage Act.

Defendants argue that certification discovery is complete and the lawsuit has been going on for nearly six years, thus making the second stage analysis applicable. Under such an analysis, the court is required to take a hard look at whether Plaintiffs are actually similarly situated, utilizing the three factors discussed above. See Thiessen, 267 F.3d at 1102-03. We note, however, that the district court has only had one opportunity so far to determine whether Plaintiffs were similarly situated. Additionally, the court itself observed that it was still early in the lawsuit and stated that it planned to return to the issue of whether Plaintiffs were similarly situated.

See Thiessen, 267 F.3d at 1102-03. We note, however, that the district court has only had one opportunity so far to determine whether Plaintiffs were similarly situated. This suggests that the less stringent notice stage analysis is more appropriate. Moreover, although class certification discovery has been completed, it does not appear that merits discovery has begun yet. See Pivonka v. Bd. of County Comm’rs, No. 04-2598-JWL, 2005 WL 1799208, at *2 (D. Kan. July 27, 2005) (concluding that first-tier analysis is appropriate where class certification discovery was complete, but merit-based discovery had not begun). Additionally, no notice has been sent out to putative class members.

See Brown v. Money Tree Mortgage, Inc., 222 F.R.D. 676, 679 (D. Kan. 2004) (stating that at the first tier, “the district court determines whether a collective action should be certified for purposes of sending notice of the action to potential class members” (emphasis added)). We therefore conclude that the district court should have evaluated Plaintiffs’ claims under the less stringent notice stage standard. Thus, to the extent that the district court accepted Plaintiffs’ argument that a less stringent standard should be applied to the question of whether Plaintiffs are similarly situated, we hold that the district court did not apply an incorrect legal standard in determining whether Plaintiffs were similarly situated under Section 50-4-26(B)(2).

Under the notice stage, Plaintiffs need only present substantial allegations that the “putative class members were together the victims of a single decision, policy, or plan.” Vaszlavik, 175 F.R.D. at 678 (internal quotation marks and citation omitted). “The standard for certification at this notice stage . . . is a lenient one that typically results in class certification.” Brown, 222 F.R.D. at 679. We do not believe that the district court abused its discretion in concluding that this standard was met.

Plaintiffs allege that Defendants’ corporate policies and procedures create an environment in which employees are forced or coerced to work through breaks and off the clock. In support of this assertion, Plaintiffs presented evidence of a corporate atmosphere in which managers are encouraged to keep labor costs down. As previously discussed, Plaintiffs have presented various methodologies in which they hope to demonstrate that missed breaks and off-the-clock work are widespread problems throughout Defendants’ stores. Deposition testimony from the class representatives support these general allegations. See Brown, 222 F.R.D. at 681. Affidavits from putative class members provide additional support for Plaintiffs’ allegations. We believe that the evidence presented by Plaintiffs supports their assertion that “putative class members were together the victims of a single decision, policy, or plan,” which was Defendants’ alleged pattern and practice of forcing or coercing off-the-clock work and missed rest breaks in an attempt to minimize labor costs. Vaszlavik, 175 F.R.D. at 678 (internal quotation marks and citation omitted); see Brown, 222 F.R.D. at 681.

Below, the district court acknowledged that Defendants had presented evidence to suggest that Plaintiffs were not similarly situated as Defendants had individual defenses to the claims. The court noted, however, that it was satisfied that Plaintiffs had presented enough evidence at this stage to allow the suit to proceed. It further stated that it planned to revisit the question of whether Plaintiffs were similarly situated at a later date. See Brown, 222 F.R.D. at 682 (“[T]he court will examine the individual plaintiffs’ disparate factual and employment settings, as well as the various defenses available to the defendant which appear to be individual to each plaintiff, during the ‘second stage’ analysis after the close of discovery.”). Based on these facts, we cannot say that the district court abused its discretion in concluding, albeit
tentatively, that Plaintiffs were similarly situated under Section 50-4-26(B)(2).

Subclass Definitions

(56) As a final matter, we note that Defendants have raised concerns about the district court’s definitions of the three subclasses. Below, the district court defined the three applicable subclasses as follows:

1. A subclass of all New Mexico store employees of the Defendants who are entitled to earned rest breaks during their shifts from September 19, 1994, to the present, and who failed to “clock out” of the Defendants’ computerized payroll system for any earned rest break(s) because of any action, policy or practice of the Defendants. . . .

2. A subclass of all New Mexico store employees of the Defendants who worked the night shift from September 19, 1994, to the present and who continued to work and/or were not allowed to immediately leave Defendants’ premises after having “clocked out” of the Defendants’ computerized payroll system because of any action, policy or practice of the Defendants. . . .

3. A subclass of all New Mexico store employees of the Defendants who worked the day or evening shifts from September 19, 1994, to the present and who continued to work off the clock after having “clocked out” of the Defendants’ computerized payroll system because of any action, policy or practice of the Defendants. Defendants contend that these subclasses definitions are legally erroneous because the definitions (1) depend on the merits of the claims asserted, (2) rely on subjective criteria, (3) are overly broad, and (4) will fail to bind class members in the event of an adverse judgment. We agree that the subclass definitions are dependent on the merits of the claims asserted and therefore modify the definitions accordingly.

(57) “Whether a class definition is legally sufficient depends on the facts of each case and must be determined on a case-by-case basis.” Brooks, 2004-NMCA-134, ¶ 23. Generally, class definitions should be related to the defendant’s activities and “should include a common transactional fact or status predicated on the cause of action, the appropriate time span, and geographical boundaries, if applicable, or other pertinent facts or characteristics that would make the class readily identifiable and capable of accurate verification.” Id. A class definition should not contain “subjective criteria or circular definitions that depend on the outcome of the litigation.” Id. Additionally, “[i]mprecise, vague, or broad definitions that include persons with little connection to the claims will fail to meet the definiteness requirement.” Id.

(58) We agree with Defendants that the phrase “because of any action, policy or practice of the Defendants” presents a merits-based question to determine subclass membership. In order to determine whether a putative class member satisfies this condition of class membership, the district court would have to decide whether Defendants’ policies or practices coerce or force individuals to either work off the clock or to miss breaks, a determination that turns on the central issue of liability in the present case. See Petty, 773 N.E.2d at 579-80 (rejecting class definition that defined class as “all employees who were required or permitted to work off the clock or miss breaks and meals” on grounds that it would require a merits-based analysis (emphasis added)).

(59) In re Natural Gas Commodities Litigation, 231 F.R.D. 171 (S.D.N.Y. 2005), presents a similar class definition issue. In that case—a class action alleging that various energy companies had manipulated the natural gas futures market—the relevant class was defined to include investors who purchased or sold natural gas futures and who suffered losses due to the defendants’ manipulation of the market. Id. at 178-79. The court concluded the second part of the class definition hinged upon whether the energy companies had actually manipulated the market, which would require the court to inquire into the merits of the plaintiffs’ complaint to determine class membership. Id. at 179-80. As such, the class definition was improper. Id.; see Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (rejecting class definition that would require “a mini-hearing on the merits of each case”). The court concluded that the best way to deal with the erroneously defined class was simply to strike the second part of the definition. In re Natural Gas, 231 F.R.D. at 180. Likewise, we believe that the phrase “because of any action, policy, or practice of Defendants” should be stricken from each of the three subclasses.

(60) We also agree with Defendants’ contention that the district court erred in including the phrase “failed to clock out” in the subclass dealing with missed rest breaks. As Defendants point out, the practice of requiring employees to clock out for rest breaks was ended in February 2001. As such, we believe that the court should modify the subclass definition by deleting the phrase “failed to clock out” and simply define the class as including those employees who missed rest breaks during the applicable time period.

(61) Having modified the pertinent subclasses accordingly, we decline Defendants’ request to reverse the district court’s grant of class certification. Because Plaintiffs have not appealed the various aspects of the district court’s order granting class certification that they do not agree with, we decline to address such arguments on appeal. See Watkins v. Local Sch. Bd. of Los Alamos Schs., 88 N.M. 276, 278, 540 P.2d 206, 208 (1975) (“[A] party . . . who does not appeal is presumed to be satisfied with the judgment rendered by the court below.”).

CONCLUSION

(62) We affirm the district court’s grant of Plaintiffs’ motion for class certification as modified.

(63) IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CELIA FOY CASTILLO, Judge
CLE Programs – University of New Mexico School of Law

The UNM School of Law cordially invites the New Mexico legal community to
“A Lawyer’s Creed in Practice”
Moderated by Professor Rob Schwartz

Thursday, October 25, 2007, 5:30-7:00 p.m.
UNM School of Law, 1117 Stanford NE, Albuquerque

This course has been approved by the New Mexico Minimum Continuing Legal Education Board
for 1 HOUR OF PROFESSIONALISM CREDIT. $25 in advance or $30 at the door
The program is free if not attended for CLE credit.

5:30-6:00 Henry Weihofen Endowed Chair Presentation

The CLE program will be preceded by a presentation naming Professor Jim Ellis to the Henry Weihofen Chair. The Chair was established in 2004 to strengthen UNM Law School’s academic program by recognizing distinguished teachers and scholars. New York University Law Professor Anthony Amsterdam, one of the most influential legal scholars in the United States and co-author of Minding the Law (Harvard University Press 2000), will make a special trip to Albuquerque to help honor Professor Ellis, his longtime friend and colleague.

6:00-7:00 Professionalism CLE

Professor Schwartz will speak about Professor Ellis’ three decades of groundbreaking advocacy on behalf of people with mental disabilities as the embodiment of several principles in “A Lawyer’s Creed of Professionalism,” followed by a panel and audience discussion. Ellis has spent his career writing articles and amicus briefs, and appearing before congressional and state legislative committees across the country arguing for the rights of people with disabilities. He has filed briefs in 18 cases in the U.S. Supreme Court, and argued Atkins v. Virginia, in which the Court held that the execution of individuals with mental retardation violates the Eighth Amendment’s prohibition on cruel and unusual punishment. Ellis has received numerous national awards for his work, including the National Law Journal’s “Lawyer of the Year” honor in 2002.

Ellis’ interest in mental disability dates to his service at the Yale Psychiatric Institute as a conscientious objector. After law school, he worked at the Bazelon Center for Mental Health Law in Washington, D.C., before joining the UNM law faculty.

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WEDNESDAY, OCTOBER 24, 2007
8:30 a.m. The Medical Language and Anatomy for the Courtroom
   I. Anatomy.
      Skin, subcutaneous tissue, muscle, ligaments, tendon, cartilage, artery, veins, lymph, bone, nerve, CNS, periphr. nervous system.
   II. Musculoskeletal anatomy.
   10:00 a.m. Break
   10:15 a.m. Musculoskeletal anatomy (continued)
   11:45 a.m. Lunch (provided at the State Bar Center)
   12:45 p.m. The Recalcitrant Medical Witness. A New Way of Discovery.
      The Horizontal Review of Medical Records
      III. Orthopedics. Urgent / Emergent. Related to nearby structures.
      IV. Head and neck. Skull / contents. – computer, central command, communications. CNS includes cranial nerves. Carotid - extension of major vessels.
   2:45 p.m. Break
The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. They do not report attorneys or judges to law enforcement, the Disciplinary Board or the Judicial Standards Commission. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

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*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.