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“Horsewoman” by Russ Ball (see page 5)  
Weems Gallery, Albuquerque

Special Insert:
Daniels-Head Professional Liability Insurance

www.nmbar.org
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.

Free parking for this event is available in the Law School “L” lot.

CLE Registration: Fax or mail this completed form, or call to register by phone.

Name ___________________________________________  NM Bar #_____________
Street ___________________________________________  City/State/Zip__________________
VISA ___ MC ___  Card # ___________________________  Exp. Date ________  Total: $______
Signature ________________________________________  Check enclosed ___  (payable to UNM School of Law)

Attn: Claire Conrad, UNM School of Law, MSC11-6070, 1 University of New Mexico,
Albuquerque, NM, 87131-0001  Phone: 505-277-0080  Fax: 505-277-4165
Get Involved in State Bar Committees

By joining you will:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Name:_____________________________________________________________________________________________________

Address:__________________________________________________________________________________________________

City/State:__________________________________________________________________________________ Zip:________________

Telephone: _______________________________________________  Fax: _______________________________________________

E-mail:____________________________________________________________________________________________________

Mail To: State Bar of New Mexico, Membership and Communications Department,  
PO Box 92860, Albuquerque, NM 87199-2860  
Fax: (505) 828-3765 • Request by E-mail: membership@nmbar.org
INCREASING THE EFFECTIVENESS OF MEDIATION ADVOCACY:
Using the Negotiator’s Toolbox with Andrea Schneider

Friday, November 2, 2007 • State Bar Center, Albuquerque
6.0 General CLE Credits

Co-Sponsors: Court Alternatives, 2nd Judicial District Court
1st Judicial District Court
ADR Committee, State Bar of New Mexico
☑ Standard Fee $239

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

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name _______________________________________________ NM Bar # _________________________________
Street ____________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________
Phone __________________________ Fax __________________________
E-mail ______________________________________________
☑ Purchase Order (Must be attached to be registered) ☐ Check enclosed $ ____________ Make check payable to: CLE
Credit Card # __________________________ Exp. Date ____________
Authorized Signature __________________________________________
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**Professionalism Tip**

With respect to the public and to other persons involved in the legal system:

I will willingly participate in the disciplinary process.

### Meetings

#### October

- 24 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room

#### November

- 2 Board of Bar Commissioners Board Meeting, Albuquerque
  - Family Law Section Board of Directors, 9 a.m., via teleconference

### State Bar Workshops

#### October

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

#### November

- 1 Lawyer Referral for the Elderly Workshop 1:15 p.m., Meadowlark Senior Center, Rio Rancho
- 26 Lawyer Referral for the Elderly Workshop 1:15 p.m., Meadowlark Senior Center, Belen

**Cover Artist**: Russ Ball is known for his exquisite drawings and paintings of birds and dalmatians in oil and pastel. He also paints large and surreal acrylic and oil paintings of harlequins on tightropes and dreamlike “horsewomen” riding the range. Ball painted the official poster of the 2006 Albuquerque Balloon Fiesta and is well known in Albuquerque for his illustrations in the *Albuquerque Journal*, where he has worked for the past 27 years. To see the cover art in its original color, visit [www.nmbar.org](http://www.nmbar.org) and click on *Bar Bulletin*. 

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Bar Bulletin - October 22, 2007 - Volume 46, No. 43
**NOTICES**

**COURT NEWS**

**N.M. Supreme Court Judicial Performance Evaluation Commission Upcoming Meeting**

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The Commission's next regular meeting will be from 8 a.m. to 5 p.m., Oct. 26, at Clovis, for the purpose of interviewing judges in the 9th and 10th judicial districts.

**Law Library**

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

**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.

**STATE BAR NEWS**

**2007 Section Elections**

Nominating committees have put forth their slate of candidates. Visit www.nmbar.org and select Divisions/Sections/Committees, Sections, Section Elections to view the candidates and their biographies. Members wishing to contest the positions may do so by completing a petition, also found on the Web site. The petition must be signed by at least 10 members of the section whose membership began at least 30 days prior to the commencement of the election. Should any of the positions be contested, ballots will be mailed by Nov. 9.

**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**

**Board and Commission Appointments Client Protection Fund Commission**

The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for a one-year term to begin Jan. 1, 2008. The Commission exists to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of lawyers.

Members wishing to serve on the Commission should send a letter of interest and brief resume by Oct. 31 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

**N.M. Legal Aid (NMLA) Board**

The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid Board. Two of the appointments are one-year terms and one appointment is a one-year term, with one of the appointments being a member of and recommended by the Indian Law Section.

Members wishing to serve on the Board should send a letter of interest and brief resume by Dec. 10 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

**Employment and Labor Law Section Board Meetings Open to Section Members**

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, Nov. 7, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call S. Charles Archuleta, section chair, (505) 346-4646.

**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 the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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<td>May be retrieved through Nov. 29</td>
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Natural Resources, Energy and Environmental Law Section
Annual Meeting and CLE
The Natural Resources, Energy and Environmental Law Section will hold its annual meeting at 12:15 p.m., Dec. 14, in conjunction with the CLE, *Natural Resource Issues in Indian Country*. Agenda items for the annual meeting should be sent to Chair Steve Hattenbach, steve.hattenbach@usda.gov, or (505) 248-6020.

Attendees at the CLE will earn 6.1 general, 1.0 ethics and 1.0 professionalism CLE credits. The cost of the CLE program is $229, and $219 for section members, government and legal services attorneys and paralegals. Lunch will be provided and a reception and law student/attorney mixer will be held after the CLE. 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.

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.

Real Property, Probate and Trust Section
Annual Meeting and CLE
The Real Property, Probate and Trust Section will hold its annual membership meeting at 12:45 p.m., Nov. 30, in conjunction with the 2007 Real Property Institute at the State Bar Center. Contact Chair Scotty Holloman, scotty@leaco.net or (505) 393-0505, to place an item on the agenda.

CLE attendees will earn 7.0 general CLE credits. The cost of the CLE program is $189; and $179 for section members, government and legal service attorneys and paralegals. Lunch will be provided. See the CLE At-a-Glance insert in the Oct. 15 (Vol. 46, No. 42) *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.

Other Bars
Albuquerque Bar Association
Call for Nominations for Outstanding Lawyer and Outstanding Judge
The Albuquerque Bar Association is entertaining nominations for the Outstanding Attorney and Outstanding Judge of 2007. Nominations close Nov. 9. E-mail the Albuquerque Bar Association at abqbar@abqbar.com.

Membership Luncheon
The Albuquerque Bar Association’s Membership Luncheon will be held at noon, Tuesday, Nov. 6, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The luncheon speaker is David J. Schmidly, president of the University of New Mexico.

The CLE (1.0 professionalism CLE credit) will immediately follow the luncheon from 1:30 p.m. to 2:30 p.m. Lauren Marble will present *Professionalism: The Secret to a Successful Practice*, a one-hour presentation analyzing professionalism through New Mexico’s rich history of cultural diversity—Native American, Hispanic and Anglo-American—to uncover the sometimes hidden, sometimes forgotten teachings from the past, and integrate them into our understanding of professionalism.

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

Register for lunch by noon, Friday, Nov. 2. Those unable to register prior to the luncheon will be charged an additional $5 at the door. To register:

1. log on to www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. by fax to (505) 842-0287;
4. call (505) 842-1151 or (505) 243-2615; or
5. mail to PO Box 40 Albuquerque, NM 87103-0040

UNM School of Law
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:
- 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.

Fall Library Hours
Sunday Noon to 4 p.m.
Monday–Friday 9 a.m. to 6 p.m.

Reference
Monday–Friday 9 a.m. to 6 p.m.
Sunday Noon to 4 p.m.
Thanksgiving Holidays Closed
Nov. 22–23

Holiday Deadlines
Due to the Thanksgiving Holidays, the deadlines for the Nov. 26 issue of the *Bar Bulletin* are as follows:

Advertising .................................................... Friday Nov. 9
Notices and Court Documents .............. Wednesday, Nov. 14
Free Webinar on E-mail Encryption

Zix Corporation has been selected by the State Bar of New Mexico Alliance Program to offer members easy solutions for securing e-mail communications. E-mail encryption from ZixCorp is easy-to-deploy, integrates seamlessly into existing communications infrastructures, and can be up and running in just a few hours.

To learn more about e-mail encryption from ZixCorp, register for the upcoming Webcast, *E-mail Encryption: A Legal Imperative*, being held from 11 a.m. to noon, Oct. 23.

Participation entitles members to receive special promotional pricing. Register at www.zixcorp.com/info/sbnm or call Michael Salvatore, at (214) 370-2218.

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-served 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.

**Learn Excel**

Learn how to format, create spreadsheets and save files. Work with formulas, work-sheets and charts. Understand database basics, data tables and queries and much 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.

Other News

Center for Civic Values

IOLTA Grants

IOLTA grant applications are available on the CCV Web site at www.civicvalues.org/iolta.htm. Grants are awarded to New Mexico nonprofit organizations that provide civil legal services for the poor, legal education for the public or improvements in the administration of justice.

For civil legal service providers, applications that address specific legal issues impacting low-income persons as identified by the 2007 *State Plan for Providing Civil Legal Aid to Low Income New Mexicans*, adopted by the Supreme Court, August 2007, will be favored. These issues include disability benefits and rights, welfare benefits, unemployment benefits, welfare-to-work programs, health benefits, landlord-tenant relations, housing quality, affordable housing, housing discrimination, foreclosure and condemnation, domestic violence, child custody, child support, divorce and consumer rights, water rights, migrant worker and Native American issues and other issues as established by the State Plan.
The next time you are heading up U.S. 84 to Chromo, Colorado, stop at the state line and with your trusty GPS see what it says for the degree of latitude north of the Equator. Then compare that with the “legal description” in Article I of the pocket edition of the Constitution of the State of New Mexico, which you always carry for the purpose of instantly settling disputes. Or perhaps when you are heading for Texline, Texas, on U.S. 87, stop at the state line to compare your GPS reading of the meridian, i.e. the degrees of longitude west of Greenwich, England, with the Constitution’s legal description of the eastern border. What gives?

The delegates to the Constitutional Convention of 1910 did not make up the state boundaries out of “whole cloth.” Each of the eight boundary lines described in the Constitution came from preexisting legal documents: (1) the “Organic Act” establishing the Territory of New Mexico in 1850; (2) the “Gadsden Treaty” signed December 30, 1853; (3) the act creating the temporary government for the Territory of Colorado; and, (4) the act providing for the temporary government of the Territory of Arizona. Half of these borders present interesting problems for the “casual” reader of the Constitution.

Section one of the Organic Act reflects the compromise whereby Texas gave up its claim of territory from the 103rd meridian to the Rio Grande River for a $10 million bond issued by the United States. Section two then used the 103rd as the eastern boundary of New Mexico, from, at that time, the 32nd to the 38th parallel north of the Equator. But the so-called “Clark Survey” of 1859 deviated from the 103rd at the southwest corner of what is now the Oklahoma panhandle, resulting in the boundary moving west and a loss of approximately 600,000 acres to Texas. That part of the southern boundary in the Organic Act using 32° N was part of the Texas compromise and it went west to the “main channel” of the Rio Grande. From there, however, it was a guessing game, the result of the mess created by the Treaty of Guadalupe Hidalgo, a whole other story. One result of the Gadsden Treaty was to set a point in the river at 31° 47´ N and then extend the boundary west from that point. But that meant following the channel from those two parallels and, surprise, the river changed course. The solution, expressed in the Constitution, was to modify the description to use the main channel “as it existed” on Sept. 9, 1850, the date of adoption of the Organic Act. It eventually took a survey ordered by the U.S. Supreme Court to settle that ambiguity.

On its face, the northern boundary with Colorado should be “straightforward.” New Mexico lost some territory with the creation of the territory of Colorado in 1861, but the entire boundary was set at 37° N from east to west, the boundary incorporated into the constitutional legal description. Alas, the so-called “Darling Survey” of 1868 created a line south of that parallel from roughly a point east of where State Road 551 (Union County) crosses the border to a point about five miles west of U.S. 84 in Rio Arriba County. Congress and the President could never seem to agree on a solution to the problem, and when it finally got to the U.S. Supreme Court, the court held that New Mexico had acquiesced in the survey. Thus the actual boundary on the north does not follow the legal description in the Constitution.

The western boundary set by the statute creating the Arizona Territory in 1863 is not “wrong” but, of course, it requires yet another history lesson. The boundary, incorporated into the constitutional legal description, is set at the “thirty-second meridian of longitude west from Washington.” Before the 1894 agreement which recognized Greenwich, every nation worth its salt thought the 0 meridian should run through its own capital, and the United States was no exception. Why the Constitutional Convention did not just use 109° 2´ 12” West of Greenwich in 1910 is not known, but clearly that was the least of the problems the convention had when creating a legal description for New Mexico.

In its 1925 opinion, the U.S. Supreme Court does not indicate the amount of the territory lost to Colorado, but does say that it was a “large strip” and included, after Colorado had exercised control,

continued on next page
“one town and two villages, and five post offices.” The loss to Texas is probably more substantial, estimated at 600,000 acres, including the towns of Farwell and Texline. New Mexico officials from time to time express dissatisfaction with the loss of territory to Texas. As early as 1911 a legal argument was suggested,11 but whether or not an action to reclaim the property would be successful is anyone’s guess.

(Endnotes)
1 Act of September 9, 1850, §§ 1 & 2.
2 Act of February 28, 1861, § 1.
3 Act of February 24, 1863, § 1.
5 Act of August 21, 1911, § 502.
6 See e.g., Whittier, note 4 supra, at p. 11.
7 Although a curious shape, probably worthy of another story, the remainder of the southern boundary set by the treaty was incorporated into the constitution and is not in question.
8 New Mexico v. Texas, 276 U.S. 558 (1928).
10 New Mexico v. Colorado, 267 U.S. at 37.
11 Note 6, supra.
12 Ibid.

About the Author:
Mark Thompson, a member of the State Bar Historical Committee, is an occasional contributor of history articles to the Bar Bulletin.

Ethics Advisory Opinions

Visit the State Bar advisory opinion archive and topical index on the State Bar Web site,* www.nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

Easy to Use
• 80 indexed, summarized opinions.
• Select Attorney Services/Practice Resources then Ethics Advisory Opinions.

More Resources
• Risk Management Hotline, (800) 326-8155.
• Original questions involving one’s own conduct should be sent to the Ethics Advisory Committee, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 or membership@nmbar.org.

* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
22  When Politics Tip the Scales of Justice
Teleconference
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2.0 E
(800) 672-6253
www.trtcle.com

23  Fiduciary Litigation Update
Teleseminar
Center for Legal Education of NMSBF
1.0 G
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23  International Adoption
VR, State Bar Center
Center for Legal Education of NMSBF
4.2 G, 2.5 E
(505) 797–6020
www.nmbarcle.org

23  Lawyer as Problem Solver: 2007 Professionalism
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 P
(505) 797–6020
www.nmbarcle.org

23  Sophisticated Estate Planning Strategies for the Advanced Practitioner
Albuquerque
National Business Institute
5.6 G, 1.0 E
(715) 835-8525
www.nbi-sems.com

23  Success as a Lawyer and Judicial Elections
[Excerpts from 2007 Annual Meeting]
VR, State Bar Center
Center for Legal Education of NMSBF
0.7 G, 0.5 E
(505) 797–6020
www.nmbarcle.org

23  Tsunami on the Horizon—Ethics of Transnational Law
Teleconference
TRT
2.0 E
(800) 672-6253
www.trtcle.com

23  What Every Lawyer Should Know About IP
VR, State Bar Center
Center for Legal Education of NMSBF
2.7 G
(505) 797–6020
www.nmbarcle.org

24  Cutting Through the Technical Tax Rules Impacting Charities
Satellite Broadcast
Edward Jones
2.8 G
(800) 441-2018

24  Internal Investigations of Employee Issues
Albuquerque
Lorman Education Services
3.3 G
(715) 833-3940
www.lorman.com

24  Mediation—Theory and Practice
Teleconference
TRT
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(800) 672-6253
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Albuquerque
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24  Medical School for Attorneys
State Bar Center
Center for Legal Education of NMSBF
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24  Resolving Legal and Financial Issues in Elder Care
Albuquerque
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26  Art of the Deal 4: Getting the Property in the Right Way: Acquisition Agreements
Teleseminar (Live Replay)
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G = General  E = Ethics
P = Professionalism  VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
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Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**WRITS OF CERTIORARI**

**As Updated by the Clerk of the New Mexico Supreme Court**

**Effective October 22, 2007**

**Petitions for Writ of Certiorari Filed and Pending:**

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<td>25,549</td>
<td>3/14/07</td>
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<td>29,941</td>
<td>Baldonado v. El Paso Natural Gas Co.</td>
<td>24,821</td>
<td>3/14/07</td>
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<td>29,953</td>
<td>State v. Day</td>
<td>25,290</td>
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<td>30,021</td>
<td>Helen G. v. Mark J.H.</td>
<td>25,877</td>
<td>4/11/07</td>
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<td>29,835</td>
<td>State v. Rogers</td>
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<td>25,005</td>
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<td>Heath v. La Mariana Apts.</td>
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**Petition for Writ of Certiorari Denied:**

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<td>Gonzalez v. Ulibarri</td>
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<td>State v. Guerin</td>
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<tr>
<td>30,646</td>
<td>State v. Crofutt</td>
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<td>Gallegos v. Aragon</td>
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www.supremecourt.nm.org
**OPINIONS**

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

Gina M. Maestas, Chief Clerk New Mexico Court of Appeals

PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925

**EFFECTIVE OCTOBER 12, 2007**

**PUBLISHED OPINIONS**

<table>
<thead>
<tr>
<th>No.</th>
<th>Circuit</th>
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<tr>
<td>26206</td>
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<td>CR-05-4, STATE v R MAESTAS (vacate and remand)</td>
<td>10/10/2007</td>
</tr>
<tr>
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**UNPUBLISHED OPINIONS**

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<td>LR-06-14, STATE v M LINGERFELT (affirm)</td>
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<td>CV-05-6, F VALDEZ v J WOOD (affirm)</td>
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<td>27672</td>
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<td>CR-06-1250, STATE v H JACKSON (dismiss)</td>
<td>10/12/2007</td>
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Slip Opinions for Published Opinions may be read on the Court’s Web site:

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Vice President
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**PRELIMINARY PREMIUM INDICATION WORKSHEET**

**Firm Name:**

**Contact Person:**

**Address:**

**City:**

**State:**

**Zip:**

**Business Phone:** ( )

**Facsimile Number:** ( )

**Email:**

All attorneys must be listed to be considered as Insureds. Of Counsel attorneys need not be listed unless individual coverage is desired. If you are a sole practitioner, please list yourself. Attach sheet if additional attorneys are to be listed.

<table>
<thead>
<tr>
<th>Attorney Name</th>
<th>D/C*</th>
<th>Social Security Number</th>
<th>Years in Practice</th>
<th>Date Joined Firm #</th>
<th>Prior Acts Exclusion Date #</th>
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* Designation Codes (D/C)*

O=Officers, Directors or Shareholders of the corporation who are licensed as lawyers

E=Employed Lawyers (must be employee of applicant)

S=Sole Proprietor

PT=Part-time Lawyer (must work less than 26 hours per week in the private practice of law solely on behalf of the applicant firm)

**Current Insurance** (Complete this Section or Send copy of you Current Declaration Page)

**Carrier:**

**Limits:**

**Reneval Date:**

**Expiring Annual Premium:** $

**Desired Limits and Deductible** (if different than current) Desired Limits Deductible

**Firm's Retroactive Date**

Are you aware of any claims against your firm or any incidents that could result in a claim against your firm within the past five years? If "YES", how many? Please provide details of each, including a description of the allegations, current reserve and/or indemnity paid, expenses paid, etc.

Has any member of the applicant firm been refused admission to practice, disbarred, suspended, reprimanded, sanctioned, or held in contempt by the court administrative agency or regulatory body? If "YES", please provide details.

Does the firm handle any Class Action or Mass Tort cases?  Yes No

**Areas of Practice** (Round to the nearest whole percent.)

<table>
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<tr>
<td>Admiralty/ Maritime</td>
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<td>Antitrust/ Trade Registration</td>
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<td>Aviation</td>
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<td>Bankruptcy</td>
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<td>Business Transactions/ Commercial Law</td>
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<td>Civil Rights</td>
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<td>Collections</td>
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<td>Commercial Practice- Business Litigations</td>
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<td>Corporate-Business Formation/ Alteration</td>
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<td>Criminal Law</td>
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<td>Disability/ Social Security</td>
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<td>Elder Law</td>
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<td>Estates/ Wills/ Trust/ Probate</td>
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<tr>
<td>Family Law</td>
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<tr>
<td>Financial Institutions- Reg. Compliance</td>
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</table>

**TOTAL MUST EQUAL 100%**

Print or Type Name and Title Signature of Owner, Officer or Partner Date (Month/ Day/Year)

Preliminary Indications Are Not Binding
Take Stock of Your Liability Risks

An important step in considering which coverage would be right for your law firm is to examine your operations and how you conduct business. Certain activities make your firm more vulnerable to potential losses. To begin your analysis, just review the list below and start by identifying areas that could expose you or your law firm to loss.

Do I need to increase my limits of liability to protect me and my firm against any increased exposure?

Has my liability exposure increased with new clients and new matters?

Could this potentially increase the damages I am responsible for if I make an error?

Have my areas of practice changed since my last application?

Have I added or increased my hazardous areas of practice?

Does this create more of an exposure to my practice?

Can I afford my deductible? Is the premium difference affordable so that there would be little or no money out of pocket in the event of a claim?

Are my Extended Reporting Period options adequate to protect my future?

Will my limits of liability protect me in my “worst case” claim?

Will my limits cover defense costs and actual judgement or settlement?

Do I use the services of other attorneys, Of Counsel attorneys, or independent contractors?

If so, are these attorneys insured?

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505-922-8881 or dj32@dhianm.com
www.danielshead.com
IN THE MATTER OF THE AMENDMENTS OF FORMS 4-963, 4-963A, 4-965, 4-970, 4-971, AND 4-973 NMRA OF THE RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Domestic Relations Task Force to amend Civil Forms 4-963, 4-963A, 4-965, 4-970, 4-971, and 4-973 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Civil Forms 4-963, 4-963A, 4-965, 4-970, 4-971, and 4-973 NMRA hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Civil Forms 4-963, 4-963A, 4-965, 4-970, 4-971, and 4-973 NMRA shall be effective September 17, 2007;

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

DONE at Santa Fe, New Mexico, this 8th day of August, 2007.

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

4-971*
STATE OF NEW MEXICO
COUNTY OF ____________________________
JUDICIAL DISTRICT
No. ____________________________

Petitioner v.

Respondent

*Note: Form 4-971 was inadvertently not printed with other forms published in the Aug. 20 (Vol 46, #34) Bar Bulletin. The form is available for downloading in the legal forms posted on www.supremecourt.nm.org.

STIPULATED ORDER OF PROTECTION AGAINST PETITIONER

This is not an order of protection under 18 U.S.C. Section 922.

THIS MATTER came before the court upon agreement of the parties to the entry of an order. The court, having determined that it has legal jurisdiction over the parties and the subject matter, FINDS, CONCLUDES AND ORDERS:

(check only applicable paragraphs)

1. NOTICE AND APPEARANCES
This order was entered on stipulation of the parties in a proceeding that does not satisfy the requirements of 18 U.S.C. Section 922.

2. EFFECT OF STIPULATION TO ORDER OF PROTECTION
Violation of this order can have serious consequences, including:
A. If you violate the terms of this order, you may be charged with a misdemeanor, which is punishable by imprisonment of up to 364 days and a fine of up to $1,000.
B. You may be found to be in contempt.
C. If you are not a citizen of the United States, entry of this order may have a negative effect on your application for residency or citizenship.

3. DOMESTIC ABUSE PROHIBITED
The petitioner shall not abuse the respondent or members of the respondent’s household.
“Abuse” means any incident by petitioner against the respondent or respondent’s household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat by petitioner causing imminent fear of bodily injury to respondent’s or respondent’s household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by respondent’s or respondent’s household members’ residence or workplace; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children in any manner set forth above. Petitioner shall not ask or cause other persons to abuse the respondent or respondent’s household members.

4. CONTACT PROHIBITIONS
Petitioner shall stay _______ yards away from the respondent and the respondent’s home and workplace at all times, unless at a public place, where the petitioner shall remain _______ yards away from the respondent except as specifically permitted by this order. Petitioner shall not telephone, talk to, visit or contact respondent in any way except as follows:
[ ] The parties may contact each other by telephone regarding medical emergencies of minor children;
[ ] The parties may attend joint counseling sessions at the counselor’s discretion.

(Unless the court has entered an order sealing respondent’s address, include the address of residence and employment for the respondent.)

Petitioner’s addresses

(home address)
(work address)
IT IS FURTHER ORDERED

Respondent’s addresses:

_______________________  _______________________
(home address)  (home address)
_______________________  _______________________
(work address)  (work address)
_______________________  _______________________
(city)  (city)
_______________________  _______________________
(if applicable, tribe or pueblo)  (if applicable, tribe or pueblo)
_______________________  _______________________
(state and zip code)  (state and zip code)

9. The petitioner shall report to _____________________
   Respondent shall attend and complete counseling at __________ at _________ (a.m.) (p.m).

5. COUNSELING
   [ ] Petitioner shall attend and complete counseling at __________, contacting that office within five (5) days. The petitioner shall participate in, attend and complete counseling as recommended by the named agency.
   [ ] Respondent shall attend and complete counseling at __________, contacting that office within five (5) days. The respondent shall participate in, attend and complete counseling as recommended by the named agency.

6. CUSTODY
   [ ] The court’s orders regarding the minor [child] [children] of the parties are found in the Custody, Support and Division of Property Attachment of this Order of Protection.

7. PROVISIONS RELATING TO SUPPORT
   [ ] The court’s orders regarding support issues for the parties are found in the Custody, Support and Division of Property Attachment of this Order of Protection.

8. PROPERTY, DEBTS, PAYMENTS OF MONEY
   [ ] The court’s orders regarding property, debts and payment of money are addressed in the Custody, Support and Division of Property Attachment of this Order of Protection.

9. ADDITIONAL ORDERS
   [ ] Review hearing. The parties are ordered to appear for a review hearing on the ______ day of _____________, ______, at _________ (a.m.) (p.m).

IT IS FURTHER ORDERED:

10. RESPONDENT SHALL NOT CAUSE VIOLATION.
    While this order of protection is in effect, the respondent should refrain from any act that would cause the petitioner to violate this order. This provision is not intended to and does not create a mutual order of protection.

11. EFFECTIVE DATE OF ORDER; EXTENSION; MODIFICATION
    This order is effective upon filing with the clerk of the court.
    This order [with the exception of the orders in the Custody, Support and Division of Property Attachment] shall continue until _____________ (date), or until modified or rescinded by the court.

12. NOT TO BE ENTERED IN FEDERAL REGISTRY
    This order shall not be entered into a national domestic violence registry or other national information system.

13. NOTICE TO LAW ENFORCEMENT AGENCIES
    ANY LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.
   [ ] Petitioner is ordered to surrender all keys to the residence to law enforcement officers.
   [ ] Law enforcement officers or _____________________ shall be present during any property exchange.
   [ ] This order supersedes prior orders in County, State of __________, Cause No. ____________ to the extent that there are contradictory provisions.

14. NOTICE TO PETITIONER AND RESPONDENT
    This order does not serve as a divorce and does not permanently resolve child custody or support issues.

15. AGREEMENT OF PARTIES
    Without admitting that domestic abuse has occurred, the parties stipulate to the entry of this order and affirm that they have read and do understand the affects of this order as stated in Paragraph 2.

Petitioner’s signature                    Respondent’s signature
Petitioner’s counsel, if any              Respondent’s counsel, if any

Date                                      Date

16. RECOMMENDATIONS
    I have:
   [ ] reviewed the pleading for order of protection;
   [ ] prepared this order as my recommendation to the district court judge regarding disposition of requests for order of protection.

Signed

Domestic Violence Commissioner
Court’s telephone number: ________________

SO ORDERED.

District Judge

[ ] A copy of this order was [ ] hand delivered [ ] faxed [ ] mailed to [ ] respondent [ ] respondent’s counsel on __________ (date).
[ ] A copy of this order was [ ] hand delivered [ ] faxed [ ] mailed to [ ] petitioner [ ] petitioner’s counsel on __________ (date).

Signed

USE NOTES

1This form may be used if the parties stipulate to an order of protection against the petitioner without any findings of abuse.

2This order may be entered only upon stipulation of the parties without a hearing on the issue of abuse. If a hearing is held on the issue of abuse, use Form 4-965. If a hearing is held on other matters, Form 4-967 may be attached to this order.

3See Form 4-967, “Custody, Support and Division of Property Attachment”.

4If appropriate, an order providing for restitution may be included in this paragraph.

5Petitioner may be served at the time this order is issued. If petitioner is not present at the time this order is issued, service upon petitioner shall be made by delivering a copy to the party.

See Section 40-13-6(A) NMSA 1978.
[Effective September 17, 2007.]

COMMITTEE COMMENT
See Committee Comment to Civil Form 4-970 NMRA.
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-048

STATE OF NEW MEXICO, Plaintiff-Appellant, versus KEVIN SUTPHIN, Defendant-Appellee.

No. 30,259 (filed: August 28, 2007)

ORIGINAL PROCEEDING ON CERTIORARI

DOUGLAS R. DRIGGERS, District Judge

GARY KING
Attorney General
ANDREW S. MONTGOMERY
Assistant Attorney General
Santa Fe, New Mexico
for Respondent

NANCY M. HEWITT
Santa Fe, New Mexico
for Amicus Curiae
New Mexico Public Defender Department

OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

{1} We use this case to clarify our jurisdiction over a district court’s denial of a petition for a writ of habeas corpus. We conclude that allowing a petitioner to seek a writ of certiorari from this Court in such circumstances is a proper exercise of our original jurisdiction over habeas matters. As for the merits of the case, we deny Petitioner Kenneth Cummings a writ of habeas corpus because his ineffective assistance of counsel claim has no merit, and because the writ may not be used to restore a person’s right to vote.

I. BACKGROUND

{2} While living in El Paso, Texas, Cummings used the internet to send images of his genitals to a child located in Doña Ana County, New Mexico—or so he believed. The “child” was actually an undercover officer. Cummings pled guilty to six counts of attempting to contribute to the delinquency of a minor and six counts of attempted child luring. Although the actual crimes of contributing to the delinquency of a minor and child luring are fourth-degree felonies, NMSA 1978, §§ 30-6-3 (1990), 30-37-3.2(B) (1998, prior to 2005 amendment), attempting to commit a fourth-degree felony is a misdemeanor. NMSA 1978, § 30-28-1(D) (1963). Having been convicted of twelve misdemeanors, the trial court sentenced Cummings to twelve consecutive sentences of 364 days. Pursuant to his plea agreement, Cummings did not appeal his convictions.

{3} Cummings later sought a writ of habeas corpus in the district court in which he was convicted. Cummings alleged: (1) his defense counsel was ineffective for failing to raise two defenses, and (2) he was erroneously deprived of the right to vote despite the fact that he was not convicted of a felony. The district court summarily dismissed the petition without a hearing. The district court concluded that Cummings could not show that his attorney’s performance fell below the standard of reasonable competence, or that he was prejudiced by his attorney’s acts or omissions, because the defenses Cummings claimed his trial attorney should have raised were without merit. Regarding the right to vote issue, the district court concluded that it did not have jurisdiction to hear Cummings’s claim because there was no showing that Cummings had exhausted his administrative remedies. See NMSA 1978, § 33-2-11(B) (1990) (providing that no court has jurisdiction over any claim “that is substantially related to the inmate’s incarceration” unless the inmate first “exhausts the corrections department’s internal grievance procedure”).

{4} Cummings sought a writ of certiorari from this Court pursuant to Rule 5-802(H)(2) NMRA and Rule 12-501 NMRA. In response, the State suggests that the Court of Appeals has appellate jurisdiction over this case. The State asserts that, although the New Mexico Constitution vests us with original jurisdiction to issue writs of habeas corpus, we lack authority to review the district court’s denial of Cummings’s habeas petition. Instead, the State contends that two statutes apparently vest the Court of Appeals with appellate jurisdiction over this case. See NMSA 1978, §§ 31-11-6 (1966) (providing for a “post-conviction remedy”); 34-5-8(A)(4) (1983) (providing that the Court of Appeals has appellate jurisdiction over “post-conviction remedy proceedings, except where the sentence involved is death or life imprisonment”).

II. DISCUSSION

A. Even Though a Habeas Petitioner May Not Directly Appeal a District Court’s Adverse Ruling, Such a Petitioner May Seek Review in This Court by Writ of Certiorari

{5} The writ of habeas corpus, a creature of common law dating back to at least the Magna Carta, became part of New Mexico law when the Territory adopted the common law. In re Forest, 45 N.M. 204, 208, 113 P.2d 582, 584 (1941). Well before statehood, with little modification since, our territorial legislature enacted statutes pertaining to the writ. NMSA 1978, §§ 44-1-1 to -38 (1963). The New Mexico Constitution provides that this Court has concurrent jurisdiction with district courts to entertain petitions for writs of habeas corpus. N.M. Const. art. VI, §§ 3, 13. An analysis of early case law reveals that we have properly used our original jurisdiction over habeas corpus petitions to give a petitioner the functional equivalent of an appeal from a denial of the writ in district court.

{6} At the beginning of statehood, a district court’s ruling on a petition for habeas cor-
pus was final in all respects. In Notestine v. Rogers, the State appealed the district court’s grant of the writ and discharge of the petitioner from custody. 18 N.M. 462, 465, 138 P. 207, 207 (1914). Concerned that allowing the State to appeal such cases would deny a petitioner the speedy remedy afforded by habeas corpus, and due to the fact that the Legislature had not explicitly authorized appeals in habeas corpus actions, we dismissed the State’s appeal. Id. at 466-67, 138 P. at 207-08. In conclusion, we stated: “That the legislature could provide for appeals in such cases is not doubted, but until it does so, in clear and unequivocal language, and under suitable regulations which do not impair the constitutional provisions governing the right to the writ, the courts will deny such right.” Id. at 467, 138 P. at 208.

{7} One year later, the Legislature responded by enacting a law allowing the State to appeal a district court’s granting of the writ. 1915 N.M. Laws ch. 77, § 1, at 113-14. Presumably in order to ensure a petitioner’s speedy right to the writ as emphasized in Notestine, the new law provided that the State’s appeal would not stay the discharge-rather, the petitioner would be released from custody, and if the district court’s order was reversed on appeal the petitioner would have to be rearrested. Id. at 114. As discussed below, this law is now codified with amendments at NMSA 1978, § 39-3-15 (1966).

{8} Several years later in Ex parte Nabors, we tackled the other side of the coin, that is, how a habeas corpus petitioner may obtain review of an adverse ruling in district court. 33 N.M. 324, 267 P. 58 (1928). In that case, Nabors originally sought a writ of habeas corpus in this Court and we denied the request because Nabors had not first petitioned the district court. Id. at 325, 267 P. at 59. After filing in district court, the court denied Nabors relief. Id. Nabors then returned to this Court and we exercised our original jurisdiction to hear the case. See id. The State contended that, because nothing had changed in the interim, we should defer to the district court’s ruling. Id. After discussing Notestine and the legislation resulting from that case, we rejected the State’s argument: “It would be a one-sided system unless we hold that the right of appeal from the order of discharge is offset by the right of one remanded to custody to apply to another judge having [concurrent] jurisdiction.” Id. at 326, 267 P. at 59 (emphasis added). Thus, notwithstanding the fact that a petitioner does not have a statutory right to appeal the denial of a habeas corpus petition, it has been the case for nearly 100 years that a petitioner has the right to seek relief in this Court after being denied relief in district court because we, too, have original jurisdiction over habeas actions. This principle is sound and we see no reason to stray from our precedent established in Nabors.

{9} The State argues that by employing a writ of certiorari in habeas cases, we are wrongly exercising our appellee jurisdiction, not our original jurisdiction. This is a distinction without a difference. In exercising our original jurisdiction to issue writs of habeas corpus, holding another hearing in this Court for fact-finding purposes would be redundant and impracticable, if not impossible. Thus, historically we have simply obtained the district court’s record by issuing a writ of certiorari so that we may exercise our original jurisdiction by reviewing the ruling of the district court. This is perfectly acceptable given that our Constitution provides that we may issue writs of certiorari “for the complete exercise of [our] jurisdiction.” N.M. Const. art. VI, § 3. That this results in what would ordinarily look like the discretionary exercise of our appellate jurisdiction does not matter.

B. Sections 31-11-6 and 34-5-8(A)(4) Do Not Govern Petitions for Writs of Habeas Corpus

{10} The State is in the odd position of asserting that, by enacting Sections 31-11-6 and 34-5-8(A)(4), the Legislature has provided a habeas petitioner with the same right of appeal that it enjoys, and that an appeal from the district court’s denial of a habeas petition in cases not involving a sentence of life imprisonment or death is heard in the Court of Appeals. On the contrary, those two statutes say nothing about petitions for writs of habeas corpus; thus, it is apparent to us the Legislature has not clearly and unequivocally given habeas petitioners the right of appeal at all. See Notestine, 18 N.M. at 467, 138 P. 208 (declining to allow the State an appeal from the district court’s grant of the writ because the Legislature had not done so “in clear and unequivocal language”).

1. A “Post-Conviction Remedy” Is Distinct from a Writ of Habeas Corpus

{11} Section 31-11-6, titled “Post-conviction remedy,” was enacted and became immediately effective on March 1, 1966. 1966 N.M. Laws ch. 29, § 1, at 135-36. The statute, for all practical purposes, mimicked verbatim our then Rule 93 of Civil Procedure, which had become effective two months prior. The rule allowed a prisoner to motion the court that imposed his or her sentence to “vacate, set aside or correct the sentence” on the grounds that the sentence was imposed in violation of the Constitution of the United States, or of the Constitution or laws of New Mexico, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

NMSA 1953, § 21-1-1(93); § 31-11-6.

{12} Notwithstanding the fact that the remedy provided for by former Rule 93 overlapped significantly with that of a writ of habeas corpus, see Smith v. State, 79 N.M. 450, 452, 444 P.2d 961, 963 (1968), it is clear the two were distinct. First, the denial of a prisoner’s Rule 93 motion could be appealed directly to this Court, whereas the denial of a petition for a writ of habeas corpus could not. See NMSA 1953, § 21-1-1(93)(e); § 31-11-6(E). Second, Rule 93 itself explicitly stated that a prisoner applying for a writ of habeas corpus first had to exhaust his or her remedies under the Rule before seeking the writ. NMSA 1953, § 21-1-1(93)(f); see § 31-11-6(F). Since Section 31-11-6 mimics former Rule 93, a “post-conviction remedy” under Section 31-11-6 is as equally distinct from a writ of habeas corpus. This is not a new insight. See Thomas A. Donnelly & William T. MacPherson, Habeas Corpus in New Mexico, 11 N.M. L. Rev. 291, 300 (1981) (stating that neither Section 31-11-6 nor Rule 93 “attempted to replace the writ of habeas corpus”). Thus, since a motion pursuant to Section 31-11-6 is distinct from a petition for a writ of habeas corpus, and since Cummings is seeking a writ of habeas corpus, Section 31-11-6 is irrelevant to this case.

2. Section 34-5-8(A)(4), Which Pertains to Appeals from “Post-Conviction Remedy Proceedings,” Does Not Give a Habeas Petitioner the Right of Direct Appeal to the Court of Appeals

{13} Also enacted with immediate effect on March 1, 1966 were two statutes concerning appellate jurisdiction. First was the general statute providing for the newly-created Court of Appeals’s appellate jurisdiction. 1966 N.M. Laws ch. 28, § 8,
at 106 (codified as amended at § 34-5-8). As enacted, the statute made no mention of habeas petitions or post-conviction remedy motions. One year later, the Legislature amended the statute, giving the Court of Appeals appellate jurisdiction over “post conviction remedy proceedings except where the sentence involved is death or life imprisonment.” 1967 N.M. Laws ch. 24, § 1(D), at 287-88 (codified as amended at § 34-5-8(A)(4)). As just discussed, however, a post-conviction remedy proceeding is not the same as a habeas corpus proceeding, so Section 34-5-8(A)(4) is as equally irrelevant to this case as Section 31-11-6.

{14} Second was Section 39-3-15. This statute-titled “Appeals; contempt and habeas corpus”--was an amendment to the 1915 law allowing the State to appeal the district court’s granting of a writ of habeas corpus. 1966 N.M. Laws ch. 28, § 43, at 124-25 (codified at NMSA 1978, § 39-3-15 (1966)). The amendment provided that instead of the State’s appeal going directly to this Court, the State’s appeal is to now go “to the supreme court or the court of appeals, as appellate jurisdiction may be vested by law in these courts.” § 39-3-15(B); cf. State v. Smallwood, 2007-NMSC-005, ¶¶ 9-11, 141 N.M. 178, 152 P.3d 821 (holding that a statute providing for interlocutory appeals to be heard in the court where “appellate jurisdiction may be vested by law” means that this Court has appellate jurisdiction over interlocutory appeals in cases where the sentence of life imprisonment or death may be imposed). {15} In sum: (1) Section 31-11-6, on its face, distinguishes between a post-conviction remedy and a writ of habeas corpus and provides that either party may appeal post-conviction remedy motions; (2) Section 34-5-8(A)(4) provides that the Court of Appeals has jurisdiction over appeals in “postconviction remedy proceedings” in cases not involving life imprisonment or death; (3) Section 39-3-15(B), a statute specifically pertaining to appeals in habeas cases, provides that the State, and only the State, has the right to appeal a district court’s ruling on a habeas corpus petition, and that the appeal is to go to this Court or the Court of Appeals, depending on where appellate jurisdiction is vested. Since Cummings is seeking a writ of habeas corpus and not a “post-conviction remedy,” we reject the idea that Cummings should have directly appealed this case to the Court of Appeals.

3. Cummings Was Not Required to File a “Post-Conviction Remedy Motion” Before Seeking a Writ of Habeas Corpus

{16} Although not explicitly raised by the State, we think it helpful to clarify what exactly a “post-conviction remedy” is, and whether Cummings was required to pursue one before seeking a writ of habeas corpus. Since Section 31-11-6 mimicked our former Rule 93 when enacted, there was no conflict between the two while Rule 93 remained in effect. Nearly a decade after Rule 93 and Section 31-11-6 first went into effect, however, we adopted Rule 57 of Criminal Procedure, which superseded Rule 93. See NMSA 1953, § 41-23-57 note (Supp. 1975) (Effective Date). Although Rule 57 retained the requirement that a prisoner first pursue a motion for a post-conviction remedy before seeking a writ of habeas corpus, NMSA 1953, § 41-23-57(j), Rule 57 conflicted with Section 31-11-6 because Rule 57 declared that “[t]he order of the district court on a motion under this rule is final and not subject to appeal.” NMSA 1953, § 41-23-57(a). {17} This conflict was addressed by the Court of Appeals in State v. Garcia, 101 N.M. 232, 680 P.2d 613 (Ct. App. 1984). In Garcia, the defendant challenged Rule 57’s no appeal clause on the grounds that, inter alia, it denied him his statutory right of appeal. Id. at 233, 680 P.2d at 614. The court resolved the defendant’s assertion by characterizing Section 31-11-6 as “procedural.” The court began by noting that “while the creation of a right to appeal is substantive, restrictions on the time and place of exercising this right are procedural and within the Supreme Court’s rule-making power.” Id. at 234, 680 P.2d at 615. Garcia’s rationale is thus: “That this statute is a procedural statute is clear from its wording. It purports to provide for post-conviction relief. Post-trial mechanisms designed to accomplish a just determination of rights and duties granted by substantive law are procedural mechanisms.” Id. at 235, 680 P.2d at 616 (citing Ammerman v. Hubbard Broad, Inc., 89 N.M. 307, 551 P.2d 1354 (1976)). The court went on to note that Section 31-11-6 was enacted soon after Rule 93 and, thus, according to the court, “[t]his history shows a legislative attempt to regulate procedure already regulated by Supreme Court rule.” Id. In conclusion, the court held that because Rule 57 superseded Rule 93, and because Rule 93 was virtually identical to Section 31-11-6, “the statute was not effective [after September 1, 1975] to provide a post-conviction remedy to the extent it conflicted with Rule 57.” Id. {18} Shortly after Garcia, we replaced Rule 57 with Rule 5-802 as part of a recodification of our rules. Rule 5-802 did away with the general concept of a “post-conviction remedy”—it is titled “habeas corpus” and it simply governs the procedure for a habeas petitioner to exercise his or her long-established constitutional right to petition this Court for the Great Writ.

{19} Four years after our promulgation of Rule 5-802, the Court of Appeals published State v. Peppers, 110 N.M. 393, 796 P.2d at 614 (Ct. App. 1990). In that case, the court noted that it had earlier held in Garcia that Rule 57 had superseded Section 31-11-6, “because Section 31-11-6 is a statute governing procedure” and that it did not believe the promulgation of Rule 5-802 had “revived” the statute. Id. at 396, 796 P.2d at 617. Thus, according to the court, Rule 5-802 “preempted” Section 31-11-6. Id. at 395-96, 796 P.2d at 616-17. At the same time, Peppers held that two other post-conviction motions—a motion for a new trial and a motion for modification of a sentence—were not preempted by Rule 5-802. Id. at 395, 796 P.2d at 616; See Rule 5-614 NMRA (new trial); Rule 5-801 NMRA (modification of sentence).

{20} We believe Garcia’s holding that Section 31-11-6 is without force is correct to the extent that Section 31-11-6 is construed as providing a remedy commensurate with that of habeas corpus. First, requiring a prisoner to pursue a motion for post-conviction relief before seeking a writ of habeas corpus would improperly interfere with our authority to regulate the manner in which we exercise our original jurisdiction over such writs. Second, providing a prisoner with the right of an appeal from the denial of a post-conviction motion when the exact same relief could be obtained directly by a writ of habeas corpus would contravene Section 39-3-15(B), a more specific statute dealing with appeals in habeas cases See Compton v. Lytle, 2003-NMSC-031 ¶ 16, 134 N.M. 586, 81 P.3d 39 (“[W]here two statutes conflict, the specific governs over the general.”).

{21} Regarding Peppers, we agree with that case that Rule 5-802 did not preempt the rules pertaining to a motion for a new trial and for a modification of a sentence, and that such motions are post-conviction motions for relief. Thus, at the risk of stating the obvious, a defendant has the statutory right to directly appeal such motions to the Court of Appeals in cases not involving the sentence of death or life
imprisonment. § 34-5-8(A)(4). We also agree with Peppers that Rule 5-802 trumps Section 31-11-6 to the extent that statute is construed as providing a remedy identical to that which can be obtained by writ of habeas corpus. See Peppers, 110 N.M. at 396, 796 P.2d at 617 (“The scope of Section 31-11-6 is essentially identical to that of Rule 5-802.”).

(22) In sum, we hold that an inmate may not resort to Section 31-11-6, and by extension Section 34-5-8(A)(4), when the relief sought can be obtained directly by writ of habeas corpus. The flip side of this proposition is that a habeas petitioner is not required to first seek relief via a post-conviction remedy motion before seeking a writ of habeas corpus. Thus, having properly granted certiorari, we now consider the merits of Cummings’s claim.

C. Cummings’s Ineffective Assistance of Counsel Claim Is Without Merit

(23) The district court did not err in dismissing Cummings’s ineffective assistance of counsel claim without a hearing because that claim, as pled, is without merit. Cummings first asserted that his counsel was ineffective for failing to raise the defense of impossibility since he sent the images to was not actually a child. However, “criminal liability for attempt is appropriate when the defendant has done everything in his power to commit the crime but did not complete the crime due to a factual impossibility.” State v. Cearley, 2004-NMCA-079, ¶ 22, 135 N.M. 710, 92 P.3d 1284 (citing State v. Lopez, 100 N.M. 291, 292, 669 P.2d 1086, 1087 (1983)). Cummings also asserted that his counsel was ineffective for failing to argue that the district court lacked subject-matter jurisdiction since he was in Texas at the time he sent the images that were received in New Mexico. This argument, too, lacks merit. See State v. Jones, 39 N.M. 395, 399-400, 48 P.2d 403, 405-06 (1935) (holding that defendants could be convicted of bribery in New Mexico even though the actual transaction occurred in Texas since defendants attempted to obstruct justice in New Mexico); see also People v. Ruppenthal, 771 N.E.2d 1002, 1008 (Ill. App. Ct. 2002) (finding proper jurisdiction in a solicitation of sexual contact of a minor case since “Illinois has a valid public interest in protecting minor children . . . from individuals who seek underage sexual partners using the Internet”); State v. Backlund, 672 N.W.2d 431, 436 (N.D. 2003) (stating in a child luring case that “a person who, while outside this state, solicits criminal action within this state and is thereafter found in this state may be prosecuted under [this state’s] law”).

D. Cummings’s Right to Vote Cannot be Restored by Writ of Habeas Corpus

(24) In his petition for certiorari, Cummings alleges that the district court wrongly informed the county clerk that he was a convicted felon, and was thus wrongly denied the right to vote. The State now concedes Cummings is not a convicted felon and that sending his name to the voter registration section of the county clerk’s office was erroneous.

(25) Yet, while the scope of relief afforded by a writ of habeas corpus has expanded over time, see generally Lopez v. LeMaster, 2003-NMCA-003, ¶¶ 13-15, 133 N.M. 59, 61 P.3d 185, it is not a one-stop shop for a prisoner’s grievances. The writ is to be used when a petitioner is alleging that his or her custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

Rule 5-802(A). Being denied the right to vote is not part of a defendant’s felony conviction and sentence. It is simply a collateral consequence of that conviction and sentence. See N.M. Const. art. VII, § 1; NMSA 1978, § 31-13-1(A) (2005). Moreover, being denied the right to vote, even if the deprivation is wrongful, does not subject a person to custody or restraint. Cummings is not alleging that his underlying conviction and sentence is illegal or that he is being denied a right that would hasten his release from custody, but only that the district court made a clerical error, which wrongly denied him the right to vote. Relief for such an error cannot be had by way of a writ of habeas corpus. Cf. Canfield v. Bradshaw, No. 3:05 CV 2343, 2007 WL 397019, at *6 (N.D. Ohio 2007) (holding that a habeas corpus petition was not a valid avenue for seeking a determination that the petitioner was erroneously classified as a sexual predator). Therefore, we dismiss this case and affirm the district court’s denial of the writ.

(26) Although we deny the writ, we take this opportunity to note that we question the district court’s conclusion that Cummings is first required to exhaust his administrative remedies pursuant to Section 33-2-11(B) before requesting relief in district court. The Corrections Department has the power and duty to “inquire into all matters connected with the government, discipline and police of the corrections facilities and the punishment and treatment of the prisoners.” § 33-2-11(A). Requiring a prisoner to exhaust internal grievance procedures ensures that the Department has been given a full opportunity to undertake such an inquiry.

Yet Cummings’s allegation has nothing to do with the correctional facilities where he is housed, nor does it have anything to do with his punishment and treatment. Cummings is alleging that the clerk of the court wrongly denied him the right to vote, not the Corrections Department. Forcing Cummings to pursue an administrative remedy would be futile simply because there is no administrative remedy for what he seeks.

(27) Also, by dismissing this case we do not suggest that Cummings may not find relief. See NMSA 1978, § 44-6-14 (1975) (providing that the purpose of the Declaratory Judgment Act “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered”). As noted above, the State now concedes that purging Petitioner from the county’s voter registration roll was erroneous. Given this concession, we see no reason why the resolution of this matter requires further litigation.

III. CONCLUSION

(28) Reviewing the district court’s denial of Cummings’s habeas petition by certiorari is a proper exercise of our original jurisdiction over habeas matters. Sections 31-11-6 and 34-5-8(A)(4) are inapposite because Cummings is not motioning for a post-conviction remedy. As for the merits of the case, we affirm the district court and deny Cummings a writ of habeas corpus.

(29) IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSÓN, Justice
PAMELA B. MINZNER, Justice
(not participating)
OPINION

PETRA JIMENEZ MAES, JUSTICE

Defendant, Steven Lopez, was tried with four codefendants facing various charges as a result of the death of Defendant’s five-month-old niece, Baby Briana. This Court examined the cases of two of Defendant’s codefendants, Stephanie Lopez, Baby Briana’s mother (Mother), and Andrew Walters, Baby Briana’s Father (Father). See State v. Lopez, 2007-NMSC-037, ¶ 2-4, N.M. _, _, P.3d __; State v. Walters, 2007-NMSC-050, ¶ 3, N.M. _, _, P.3d __ (No. 29,806, filed Aug. 2007). The question raised in Defendant’s case mirrors the issue this Court addressed in Lopez and Walters: whether Defendant’s Sixth Amendment right to confrontation was violated when the custodial statements of his codefendants were admitted at his joint trial. Just as we held in Lopez and Walters, we hold that Defendant’s right to confrontation was violated when his codefendants’ statements were introduced as evidence. We determine, however, that this constitutional error was harmless with regard to Defendant’s convictions for intentional child abuse resulting in death or great bodily harm and criminal sexual penetration in the first degree, and we affirm Defendant’s convictions for those crimes. We conclude that this error was not harmless as to Defendant’s conspiracy conviction and reverse that conviction.

BACKGROUND

Defendant was convicted of intentional child abuse resulting in death or great bodily harm, contrary to NMSA 1978, § 30-6-1 (2001); conspiracy to commit intentional child abuse resulting in death or great bodily harm, contrary to NMSA 1978, § 30-28-2 (1979) and Section 30-6-1; and criminal sexual penetration of a child under thirteen in the first degree, contrary to NMSA 1978, § 30-9-11(A), (C)(1) (2001). Defendant’s convictions related to the injuries inflicted on Baby Briana during the last two days of her life.

The tragic facts of this case have been set forth by this Court in Lopez and Walters. See Lopez, 2007-NMSC-037, ¶¶ 2-4; Walters, 2007-NMSC-050, ¶¶ 2-4. Baby Briana died on July 19, 2002. Lopez, 2007-NMSC-037, ¶ 2. At the time, Defendant lived in the mobile home of Baby Briana’s grandmother and shared a bedroom with Baby Briana, Mother, Father, and Baby Briana’s eighteen-month-old brother, Andy Jr. Id. On the morning of July 19, 2002, Mother called 911 to report that Baby Briana had stopped breathing. Id. ¶ 3. Baby Briana was transported to the hospital where, after attempts to resuscitate her were unsuccessful, she was pronounced dead. Id. ¶ 4. The full extent of Baby Briana’s injuries were chronicled by this Court in Lopez and Walters. For the purposes of Defendant’s appeal, we only relate those injuries inflicted on Baby Briana in the last days of her life. The autopsy of Baby Briana revealed that she died from cranial cerebral injuries. Id. ¶ 4. She had bruising and scraping injuries throughout her head, as well as on her upper forehead. Id. She suffered a blunt force injury to her head in the last three days or less of her life which resulted in a large subdural hematoma on her brain. Walters, 2006-NMCA-071, ¶ 4. Baby Briana had bleeding within the membranes around the brain as well as around her optical nerves which meant that she had been violently shaken. Lopez, 2007-NMSC-037, ¶ 4. Additionally, Baby Briana’s anus and vagina were injured. Id. She had a significant abrasion on her buttocks which went into the buttocks and was consistent with sexual assault. Walters, 2006-NMCA-071, ¶ 5. Immediately after Baby Briana was pronounced dead, the attending nurse observed that her anus had no muscle tone and gaping open. Id. At her autopsy, it was observed that Baby Briana’s anal opening was dilated to a full inch. Id. The internal examination showed a half-inch to an inch injury inside the anal opening as well as vaginal injuries inside Baby Briana’s labia minora, including three small injuries to her hymen. Id.

Statements of Defendant and his Codefendants

On the day of Baby Briana’s death, Defendant and his codefendants were interviewed by police at the Sheriff’s Department. In his statement to police, Defendant said that on the night of July 18, 2002, he was in the bedroom with Mother, Father, Father’s brother, Robert Walters (Second Uncle), as well as a friend of Second Uncle. They were drinking beer and playing video games. Defendant acknowledged that he consumed six beers over the course of the night. Initially, Defendant said nothing unusual happened that night, that he slept
through the night and was awakened by Second Uncle on the morning of July 19, 2002. Later in the interview, police asked Defendant if anybody had ever throw Baby Briana up in the air and if she had ever hit her head. Uncle admitted to throwing her up in the air so that her head hit the ceiling. Police also confronted Defendant with admissions made by Father regarding the events of July 18, 2002. Defendant then told police that he and Father were throwing Baby Briana up in the air so that she hit her head on the ceiling and allowing her to fall to the floor. Defendant confirmed this statement several times. Defendant was then shown photographs of Baby Briana’s anus. Initially Defendant denied touching Baby Briana’s anus, saying, “Oh no. I didn’t do that. I didn’t do nothing like that.” When questioned further, Defendant’s response changed to, “I can’t remember. I don’t remember.” Finally, Defendant told police that he was intoxicated and that he could not remember starting the sex act with Baby Briana, but he remembered stopping because he realized what he was doing was wrong.

Mother also gave a statement to police on the day of Baby Briana’s death. Mother discussed the events of July 18, 2002. She told police that she had two to three beers and fell asleep at 10:00 p.m. In describing the events of that evening, Mother did not mention Defendant except to say that he remained awake with Father and Second Uncle after she fell asleep. Mother said that she woke up at 9:45 a.m. on July 19, 2002, and saw that Baby Briana was pale and that she was not breathing, so she and Father called Grandmother and then called 911. Mother stated that she asked Father what had happened to Baby Briana and Father said, “maybe [Defendant] threw the baby up.”

Father was also interviewed by police investigators on the day of Baby Briana’s death. His interview lasted several hours and was taped. Father confirmed that he was in the bedroom with Defendant, Mother, and Second Uncle, drinking beer and playing video games. Initially, Father stated that Baby Briana had fallen off the bed during the night. Later in the interview, Father admitted that he and Defendant had been “playing rough” with Baby Briana. Father said they threw Baby Briana into the air so that she hit the ceiling, and allowed her to drop to the floor when he “missed” her. Father acknowledged that he threw Baby Briana into the air, and on three occasions her head hit the ceiling, and he allowed her to fall to the floor between two and three times. Father said Baby Briana cried when she was dropped onto the floor, and when he was asked what he did to calm her down, he answered, “I just kept throwing her in the air.”

With regard to Baby Briana’s sexual injuries, when Father was shown a photograph of Baby Briana’s anus he became very upset and profane, saying to police that they were “not going to find any semen.” Father told police he cleaned Baby Briana’s butt with a baby wipe, wrapped the baby wipe around his left index finger, and put the wrapped finger into Baby Briana’s anus up to the second knuckle at the middle of his finger. When he took his finger out, “[t]here was a little bit of blood on there.” Father stated that he did not think Defendant was capable of causing the injury to Baby Briana’s anus.

Defendant’s Trial

Defendant was charged with intentional child abuse resulting in death or great bodily harm, conspiracy to commit intentional child abuse, and criminal sexual penetration in the first degree. Defendant’s trial was joined with that of his codefendants: Mother, Father, Grandmother, and Second Uncle. The State filed a Statement of Joinder, requesting that Defendant be tried together with Mother, Father, Grandmother, and Second Uncle. Defendant joined Mother’s Motion to Sever her trial from that of her codefendants. In her Motion to Sever, Mother asserted that her right to confrontation would be violated in a joint trial if the custodial statements of her codefendants were admitted as evidence at trial. Lopez, 2007-NMSC-037, ¶ 1. The trial court denied the codefendants’ motion to sever the trials and proceeded with the joint trial. The statements of the codefendants were admitted over Defendant’s renewed objection that the admission of these statements would violate his right to confront the witnesses against him.

Defendant was convicted of each of the charges, and he appealed to the Court of Appeals. The Court of Appeals determined that the admission of the statements each codefendant made during police interrogations violated Defendant’s confrontation rights and that this error was not harmless. State v. Walters, 2006-NMCA-071, ¶ 1, 139 N.M. 705, 137 P.3d 645. The Court of Appeals reversed the convictions of Defendant and his codefendants and remanded with the instruction that each of the codefendants be tried separately. Id. The State appealed to this Court.

DISCUSSION

Preservation

We begin by addressing the State’s claim that Defendant failed to adequately preserve his argument that the statements of his codefendants were inadmissible against him, and the admission of those statements violated the Confrontation Clause. As in Lopez and Walters, the State argues that Defendant’s objections were not adequate to preserve this issue for appeal.

“To preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon.” Lopez, 2007-NMSC-037, ¶ 15 (citing Rule 12-216 NMRA; State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280). In Lopez, we held that Mother’s Motion to Sever and her renewed objections throughout trial adequately alerted the court to the argument that the admission of codefendants’ statements would result in a violation of her Sixth Amendment right to confront witnesses against her. 2007-NMSC-037, ¶ 16. We conclude that by joining in Mother’s Motion to Sever and raising repeated objections to the admission of the codefendants’ statements, Defendant also properly preserved the issue for appeal.

Sixth Amendment Right to Confrontation

In his brief to this Court, Defendant asserts that the Court of Appeals was correct in holding that the admission of his codefendants’ statements violated his Sixth Amendment right to confrontation. We review de novo the issue of whether Defendant’s Sixth Amendment right was violated when the trial court admitted the custodial statements of his codefendants. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999); Walters, 2007-NMSC-050, ¶ 20; Lopez, 2007-NMSC-037, ¶ 18.

Consistent with our holdings in the Lopez and Walters cases, we hold that the trial court’s admission of the codefendants’ statements constituted a “per se” violation of Defendant’s Sixth Amendment right of confrontation. See Lopez, 2007-NMSC-037, ¶ 21; Walters, 2007-NMSC-050, ¶ 24. As discussed in Lopez, “[t]he Confrontation Clause bars the ‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” 2007-NMSC-037, ¶ 19 (quoting Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). It is undisputed that Defendant did not have a
prior opportunity to cross-examine his co-defendants. Additionally, we determine that the codefendants’ statements, elicited by police officers investigating Baby Briana’s death, are testimonial for the purposes of Crawford. See Lopez, ¶ 20 (“[P]olice interrogations produce testimony when ‘the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.’”) (quoting Davis v. Washington, ___ U.S. ___, 126 S.Ct. 2266, 2274 (2006)).

Thus, we hold that Defendant’s constitutional right to confront witnesses against him was violated when the custodial statements of his codefendants were admitted at his joint trial. See id. ¶ 21 (citing State v. Johnson, 2004-NMSC-029, ¶ 7, 136 N.M. 348, 98 P.3d 998 (“[U]nder Crawford, because Defendant did not have an opportunity to cross-examine [the witness], the admission of [his] statement constituted a per se violation of Defendant’s Sixth Amendment right of confrontation.”)).

Harmless-Error Analysis

¶ 25. As in Lopez and Walters, we examine each of Defendant’s convictions separately to determine if the constitutional violation may be characterized as harmless with respect to any of Defendant’s convictions. See Lopez, 2007-NMSC-050, ¶ 28. In his confession, Defendant re-stated the information provided by police investigators that he and Defendant did not have the opportunity to cross-examine the defendant (his witness), the admission of his statement constituted a per se violation of Defendant’s Sixth Amendment right of confrontation.

¶ 24 (“Because our harmless-error analysis instructs that error may be prejudicial with respect to one conviction, but harmless with respect to another, we review the effect of [codefendant’s] statement with respect to each conviction separately.”). A constitutional violation may be deemed harmless when there is no “reasonable possibility that the evidence complained of might have contributed to the [defendant’s] convictions.” State v. Johnson, 2004-NMSC-029, ¶ 9 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). We look to a variety of factors in order to determine if erroneously admitted testimony may be deemed harmless.

These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

¶ 11 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)). We apply these factors to each of Defendant’s convictions.

I. Intentional Child Abuse Resulting in Death or Great Bodily Harm

¶ 16. The charge of intentional child abuse resulting in death or great bodily harm arose from the injuries inflicted on Baby Briana in the last two days of her life. “Abuse of a child consists of a person knowingly, intentionally or negligent, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child’s life or health; (2) tortured, cruelly confined or cruelly punished . . . . “ Section 30-6-1(D). “[T]o obtain a conviction under the theory of intentional child abuse, the State was required to prove beyond a reasonable doubt that (1) Defendant caused Baby Briana to be placed in a situation which endangered her life or health, or tortured or cruelly confined or punished Baby Briana; (2) Defendant acted intentionally; and (3) Defendant’s actions resulted in the death of or great bodily harm to Baby Briana.” Walters, 2007-NMSC-050, ¶ 28 (citing UJI 14-602 NMRA (defining the elements of intentional child abuse resulting in great bodily harm)).

¶ 28. We review the codefendants’ statements related to Defendant’s actions during the last two days of Baby Briana’s life in order to determine the impact of those statements and whether their erroneous admission may be characterized as harmless. In her statement to police, Mother did not mention Defendant’s behavior except to say that he was in the bedroom with her and Baby Briana and that he remained awake after she fell asleep. Father’s statement to police was more condemnatory. He told police investigators that he and Defendant had been “playing rough” with Baby Briana and that they threw her up in the air so her head hit the ceiling and allowed her to fall to the floor. During his police interrogation, Defendant confirmed the information Father gave in his statement several times.

First, Defendant admitted to throwing her up in the air so that her head hit the ceiling. Then, Defendant told police that he and Father were throwing Baby Briana up in the air so that her head hit the ceiling, as well as the statements of Mother and Father. See Walters, 2007-NMSC-050, ¶ 32. It is undisputed that Defendant did not have the opportunity to cross examine his codefendants, the fourth Johnson factor, cannot be minimized. In his confession, Defendant repeatedly confirmed that he and Father threw Baby Briana up in the air so that she hit her head on the ceiling and allowed her to fall to the floor. In light of Defendant’s confession and Baby Briana’s injuries substantiating his confession, we hold that the trial court’s admission of Mother’s and Father’s statements was harmless beyond a reasonable doubt with regard to Defendant’s conviction of intentional child abuse resulting in death or great bodily harm.

II. Criminal Sexual Penetration of a Child Under Thirteen in the First Degree

¶ 19. “Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.” Section 30-9-11(A). All sexual penetration perpetrated on a child under thirteen years of age is criminal sexual penetration in the first degree. Section 30-9-11(C). Under this theory of liability, the State was required to prove, in relevant part, that (1) Defendant caused Baby Briana to engage in anal intercourse; (2) Baby Briana was twelve years of age;
or younger; and (3) Defendant’s act was unlawful. See UJI 14-957 NMRA (defining the elements of criminal sexual penetration of a child under thirteen years of age).

With regard to the charge of criminal sexual penetration, the statements of Defendant’s codefendants are largely silent. Only Father remarked about Baby Briana’s sexual injuries, and he specifically said that he did not think Defendant was capable of causing the injury to Baby Briana’s anus. During his interview with police, Defendant eventually told police that he could not remember starting the sex act with Baby Briana but that he remembered stopping because he realized what he was doing was wrong. Because his codefendants’ statements did not strengthen Defendant’s confession or the corroborating physical evidence of guilt, we conclude that the admission of the statements was harmless beyond a reasonable doubt with respect to his conviction for criminal sexual penetration. See Johnson, 2004-NMSC-029, ¶ 53.

III. Conspiracy to Commit Intentional Child Abuse

“Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.” Section 30-28-2. “An overt act is not required and the crime of conspiracy is complete when the felonious agreement is reached.” Walters, 2007-NMSC-050, ¶ 42 (citing Johnson, 2004-NMSC-029, ¶ 49).

To obtain a conviction under the theory of conspiracy, the State was required to prove beyond a reasonable doubt that: (1) Defendant and Father by words or acts agreed together to commit intentional child abuse resulting in death or great bodily harm and (2) Defendant and Father intended to commit intentional child abuse resulting in death or great bodily harm. See UJI 14-2810 NMRA (defining the elements of conspiracy).

The inculpatory statements related to the charge of conspiracy are the following. Mother said that on the morning of July 19, 2002, Father told her that he threw Baby Briana up in the air once and “maybe [Defendant] threw the baby up.” Father also implicated Defendant in his statement to police. Father stated that he and Defendant were “playing rough” with Baby Briana and indicated Defendant participated in throwing Baby Briana to the ceiling and allowing her to fall to the floor. In his statement to police, Defendant admitted that on the night of July 18, 2002, he had thrown Baby Briana in the air so that she hit her head on the ceiling and that Father threw her in the air so she hit her head on the ceiling twice.

As in Walters, we conclude that the codefendants’ statements were important to the prosecution’s case. While the codefendants’ statements do not constitute direct evidence of the existence of an agreement between Defendant and Father to commit intentional child abuse, Mother’s and Father’s statements related circumstances from which the jury could infer that Defendant and Father had agreed to act together to abuse Baby Briana. Walters, 2007-NMSC-050, ¶¶ 43-44. There is no direct evidence of conspiracy in this case, as neither Defendant nor Father acknowledged that they had entered an agreement to commit child abuse, and no other witness testified as to the existence of an agreement between Defendant and Father. Thus, the statements from Defendant’s alleged coconspirator that he and Defendant were acting in conjunction with one another were important to the prosecution’s case. We acknowledge that Defendant himself confessed to acting together with Father, making Father’s and Mother’s statements cumulative. However, because Defendant’s statement is the only properly admitted piece of evidence to support the prosecution’s conspiracy theory, we conclude that the admission of his codefendants’ statements was not harmless beyond a reasonable doubt. Id.

CONCLUSION

With regard to Defendant’s convictions for intentional child abuse resulting in death or great bodily harm and criminal sexual penetration of a child under thirteen years of age in the first degree, we affirm Defendant’s convictions, and we reverse the Court of Appeals’ decision to overturn Defendant’s convictions and remand for a separate trial. However, with regard to Defendant’s conviction for conspiracy to commit intentional child abuse resulting in death or great bodily harm, we affirm the Court of Appeals’ decision to reverse Defendant’s conviction. Accordingly, we vacate Defendant’s conspiracy conviction and remand for a new trial in which Defendant may be retried on that count.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSÓN, Justice

PAMELA B. MINZNER, Justice

(not participating)
OPINION

LYNN PICKARD, JUDGE

[1] Petitioner appeals from the district court’s award of summary judgment in favor of Respondent in a probate proceeding involving the death of Petitioner’s husband. We refer to Petitioner as “Wife” and to Respondent, who is Decedent’s niece, as “Niece.” In granting summary judgment, the district court found that no issues of material fact existed and that, as a matter of law, Decedent did not revoke his last will and testament. On appeal, Wife argues that issues of material fact do exist and that the district court erred in granting summary judgment in favor of Niece. We hold that Decedent’s “Revocation of Missing Will(s)” document does not satisfy the requirements of NMSA 1978, § 45-2-507(A)(1) (1993), and therefore did not validly revoke his prior will. We also hold that the performance of a revocatory act on a photocopy of a will does not affect a valid revocation of the original will. See § 45-2-507(A)(2). Accordingly, we affirm the district court’s grant of summary judgment in favor of Niece.

BACKGROUND

[2] The pertinent facts, which we view in the light most favorable to the party appealing the district court’s grant of summary judgment, are as follows. See Steiber v. Journal Publ’g Co., 120 N.M. 270, 271-72, 901 P.2d 201, 202-03 (Ct. App. 1995). Decedent died on February 12, 2005, at the age of ninety. Wife subsequently filed an application for informal appointment of a personal representative, requesting that she be appointed as personal representative. In her application, Wife asserted that Decedent had died intestate and that he had left no devisees. Wife further asserted that she was unaware of “any unrevoked testamentary instrument relating to property” within the State of New Mexico. Niece subsequently filed an objection to Wife’s application to be appointed personal representative. In her objection, Niece claimed that Decedent did in fact have a last will and testament and that Wife should not be appointed personal representative as she is not a devisee under the will and because Wife is in a position of conflict of interest due to her transfer of some of Decedent’s assets after his death.

[3] Decedent had his will drafted while Wife was in the hospital during the spring of 2000. During Wife’s hospitalization, Decedent contacted another niece and her husband, Betty and Ted Dale, and asked them to help him get a will prepared. The will provided that Decedent’s separate property, which included his ranch and oil, gas, and mineral interests, would be held in trust for the benefit of Wife during her lifetime. Upon Wife’s death, the will provided that the trust assets would be distributed to seven of his nieces and nephews. The original will was given to Betty and Ted Dale, who were not beneficiaries under the will, for safekeeping.

[4] When Wife learned of Decedent’s will, she requested a copy from Ted Dale (Dale). Dale refused to return the will. Decedent contacted a lawyer for assistance in revoking the will. The lawyer prepared a document titled “Revocation of Missing Will(s),” in which Decedent stated that he wished to revoke his prior will and that he had written the word “revoked” on the copy of the three pages of the will, which were supposedly attached to the signed document. Decedent further stated that it was his intent that Betty and Ted Dale were not to inherit anything from his estate. The document was signed by Decedent and two witnesses and was also notarized. The document was eventually recorded with the Roosevel County Clerk’s Office, but the three photocopied pages of the will on which Decedent had written “revoked” were not attached.

[5] After Dale refused to return the will, Decedent contacted a lawyer for assistance in revoking the will. The lawyer prepared a document titled “Revocation of Missing Will(s),” in which Decedent stated that he wished to revoke his prior will and that he had written the word “revoked” on the copy of the three pages of the will, which were supposedly attached to the signed document. Decedent further stated that it was his intent that Betty and Ted Dale were not to inherit anything from his estate. The document was signed by Decedent and two witnesses and was also notarized. The document was eventually recorded with the Roosevel County Clerk’s Office, but the three photocopied pages of the will on which Decedent had written “revoked” were not attached.

[6] According to Wife, the lawyer hired by Decedent to revoke the will was eventually able to obtain a photocopy of the will from the lawyer who had originally prepared it. Decedent then wrote the word “revoked” and his initials across each page of the photocopy. This photocopy was also signed by Decedent and notarized. The photocopy of the original will was subsequently recorded with the Roosevel County Clerk’s Office along with the “Revocation of Missing Will(s)” document.

[7] Before the district court, Wife disputed Wife’s claim that Decedent contacted Dale to obtain his original will and maintained that Decedent never told Dale that he wished to revoke his will. Wife argued to the district court that Decedent’s method of revocation in the instant case was ineffective as a matter of law. As such, Wife claimed that Decedent’s last will and testament had not been revoked and therefore should be admitted to probate. Wife disagreed, arguing that Decedent had been prevented from obtaining his original will and that his attempt to revoke his will was ineffective.

[8] Agreeing with Niece’s assertions, the district court granted partial summary judgment in favor of Niece and denied Wife’s countermotion for summary judgment. In
granting Niece’s motion, the district court concluded that the “Revocation of Missing Will(s)” document was not testamentary in character and therefore could not serve to revoke Decedent’s will. Additionally, the court concluded that writing “revoked” on the pages of a photocopy of the will was ineffective, as the revocatory act must be done on the original will itself or on a “duplicate” original, which is not the same as a photocopy. Wife appeals.

STANDARD OF REVIEW

[9] A district court’s grant of summary judgment is reviewed de novo. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. A party moving “for summary judgment need only make a prima facie showing that there is no genuine issue of material fact, and that on the undisputed material facts, judgment is appropriate as a matter of law.” Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263; see also Roth v. Thompson, 113 N.M. 331, 335, 825 P.2d 1241, 1245 (1992) (“If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper.”). At that point, the burden shifts to the nonmoving party to demonstrate “at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact.” Ciup, 1996-NMSC-062, ¶ 7; see also Oeswald v. Christie, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980) (“Summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues.”). This Court “view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits.” Handmaker v. Henney, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

DISCUSSION

[10] On appeal, Wife argues that the district court erred in granting summary judgment in favor of Niece because there are material facts in dispute and because the district court incorrectly concluded as a matter of law that Decedent did not revoke his will. Specifically, Wife contends that (1) the “Revocation of Missing Will(s)” document contained testamentary language and was executed with the necessary formalities, and it was therefore effective in revoking Decedent’s will; and (2) Decedent’s act of writing “revoked” across the pages of a photocopy of his will was sufficient to revoke the original will. Wife also contends that whether Decedent actually contacted Dale and attempted to obtain the original will is an issue of disputed material fact that precludes summary judgment. In addressing Wife’s arguments, we will first examine the law regarding revocation of wills. Next, we will determine whether either of Decedent’s two attempts to revoke his will was sufficient to revoke the will under New Mexico probate law. Additionally, we will decide whether the assertion that Decedent attempted to obtain the original will is in dispute and, if so, whether it is a material fact precluding summary judgment. We have jurisdiction to consider Wife’s appeal from the district court’s grant of partial summary judgment pursuant to the rule described in In re Estate of Newalla, 114 N.M. 290, 294, 837 P.2d 1373, 1377 (Ct. App. 1992) (“[T]he Probate Code teaches that as a practical matter each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order.”).


1. by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
2. by performing a revocatory act on the will if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator’s conscious presence and by the testator’s direction.

Section 45-2-507(A). In the present case, we are asked to construe the meaning of both subsections. First, we must decide if Decedent’s “Revocation of Missing Will(s)” document constitutes a “subsequent will that revokes the previous will,” as previously construed by our Court in In re Estate of Martinez, 1999-NMCA-093, 127 N.M. 650, 985 P.2d 1230. Second, we must determine whether performing a revocatory act on a photocopy of a will, as opposed to the original will, is sufficient to revoke the will. Addressing each question in turn, we affirm the district court.

“Revocation of Missing Will(s)”

Document

[12] As previously stated, Section 45-2-507(A)(1) provides that the only writing that may be used to revoke an existing will is a subsequent will. In Martinez, 1999-NMCA-093, our Court visited the meaning of Section 45-2-507(A)(1), which allows for the revocation of a will by a subsequent will. Martinez, 1999-NMCA-093, ¶ 8. In that case, the decedent executed a will appointing one of his children as his personal representative and leaving some of his real property to two other children. Id. ¶ 2. Nearly ten years later, the decedent executed a document in which the decedent declared that he wished to revoke his prior will. Id. ¶ 3. After the decedent passed away, the district court concluded that the decedent died intestate as he had validly revoked his prior will. Id. ¶ 5. Our Court reversed. Id. ¶ 1.

[13] In our opinion, we observed that “statutes providing for revocation of wills are mandatory and that generally a will may be revoked only in the manner prescribed by statute.” Id. ¶ 9 (citing Albuquerque Nat’l Bank v. Johnson, 74 N.M. 69, 71, 390 P.2d 657, 658 (1964)). Additionally, we observed that “the intent of the testator, no matter how unequivocal, is insufficient to effect revocation if it does not comply with the statutory method of revocation.” Id. (citing Pershbacker v. Moseley, 75 N.M. 252, 256, 403 P.2d 693, 695 (1965)). We further noted that although both of these principles were first announced in cases that predated New Mexico’s adoption of the UPC, these principles remained true under the UPC. Id. ¶ 10.

[14] Our Court next considered the requirements of Section 45-2-507(A)(1), which allows for the revocation of a will by a subsequent will. Martinez, 1999-NMCA-093, ¶ 11. We noted that our statutes define a will as “‘any testamentary instrument’” that, among other things, “‘revokes or revises another will.’” Id. (quoting § 45-1-201(A)(53)). We further recognized that “[a] testamentary instrument is one that operates only upon and by reason of the death of the maker.” Id. (quoting Vigil v. Sandoval, 106 N.M. 233, 235, 741 P.2d 836, 838 (Ct. App. 1987)). Finally, we observed that a document or instrument that is testamentary must also be properly executed and witnessed, as required by Section 45-2-502, to satisfy the will requirement of Section 45-2-507(A)(1). Martinez, 1999-NMCA-093, ¶¶ 11-12.

[15] Applying those rules to the document
at issue in *Martinez*, our Court concluded that the decedent did not revoke his will because the document in which he declared his intent to revoke the will lacked testamentary language and thus could not be considered a subsequent will. *Id.* ¶ 11. We observed that, unlike a will, the document “would have taken effect immediately, not after the death of the decedent.” *Id.* Additionally, we concluded that the document could not be a subsequent will because it was not signed by two witnesses, which is required by Section 45-2-502. *Martinez*, 1999-NMCA-093, ¶ 12. As such, we held that the decedent’s will was not revoked. *Id.* ¶ 13.

{16} In the present case, Wife argues that *Martinez* is distinguishable. She maintains that the “Revocation of Missing Will(s)” document, which was properly executed and witnessed, does contain testamentary language and therefore does comport with Section 45-2-507(A). Wife points to language within the document stating that Betty and Ted Dale were not to inherit anything from Decedent’s estate as evidence of the testamentary nature of the document. We observe, however, that Decedent expressly states in the document that it was his intent “to revoke any and all wills and codicils made by me at any time heretofore without making a subsequent will.” (Emphasis added.) Such language indicates that although some portions of the document may arguably contain testamentary language, the document itself was not intended to be a subsequent will. Thus, we do not believe that the document satisfies Section 45-2-507(A)(1), which allows for the revocation of a will only by a subsequent will. See *Martinez*, 1999-NMCA-093, ¶¶ 11-12. We therefore hold that Decedent’s “Revocation of Missing Will(s)” document did not revoke his last will and testament.

**Revocatory Act on Photocopy of Will**

{17} We next address Wife’s assertion that Decedent’s act of writing “revoked” across the pages of a photocopy of his will was sufficient to revoke the original. As previously mentioned, in addition to revoking a will by subsequent will, a will may also be revoked “by performing a revocatory act on the will.” Section 45-2-507(A)(2). The UPC defines a “revocatory act” as “burning, tearing, canceling, obliterating or destroying the will or any part of it.” *Id.* According to the UPC, it is not necessary that the revocatory act actually touch any of the words on the will itself. *Id.*

{18} In the present case, there is no question that had Decedent written the word “revoked” on the pages of an original will, Decedent’s last will and testament would have been considered revoked and would not have been admitted to probate, providing of course that Decedent performed the revocatory act with the intent and purpose of revoking his will. See, e.g., *Boddy v. Boddy*, 77 N.M. 149, 151, 154, 420 P.2d 301, 302, 304 (1966) (holding, in a pre-UPC case, that the decedent properly revoked his will by writing the word “void” across the pages of will). Less clear, however, is whether a revocatory act on a photocopy achieves the same result.

{19} In support of her argument that Decedent’s revocatory act on a photocopy was sufficient to revoke the original, Wife cites to a number of cases in which courts have held that a revocatory act performed on a duplicate original or executed carbon copy of a will is sufficient to revoke the original will. See, e.g., *In re Estate of Tong*, 619 P.2d 91, 92 (Colo. Ct. App. 1980) (cancelling executed carbon copy of will sufficient to revoke original will); *In re Holmberg’s Estate*, 81 N.E.2d 188, 191 (Ill. 1948) (writing “void” on executed carbon copy sufficient to revoke original will); *In re Will of Nassano*, 489 A.2d 1189, 1191 (N.J. Super. Ct. App. Div. 1985) (writing “null and void” on executed duplicate copy sufficient to revoke original will). We observe, however, that duplicate originals and executed carbon copies are not the same as photocopies. See *Lauermann v. Super. Ct.*, 26 Cal. Rptr. 3d 258, 262 (Ct. App. 2005) (holding that the term “duplicate original” does not include a photocopy).

{20} Duplicate originals result from when a will is executed in duplicate, that is, more than one copy of the original will is signed, witnessed, and notarized at the same time the original is executed. *Id.* at 260, 262 (holding that a “duplicate original” is a “will executed in duplicate,” meaning “that the testator has physically signed two separate copies of his will, each of which has also been witnessed and signed by the witnesses” (internal quotation marks and citation omitted)). Similarly, although a carbon copy is akin to photocopy, an executed carbon copy is actually physically signed by the testator. See *Black’s Law Dictionary* 609 (8th ed. 2004) (defining “executed” as a document “that has been signed”); see also *In re Estate of Stanton*, 472 N.W.2d 741, 747 (N.D. 1991) (differentiating between an executed copy of a will and an unexecuted copy of a will). Conversely, photocopies, unlike duplicate originals or executed carbon copies, do not bear the actual signature of the testator. See *In re Estate of Goodwin*, 2000 OK CIV APP 147, ¶ 16, 18 P.3d 373.

{21} Courts have also recognized that treating photocopies differently from duplicate originals or executed carbon copies is important as a matter of policy. For example, the Oklahoma Court of Appeals has observed that administrator points out the case with which an individual, using common office computers, scanners, and software, could create an unauthorized will, scan and reproduce an authentic signature from another document, and merge the authentic signature and the bogus document. After making a photocopy of the bogus document, the final result would be indistinguishable from a photocopy of an authentic document. While the authenticity of the document in this case is not in question, the statutory requirement of an original signature on reproduced documents would serve as a safeguard against such an act.

**Goodwin**, 2000 OK CIV APP 147, ¶ 11 n.3; cf. *Lauermann*, 26 Cal. Rptr. 3d at 262 (“[N]ot only are photocopies ubiquitous, but the simplicity of their creation stands in stark contrast to the considerable formalities surrounding the execution of a will.”). Similarly, a New York court wondered what would happen upon a testator’s death in which the original will was found, but not all of the photocopies could be located. See *In re Estate of Charitou*, 595 N.Y.S.2d 308, 311 (N.Y. Surr. Ct. 1993). The court noted that under such circumstances, “it might be intended that one or more of the photocopies had been destroyed by decedent with the intention to revoke the will.” *Id.* The court in *Lauermann* envisioned a similar problem:

A testator may make several photocopies of his or her will, perhaps to send to relatives or other beneficiaries, or to retain for the purpose of drafting possible changes. It would be unreasonable to expect a testator to track down and destroy all such copies before giving effect to his intended revocation. Thus, the rule urged by real parties in interest was perhaps intended to prevent the perversity of effecting the validity of a will.
which the testator had done everything in his power to revoke. 26 Cal. Rptr. 3d at 261-62. Based on the differences between photocopies and duplicate originals or executed carbon copies, a number of courts have held that a revocatory act performed on a photocopy of a will does not revoke the original will. See, e.g., In re Estate of Tolin, 622 So. 2d 988, 990 (Fla. 1993); Charitou, 595 N.Y.S.2d at 311-12; Stanton, 472 N.W.2d at 747; see also Restatement (Third) of Property § 4.1 cmt. f (1999) (“Performing the [revocatory] act on another document or on an unexecuted copy of the will is insufficient.”). We therefore do not consider Wife’s reliance on cases involving duplicate originals or executed carbon copies to be helpful to our analysis.

Wife correctly observes that one of the stated purposes of the UPC is to give effect to the intent of the testator. See id. We do not believe, however, that the intent of the testator can override the actual provisions of the UPC. We believe that our Court in Martinez made this point clear when it recognized that “the intent of the testator, no matter how unequivocal, is insufficient to effect revocation if it does not comply with the statutory method of revocation.” 1999-NMCA-093, ¶ 9. Although our Court relied on a pre-UPC case for that proposition, we believe that the proposition has survived the adoption of the UPC.

In determining the importance of a testator’s intent, we find it significant that in adopting our version of the UPC, our legislature chose not to adopt section 2-503 of the UPC. See § 45-2-503. According to that provision:

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent’s will, (ii) a partial or complete revocation of the will, (iii) an addition to or alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Unif. Probate Code § 2-503 (amended 1997), 8 U.L.A. 38 (Supp. 2006). “The UPC section 2-503 harmless-error rule has since been enacted into the state statutes of Colorado, Hawaii, Michigan, Montana, South Dakota and Utah.” Emily Sherwin, Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice, 34 Conn. L. Rev. 453, 454 n.2 (2002). Under section 2-503, had it been adopted in New Mexico, if Decedent’s intent was established by clear and convincing evidence, the district court could have concluded that although Decedent’s attempt to revoke his will did not comport with the UPC’s requirements for the revocation of a will, his will was nonetheless revoked. In the absence of such a provision, we do not believe that Decedent’s intent can control the result.

The understanding that the statutory provisions of the UPC still control irrespective of a testator’s intent has been recognized by a number of UPC jurisdictions. For example, in determining the effect that a testator’s intent has on the content of a will, the Arizona Court of Appeals concluded that regardless of a testator’s intent, “a duly executed will remains effective unless the testator takes the steps required by statute to revoke it in whole or part.” In re Estate of Ward, 23 P.3d 108, 112 (Ariz. Ct. App. 2001). Arizona adopted the UPC in 1973. In re Estate of Mason, 947 P.2d 886, 887 (Ariz. Ct. App. 1997).

Like Arizona, North Dakota adopted the UPC in 1973. In re Estate of Kimbrell, 2005 ND 107, ¶ 6, 697 N.W.2d 315. In Stanton, the Supreme Court of North Dakota rejected the argument that performing a revocatory act—in this case, crumpling—on a certified copy of a will was sufficient to revoke the original will. 472 N.W.2d at 747. The court observed that “the physical act of destruction (‘crumpl[ing]’) was not made of the original will, but rather of a copy of the will.” Id. The court then concluded that “[w]hile the destruction of an executed, duplicate will may operate to revoke the original will, the destruction of an unexecuted or conform copy is ineffective as an act of revocation regardless of the testator’s intent.” Id. (citations omitted). The testator’s attempted revocation was therefore ineffective. Id.

We believe that “it would be misguided sympathy to hold that a clear intent to revoke a will can be a substitute for compliance with the other statutory requirements.” Charitou, 595 N.Y.S.2d at 311. As previously recognized, while one of the UPC’s stated purposes is “to discover and make effective the intent of a decedent,” § 45-1-102(B)(2), it nonetheless remains true that in order to revoke a will, a testator must comply with the UPC’s requirements for revocation of wills. Martinez, 1999-NMCA-093, ¶ 9; see Ward, 23 P.3d at 112; Stanton, 472 N.W.2d at 747. “To reach a contrary conclusion would be to undermine the rigorous, but necessary, statutory provisions relating to revocation of wills.” In re Coffed’s Estate, 387 N.E.2d
1209, 1210 (N.Y. 1979); see In re Wehr’s Will, 18 N.W.2d 709, 715 (Wis. 1945) (concluding that “to hold that a mutilation of a conformed copy was a revocation would be to interpolate or add to the statute what plainly is not there or to establish a symbolic revocation by judicial decree in the face of a statute which plainly does not mean to recognize it”). Moreover, although such a rule may lead to unfair results, “[a] less stringent provision would open the door to the dual evils of fraud and perjury, and perhaps fail to impress upon the mind of the testator the solemnity of the occasion.” Coffed, 387 N.E.2d at 1211 (citation omitted).

{29} We therefore hold that the statutory language “on the will” in Section 45-2-507(A)(2) means on the original will or on a fully executed copy. In light of this holding, Decedent’s attempt to revoke his will by writing “revoked” on a photocopy was not effective to revoke the original will. In so holding, we observe that Decedent’s inability to obtain his original will did not foreclose his ability to revoke his will if he desired to. Although Decedent was unable to revoke his will by performing a revocatory act upon it, the UPC provides that a will may also be revoked by a subsequent will. See § 45-2-507(A)(1); see also Robert Whitman, Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future, 55 Alb. L. Rev. 1035, 1035 (1992) (“In the hands of a competent lawyer, concern for creating ambiguity when a will is revoked is minimized. This is so because, unless there are extraordinary circumstances, an attorney can effectively provide for revocation of an old will by drafting a new will, which revokes all previous wills.”). Thus, if Decedent truly wished to revoke his will and allow his estate to pass by intestacy, he could have simply drafted and executed a new will, which would have served to revoke his original will, and then he could have easily destroyed the new will immediately after its execution. At that point, Decedent would have revoked all of his previous wills and his estate would pass by intestacy. Decedent did not do this. We therefore conclude that the district court properly granted summary judgment in favor of Niece on the grounds that Decedent did not revoke his last will and testament.

CONCLUSION

{30} We affirm the district court’s grant of summary judgment.

{31} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:
JONATHAN B. SUTIN, Chief Judge
RODERICK T. KENNEDY, Judge

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**Certiorari Granted, No. 30,537, September 17, 2007**

From the New Mexico Court of Appeals

**Opinion Number: 2007-NMCA-122**

SUE LESSARD and JOEL LESSARD, Plaintiffs-Appellants,
versus
CORONADO PAINT AND DECORATING CENTER, INC., a New Mexico corporation, Defendant-Appellee.

No. 26,005 (filed: June 20, 2007)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MICHAEL E. VIGIL, District Judge

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for Appellee

**OPINION**

**CELIA FOY CASTILLO, JUDGE**

{1} In this case, we review the entry of summary judgment in favor of Defendant, Coronado Paint and Decorating Center (Coronado), on the claims of respondeat superior and negligent hiring or retention brought by Plaintiffs, Sue Lessard (Lessard) and her husband, Joel Lessard. Summary judgment was granted by the trial court on grounds that employee Barry Fennell (Fennell) was acting outside the scope of his employment as a matter of law and that liability was thus precluded under both theories. In regard to the claim based on a theory of respondeat superior, we conclude that under the circumstances of this case, Fennell was acting outside the scope of his employment as a matter of law. In regard to the claim for negligent hiring or retention, we conclude that Coronado owed a duty to the motoring public and that any questions regarding the scope or breach of that duty, as well as questions of proximate cause, must be reserved for the fact-finder. Accordingly, we affirm in part, reverse in part, and remand for further proceedings in light of this opinion.

I. BACKGROUND

{2} This case arises out of an automobile accident between Lessard and Fennell. Lessard suffered serious injuries when Fennell’s car crossed over the center line onto the wrong side of the road, struck Lessard’s car, and thus caused it to roll. Filing a complaint against Coronado, as well as other parties, Lessard and her husband alleged that Coronado was liable under theories of respondeat superior and negligent hiring and retention. Upon Coronado’s motion, the trial court granted summary judgment to Coronado on both causes of action and relied on Coronado’s argument that an employer is not liable for the acts of an employee who is returning home from work at the end of the day.
{3} For the purposes of the summary judgment motion, Coronado asked the trial court to assume, without deciding, that Fennell was its employee. Coronado set out the following facts as undisputed:

1. On November 20, 2000, Fennell was involved in an auto accident on Rancho Viejo Boulevard, in Santa Fe, New Mexico.
2. At the time of the accident, Fennell was driving a vehicle owned by Clayton Gober.
3. At the time of the accident, Fennell was on his way home from work, having left work at around 4:35 to 4:40 p.m., and had traveled about a mile from the home building development.
4. The accident occurred at approximately 4:45 p.m.
5. Coronado contracted with Fennell to perform tile repair services on the Rancho Viejo home building development, and a couple of other locations.
6. During the time, Fennell worked for Coronado prior to the accident, he drove Mr. Gober’s Toyota pickup truck.
7. Coronado never lent Fennell a vehicle, and Fennell never drove one of Coronado’s company vehicles.
8. The manner in which Fennell was to get to job sites was never discussed with Coronado.

(Citations omitted.) Based on these facts, Coronado argued that summary judgment was proper on the claim for respondent superior because an employer is not liable for the negligence of employees who are simply traveling home after work is over for the day. In addition, Coronado argued that summary judgment was proper on the negligent hiring and retention claim because no connection existed between Coronado’s business and Lessard and because hiring and retaining Fennell did not proximately cause Lessard’s injuries.

{4} In her response, Lessard disputed facts 3, 5, 7, and 8 and qualified fact 6. We address Lessard’s contentions in regard to facts 3, 6, 7, and 8 together because each contention tends to provide additional facts, rather than create a dispute about the fact offered by Coronado. In regard to fact 3, Lessard asserted that “[w]hile one possible construction of the events is that Fennell was on his way home from work, another is that Fennell had left the last job

he was sent to by Coronado for the day.” Our review of the record reveals that Fennell testified he was on his way home from work: “I was just getting off of work. I was going home.” Lessard’s contention is based on an additional fact—Fennell, on his way home from work, had just left the location of his last job for Coronado that day. Similarly, in regard to fact 6, Lessard admits that Fennell drove Gober’s truck but further states that following the accident, Fennell drove a truck that was purchased for him by Coronado employee Miles Poteet (Poteet) after he bailed Fennell out of jail. Likewise, in regard to fact 7, Lessard disputed in part Coronado’s assertion that it never loaned Fennell a vehicle or provided him with a company vehicle; Lessard added that after the accident, Poteet purchased a vehicle for Fennell, who in turn purchased the vehicle from Poteet. Further, in regard to fact 8, Lessard disputed Coronado’s assertion that Coronado and Fennell never discussed the manner in which he would travel to job sites. Lessard contended that the facts show Coronado expected Fennell to drive to job sites to perform its repair work. Specifically, Lessard asserted that Poteet knew Fennell drove because Poteet regularly got materials ready for Fennell to pick up and that Poteet’s actions in bailing Fennell out of jail and purchasing another truck for him were evidence that Coronado expected Fennell to drive to job sites. We conclude that Lessard’s contentions, in regard to these undisputed facts set forth by Coronado, do not create issues of fact regarding Coronado’s assertions, but rather consist of additional facts to be considered in our analysis. We discuss the relevance of these facts as they become pertinent to our discussion.

{5} Finally, in regard to fact 5, Lessard disputed Coronado’s assertion that Coronado had contracted with Fennell. Lessard contends that a disputed fact exists regarding whether Fennell was an employee or a contractor. As observed earlier, however, Coronado stipulated that Fennell was an employee for the purposes of the summary judgment motion; thus, we conclude that this fact, though disputed, is not material to our discussion.

{6} Lessard offered additional statements of undisputed fact regarding Coronado’s acts and omissions, as well as Fennell’s driving record and drug use. Germane to our discussion are Lessard’s statements that “Coronado specifically hired Fennell to drive to its customers’ locations and perform repairs to tile work” and that Coronado depended on Fennell’s driving to various job sites. Further, Lessard asserted that Poteet knew that Fennell drove, expected him to get to the job sites to perform repairs, and discussed with Fennell what supplies were needed in order to get the materials ready for Fennell to pick up. In addition, Lessard relied on the fact that Coronado gave Fennell a cell phone to use for communicating with Coronado and scheduling appointments with Coronado’s customers. Later, in a supplemental brief requested by the trial court, Lessard relied on a weekly installation contract in support of her argument that Fennell’s employment was conditioned on his use of a vehicle to drive from job site to job site. The contract provided that Fennell would insure the vehicle he used for work and that he would name Coronado as an additional insured.

{7} Thus, Lessard argued that genuine issues of material fact preclude summary judgment on both claims because factual issues exist regarding exceptions to the going and coming rule and regarding whether Coronado knew or should have known that Fennell was unfit to drive. After a hearing on the motion and supplemental briefing, the trial court found that no genuine issues of material fact exist and awarded summary judgment to Coronado, based on the arguments presented in its motion.

II. STANDARD OF REVIEW

{8} “Summary judgment is a drastic measure that should be used with great caution.” Narney v. Daniels, 115 N.M. 41, 47, 846 P.2d 347, 353 (Ct. App. 1992). Summary judgment is proper only when the material facts are undisputed and the remaining issues are the legal effects of those facts. Rule 1-056 NMRA; Richardson v. Glass, 114 N.M. 119, 122, 835 P.2d 835, 838 (1992). We review a grant of summary judgment de novo. Upton v. Clovis Mun. Sch. Dist., 2006-NMSC-040, ¶ 7, 140 N.M. 205, 141 P.3d 1259. We view the evidence and make all reasonable inferences in favor of the nonmoving party—in favor of granting a trial on the merits. Id.; Narney, 115 N.M. at 47, 846 P.2d at 353.

III. DISCUSSION

{9} As a preliminary issue, we address the parties’ use of the term “going and coming rule.” Coronado used the term in the motion for summary judgment, and both parties have used the term throughout the pleadings below and in the briefs to this Court. As observed by Lessard in her brief in chief, New Mexico cases have referred to the going and coming rule only in workers’ compensation cases. See, e.g.,
Ramirez v. Dawson Prod. Partners, Inc., 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043. Ramirez discussed the going and coming rule in the workers’ compensation arena: “[W]orkers injured while traveling between home and work are generally not eligible for compensation.” Id. (observing that several exceptions exist); see also NMSA 1978, § 52-1-19 (1987) (excluding from compensation “injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties”). A similar rule has been judicially established in the context of tort claims. Our Supreme Court held in Nabors v. Harwood Homes, Inc., 77 N.M. 406, 423 P.2d 602 (1967), “that an employee enroute [sic] to, or returning from, his place of employment, using his own vehicle[,] is not within the scope of his employment absent additional circumstances evidencing control by the employer at the time of the negligent act or omission of the employee.” Id. at 408, 423 P.2d at 603; see also Zamora v. Foster, 84 N.M. 177, 178, 500 P.2d 1001, 1002 (Ct. App. 1972). We recognize that similar principles may apply to the rule in both contexts. However, the policies served by the two areas of law differ, and application of the rule in each context has produced analyses that differ from each other. Compare Ramirez, 2000-NMCA-011, ¶¶ 1-2, 5, 7-10 (addressing workers’ compensation awards to workers who were injured in an accident occurring while one worker was driving them home from the job site, located ninety miles away, and discussing the application of the traveling employee exception to the going and coming rule, in light of the purposes of the workers’ compensation statutes), with Richardson, 114 N.M. at 122, 835 P.2d at 838 (concluding that an employer was not responsible for a third party’s injuries, which resulted from an employee’s negligence, because the plaintiff did not dispute the fact that the employee was acting outside the scope of his employment and because the plaintiff failed to establish that the employer exercised any control over the employee while he drove back to work after lunch). In an effort to prevent any confusion that might arise from merging the issue of scope of employment as it applies to workers’ compensation and as it applies to tort law, we refrain from using the term “going and coming rule” in this opinion. We rely on the terminology and analysis historically used by our courts when addressing respondeat superior and negligence in hiring and retention claims.

We address each claim below.

A. Respondeat Superior

{10} On appeal, Lessard argues that genuine issues of material fact exist regarding whether Fennell was acting within the scope of his employment, which would trigger liability for Coronado under the theory of respondeat superior. She frames the question posed as “whether there is an exception to the [going and coming] rule when an employer, either explicitly or implicitly, requires an employee to bring a personal vehicle to work for use in performing essential job duties.” In turn, Coronado answers that summary judgment in its favor was proper because Lessard failed to show that Fennell was acting in furtherance of Coronado’s business and subject to its control. Thus, Coronado contends that Fennell was not acting within the scope of his employment and that Coronado cannot be held vicariously liable for Fennell’s actions.

{11} Under the doctrine of respondeat superior, an employer can be held vicariously liable for the negligent actions of an employee who is acting within the scope of his employment. Medina v. Graham’s Cowboys, Inc., 113 N.M. 471, 475, 827 P.2d 859, 863 (Ct. App. 1992). A determination regarding scope of employment is a question of fact for the jury when sufficient evidence exists to show that the employee was acting within the scope of his employment. McCauley v. Ray, 80 N.M. 171, 180, 453 P.2d 192, 201 (1968); Medina v. Fuller (Fuller), 1999-NMCA-011, ¶ 22, 126 N.M. 460, 971 P.2d 851 (stating that “generally, whether an employee is acting in the course and scope of employment is a question of fact,” unless only one reasonable conclusion can be drawn from the facts presented). This Court has rejected the use of any bright-line test for determining if an employee was acting within the scope of his employment. Narney, 115 N.M. at 48, 846 P.2d at 354. Instead, we use a multifactored test to consider scope of employment. Narney, 115 N.M. at 48, 846 P.2d at 354.

{12} In Narney, we adopted a four-point test whether an employee’s acts were performed within the scope of employment.

An employee’s action, although unauthorized, is considered to be in the scope of employment if the action (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area; and (4) is actuated, at least in part, by a purpose to serve the employer. Id. at 49, 846 P.2d at 355; see also Restatement (Third) of Agency § 7.07(2) (2006). Further guidance is provided in the uniform jury instruction.

An act of an employee is within the scope of employment if:

1. It was something fairly and naturally incidental to the employer’s business assigned to the employee, and

2. It was done while the employee was engaged in the employer’s business with the view of furthering the employer’s interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

UJI 13-407 NMRA; see also Childers v. S. Pac. Co., 20 N.M. 366, 372-73, 149 P. 307, 308, (1915) (“But in general terms it may be said that an act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master’s business and be done, although mistaken or ill]-advisedly, with a view to further the master’s interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master’s business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.”) (internal quotation marks and citation omitted). Despite the seemingly straightforward definition provided by the jury instruction, our courts have repeatedly observed that “it is impossible to state the rule . . . briefly and comprehensively so as to make it clearly applicable to all cases, because of the ever-varying facts of each particular case.” Nabors, 77 N.M. at 407, 423 P.2d at 603; see also Bolt v. Davis, 70 N.M. 449, 463, 374 P.2d 648, 658 (1962); Tinley v. Davis, 94 N.M. 296, 297, 609 P.2d 1252, 1253 (Ct. App. 1980) (“To define ‘the course and scope of employment’ is variable.”).
Fuller, 1999-NMCA-011; Zamora, 84 N.M. 177, 500 P.2d 1001. As noted earlier, the general rule precludes imposing vicarious liability on an employer for its employee’s negligent use of a personal vehicle while driving to and from work. See Nabors, 77 N.M. at 408, 423 P.2d at 603. In Nabors, the employee worked as a supervisor for a home construction business. Id. at 407, 423 P.2d at 602. The employee negligently caused a car accident on a Sunday while he was driving his personal truck to the employer’s housing project. Id. at 406-07, 423 P.2d at 602. The employee sometimes used his personal truck in his capacity as a supervisor, but he had not been ordered or directed to go to the housing site on this particular day. Id. at 407, 423 P.2d at 602. Our Supreme Court held that there was substantial evidence to support the lower court’s finding that the employee was not acting within the scope of his employment when the accident occurred. Id. at 408, 423 P.2d at 603. The Court observed that “the employee had not arrived at the construction site and he was not furthering the employer’s business at the time of the accident.” Id. at 407, 423 P.2d at 603. The Court relied on the Restatement (Second) of Agency § 239 (1958) for the proposition that an employer is not liable for injuries resulting from the employee’s negligent use of an instrumentality over which the employer has no right of control. Nabors, 77 N.M. at 408, 423 P.2d at 603. Thus, the Court held that without “additional circumstances evidencing control by the employer at the time of the negligent act or omission of the employee,” an employee is not within the scope of his employment while traveling to or from his place of employment in his own vehicle. Id.

{14} In reaching the conclusion that the question of control was essential to the issue, the Court in Nabors relied on Bolt, 70 N.M. at 463-65, 374 P.2d at 658-59. Nabors, 77 N.M. at 407-08, 423 P.2d at 603. Bolt held that the plaintiff failed to show that the employee had express or implied authority to make use of his personal car and that the employer could thus not be held liable. 70 N.M. at 464, 374 P.2d at 658. Bolt quoted a case from a Maryland court in a discussion of the general rule:

[A] master will not be held responsible for negligent operation of a servant’s automobile, even though engaged at the time in furthering the master’s business, unless the master expressly or impliedly consented to the use of the automobile, and had the right to control the servant in its operation, or else the use of the automobile was of such vital importance in furthering the master’s business that his control over it might reasonably be inferred.

Id. (emphasis omitted) (quoting Estate of Gallagher v. Battle, 122 A.2d 93, 97 (Md. 1956)). We read Bolt as identifying three circumstances that must exist in order to impose vicarious liability on an employer for an employee’s negligent actions in driving a personal vehicle to and from work: (1) the employer must expressly or impliedly consent to the use of the vehicle; (2) the employer must have the right to control the employee in his operation of the vehicle, or the employee’s use of the vehicle must be so important to the business of the employer that such control could be inferred; and (3) the employee must be engaged at the time in furthering the employer’s business. See 70 N.M. at 464, 374 P.2d at 658; see also Morris v. Cartwright, 57 N.M. 328, 332, 258 P.2d 719, 722 (1953) (“It is fundamental that liability of the master for the use of an automobile by the servant is created only when it appears that its use is with knowledge and consent of the master and that it is used within the scope of employment of the servant and to facilitate the master’s business.”).

{15} In light of the discussion in Bolt, we look at Nabors with fresh eyes. We read the holding in Nabors to say that there was substantial evidence that the employer did not control the employee’s vehicle and that the employee was thus not acting in the scope of his employment while traveling to the job site. 77 N.M. at 408, 423 P.2d at 603. While we do not disagree with the holding under the facts of that case, we observe that it appears to conflate the three questions pertinent to our analysis in the instant case. In doing so, Nabors reduces the test for scope of employment to a question of control generally and thereby obviates the factors ordinarily relevant to the scope of employment determination. We believe that the threefold analysis is the better approach under the facts of our case. Thus, by asking the following three questions, we determine if Fennell was acting within the scope of his employment. Did Coronado consent to the use of the vehicle driven by Fennell? Did Coronado have the right to control Fennell’s operation of the vehicle, or was the use of Fennell’s vehicle so important to Coronado’s business that control could be inferred? Was Fennell acting in furtherance of Coronado’s business at the time of the accident?

{16} To find Coronado liable for Fennell’s negligent actions, each question must be answered in the affirmative. We examine the facts in our case to determine whether summary judgment for Coronado was appropriate on the respondent superior claim.

1. Consent to Use

{17} Viewing the facts in favor of Lessard as the nonmoving party, we conclude that sufficient evidence exists from which a jury could find that Coronado consented to Fennell’s use of his vehicle. Fennell was hired to repair tile installations in various homes throughout a housing development and at other sites in the vicinity, which required him to travel from job site to job site. Coronado did not provide any other transportation for Fennell or for the materials. Fennell testified that he used the vehicle to pick up materials from Coronado after he had discussed the job needs with Poteet and that Fennell regularly visited more than one job site in one day. In addition, Poteet procured another vehicle specifically for Fennell after the accident. From these facts, a jury could reasonably infer that Coronado consented to Fennell’s use of his personal vehicle to travel from job site to job site in the performance of his duties.

2. Control of the Instrumentality

{18} Similarly, we conclude that Coronado’s control over the operation of the vehicle could be implied in these circumstances. Use of Fennell’s personal vehicle could be considered essential to the performance of his duties as an employee because he was required to drive from job site to job site, even though Coronado did not provide him with a vehicle. See Bolt, 70 N.M. at 464, 374 P.2d at 658 (“[T]he use of the automobile was of such vital importance in furthering the master’s business that his control over it might reasonably be inferred.” (emphasis, internal quotation marks, and citation omitted)). Moreover, Coronado’s weekly payment contract with Fennell required him to insure the vehicle used in the performance of his duties and to name Coronado as an additional insured. Thus, the question of control over the operation of the vehicle is for the fact-finder. We now consider the final prong of our analysis—whether Fennell was engaged in furthering Coronado’s business at the time.

3. Furthering Coronado’s Business

{19} In the third step of our analysis, we ask if Fennell was engaged at the time in furthering Coronado’s business. The
evidence in the record does not support

Lessard’s contention that Fennell’s conduct at the time of the accident was in furtherance of Coronado’s business. The only relevant evidence in this respect is Fennell’s testimony that he was “just getting off work,” that he was going home, and that he was heading home by a direct route at the time of the accident. Lessard asserts that Coronado provided Fennell with a cell phone to “keep in touch with Coronado.” However, Lessard neither made allegations nor offered any evidence that could lead a reasonable jury to infer that Fennell was on call or otherwise engaged in using the cell phone to further Coronado’s interest at the time of the accident. Because Lessard has failed to present evidence that would support an inference that Fennell’s conduct at the time was in furtherance of Coronado’s business, we conclude as a matter of law that no jury could reasonably infer that Fennell was acting within the scope of his employment.

{20} Consideration of the jury instruction supports the conclusion we have reached in our three-prong analysis. Because Fennell’s duties required him to drive from job site to job site, a jury could reasonably infer that his negligent conduct was fairly and naturally incidental to the employer’s business assigned to the employee. See UJI 13-407(1). However, we cannot conclude from the evidence in the record that Fennell, at the time of the accident, was acting in any part to further Coronado’s interests under these facts. As noted in the previous paragraph, the only evidence regarding the reasons for Fennell’s actions at the time of the accident was his testimony that he was driving home. Thus, we conclude that Fennell’s conduct arose entirely from this “external, independent and personal motive.” UJI 13-407(2); see also Restatement (Third) of Agency § 7.07 (discussing scope of employment). Lessard has provided no evidence from which a jury could reasonably infer otherwise. We therefore affirm the trial court’s grant of summary judgment in favor of Coronado on the respondeat superior claim.

{21} Lessard cites to several cases from other jurisdictions in support of her argument that a reasonable jury could conclude that Coronado is vicariously liable under the facts of this case. Considering our analysis above based on New Mexico law, we are not convinced that these out-of-state cases are applicable. We specifically address the three cases upon which Lessard relies most heavily. We recognize that the facts in Carter v. Reynolds, 815 A.2d 460 (N.J. 2003), and Huntsinger v. Fell, 99 Cal. Rptr. 666 (Ct. App. 1972), are very similar to the facts in our case. Both cases involve employees like Fennell, who were required to use their vehicles in the performance of their job duties and whose negligent actions occurred on the way home from work. Huntsinger, 99 Cal. Rptr. at 667; Carter, 815 A.2d at 462. Our review of Carter and Huntsinger leads us to conclude, however, that these cases are distinguishable, based on differences in the law of each jurisdiction. The third case, Murray v. Travelers Insurance Co., 601 N.W.2d 661 (Wis. Ct. App. 1999), is distinguishable on its facts. We discuss each case below.

{22} In Carter, the Supreme Court of New Jersey held that the employee came within the “required-vehicle exception” to the general rule precluding vicarious liability. 815 A.2d at 469-70. The required-vehicle exception, which arose from workers’ compensation law, had been previously recognized in two New Jersey tort cases. Id. at 467. In the context of tort liability, the court reasoned that “[d]riving a required vehicle . . . satisfies the control and benefit elements of respondeat superior” because the employee is providing an “essential instrumentality” to perform the employer’s work and because “the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.” Id. at 468 (emphasis, internal quotation marks, and citation omitted). Thus, the court concluded that the employee’s use of her own vehicle “to advance her employer’s business interests fell within the dual purpose, required-vehicle exception to the going and coming rule and placed her squarely . . . within . . . the scope of her employment at the time of the accident.” Id. at 469; see also Clark v. Elec. City, 90 N.M. 477, 480, 565 P.2d 348, 351 (Ct. App. 1977) (discussing the dual purpose rule in workers’ compensation cases). The court in Carter relied on New Jersey precedent, which established “that one who expects to derive a benefit or advantage from an act performed on his behalf by another must answer for any injury that a third person may sustain from it.” 815 A.2d at 463.

{23} The Huntsinger court relied on a similar rationale when it concluded that substantial evidence existed from which the jury could have found that the employee’s “use of his vehicle was an implied or express condition of his employment.” 99 Cal. Rptr. at 668. This arrangement constituted a benefit to the employer; thus, the question of scope of employment was for the jury. Id. at 670. The court emphasized that the principal justification for vicarious liability under the doctrine of respondeat superior is the employer’s ability to spread risk and carry the costs as costs of doing business. Id. at 668. Thus, the court rationalized importing the exception previously applied in workers’ compensation cases. See id. at 668-69. The court concluded that “when a business enterprise requires an employee to drive to and from his office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents is risks incident to the business enterprise.” Id. at 670.

{24} Both Carter and Huntsinger impose liability on the basis of benefit to the employer. We acknowledge that benefit to the employer is one factor that has been used in the context of workers’ compensation to determine whether a worker’s injury “arise[s] out of and in the course of employment.” See Ramirez, 2000-NMCA-011, ¶ 17 (“The injury must, however, arise out of and in the course of employment, which means that it must occur during the commission of an activity that is reasonable and foreseeable both as to its nature and manner of commission, and must be of some benefit to the employer.”). While we agree that the benefit analysis works in the workers’ compensation area, we do not believe New Mexico law allows expansion of this benefit analysis in tort law. In addition, the court in Huntsinger relied on a broad theory of enterprise liability. While we recognize that a theory of enterprise liability, including benefit to the employer, may support the doctrine of respondeat superior, see generally Medina, 113 N.M. at 475-76, 827 P.2d at 863-64 (discussing justifications for the doctrine of respondeat superior), we do not read New Mexico law to support a finding that an employee is acting within the scope of his employment under the facts of this case. Cf. Fuller, 1999-NMCA-011, ¶¶ 19-20 (discussing with approval a California case in which the court relied on benefit to the employer and the enterprise liability theory); Carter, 815 A.2d at 469-70 (declining to adopt California’s “broad enterprise liability theory”). As discussed earlier, our review of pertinent New Mexico law reveals a focus on furthering the business of the employer at the time the negligent
act occurred. Therefore, without evidence that Fennell was furthering Coronado’s business at the time of the accident, we cannot conclude that Fennell was acting within the scope of his employment solely on the basis of benefit to the employer and the enterprise liability theory. See Fuller, 1999-NMCA-011, ¶ 1-2, 21 (concluding that the employee, who was in an accident about ten minutes after she left work to go home, was within her scope of employment as a matter of law, since she was “on duty and doing her employer’s business on her way to and from work because she was in her patrol unit, with her radio on, with badge and gun, and ready to respond to calls, which, after all, is the business of the Sheriff’s Department”). We leave the expansion of tort liability under these circumstances to our legislature and Supreme Court.

{25} Finally, Lessard relies on Murray, 601 N.W.2d 661. In Murray, the court concluded that the general rule precluding employer liability for accidents occurring while an employee traveled to or from work was not applicable because the employee did not have a fixed place of employment. Id. at 662-64. The court then determined that the employee was acting within the scope of her employment when the car accident occurred on the way to a patient’s home “because travel was an essential element of her employment duties . . . and, consequently, at the time of the accident, her travel was actuated by a purpose to serve her employer.” Id. at 662 (emphasis added). In our case, we recognize that Fennell’s job duties are similar to those in Murray, such that Fennell’s travel could be considered an essential element of his duties. As discussed in paragraph 19, however, Lessard has presented no evidence that Fennell’s travel at the time of the accident was in furtherance of Coronado’s business or, in other words, actuated by a purpose to serve Coronado.

B. Negligent Hiring and Retention

{26} Lessard disputes Coronado’s assertion that the going and coming rule precludes liability for the negligent hiring and retention claim. She contends that this approach is not consistent with New Mexico negligence law and that the appropriate analysis requires this Court to address duty, breach of duty, proximate cause, and cause-in-fact of the plaintiff’s damages. Lessard asserts that as a matter of law, Coronado owes a duty to her because Coronado, as an employer who hired an employee to drive, owes a duty to members of the motoring public. She contends that resolution of the issue is a jury question. In response, Coronado argues that as a matter of law, it has no duty to Lessard because no authority creates, and public policy does not support, a duty running from Coronado to Lessard. Under the circumstances of this case, we agree with Lessard.

{27} “Generally, a negligence claim requires the existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff’s damages.” Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181; see also Payne v. Hall, 2004-NMCA-113, ¶ 17, 136 N.M. 380, 98 P.3d 1030 (stating that negligence requires proof of “duty, breach of that duty by failing to conform to the required standard, proximate cause, and loss or damage”) , rev’d on other grounds, 2006-NMSC-029, ¶ 2, 139 N.M. 659, 137 P.3d 599. Determining the existence of a duty is a question of law for the court, Herrera, 2003-NMSC-018, ¶ 6, whereas breach of duty and proximate cause are questions of fact for the jury. Id. ¶¶ 8, 33.

{28} Negligence in hiring or retention is based on the employer’s negligent acts or omissions in hiring or retaining an employee when the employer knows or should know, through the exercise of reasonable care, that the employee is incompetent or unfit. F&T Co. v. Woods, 92 N.M. 697, 699, 594 P.2d 745, 747 (1979); see also Valdez v. Warner, 106 N.M. 305, 307, 742 P.2d 517, 519 (Ct. App. 1987) (“In order to support an instruction on negligent hiring and retention, there must be evidence that the employee was unfit, considering the nature of the employment and the risk he posed to those with whom he would foreseeably associate, and that the employer knew or should have known that the employee was unfit.”) (citation omitted)); Restatement (Third) of Agency § 7.05(1) (2006) (“A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”). An employer may be held liable for negligent hiring or retention, even if the employer is not vicariously responsible for the employee’s negligent acts under a theory of respondeat superior. Los Ranchitos v. Tierra Grande, Inc., 116 N.M. 222, 228, 861 P.2d 263, 269 (Ct. App. 1993). In our case, Lessard claimed that if Coronado had inquired, it would have discovered that Fennell’s driver’s license had been suspended for his failure to pay two car-accident-related judgments and that Fennell had numerous moving violations. {29} Here, we recognize that the parties did not expressly argue the question of duty and foreseeability in their pleadings below, but rather focused on the question of whether the going and coming rule precluded liability on both claims. The issue of duty is implicit, however, in the arguments made below, and both parties expressly address the issue on appeal. Moreover, the trial court’s decision can be interpreted as a determination that the going and coming rule precluded the existence of a duty in these circumstances. We therefore begin our analysis by discussing duty.

{30} A duty may exist based on statutory law; based on common law that has created an affirmative duty toward a specific individual or group of individuals; or based on a general negligence standard, which requires an individual to exercise reasonable care in his dealings and activities with the public. Calkins v. Cox Estates, 110 N.M. 59, 62 n.1, 63, 792 P.2d 36, 39 n.1, 40 (1990) (relying on statute and common law and concluding that the plaintiff was owed a duty based on the landlord-tenant relationship); see also Spencer v. Health Force, Inc., 2005-NMSC-002, ¶¶ 10-11, 137 N.M. 64, 107 P.3d 504. Lessard concedes that Coronado does not have a statutory duty under these facts. However, an employer can be held liable for negligent hiring or retention under the common law duty to “members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.” Spencer, 2005-NMSC-002, ¶ 19 (internal quotation marks and citation omitted). Determining whether a duty exists in a particular case is a two-step procedure. First, we must consider foreseeability as to a particular plaintiff and a particular harm. Chavez v. Desert Eagle Distrib. Co. of N.M., LLC, 2007-NMCA-018, ¶ 16, 141 N.M. 116, 151 P.3d 77, cert. denied, 2007-NMCERT-001, 141 N.M. 164, 152 P.3d 151. If foreseeability exists, we then consider public policy to determine whether imposing a duty is supported by law. Id. ¶ 25.

{31} The district court agreed with Coronado’s argument that it did not owe a duty to Lessard under these facts. We do not agree. First, Lessard was a foreseeable plaintiff because Coronado could reasonably antici-
Coronado relies on any person not licensed as provided in Section 66-5-42. As a driver of a motor vehicle shall employ as a driver of a motor vehicle marked and citation omitted)). The proposition—inferred from legal precedents (stating that we may look to general legal policy); domain of the legislature to make public recognition and effect to Coronado’s obligation to people who might come into contact with its employee on the road. See Herrera, 2003-NMSC-018, ¶ 9 (explaining that duty comprises foreseeability of the plaintiff and the determination that the defendant’s obligation is one to which the law will give recognition and effect). {32} Lessard asserts that NMSA 1978, § 66-5-42 (1978) is an expression of legislative intent that supports the existence of a duty to investigate under these circumstances. As we discuss below, we conclude that Section 66-5-42 supports the existence of a duty to protect the motoring public; whether the scope of that duty includes investigation into Fennell’s driving capabilities or licensing, under these circumstances, is a question for the jury. {33} We agree with Coronado that Lessard failed to make any argument based on Section 66-5-42 in the court below. This failure, however, does not preclude us from considering whether Section 66-5-42 and the public policy expressed therein provides support for a duty in this case. See Spencer, 2005-NMSC-002, ¶¶ 19-20 (noting that “duty is a question of policy based upon statutes, precedent, or other principles of law” and that a particular statute evinced a legislative determination “that the disabled warrant special protection”); Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (stating that it is the particular domain of the legislature to make public policy); Chavez, 2007-NMCA-018, ¶ 25 (stating that we may look to general legal propositions—inferrable from legal precedent, “relevant statutes, learned articles, or other reliable indicators of community moral norms and policy views”—for guidance on policy questions (internal quotation marks and citation omitted)). {34} Section 66-5-42 states, “No person shall employ as a driver of a motor vehicle any person not licensed as provided in this article.” We digress here to address Coronado’s argument that Section 66-5-42 does not provide guidance under these facts because Fennell was not employed as a “driver/châuffeur,” but rather to repair tile. Coronado relies on Mavrikidis v. Petullo, 707 A.2d 977, 986-87 (N.J. 1998) for the proposition that a person hired to perform tile work is not a “driver” for the purposes of Section 66-5-42. See Mavrikidis, 707 A.2d at 986-87 (holding that no basis existed to find liability on the part of the defendant because the independent contractor was hired to perform paving work and no evidence supported a finding that the contractor was incompetent to perform the work for which it was hired). Mavrikidis is distinguishable. In Mavrikidis, the court addressed an exception to the general rule that principals are not liable for the negligence of independent contractors. Id. at 984 (observing that an exception exists when a principal engages an incompetent contractor). As we stated earlier, Coronado conceded for the purposes of their summary judgment motion that Fennell was an employee of Coronado. We therefore conclude that Mavrikidis is not helpful to our analysis. {35} By enacting Section 66-5-42, the legislature expressed its desire to protect the motoring public. To the extent that Coronado argues Section 66-5-42 applies only to those employees whose job duties entail solely driving or chauffeuring, we are not persuaded. We are not construing the statute, but rather looking to the public policy manifested by the statute. The public policy expressed in Section 66-5-42 gives recognition to Coronado’s obligation to people who might come into contact with its employee on the road. See Herrera, 2003-NMSC-018, ¶ 9. We therefore conclude that public policy supports the existence of a duty to the motoring public. Just how this obligation is satisfied depends on the circumstances of the case. {36} Any question regarding the scope of that duty, that is, whether it includes a duty to investigate the driver’s record and how that duty may be satisfied, is a question of fact for the jury. See Bober v. N.M. State Fair, 111 N.M. 644, 650, 808 P.2d 614, 620 (1991) (stating that a determination regarding breach of a duty is a factual question, or mixed question of law and fact, and that this determination requires consideration “of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all the surrounding circumstances”). This view is consistent with the Supreme Court’s decision in Spencer, which stated that it was up to the jury to decide whether the defendant breached its duty “when it contacted [its employee’s] references but did not perform any type of criminal background check.” 2005-NMSC-002, ¶ 22. {37} We find further support for our conclusion in the Restatement (Third) of Agency § 7.05(1), which provides that “[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.” See id. cmt. a, at 177 (“The rules stated in this section are specific instances of general tort-law principles.”); see also Gabaldon v. Erisa Mortgage Co., 1999-NMSC-039, ¶ 27, 128 N.M. 84, 990 P.2d 197 (“As a matter of course, we emphasize that the Restatement is merely persuasive authority entitled to great weight that is not binding on this Court.”). The Restatement’s various comments and illustrations make it clear that an employer’s general duty may also include the obligation to investigate an employee, depending on the circumstances. One illustration concerns the owner of a furniture store who hires A to deliver furniture to customers. When A enters T’s home to deliver a sofa, A assaults T. “Prior to employing A, P conducted no check of A’s background. Had P done so, P would have discovered criminal convictions for assault. . . . P is subject to liability to T.” Restatement (Third) of Agency § 7.05(1) cmt. b. At 179. Another illustration concerns T Corporation, which hires P Corporation to provide security for T in its manufacture of gold-framed sunglasses. P hires A as a security guard after determining that A has no prior criminal record. However, P never asked A’s references for comments regarding A’s honesty and trustworthiness. While on guard duty at T’s facility, A and his confederates steal gold. “P Corporation is subject to liability to T Corporation. P Corporation’s conduct in hiring A was not reasonable under the circumstances.” Id. cmt. d. Illus. 8 at 181-82. These illustrations confirm our conclusion that it is a question for the jury to decide whether Coronado’s actions or omissions constituted a breach of its duty of care or were the proximate cause of Lessard’s injuries. {38} Coronado also contends that New
Mexico law limits any duty to only those members of the public who have a connection to a defendant employer’s business. Coronado asserts that Lessard did not claim any connection to Coronado’s business and thus her claim for negligent hiring or retention must fail. We are not convinced. The question of a nexus between the plaintiff and the employer is a question of proximate cause and not foreseeability in the context of duty, as asserted by Coronado. See Spencer, 2005-NMSC-002, ¶ 22-23 (concluding that the issue of proximate cause, which includes the connection between the employer’s business and the plaintiff, must be left to a jury); Narney, 115 N.M. at 52, 846 P.2d at 358 (observing that determinations of proximate cause are generally questions of fact and that the fact that the employee was off duty was not dispositive); see also Restatement (Third) of Agency § 7.05 cmt. c, at 180 (“Liability . . . also requires some nexus or causal connection between the principal’s negligence in selecting or controlling an actor, the actor’s employment or work, and the harm suffered by the third party.”).

{39} We are not persuaded in this regard by Coronado’s reliance on Raleigh v. Performance Plumbing and Heating, 130 P.3d 1011, 1013-14 (Colo. 2006). The majority opinion in Raleigh concluded as a matter of law that the employer did not owe a duty to the plaintiffs because they did not come into contact with the employee tortfeasor through his employment. Id. at 1013, 1019 (stating that the scope of the employer’s duty did not extend to the plaintiffs because the job for which the employee was hired did not include driving to and from work). It appears that the majority in Raleigh confused the issue of scope or breach of duty with the issue of whether a duty existed. See Spencer, 2005-NMSC-002, ¶ 18. We are more in agreement with the dissenting opinion in Raleigh, which stated that “[c]ausation, not duty, is the applicable principle.” 130 P.3d at 1020 (“If there is evidence that the employer has negligently hired an employee who is an unsafe driver and the employer controls or benefits from the employee’s commuting by driving, then the case should be submitted to the finder of fact to determine whether the employer’s negligence in hiring the employee caused injuries to a third party.”) (Mullarkey, C.J., dissenting). When questions of breach and/or causation exist, summary judgment is not proper. These questions of fact must be reserved for the jury. Upton, 2006-NMSC-040, ¶ 7 (“We view the facts in a light most favorable to the party opposing the motion for summary judgment and draw all reasonable inferences in support of a trial on the merits.” (internal brackets, quotation marks, and citation omitted)).

{40} Similarly, we are not persuaded by Hare v. Cole, 25 S.W.3d 617, 621-22 (Mo. Ct. App. 2000) (declining to hold as a matter of law that there is no duty to check the license status or driving record of applicants for driving positions, but concluding that the employer was not liable unless the plaintiffs could show that the employee was “in fact in the course and scope of his employment at the time of the collision”). We decline to draw a bright-line rule that would preclude recovery in a negligent hiring or retention claim if the employee was not acting within the course and scope of his employment. It is well settled that an employer may be liable for negligently hiring or retaining an employee even if the employee’s acts were outside the scope of his employment. See Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App. 1984) (explaining that negligent hiring and retention are theories that may be asserted against an employer for an employee’s assault outside the scope of employment). Whether the employee was acting within the course and scope of employment is but one factor that the fact-finder may consider in determining foreseeability in the context of proximate cause. Cf. Narney, 115 N.M. at 52, 846 P.2d at 358 (discussing foreseeability and proximate cause).

{41} Finally, Coronado relies on Gabaldon, 1999-NMSC-039, to argue that no authority supports a duty under these facts and that it would be contrary to public policy to do so because imposing such a duty would be a significant departure from existing law, create uncertainty in the law, and be open-ended as to time and place. Because the facts of this case are significantly different, we do not find Gabaldon dispositive. First, the cause of action addressed in Gabaldon was negligent entrustment. Second, the parties in Gabaldon did not lie within the parameters of a claim for negligent entrustment. See Gabaldon 1999-NMSC-039, ¶ 6 (declining to extend the tort of negligent entrustment to the lessor-lessee relationship). Third, we are not convinced that the facts of the present case will open the floodgates of “potential exposure” and impose unreasonable and uncertain duties. Our Supreme Court has emphasized that negligence in hiring or retention depends on the facts and circumstances of each case. See Narney, 115 N.M. at 52, 846 P.2d at 358 (concluding that summary judgment was improper because the fact-finder could have inferred that the defendant’s acts or omissions proximately caused the plaintiffs’ injuries). It is not our role to usurp the fact-finding functions of the jury. See Herrera, 2003-NMSC-018, ¶ 6 (“Negligence is generally a question of fact for the jury.” (internal quotation marks and citation omitted)). Thus, we conclude that the trial court erred in granting summary judgment in favor of Coronado on the claim for negligence in hiring or retention.

IV. CONCLUSION

{42} In regard to the claim of vicarious liability based upon respondent superior, our review of the record leads us to conclude as a matter of law that Lessard has failed to offer evidence from which a jury could reasonably infer Fennell’s actions at the time of the accident were within the scope of his employment. In regard to the claim for negligence in hiring or retention, we conclude that Coronado owed a duty to members of the motoring public. We further conclude that questions regarding the scope or breach of that duty, as well as questions of proximate cause, are questions of fact that must be reserved for a jury. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{43} IT IS SO ORDERED. 

CELIA FOY CASTILLO, Judge

WE CONCUR: 
CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge

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O P I N I O N


{1} This is an insurance case in which the parties dispute, among other things, the scope of uninsured motorist (UM) coverage. Defendant issued an automobile insurance policy to the personal representative of an estate to cover vehicles that were estate assets. The overarching question throughout the litigation has been whether Plaintiff, who is the personal representative’s son, was entitled to UM benefits under the terms of the policy. Over time, Defendant raised several theories in response to that question. Finally, at the close of an evidentiary hearing and following the district court’s rulings on cross-motions for summary judgment, Defendant asserted a new theory that Plaintiff’s father could not, in his fiduciary capacity as the personal representative of the estate, have a household or family member that would be entitled to UM coverage under the policy. The district court requested briefing on Defendant’s new theory, but later ruled in a partial judgment that the theory was untimely raised. In the same partial judgment, the district court held that, under the particular circumstances of this case, Defendant should be viewed as a “named insured,” but also certified the case for interlocutory appeal because the case involved “a controlling question of law as to which there is substantial ground for difference of opinion.” The district court did not specify the controlling question of law to which it referred, and Defendant filed an application for interlocutory appeal premised on the same theory that the district court ruled as untimely raised. We granted Defendant’s application for interlocutory appeal. However, after a thorough review of the record below, we conclude that our grant of interlocutory review was inappropriate. We therefore dismiss the appeal and remand for further proceedings.

B A C K G R O U N D

{2} On April 12, 1987, Plaintiff Fremont F. Ellis II (Plaintiff) was injured in a shooting related to a motor vehicle incident. Plaintiff had been a passenger in a car that was fired upon by the occupants of a pickup truck. The occupants of the truck shot Plaintiff in his leg after he got out of the car to get the license plate number of the truck. Plaintiff sued the driver and passenger of the truck and obtained a judgment against them. However, the driver and passenger were uninsured and apparently judgment-proof. Plaintiff then made an unsuccessful demand against the insurance company providing UM coverage for the vehicle in which he had been a passenger when the shooting took place.

{3} At the time of the shooting, a probate administration of the estate of Plaintiff’s grandfather, Fremont Ellis (Fremont I), had been underway for more than two years. Plaintiff’s father, Frederick Ellis, was administering the estate, initially as guardian and later as personal representative after the death of Fremont I on January 12, 1985. Among the estate assets were two Studebaker vehicles. Frederick Ellis had procured an automobile policy on the Studebakers that extended liability, property damage, and UM coverage. The policy was first issued by Defendant on November 2, 1984, to the named insured Frederick Ellis as guardian for Fremont I, and was subsequently renewed in six-month intervals throughout the administration of the estate. Frederick Ellis paid all of the policy premiums using estate funds.

{4} On April 11, 1994, after making claims for UM benefits against other insurance carriers, Plaintiff initiated litigation against Defendant to invoke the arbitration provisions of the policy. In lieu of filing an answer on the merits, Defendant filed a motion to dismiss in which Defendant alleged that the complaint was barred by the statute of limitations. The district court granted the motion and dismissed the case. Plaintiff appealed from that order, which was ultimately reversed by our Supreme Court. See Ellis v. Cigna Prop. & Cas. Cos., 1999-NMSC-034, 128 N.M. 54, 989 P.2d 429. Following remand, Defendant filed an answer on the merits, asserting, inter alia, that Plaintiff was neither a named insured nor an otherwise covered person for UM benefits under the policy.

{5} The parties filed cross-motions for summary judgment. Defendant, in its motion, asserted that: (1) Plaintiff filed his complaint after the statute of limitations had expired, and (2) the shooting incident that caused Plaintiff’s injuries was not an “accident” that could trigger UM coverage under the policy. Later, in a reply in support of its motion for summary judgment, Defendant asserted that Plaintiff was not a member of Frederick Ellis’s household and therefore was not within the definition of an “insured” under the policy. Defendant reiterated this argument in its response in opposition to Plaintiff’s motion for summary judgment. More specifically, Defendant argued that Plaintiff did not reside at his father’s address. Plaintiff replied by pointing out that: (1) Defendant had not raised the “household member” argument previously, (2) Plaintiff did, in fact, reside at his father’s address, (3) the “household member” issue was Defendant’s only challenge to Plaintiff’s status as an insured, and (4) the shooting incident was an event that could trigger UM coverage.
The district court entered an order on the motions for summary judgment on October 12, 2001. The court denied Defendant’s motion and ruled that: (1) Plaintiff’s claim was not barred by the statute of limitations, (2) the shooting incident was a covered event under the policy, and (3) the court still needed to determine who was the insured under the policy. More specifically, the district court stated that it required “an evidentiary hearing as to whether Frederick F. Ellis is the insured under the Cigna policy . . . or whether the insured is some other person or entity other than Frederick F. Ellis.”

The district court held an evidentiary hearing on May 1, 2002. The court heard evidence regarding whether Plaintiff was a member of Frederick Ellis’s household and concluded that he was. Additionally, Defendant presented the argument that, because Frederick Ellis had procured the policy in his fiduciary capacity as guardian of the estate, the policy only extended to situations involving his legal responsibility to maintain or use the covered vehicles or while acting for the estate. At the conclusion of the hearing, the district court asked for further briefing on the issue of whether Frederick Ellis’s fiduciary role had any impact on coverage.

Plaintiff filed a post-hearing memorandum in which he objected to the “insured-as-fiduciary” issue as untimely raised by Defendant. Plaintiff pointed out that Defendant’s response to Plaintiff’s motion for summary judgment raised only two issues: (1) whether the shooting was an automobile-related accident, and (2) whether Plaintiff was a member of Frederick Ellis’s household. Because the pleadings did not contain any argument related to whether Frederick Ellis, as a fiduciary for the estate, could not have a household under the policy, Plaintiff asserted that Defendant should be prohibited from raising that argument at such a late phase in the litigation. Plaintiff further argued that nothing in the policy limited household member coverage for Frederick Ellis as a guardian or personal representative. Defendant then filed its post-hearing memorandum in which it did not address the timeliness issue, but instead addressed the merits of the question of whether Frederick Ellis’s role as fiduciary for the estate had an impact on UM coverage under the policy.

The district court entered a partial judgment on September 20, 2002. The court recited in the partial judgment that it had previously determined that Plaintiff was a member of the household of Frederick Ellis and that Frederick Ellis was the named insured on the policy. The court then concluded that: (1) Defendant did not properly raise the issue regarding coverage for Frederick Ellis’s household members and “allowing it to be raised at this point is contrary to the general principal [sic] that an insurance company should not be permitted to raise new arguments for denial at this stage of litigation[,]” and (2) “under the unique circumstances of this case, the Plaintiff . . . should be viewed as a named insured and within the scope of risk.” The court therefore ordered Defendant to proceed with arbitration of Plaintiff’s UM claims as a “named insured” under the policy. However, the district court also issued a stay of proceedings pending Defendant’s application for interlocutory appeal to this Court because the partial judgment “involves a controlling question of law as to which there is substantial ground for difference of opinion.” The district court did not specify the controlling question of law to which it referred, nor does the record reveal whether the district court issued the stay of proceedings sua sponte or in response to a request from Defendant.

Defendant timely filed its application for interlocutory appeal with this Court. In its application, Defendant stated that the controlling questions of law were: (1) “Does an Estate insured under an automobile policy have a ‘family’ or ‘members of a household’ for purposes of uninsured motorist benefits?” and (2) “Is a relative of an individual fiduciary who is a named insured under an automobile policy and who is not operating or occupying an insured vehicle or engaged in any activity on behalf of the fiduciary at the time he is injured by an uninsured motorist, entitled to UM benefits under the estate’s automobile policy?” Plaintiff filed a response in which he reasserted his argument, inter alia, that Defendant failed to properly raise the above issues.

We granted the application for interlocutory appeal on November 5, 2002. However, the proceedings before this Court were postponed for several years pending the parties’ attempt to negotiate a settlement through appellate mediation. The parties having failed to reach an agreement, the case was finally submitted to a panel of this Court on April 2, 2007. After a thorough review of the record, we conclude that, under the circumstances of this case, none of the issues Defendant advances on appeal are appropriate for interlocutory review.

Although “this Court is very cautious in exercising its discretion to hear appeals over certain interlocutory orders in the district court. NMSA 1978, § 39-3-4 (1999). Section 39-3-4 provides, in relevant part:

A. In any civil action . . . in the district court, when the district judge makes an interlocutory order . . . which does not practically dispose of the merits of the action and he believes the order . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.

B. The supreme court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in those courts.

DISCUSSION

This Court has jurisdiction to hear appeals over certain interlocutory orders in the district court. NMSA 1978, § 39-3-4 (1999). Section 39-3-4 provides, in relevant part:

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Although “this Court is very cautious in exercising its discretion to hear appeals over certain interlocutory orders in the district court. NMSA 1978, § 39-3-4 (1999). Section 39-3-4 provides, in relevant part:

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UM benefits under the estate’s automobile policy[.]” The district court unambiguously barred these issues as untimely raised.

{13} Nevertheless, toward the end of the partial judgment, the district court certified for interlocutory appeal an unspecified “controlling question of law as to which there is substantial ground for difference of opinion.” Defendant proceeded as if the controlling question of law were the same as the one that the district court held as untimely raised. Although we are mystified by the district court’s ambiguous certification for interlocutory appeal, we do not read the partial judgment as barring, yet simultaneously certifying for interlocutory appeal, Defendant’s argument that a personal representative of an estate cannot have household members under the policy. The district court’s ruling on the timeliness issue is clear; the issue that was certified for interlocutory appeal is not.

{14} We conclude that the district court did not certify for interlocutory appeal the issues advanced by Defendant in its application for interlocutory appeal. To the extent that the district court intended to certify the issue of whether it correctly ruled that Defendant untimely raised its “insured-as-fiduciary” argument, we hold that such a ruling is more appropriately reviewed on appeal following the entry of a final judgment because it does not involve “a controlling question of law as to which there is substantial ground for difference of opinion.” Section 39-3-4(A).

Therefore, if Defendant wishes to appeal the district court’s ruling that the argument was untimely raised, Defendant may do so after a final disposition is reached in the case. See NMSA 1978, § 39-3-2 (1966) (expressing general rule that appeals are to be made from final judgments or orders); see also Thornton v. Gamble, 101 N.M. 764, 767, 688 P.2d 1268, 1271 (Ct. App. 1984) (discussing “policy [of] avoiding piece-meal appellate review of interlocutory decisions”).

{15} Moreover, even if the district court intended to simultaneously bar and certify for interlocutory appeal Defendant’s “insured-as-fiduciary” issue, we decline to review that issue under such an odd procedural posture; the argument is either barred, or it is not. The clear language of the partial judgment compels the conclusion that the district court barred the argument. Furthermore, we can find nothing in the record, apart from the partial judgment itself, that provides further insight into the district court’s decision to certify an issue for interlocutory appeal. Therefore, finding no grounds that would support granting interlocutory review of the partial judgment, we exercise our discretion to dismiss Defendant’s interlocutory appeal.

CONCLUSION

{16} We dismiss Defendant’s interlocutory appeal and remand for further proceedings. In doing so, we acknowledge that we improvidently granted Defendant’s application for interlocutory appeal. This case serves as a prime example of why this Court should use extreme caution in exercising its discretion to hear an interlocutory appeal. City of Sunland Park, 1999-NMCA-124, ¶ 8.

{17} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
JONATHAN B. SUTIN, Chief Judge
CYNTHIA A. FRY, Judge

Certiorari Denied, No. 30,561, August 9, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-124

JARED BENNY,
Worker-Appellant,
versus
MOBERG WELDING and NEW MEXICO MUTUAL CASUALTY COMPANY,
Employer/Insurer-Appellees.
No. 26,630 (filed: June 28, 2007)

APPEAL FROM THE WORKERS’ COMPENSATION ADMINISTRATION
TERRY S. KRAMER, Workers’ Compensation Judge

VICTOR A. TITUS
TITUS & MURPHY LAW FIRM
Farmington, New Mexico
for Appellant

ROBIN A. GOBLE
SETH V. BINGHAM
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Appellees

Opinion

MICHAEL D. BUSTAMANTE, Judge

{1} After agreeing to a stipulated compensation order setting a ten percent impairment rating, Jared Benny requested temporary total disability benefits because his medical condition had worsened. His employer, Moberg Welding, objected because Benny had asked for and received a stipulated lump sum settlement pursuant to NMSA 1978, § 52-5-12 (2003). The Workers’ Compensation Judge (WCJ) agreed with the Employer and granted summary judgment in its favor. Benny appeals and we reverse.

{2} The WCJ’s order on Benny’s complaint provides a succinct summary of the course of proceedings and facts in the case. We can do no better than to quote him:

The underlying material facts are not in dispute. Worker suffered a compensable accident on June 15, 2004. Approximately three months later, on September 10, 2004, Worker returned to work earning a comparable wage. Dr. Peter Saltzman placed Worker at maximum medical improvement
on April 18, 2005 and assigned a 10% whole person impairment. Worker had been working for almost a year when he filed a petition for a return to work lump sum on August 16, 2005. This Court reviewed the petition and, based upon the pleadings, entered an order of approval at August 31, 2005. Worker saw his treating physician, Dr. Peter Saltzman on August 29, 2005, 13 days after filing the petition for lump sum. Dr. Saltzman found Worker to be suffering from disabling pain which at that point in time prevented Worker from continuing to work and interfered with Worker’s activities of daily living. Dr. Saltzman noted that Worker had evidence of degenerative arthritic changes on previous diagnostic studies and that Worker’s lumbar spine condition had not improved. At the August 29, 2005 visit Dr. Saltzman recommended a spinal fusion. Worker underwent low back fusion surgery on November 11, 2005. Worker has not returned to work since undergoing back surgery. Worker filed a claim on September 29, 2005 requesting reinstatement of temporary total disability benefits.

[3] The WCJ decided that “[t]he plain language of [Section] 52-5-12(B) is that when a Worker receives his benefit income in a lump sum he is not entitled to any additional benefit income for the compensable injury or disablement . . . including temporary total disability benefits.” The WCJ decided he did not have to resolve any factual issues as to whether Benny’s condition had worsened because even if it had, Section 52-5-12(B)’s limitation would trump other provisions in the Workers Compensation Act (WCA) because it “is the more specific statute.” Given that the relevant facts are not disputed, we apply a de novo standard of review. Paradiso v. Tipps Equip., 2004-NMCA-009, ¶ 23, 134 N.M. 814, 82 P.3d 985.

[4] We, of course, begin our analysis with the language of the WCA. Section 52-5-12(B) addresses so-called return-to-work lump sum payments and provides in pertinent part:

B. With the approval of the workers’ compensation judge, a worker may elect to receive compensation benefits to which he is entitled in a lump sum if he has returned to work for at least six months, earning at least eighty percent of the average weekly wage he earned at the time of injury or disablement. If a worker receives any additional benefit income for the compensable injury or disablement and he shall only receive that portion of the benefit income that is attributable to the impairment rating as determined in Section 52-1-24 NMSA 1978 [(1990)]. In making lump-sum payments, the payment due the worker shall not be discounted at a rate greater than a sum equal to the present value of all future payments of compensation computed at a five-percent discount compounded annually.

NMSA 1978, § 52-5-9 (1989), addresses modification of compensation orders and provides:

A. Compensation orders are reviewable subject to the conditions stated in this section upon application of any party in interest in accordance with the procedures relating to hearings. The workers’ compensation judge, after a hearing, may issue a compensation order to terminate, continue, reinstate, increase, decrease or otherwise properly affect compensation benefits provided by the Workers’ Compensation Act . . . or the New Mexico Occupational Disease Disablement Law or in any other respect, consistent with those acts, modify any previous decision, award or action.

B. A review may be obtained upon application of a party in interest filed with the director at any time within two years after the date of the last payment or the denial of benefits upon the following grounds:

(1) change in condition[

NMSA 1978, § 52-1-56 (1989), describes how and when hearings on petitions for diminution, increase and termination of compensation are considered:

The workers’ compensation judge may, upon the application of the employer, worker or other person bound by the compensation order, fix a time and place for hearing upon the issue of claimant’s recovery. . . . If it appears upon such hearing that the disability of the worker has become more aggravated or has increased without the fault of the worker, the workers’ compensation judge shall order an increase in the amount of compensation allowable as the facts may warrant.


[6] The WCJ apparently did not consider the effect, if any, that the provisions of Sections 52-5-9 or 52-1-56 might have on the issue before him; neither does his Order display any consideration of the legislative policies that might inform his decision. In deciding that he did not have to consider any other portion of the WCA because of the supposed clarity of Section 52-5-12(B), the WCJ fell victim to the error of “beguiling simplicity” of the plain meaning rule against which the Supreme Court cautioned in Helman. 117 N.M. at 353, 871 P.2d at 1359.

[7] The Employer emphasizes the portion of Section 52-5-12(B) which states that “[i]f a worker receives his benefit income in a lump sum, he is not entitled to any additional benefit income for the compensable injury or disablement.” We do not agree that this language is so clear that no further analysis is required. First, the language the Employer emphasizes is only part of the sentence. The remainder of the same sentence limits the amount that can be paid in a lump sum to the portion “attributable
to the impairment rating as determined in [NMSA 1978, §] 52-1-24.” This provision disallows the application of any modifiers when calculating the lump sum. Thus, the employee pays a price for the privilege of getting a lump sum. Cabazos v. Cal-Tow Constr., 118 N.M. 198, 201, 879 P.2d 1217, 1220 (Ct. App. 1994) (holding that the Section 52-5-12(B) limitation on lump sum calculation is not to be applied to lump sums allowed under Section 52-5-12(C)). The inclusion of both concepts in the same sentence lends support to a view that the provision is essentially backward-looking only; that is, an employee gives up any further claim for compensation for his condition as it exists as of the time the lump sum is paid. Second, even in isolation, the language Employer relies on can reasonably be read to refer only to the “compensable injury or disablement” as it exists as of the time the lump sum is paid. Cabazos, 118 N.M. at 200, 879 P.2d at 1219.

{8} More importantly, however, relying solely on Section 52-5-12(B) gives short shrift to other provisions of the Act which address the concept of modification of awards when changes in medical circumstances occur. Section 52-5-9(A) gives the WCJ the power to “modify any previous decision, award or action” when circumstances change. (Emphasis added.) The Employer does not make any effort to explain why this broad language should not or cannot be taken into account when deciding what Section 52-5-12(B) means. Similarly, Section 52-1-56 provides that a WCJ “shall order an increase in the amount of compensation allowable as the facts may warrant” if the worker proves that his disability “has become more aggravated or has increased without the fault of the worker.” (Emphasis added.) To ignore Sections 52-5-9(A) and 52-1-56 would be to render their apparently unlimited provisions surplusage, contrary to ordinary rules of statutory construction. Souter, 2002-NMCA-078, ¶ 13. In addition, to do so would ignore a consistent body of case law in New Mexico confirming the power of modification as a central concept in our workers’ compensation jurisprudence.

{9} Henington illustrates the point. In Henington, the worker requested an increase for benefits based on the worsening of his left knee. 2002-NMCA-025, ¶ 9. The employer defended on a number of grounds, including that there could be no modification because there was no order of any kind in place that the request was late for a variety of reasons. Id. ¶¶ 11, 18. The WCJ ruled in favor of the worker and we affirmed, holding that no formal order was required for Section 52-1-56 to apply. Henington, 2002-NMCA-025, ¶ 13. Our discussion in Henington included a canvass of prior cases upholding the availability of modification under Sections 52-1-56 and 52-5-9, and recognizing its importance in our workers’ compensation law. Henington, 2002-NMCA-025, ¶¶ 13-16. Most pertinent to this case is Glover v. Sherman Power Tongs, 94 N.M. 587, 613 P.2d 729 (Ct. App. 1980). In Glover, the worker was awarded benefits for a scheduled injury to his hand. The award was paid in full before any judgment was entered. Id. at 588, 613 P.2d at 730. A year later the worker applied for an increase in benefits asserting that he was now totally disabled. Id. The employer argued that no modification was available because the worker’s disability had ended when he received all the payments to which he was entitled for the scheduled injury. We held the “any judgment for compensation in a workman’s compensation case may be reopened during the remainder of the statutory period after the original judgment, for the purpose of requesting an increase or decrease in compensation benefits.” Id. at 589, 613 P.2d at 731.

{10} In Henington, we observed that our Supreme Court and this Court had consistently held that claims under Section 52-1-56 can be filed at any time during the maximum period that a worker could have received benefits, even if the original judgment awarded benefits for less than that period of time and even if the original judgment had been fully paid some time earlier. Henington, 2002-NMCA-025, ¶ 33. We see no substantive difference between the situation where benefits have been fully paid over time and a lump sum payment insofar as the availability of modification is concerned. The important policy of meeting the effects of changes in a worker’s physical condition is served by allowing necessary modifications in both instances. Absent more specific direction from the legislature, we hold that the general language of Section 52-5-12(B) is not enough to cut off all modification remedies. To the extent Souter includes language that could be construed to indicate otherwise, it is disapproved.

{11} This matter is reversed and remanded for further proceedings consistent herewith.

{12} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY

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Jennifer M. deGraauw joined the firm as a law clerk in May 2006. Ms. deGraauw completed her law degree at the University of New Mexico School of Law in 2007. Ms. deGraauw’s practice will include representing Wolf & Fox, P.C.’s clients in general civil practice matters including, family law, estate planning, child advocacy, and litigation.

Mr. Blanchard and Ms. deGraauw can be reached at

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Assistant City Attorney
City of Alamogordo
The City of Alamogordo is accepting applications for the position of Assistant City Attorney. The Assistant City Attorney will provide legal advice and research for the Mayor, City Manager, City Commission, and other City departments as directed by the City Attorney. Starting salary will be $46,848.26 - $68,867.04, DOQ. _plus fully paid_health, dental and life insurance and an additional generous benefit package. The full vacation announcement and employment application can be found at http://ci.alamogordo. nm.us/coa/personnel/coajoblist.htm or at “City Hall 1376 E. Ninth Street, Alamogordo, NM 88310.” Position is open until filled. Contact: ewest@ci.alamogordo.nm.us <mailto:ewest@ci.alamogordo.nm.us> or (505) 439-4296.

Assistant City Attorney
The City of Rio Rancho is accepting applications for the position of Assistant City Attorney. This is a challenging position for those who wish immediate immersion into the broad area of municipal law. General responsibilities include contract review and drafting, land use, planning & zoning, law enforcement and personnel matters, drafting ordinances, resolutions, policies and procedures, and opinions of counsel, as directed by the City Attorney. May attend public meetings, conduct trainings and presentations, participate in FEMA exercises, and assist in legislative matters and supervision of outside counsel in litigation matters. Applicants must be admitted to the New Mexico Bar and have a minimum of five years’ experience, preferably with some experience in local government. Requires excellent written and oral communication skills; extensive knowledge of various areas of law, including litigation, constitutional law, land use law, contracts, tort liability, and labor law; ability to read, analyze and interpret complex and sensitive documents; ability to respond timely and effectively to sensitive inquiries and complaints from elected officials, staff and the public. Salary DOQ; includes bar dues, MCLE, and other fringe benefits. Please send resume to City of Rio Rancho, Human Resources Department, 3200 Civic Center Circle NE, Rio Rancho, NM 87144-4501. Applications must be received no later than November 30, 2007. EOE.

Associate Attorney
Albuquerque law firm seeks entry level associate to assist with all aspects of plaintiffs personal injury practice. Salary DOE. All replies kept confidential. Spanish speaking helpful. Mail resume to: Hiring Partner, 4302 Carlisle NE, Albuquerque, NM 87107 or fax to 883-5012.

Assistant Trial Attorney
Assistant Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney’s Office, which includes Catron, Sierra, Socorro and Torrance counties. Minimum Qualifications: Based on the New Mexico District Attorney’s Personnel and Compensation Plan, and admission to the State Bar of New Mexico. Salary will be commensurate with experience and budget availability. Send resume to: Seventh District Attorney’s Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park St., Socorro, New Mexico 87801.

Attorney
Wanted: half-time attorney for research, writing and motion practice. Minimum two years experience or one year as a judicial clerk. Fax resumes to Shapiro Bettinger Chase LLP at 888-6465. No phone calls please.
Assistant District Attorney
The 11th Judicial District Attorney’s office, Division I, in Farmington, NM is accepting resumes for positions of Assistant District Attorney. Salary DOE. New Mexico has a 1 year temporary license available for those who have not taken the New Mexico Bar. Please send resume to: Mr. Lyndy Bennett, District Attorney, 710 E. 20th St., Farmington, NM 87401. Equal Opportunity Employer.

Assistant Attorney General
The Criminal Appeals Division of the Attorney General’s Office (EEO employer) has an opening for an “exempt” (not classified) appellate attorney. Relevant experience includes a demonstration of the ability to write well in a timely fashion, an ability to work independently with little supervision, the skill to remain highly organized while working on multiple assignments and deadlines, and the ability to analyze and argue persuasively in support of lawful criminal convictions. Prior experience as a prosecutor is preferred. The position is to be filled in the Santa Fe office. An ideal candidate will have a personality and temperament well suited to intense research and writing as well as a willingness to engage colleagues in collaborative discussions of criminal appellate issues. An appellate attorney serves as an Assistant Attorney General charged with seeking justice and providing legal representation consistent with the rules of ethics and professionalism. The work includes filing briefs, memoranda, and appearing at oral arguments in the New Mexico appellate courts. The preparation of briefs, pleadings, and appearances in federal court are also part of the duties of an appellate attorney. New Mexico bar admission is required. Salary is commensurate with legal experience and qualifications. An application includes a resume, two writing samples, and three professional references. The application shall be sent to: Dennis Martinez, Human Resources Manager, New Mexico Attorney General’s Office, P.O. Drawer 1508, Santa Fe, New Mexico 87504-1508 by 5:00 p.m., November 15, 2007.

Lawyer-A Position
The NM Human Services Dept., Office of General Counsel seeks to fill a Lawyer-A position for child support enforcement legal services in Farmington (Job ID #10729) and a Lawyer-O position in Las Cruces (Job ID #10794). Positions require a Juris Doctor and 1 year legal experience (Lawyer-O) and 3 years legal experience (Lawyer-A). Out-of-state licensed attorneys may apply pursuant to Rule 15-301 NMRA-public employee limited license. Salary ranges from $18,356 to $32.634/hr (Lawyer-O) and $20,704 to $36.806/hr (Lawyer-A). To apply: Access the website for the NM State Personnel Office (SPO): http://www.state.nm.us/spo/ and select Search and Apply for Jobs Online. Upon completion of the PeopleSoft application process, please send a copy of your resume, bar card and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. Applications will be accepted until the positions are filled. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

City Attorney
City Of Alamogordo
The City of Alamogordo is accepting applications for the position of City Attorney. The City Attorney performs a variety of complex, high level administrative, technical and professional work. Conducts civil lawsuits, draws up legal documents, advises city officials and departments as to legal rights, obligations, practices and other related phases of applicable local, state or Federal law. The incumbent supervises secretarial and support staff, monitors and drafts City ordinances, responds to public inquiries and maintains law-related contacts with outside entities. Starting salary: will be $62,787 – $98,576 DOQ, plus fully paid health, dental and life insurance and an additional generous benefit package. The full vacancy announcement and employment application can be found at http://ci.alamogordo. nm.us/coa/personnel/coajoblist.htm or at “City Hall 1376 E. Ninth Street, Alamogordo, NM 88310.” Position is open until filled. Contact: ddcraine@ci.alamogordo.nm.us <mailto:ddcraine@ci.alamogordo.nm.us> or (505) 439-4206.

Request For Proposals
General Counsel Services (Re-issuance)
Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA)
The Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA) invites law firms and attorneys with offices located in the Greater Albuquerque area to submit proposals in accordance with the specifications contained in the Request for Proposals ("RFP"). This RFP is a re-issuance of the RFP previously first published June 6, 2007. Firms who responded to the first RFP will need to resubmit a proposal if they wish to be considered. Services will be required in the following areas of law (Area of Law, % Effort): Real Estate and Condemnation, 30%; Contracts and Agreements, 30%; Environmental / Water Law, 10%; Inter-governmental Affairs, 10%; Personnel and Administration, 10%; Construction Law, 10. It is also estimated that about 30-40 hours per month are required to perform these services. A copy of the Scope of Services and complete RFP can be obtained from the AMAFCA office located at 2600 Prospect, NE, Albuquerque, NM 87107, or via AMAFCA’s website at www.amafca.org. Proposals must be submitted to AMAFCA in six (6) copies by 2:00 p.m. (local time) on November 29, 2007. The Proposal shall include the mandatory campaign contribution disclosure form that is attached to and is made part of the scope of services. Failure to submit the campaign contribution disclosure form shall be cause to reject the proposal. AMAFCA reserves the right to reject any or all proposals and to waive any informality or technicality in any proposal. /s/ John P. Kelly, P.E., Executive Engineer, Albuquerque Metropolitan Arroyo Flood Control Authority.

City Attorney
Full Time Temporartrial Attorney
The NM Federal Public Defender is seeking a full time temporary, experienced trial attorney for its branch office in Las Cruces. Employment would be for the term of one year and one day, beginning as soon as possible. Federal salary and benefits apply. This is not an entry level position. Experienced applicant must have sufficient knowledge to assume an immediate case load. Applicants must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals. Spanish fluency preferred. Writing ability, federal court and immigration law experience will be given preference. Applicants must be licensed to practice law in at least one state, and in federal court. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C., § 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. Please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, 111 Lomas Blvd. NW, Suite 501 Albuquerque, NM 87102. Writing samples will be required only from those selected for interviews. Applications must be post marked by November 2, 2007. Position subject to availability of funding.

Full Time Temporartrial Attorney
The NM Federal Public Defender is seeking a full time temporary, experienced trial attorney for its branch office in Las Cruces. Employment would be for the term of one year and one day, beginning as soon as possible. Federal salary and benefits apply. This is not an entry level position. Experienced applicant must have sufficient knowledge to assume an immediate case load. Applicants must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals. Spanish fluency preferred. Writing ability, federal court and immigration law experience will be given preference. Applicants must be licensed to practice law in at least one state, and in federal court. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C., § 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. Please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, 111 Lomas Blvd. NW, Suite 501 Albuquerque, NM 87102. Writing samples will be required only from those selected for interviews. Applications must be post marked by November 2, 2007. Position subject to availability of funding.
Pro Se Law Clerk

Litigation Attorney
Downtown insurance defense firm seeking associate with one to three years experience in civil litigation. This person should have strong research and writing skills and the ability to work independently. Salary competitive and commensurate to experience. Inquiries will be kept confidential, please forward letter of interest and resume to: Ada B. Priest, Esq., Madison, Harbour & Mroz, P.A., P. O. Box 25467, Albuquerque, NM 87102-5333.

Experienced Paralegal - Santa Fe
Full-time experienced paralegal needed for 10-attorney intensive business and real estate litigation practice. Candidate must be able to perform under pressure and work as a dependable, positive team member. Must be willing to learn calendaring software, MS Word and state/federal court rules and procedures. Competitive salary and benefits, 401k, and collegial work atmosphere. Reply in confidence to: freyes@simonsfirm.com or to Simons & Slattery, LLP, P.O. Box 5333, Santa Fe, NM 87502-5333.

Full-Time Legal Assistant
Full-Time Legal Assistant for busy Plaintiff’s Law Firm. A minimum of five years in personal injury and insurance litigation experience. Position requires strong communication skills, and ability to multi-task, calendaring, and draft legal documents independently. Mail or fax resume to Office Administrator, 5100 Indian School Road NE, Albuquerque, NM 87110, Fax 254-0044. No phone calls please.

Legal Assistant/Paralegal
Legal Assistant/Paralegal with exp needed for busy and growing Law Firm in Journal Center area, Great Pay & Ben (hol, vac, sick, health, dental, retire plan & more). Must multi task & be able to thrive in a high volume, fast paced practice. Submit in confidence cover letter, resume, sal hist & req to 7430 Washington St. NE, Alb, NM 87109, fax 833-3040, or email resume@littledranttel.com

Paralegal
Applications for Paralegal (Regular Part-Time Position) being accepted through 5:00 p.m., October 23, 2007. Send applications or apply at the Second Judicial District Court, Human Resource Office, 400 Lomas NW, Suite 325, Albuquerque, NM 87102. SALARY AND BENEFITS: $17.49 hourly. Health, Dental, Vision, Life and Legal insurance options. 4.62 hours annual leave and 3.69 hours sick leave per pay period pro-rated according to part time schedule. 25 year retirement plan with no age limit. WORKING DAYS/HOURS: Monday through Friday (8:00 a.m.-5:00 p.m.) SUMMARY OF POSITION - Under general supervision of the Director of Pro Se; performs highly skilled non-routine legal support work in a legal office or court setting; interviews clients; manages cases; compiles legal correspondence and other legal documents as directed, and performs a variety of paralegal duties in specific areas of law. EDUCATION/EXPERIENCE: Shall meet one or more of the following educational or work experience: (A) Graduation from a paralegal program that is (1) approved by the ABA; (2) an associate degree program; (3) a post-baccalaureate certificate in paralegal studies; or (4) a bachelor’s degree program. (B) Graduation from a post-secondary legal assistant program which consists of a minimum of 60 semester hours or equivalent, as defined by the ABA guidelines for the Approval of Paralegal Education Program. (C) A bachelor’s degree in any field plus two years of substantive law-related experience under the supervision of a licensed attorney. Successful completion of at least 15 semester hours of substantive paralegal course may be substitute for one year of law-related experience. (D) Graduation from an accredited law school and not disbarred or suspended from the practice of law by the State of New Mexico or any other jurisdiction. (E) Certification by the National Association of Legal Assistants, Incorporated, the National Federation of Paralegal Associations, Incorporated or other equivalent national or state competency examination plus at least one year of substantive law-related experience under the supervision of a licensed attorney. (F) A high school diploma or equivalent plus 7 years of substantive law-related experience under the supervision of a licensed attorney.

Legal Secretary
Great career opportunity for legal secretary that has strong organizational skills along with an enthusiastic attitude. Newly established law firm seeking a legal secretary to assist in document preparation. Must possess strong computer skills along with strong work ethic. Please email or fax resume to collections@gugglielmolaw.com. Fax-520.325.2480 Attn: AAA

Legal Support
High Desert Legal Staffing seeks legal secretaries and paralegals with strong computer skills for both temporary and permanent positions with leading firms in Albuquerque and Santa Fe. E-mail: LBBrown@highdesertstaffing.com; fax (505) 881-9089; or call (505) 881-3449 for immediate interview.

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Forensic Psychiatrist
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, competency evaluations, and expert testimony. Licensed in New Mexico, Connecticut and New York. Please leave a message for Dr. Kelly at 866 317 7959 or email forensicpsychiatry@comcast.net.

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Office Space

Downtown Offices
Up to three (3) offices with secretarial areas available in downtown area (6th Street & I-40). Rent includes receptionist; use of conference room; high speed internet connection; phone system; runner 3 days a week; free parking for staff and clients; use of copy machine; and employee lounge. Janitorial and utilities included in rent. Contact Thomas Nance Jones, (505) 247-2972.

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

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

Office Space – Uptown Area
Hunt & Davis, P.C. has two offices and two secretarial spaces for rent in a beautiful one-story building near Louisiana and Menaul. Rent includes reception services, shared use of four conference rooms and an afternoon courier service for filings at the Courts and County and for mail. Plenty of parking, great location and nice atmosphere. Will rent either together or separately. Basement space is also available for rent for files. Space is available as of November 1st. Contact Cathy Davis at 881-3191 for more information.

Beautiful Adobe
Close to downtown, courthouses, hospitals. Reception area, conference rooms, employee lounge included. Copy machine available. Ample free parking and easy freeway access. From $195.00 per mo. Utilities included. Oak Street Professional Bldg., 500 Oak St. N. E. Call Jon, 507-5145; Orville or Judy, 867-6566.

Office Building Available
I-40 at Rio Grande. Please call 866-698-7435 for details.

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"Summer Haven"
WHAT IS ECONOMIC DEVELOPMENT IN INDIAN COUNTRY?

Thursday, November 8, 2007
State Bar Center, Albuquerque
2.0 General and 1.0 Professionalism CLE Credits

Co-Sponsor: Indian Law Section
Standard Fee $95 - Indian Law Section Member, Government, Legal Services Attorney, Paralegal $90
Navajo Advocate, Tribal Court Judges, Admin & Staff $47

Tribes conduct commercial transactions operating as a tribe or utilizing various entities. This CLE will cover how tribes across the country conduct business. The applicability of the UCC and lending options in Indian Country will be discussed. A professionalism credit will be offered discussing unique challenges and responsibilities faced by lawyers representing tribes and their business entities.

8:00 a.m.  Registration
8:30 a.m.  Background of Economic Development in Indian Country
           Speaker TBA
9:30 a.m.  Break
9:40 a.m.  Applicability of the UCC and Lending in Indian Country
           Speaker TBA
10:40 a.m. Break
10:55 a.m. Representing Tribes in Commercial Ventures
           (1.0 P)
           Speaker TBA
Noon       Lunch (provided at the State Bar Center)
           Traditional Native American food with Guest
           Speaker on Alternative Lending in Indian Country
           (non-credit session)
1:00 p.m.  Indian Law Section Annual Meeting followed by
           Indian Law Section Board of Directors Meeting

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

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

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

Credit Card # __________________________________________ Exp. Date ___________________________

Authorized Signature ___________________________________________
We are pleased to announce that

Samuel D. Hough

is now an associate with the firm

Mr. Hough formerly served as directing attorney at California Indian Legal Services in Eureka California. He received his B.A. from Fort Lewis College, and his J.D. and LL.M from the University of Arizona College of Law. Prior work experience has been in tribal governance, government-to-government relationships, federal Indian trust responsibility, aboriginal title rights, subsistence resources, environmental and cultural resource protection, estate planning under the American Indian Probate Reform Act, and Indian Child Welfare Act proceedings. Mr. Hough is licensed in California and Washington and will sit for the New Mexico Bar in February.

Mr. Hough will continue his practice in Indian law matters with a focus in the areas of environmental and cultural resource protection, aboriginal title and use rights, and tribal governance.

Luebben Johnson & Barnhouse LLP represents tribes, businesses and individuals in all aspects of law affecting Native peoples and Indian Nations.

7424 4th street nw    ·    los ranchos de albuquerque, nm 87107
505.842.6123    ·    fax 505.842.6124
www.luebbenlaw.com