Inside This Issue

Table of Contents .............................................. 5
Bernalillo County Metropolitan Court
   Judicial Nominee .......................................... 6
   Solicitation of Additional Applicants ............ 7
Albuquerque Bar Association
   Law Day Luncheon........................................ 9
Proclamation, Law Day, May 1, 2008 ............ 10
Proclamation, Jury Appreciation Week,
   April 28–May 2, 2008 ................................. 11
From the New Mexico Supreme Court
   2008-NMSC-016, No. 30,250:
      State v. Cantrell .................................... 17
From the New Mexico Court of Appeals
   2008-NMCA-040, No. 27,419:
      Grygorwicz v. Trujillo................................. 22
   2008-NMCA-041, No. 26,859:
      State v. Santiago ..................................... 25
   2008-NMCA-042, No. 26,428:
      Concerned Residents of Santa Fe North
      v. Santa Fe Estates, Inc. .......................... 30

Special Insert:
CLE-At-A-Glance

www.nmbar.org
Law Line 4 is a monthly call-in service aimed to assist the New Mexico public by answering questions from residents from across the state, held at the KOB studios in Albuquerque. The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:00 p.m. Please note that the November 12 date is the second Wednesday of the month, also, there will be no sessions in January or December.

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

NAME:____________________________________ PHONE:_______________________
I have some questions. Please call me at: _____________________________________

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

- May 21 5:00 – 7:00 p.m.
- June 18 5:00 – 7:00 p.m.
- July 16 5:00 – 7:00 p.m.
- August 20 5:00 – 7:00 p.m.
- September 17 5:00 – 7:00 p.m.
- October 15 5:00 – 7:00 p.m.
- November 12 5:00 – 7:00 p.m.

I have an attorney associate/ friend/ acquaintance that might be interested in participating.
NAME:____________________________________ PHONE:_______________________
-q You may use my name as a reference.  q DO NOT use my name as a reference.

If you have any questions, please call Jorge at 797-6067. Email: jjimenez@nmbar.org
Fax sign up form to the attention of Jorge at 505.797.6074

Please list your current area(s) of law: ______________________________________
_______________________________________________________________________
_______________________________________________________________________
_______________________________________________________________________
_______________________________________________________________________
Currently accepting advertising space for our newest publication

Please contact
Marcia C. Ulibarri, Account Executive
505.797.6058 mulibarri@nmbar.org

Quarterly 12-page supplement to the Bar Bulletin
Advertising Available

Please contact
Marcia C. Ulibarri, Account Executive
505.797.6058 mulibarri@nmbar.org
INTEGRATING MEDICAID AND MEDICARE: A PRACTICAL APPROACH

Thursday, April 24, 2008
State Bar Center, Albuquerque
Both Sessions (A.M. Session plus Legislative Update in P.M.)

- 3.7 General CLE Credits
- 2.7 General CLE Credits

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

This program will give an overview of Medicaid and Medicare including its statutory origins; changes through its forty-plus years of implementation; and a proposal of integrating one of the nation’s largest budgetary items. Analysis of significant statutes include: (1) the Social Security Act; (2) the Balanced Budget Act; and (3) the Medicare Modernization Act. Seminar participants will leave with a basic understanding of the Centers for Medicare and Medicaid Services (CMS), its regulations, and policy initiatives. Finally, presenters will discuss the proposed integrated model by using Medicare plans, specifically Special Needs Plans (SNPs) and the contractual relationships between State Medicaid agencies. This integrated model removes the artificial barriers in a cost-efficient manner and, at the same time, provides dual-eligibles with more choices in addressing their individual health care needs.

9:00 a.m. Overview of Medicaid
Larry Heyeck, Deputy Director, Medical Assistance Division of the Human Services Department
9:45 a.m. Overview of Medicare
Gabriel Parra, Presbyterian Healthcare Services
10:30 a.m. Break
10:45 a.m. Integration of Medicaid and Medicare
Larry Heyeck
11:30 Integration in Practice
Laura Hopkins, Chief Operating Officer, AMERIGROUP Community Care of New Mexico, Inc.
Noon Lunch (provided at the State Bar Center)

Please Note: No auditors permitted

2:00 p.m. Adjourn

FOUR WAYS TO REGISTER

Phone: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
Fax: (505) 797-6071, Open 24 hours
Internet: www.nmbarcle.org
Mail: CLE, PO Box 92860, Albuquerque, NM 87199

Name __________________________________________ NM Bar # ___________________________
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 __________ CVV# ___________

Authorized Signature ____________________________________________

also available via LIVE WEBCAST
TABLE OF CONTENTS

Notices ................................................................................................................................. 6
Proclamation, Law Day, May 1, 2008 .................................................................................. 10
Proclamation, Jury Appreciation Week, April 28–May 2, 2008 .............................................. 11
Legal Education Calendar ..................................................................................................... 12
Writs of Certiorari ................................................................................................................ 14
List of Court of Appeals’ Opinions ....................................................................................... 16
Opinions

From the New Mexico Supreme Court

2008-NMSC-016, No. 30,250: State v. Cantrell ................................................................. 17

From the New Mexico Court of Appeals

2008-NMCA-040, No. 27,419: Grygorwicz v. Trujillo ....................................................... 22
2008-NMCA-042, No. 26,428: Concerned Residents of Santa Fe North v. Santa Fe Estates, Inc. .................................................................................................................. 30

Advertising .......................................................................................................................... 41

Professionalism Tip

With respect to my clients:
I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party.

Meetings

State Bar Workshops

April

April

21
22
23
24
25
26
27
28
29
30
31

Attorney Support Group, 7:30 a.m., First United Methodist Church
Real Property, Trust and Estate Section, 4 p.m., via teleconference
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room
Health Law Section Board of Directors, 12:30 p.m., State Bar Center
Intellectual Property Section, noon, State Bar Center
Membership Services Committee, noon, State Bar Center

23 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque
24 Lawyer Referral for the Elderly Workshop
9:30 a.m., Chama Senior Center, Chama
24 Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

May

6 Lawyer Referral for the Elderly Workshop
10 a.m., Socorro Senior Center, Socorro
14 Lawyer Referral for the Elderly Workshop
10 a.m., Union County Senior Center, Clayton
15 Lawyer Referral for the Elderly Workshop
9 a.m., Roy Senior Center, Roy

Cover Artist: Susan Seligman Kennedy is a native New Mexican from a pioneer New Mexico family. She graduated from UNM with a Bachelor of Fine Arts degree. Kennedy is a professional calligrapher as well as a professional watercolorist. She shows her work at the Weems Artfest in November. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
NOTICES

COURT NEWS

N.M. Supreme Court Disciplinary Board Vacancy

A vacancy exists on the Disciplinary Board due to the resignation of one member. Attorneys interested in volunteering time on this board may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. The deadline for letters/resumes is May 9.

Judicial Performance Evaluation Commission Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court to provide 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., April 25, at the Judicial Information Division, Santa Fe, to interview judges in the 1st, 4th, and 8th 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

Proposed Revisions to Rules


Proposed Revisions to the Rules of Appellate Procedure: The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court’s consideration.

Fourth Judicial District Court Closure

The 4th Judicial District Court clerk’s offices in Las Vegas and Santa Rosa will be closed April 21 so that staff may attend the Regional Training Program in Santa Fe. Chief Judge Mathis, Judge Aragon, and Judge Baca will be available to file emergency pleadings in open court during regular business hours.

All mail and/or fax documents received on April 21 will be file-stamped or receipted as of April 21. Any attorney who feels this will interfere with the timely filing of documents should contact the District Court Clerk’s Office, (505) 425-7281, ext. 10, to make prior arrangements. Regular business hours will resume April 22.

Bernalillo County Metropolitan Court Judicial Nominee

The District Court Judicial Nominating Commission convened on April 9 in Albuquerque and completed its evaluation of the four applicants for the vacancies on the

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts 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 (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit 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 not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Unmarked Exhibits, oversized poster boards/maps and diagrams</td>
<td>1976–1992</td>
<td>May 9</td>
</tr>
<tr>
<td>(505) 476-0196</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits filed with the court, in criminal, civil, children’s court,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(505) 827-4735</td>
<td>domestic, incompetency/mental health, adoption and probate cases</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Call for Nominations
State Bar of New Mexico
2008 Annual Awards

The State Bar of New Mexico’s Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2007 or 2008. The awards will be presented at the 2008 Annual Meeting, July 17–20, Fairmont Scottsdale Princess, Scottsdale, Arizona.

Send a letter of nomination for each nominee to:
Joe Conte, Executive Director
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
Fax: (505) 828-3765
E-mail: jconte@nmbar.org

Deadline for nominations is April 25
See the Feb. 25 (Vol. 47, No. 9) Bar Bulletin for more information.

State Bar News
Attorney Support Group

The Attorney Support Group offers two meeting opportunities:
• Afternoon meeting, 5:30 p.m., May 5 (meets regularly on the first Monday of the month);
• Morning meeting, 7:30 a.m., April 21 (meets regularly on the third Monday of the month).

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Bankruptcy Law Section
Ninth Annual Golf Outing

The Bankruptcy Law Section will host its ninth annual golf outing at 12:30 p.m., May 2, at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. The cost of $65 includes a round of golf, cart and hors d’oeuvres. Participants must provide their own golf clubs. A cash bar will also

Solicitation of Additional Applicants

The Bernalillo County Metropolitan Court Nominating Commission will reconvene at 9 a.m., May 9, at the Bernalillo County Metropolitan Courthouse, 401 Lomas NW, Albuquerque, to consider Governor Richardson’s request for additional names to fill the vacancy on the Court which exists due to the removal of Judge J. Wayne Griego from the bench.

The chair of the Nominating Commission solicits additional applications for this position from lawyers who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/application.php, or via e-mail by calling Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., May 2. Applications received after that date will not be considered.

U.S. Bankruptcy Court Brown Bag Meeting

U.S. Trustee Richard Wieland will conduct a brown-bag meeting on creditor abuse and chapter 7 means testing at 12 p.m., April 24, at the Albuquerque creditors’ meeting room, 500 Gold Ave. SW, Room 12411, Albuquerque. Feel free to bring a sack lunch to what will surely be an interesting presentation.

U.S. District Court for the District of New Mexico
U.S. Magistrate Court Reappointment of Full-Time U.S. Magistrate Judge

The current term of office for incumbent full-time United States Magistrate Judge, Lorenzo F. Garcia will expire Nov. 8. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Garcia to a new eight-year term.

The duties of Magistrate Judge Garcia are defined in 28 U.S.C. § 636(a) and involve the trial of federal petty and minor offenses as per 18 U.S.C. § 3401; imposition of conditions of release under 18 U.S.C. § 3146; conducting arraignments, non-guilty pleas, and felony guilty pleas; upon designation, conducting hearings and submitting to the judges proposed findings of fact and recommendations for dispositive motions or prisoner petitions; trial and disposition of civil cases upon consent of the litigants; and performing such other duties as conferred or imposed by law or by the Federal Rules of Criminal Procedure and/or the Rules of the United States District Court for the District of New Mexico.

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Garcia to a new term of office should be considered. Submit comments to William B. Keleher, U.S. Magistrate Merit Selection Panel, PO Box AA, Albuquerque, NM 87103.

All comments will be kept confidential and should be submitted not later than June 30.
Fun Facts

The inspiring story of Donna M. Beegle, the plenary speaker, is featured in an upcoming PBS documentary, Invisible Nation, which will illustrate her rise from abject poverty to personal and professional success.

SBNM Annual Meeting
Fairmont Scottsdale Princess
Scottsdale, Arizona
July 17–20

be available. Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m. Reservations must be made by April 28. For more information or to register, contact Gerald Velarde, (505) 248-0050 or gvelarde@mac.com.

Board of Bar Commissioners
Appointment to ABA House of Delegates

The Board of Bar Commissioners will make one appointment to the American Bar Association (ABA) House of Delegates for a two-year term through the conclusion of the 2010 ABA Annual Meeting. The delegate must be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend the ABA mid-year meetings. Members wishing to serve on the House of Delegates must be a current ABA member in good standing and should send a letter of interest and resume by May 2 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax (505) 828-3765.

Appointment to Judicial Standards Commission

The Board of Bar Commissioners will make one appointment to the Judicial Standards Commission for a four-year term to begin July 1. The responsibilities of the Judicial Standards Commission are to receive, review, and act upon complaints against state judges, including supporting documentation on each case as well as other issues that may surface. The board meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment to serve on this board is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this board. Members wishing to serve on the Commission should send a letter of interest and brief resume by May 2 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Committee on Women and the Legal Profession
Outstanding Advocacy for Women Award

Nominations are being accepted for the Justice Pamela B. Minzner Outstanding Advocacy for Women Award. The award recognizes attorneys who have distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. The Committee on Women in the Legal Profession will review the nominations and recommend a recipient to the Board of Bar Commissioners. Submit a letter of nomination summarizing the work and efforts of the nominee to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax (505) 828-3765; or e-mail jconte@nmbar.org.

The nomination deadline is April 25. Direct questions to Co-Chairs Jocelyn Castillo or Katie Lockamy (505) 843-9440.

Elder Law Section
Annual Meeting and CLE

The State Bar Elder Law Section will hold its annual meeting at 11:30 a.m., May 16, at the State Bar Center prior to the 5th Annual Elder Law Seminar. Details on the CLE program are forthcoming. Send agenda items to Chair Brian Jennings, (505) 246-8676. Lunch will be provided and reservations are required. E-mail membership@nmbar.org or call (505) 797-6033 to reserve a lunch.

Equal Access to Justice
High-End Items Needed

Equal Access to Justice needs high-end donations ($350 and up) for the live auction that will be held at the State Bar Annual Meeting to raise funds for civil legal services for New Mexico’s poor. To donate to the auction, contact Kate Mulqueen, (505) 797-6064, or kmulqueen@nmbar.org. Suggested items include art, jewelry, vacation home rentals, spa packages, hotel packages, air tickets, vintage wine, or creative gift packages.

Public Law Section
Public Lawyer of the Year Award

The Public Law Section is pleased to announce that the Public Lawyer of the Year Award for 2008 will be presented to Clark de Schweinitz, who is being honored for his long and dedicated service to low-income residents of northern New Mexico as an attorney with the Santa Fe office of New Mexico Legal Aid. He is also being recognized for his leadership role in the community and his years of public service working to improve the lives of New Mexico residents.

On this occasion, the Public Law Section will also honor the memory of Craig Othmer who died in December 2007. He was an attorney for many years in both the public and private sectors in his native New Mexico and Washington, D.C. He devoted many pro bono hours on behalf of the Public Law Section, the New Mexico Public Procurement Association, the State Bar, and the ABA.

The award ceremony will be held at 4 p.m., May 1, in the Rotunda of the State Capitol in Santa Fe. Speakers include the Honorable Edward Chávez, Chief Justice of the New Mexico Supreme Court; the Honorable Gary King, New Mexico Attorney General; Henry Alaniz, President-Elect of the State Bar; and Ronn Jones, former New Mexico State Purchasing Agent. Members of the State Bar and the public are urged to attend. For further information contact Deborah A. Moll, (505) 827-2000, or e-mail deborah.moll@state.nm.us.
Students may join the State Bar for only $10 per year. Benefits include membership in sections, committees and YLD; free live CLE programs; and the Bar Bulletin and ENews via e-mail.

**Other Bars**

**Albuquerque Bar Association**

**50th Anniversary Law Day Luncheon**

The Albuquerque Bar Association will sponsor its annual Law Day Luncheon at noon, May 1, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The keynote speaker is The Honorable David F. Levi, Dean of Duke University Law School and former Chief United States District Court Judge of the Eastern District of California.

Each year on May 1, Law Day provides an opportunity for everyone to reflect upon our legal heritage, the role of law, and the rights and duties which are the foundation of peace and prosperity for all mankind. This year we celebrate the 50th anniversary of Law Day with the fundamental theme, *The Rule of Law: Foundation for Communities of Opportunity and Equity*.

Individual tickets are available for $35 and tables of 10 are available for $350. This is a pre-paid event. Tickets will not be sold at the door.

Register online at [www.abqbar.com](http://www.abqbar.com) or call (505) 243-2615. For more information contact Martha Domme, (505) 243-2615 or mdomme@abqbar.com

**N.M. Defense Lawyers Association**

**CLE Seminar**

The New Mexico Defense Lawyers Association will present *Women in the Courtroom: Power Lessons for the Female Litigator*, May 9, at the Jewish Community Center, 5520 Wyoming Blvd., Albuquerque (4.5 general, 1.0 professional and 1.0 ethics CLE credits). This seminar is designed for women litigators who want to refine their trial skills and gain practical, diverse perspectives on balance, ambition, and success. Law firm managers and other attorneys who want to recruit and retain talented female attorneys are also encouraged to attend. For further information, visit [www.nmdla.org](http://www.nmdla.org).

**N.M. Lesbian and Gay Lawyers Association**

**Election and Social Hour**

A general election and social hour for the New Mexico Lesbian and Gay Lawyers Association will be held at 6:30 p.m., April 29, in the upstairs lounge at the Slate Street Cafe, 515 Slate Street NW, Albuquerque, (505) 243-2210, [www.slatestreetcafe.com](http://www.slatestreetcafe.com). The offices of president, vice-president, treasurer/secretary and five board positions are up for election. Appetizers will be provided, and a cash bar and dinner will be available. New members or attorneys interested in joining are warmly encouraged to attend.

**UNM School of Law Library Hours**

**Building and Circulation**

Monday–Thursday: 8 a.m.–11 p.m.
Friday: 8 a.m.–6 p.m.
Saturday: 9 a.m.–6 p.m.
Sunday: Noon–11 p.m.

**Reference**

Monday–Friday: 9 a.m.–6 p.m.
Saturday: Closed
Sunday: Noon–4 p.m.

**Workers’ Compensation Administration**

**Request for Comments**

The Director of the Workers’ Compensation Administration (WCA), Glenn R. Smith, is considering the reappointment of Workers’ Compensation Judge Victor Lopez to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Lopez’s term expires Aug. 27. Anyone wishing to submit written comments concerning Judge Lopez’s performance may do so until 5 p.m., May 9. Address comments to WCA Director Glenn R. Smith, c/o Human Resources, PO Box 27198, Albuquerque, NM 87125-7198; or fax to (505) 841-6813.

**Other News**

**N.M. Christian Legal Aid Training**

The Christian Legal Aid annual training session will be conducted from noon to 4 p.m., April 25, at the State Bar Center. This training is for lawyers, law students and paralegals interested in volunteering to provide advice and assistance to the poor and homeless. Lunch will be provided. For details and reservations, call Jim Roach, (505) 243-4419.

**Equal Access to Justice**

**Legal Aid**

N.M. Legal Aid—An elderly woman had moved multiple times, prompted by the uninhabitable conditions she kept finding at the level of housing she could afford. Her most recent landlord kept her deposit without bothering to send the required notice at termination. NMLA demanded refund of the deposit, which the landlord declined. NMLA sued and recovered not only the deposit, but also the bad faith retention award. After the successful conclusion of this case, the client revealed that each of her previous landlords had also retained her deposits. She is going to use the pleadings filed on her behalf and sue some of her former landlords. She is actively pursuing her own justice with the lessons she learned at New Mexico Legal Aid. She is through being a passive victim.
In the Supreme Court of the State of New Mexico

Proclamation

Law Day, May 1, 2008

Law Day began 50 years ago with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

President Eisenhower noted that it was “fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law that our forefathers bequeathed to us.” Further, he said that it is “our moral and civic obligation as free [people] and as Americans to preserve and strengthen that great heritage.”

In celebrating Law Day this year, let us dedicate ourselves to the great values protected and preserved in our Constitution.

And, at the same time, let us recognize that democracy is not static, that we must always work to improve and perfect it. Let us seek to draw ever closer to the ideal cut in stone over the entrance to the United States Supreme Court: “Equal Justice Under Law.”

Let us resolve that Law Day be an opportunity for all of us, in government and the private sector, to examine our efforts to make equal justice a reality and to work together to reach that goal.

For more than 100 years, America’s charitable institutions and foundations, its lawyers and its courts, and countless others have worked to bring equal justice to as many people as possible.

Law Day 2008 is an opportune time to recognize the work of those who try to make courts accessible and justice equal:

• Legal aid offices that provide legal services to those unable to afford them;
• Pro Bono Publico programs under which private lawyers accept worthy cases at no fee;
• Lawyer referral programs that help people find appropriate legal services;
• Court programs that are designed to inform the public about laws and legal procedures, provide interpreters for those who need them, and generally make courts accessible.

We salute these efforts, but let us offer greater support to those who work daily to provide legal services to those who most need them. Let us dedicate ourselves to improving our courts and our justice system, so that we will truly have “justice for all.”

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do hereby recognize Thursday, May 1, 2008, as Law Day. I urge the legal professionals of New Mexico to recognize the designated day and to participate in the observance of that date.

DONE in Santa Fe, New Mexico, this 9th day of April, 2008.

Edward L. Chávez, Chief Justice
In the Supreme Court of the State of New Mexico

Proclamation

Juror Appreciation Week
April 28–May 2, 2008

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;

WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our democracy as the right to vote;

WHEREAS, our courts depend upon citizens to serve as jurors;

WHEREAS, service by citizens as jurors is indispensable to the judicial system;

WHEREAS, all citizens are encouraged to respond when summoned for jury service;

WHEREAS, a continuing and imperative goal for the courts, the bar, and the broader community is to ensure that jury selection and jury service are fair, effective, and not unduly burdensome on anyone; and

WHEREAS, one of the most significant actions a court system can take is to show appreciation for the jury system and for the tens of thousands of citizens who annually give their time and talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:

• educating the public about jury duty and the importance of jury service;
• applauding the efforts of jurors who fulfill their civic duty;
• ensuring that the responsibility of jury service is shared fairly by supporting employees who are called upon to serve as jurors;
• ensuring that the responsibility of jury service is shared fairly among all citizens and that a fair cross section of the community is called for jury service including this state’s non-English speaking population;
• ensuring that all jurors are treated with respect and that their service is not unduly burdensome;
• providing jurors with tools that will assist their decision making; and
• continuing to improve the jury system by encouraging productive dialogue between jurors and court officials.

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do hereby recognize the week of April 28–May 2, 2007, as Juror Appreciation Week in New Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 9th day of April, 2008.

Edward L. Chávez, Chief Justice
April

22 Computer as Witness: Managing a Data Forensics Investigation
   Teleconference
   TRT
   2.0 G
   1-800-672-6253
   www.trtcle.com

22–23 Things Secured Parties Should Know, Do and Avoid When Foreclosing on Collateral, Parts 1 & 2
   National Teleseminar
   Center for Legal Education of NMSBF
   2.0 G
   (505) 797-6020
   www.nmbarcle.org

23 Collection Law Tips and Strategies
   Albuquerque
   NBI, Inc.
   5.0 G, 1.0 E
   (715) 835-8525
   www.nbi-sems.com

23 Litigation Skills for Legal Staff
   Albuquerque
   Lorman Education Services
   6.0 G
   (715) 833-3940
   www.lorman.com

24 Integrating Medicaid and Medicare: A Practical Approach
   Albuquerque
   Center for Legal Education of NMSBF
   3.7 G
   (505) 797-6020
   www.nmbarcle.org

24 Legislative Process Review in New Mexico (2006)
   Video Replay
   Center for Legal Education of NMSBF
   6.5 G
   (505) 797-6020
   www.nmbarcle.org

24 Mediation: An Alternative to Litigation?
   Teleconference
   TRT
   2.0 G
   1-800-672-6253
   www.trtcle.com

25 2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
   Video Replay
   Center for Legal Education of NMSBF
   1.0 P
   (505) 797-6020
   www.nmbarcle.org

25 24th Annual Bankruptcy Year in Review
   Video Replay
   Center for Legal Education of NMSBF
   6.0 G, 1.0 E
   (505) 797-6020
   www.nmbarcle.org

25 Am I My Bar’s Keeper?
   Teleconference
   TRT
   1.0 E, 1.0 P
   1-800-672-6253
   www.trtcle.com

25 Creative Tax Planning for Real Estate (Live Video Webcast)
   National Video Webcast
   Center for Legal Education of NMSBF
   3.0 G
   (505) 797-6020
   www.nmbarcle.org

25 Drafting Documents That Even Clients Might Appreciate
   Video Replay
   Center for Legal Education of NMSBF
   1.0 G
   (505) 797-6020
   www.nmbarcle.org

25 What Is Economic Development in Indian Country
   Video Replay
   Center for Legal Education of NMSBF
   2.0 G, 1.0 P
   (505) 797-6020
   www.nmbarcle.org

28 Scientific Evidence: The Law Against Junk
   Teleconference
   TRT
   2.0 G
   1-800-672-6253
   www.trtcle.com

29 Disposition and Distressed Real Estate
   National Teleseminar
   Center for Legal Education of NMSBF
   1.0 G
   (505) 797-6020
   www.nmbarcle.org

29 E: Mysteries and Histories
   Teleconference
   TRT
   2.0 E
   1-800-672-6253
   www.trtcle.com

29 Medicaid and Elder Law
   Albuquerque
   Lorman Education Services
   6.6 G
   (715) 833-3940
   www.lorman.com

30 2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
   Video Replay
   Center for Legal Education of NMSBF
   1.0 P
   (505) 797-6020
   www.nmbarcle.org

30 Am I My Bar’s Keeper
   Teleconference
   TRT
   1.0 E, 1.0 P
   1-800-672-6253
   www.trtcle.com

G = General    E = Ethics
P = Professionalism    VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
**LEGAL EDUCATION**

**30**  
**Auto Insurance Law Basics**  
Albuquerque  
NBI, Inc.  
5.0 G, 1.0 E  
(715) 835-8525  
www.nbi-sems.com

**30**  
**Basics of Family Law**  
Video Replay  
Center for Legal Education of NMSBF  
6.5 G  
(505) 797-6020  
www.nmbarcle.org

**30**  
**e-filing in Federal District Court**  
Video Replay  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**30**  
**Immigration Fundamentals: Keeping Families Together**  
Video Replay  
Center for Legal Education of NMSBF  
3.0 G  
(505) 797-6020  
www.nmbarcle.org

**30**  
**FMLA Master Class**  
Albuquerque  
M. Lee Smith Publishers LLC  
6.0 G  
1-800-274-6774  
www.HRhero.com/nm-fmla

**30**  
**New Mexico Special Education Law**  
Albuquerque  
NBI, Inc.  
5.0 G, 1.0 E  
(715) 835-8525  
www.nbi-sems.com

**MAY**

**1**  
**Lawyers and Law Firm Crackups**  
Teleconference  
TRT  
2.0 E  
1-800-672-6253  
www.trtcle.com

**2**  
**Corporate Counsel’s Moral Compass**  
Teleconference  
TRT  
2.0 E  
1-800-672-6253  
www.trtcle.com

**2-3**  
**New Mexico Collaborative Law Symposium**  
Albuquerque  
Center for Legal Education of NMSBF  
10.2 G, 1.5 E  
(505) 797-6020  
www.nmbarcle.org

**5**  
**E: Mysteries and Histories**  
Teleconference  
TRT  
2.0 E  
1-800-672-6253  
www.trtcle.com

**6**  
**2008 Professionalism: Angels and Demons How Attorneys Help and Hinder ADR**  
Video Replay, Las Cruces  
Center for Legal Education of NMSBF  
1.0 P  
(505) 797-6020  
www.nmbarcle.org

**6**  
**2008 Professionalism: Angels and Demons How Attorneys Help and Hinder ADR**  
Video Replay, State Bar Center  
Center for Legal Education of NMSBF  
1.0 P  
(505) 797-6020  
www.nmbarcle.org

**6**  
**Drafting Documents That Even Clients Might Appreciate**  
Video Replay, Las Cruces  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**6**  
**Making Your Case with a Better Memory**  
Video Replay  
Center for Legal Education of NMSBF  
5.5 G  
(505) 797-6020  
www.nmbarcle.org

**6**  
**Tax Planning for Educational Expenses**  
National Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**6**  
**Trust Accounting: It’s Not an Oxymoron**  
Video Replay, State Bar Center  
Center for Legal Education of NMSBF  
1.5 E, 1.0 P  
(505) 797-6020  
www.nmbarcle.org

**6**  
**Trust Accounting: It’s Not An Oxymoron**  
Video Replay, Las Cruces  
Center for Legal Education of NMSBF  
1.5 E, 1.0 P  
(505) 797-6020  
www.nmbarcle.org

**7**  
**Arbitrate or Litigate?**  
Teleconference  
TRT  
2.0 G  
1-800-672-6253  
www.trtcle.com

**8**  
**Computer as Witness: Managing a Data Forensics Investigation**  
Teleconference  
TRT  
2.0 G  
1-800-672-6253  
www.trtcle.com

**9**  
**Lawyers and Law Firm Crackups**  
Teleconference  
TRT  
2.0 E  
1-800-672-6253  
www.trtcle.com
**WRITS OF CERTIORARI**

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

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

**Effective April 21, 2008**

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

<table>
<thead>
<tr>
<th>No.</th>
<th>Case</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,058</td>
<td>State v. David L.</td>
<td>4/11/08</td>
</tr>
<tr>
<td>31,057</td>
<td>State v. Campos</td>
<td>4/11/08</td>
</tr>
<tr>
<td>31,056</td>
<td>State v. Kelly</td>
<td>4/11/08</td>
</tr>
<tr>
<td>31,055</td>
<td>State v. Bailey</td>
<td>4/9/08</td>
</tr>
<tr>
<td>31,054</td>
<td>State v. Klinicheenie</td>
<td>4/9/08</td>
</tr>
<tr>
<td>31,053</td>
<td>Waynes v. Heredia</td>
<td>4/9/08</td>
</tr>
<tr>
<td>31,052</td>
<td>O'Neill v. Tapia</td>
<td>4/8/08</td>
</tr>
<tr>
<td>31,050</td>
<td>Allen v. Schrader</td>
<td>4/8/08</td>
</tr>
<tr>
<td>31,047</td>
<td>State v. Villalobos</td>
<td>4/7/08</td>
</tr>
<tr>
<td>31,045</td>
<td>State v. Esparza</td>
<td>4/4/08</td>
</tr>
<tr>
<td>31,044</td>
<td>Bruvold v. State</td>
<td>4/3/08</td>
</tr>
<tr>
<td>31,041</td>
<td>Deal v. Romero</td>
<td>4/2/08</td>
</tr>
<tr>
<td>31,040</td>
<td>State v. Utley</td>
<td>4/2/08</td>
</tr>
<tr>
<td>31,039</td>
<td>Romero v. Tierra Grande</td>
<td>4/1/08</td>
</tr>
<tr>
<td>31,033</td>
<td>State v. Rubio</td>
<td>3/28/08</td>
</tr>
<tr>
<td>31,032</td>
<td>State v. Scott</td>
<td>3/28/08</td>
</tr>
<tr>
<td>31,031</td>
<td>State v. Mudrak</td>
<td>3/27/08</td>
</tr>
<tr>
<td>31,030</td>
<td>State v. Garcia</td>
<td>3/27/08</td>
</tr>
<tr>
<td>31,029</td>
<td>Sanchez v. Shortle Properties</td>
<td>3/27/08</td>
</tr>
<tr>
<td>31,028</td>
<td>State v. Muldowney</td>
<td>3/26/08</td>
</tr>
<tr>
<td>31,027</td>
<td>State v. Mosby</td>
<td>3/25/08</td>
</tr>
<tr>
<td>31,026</td>
<td>State v. Johnston</td>
<td>3/25/08</td>
</tr>
<tr>
<td>31,005</td>
<td>State v. Flores</td>
<td>3/25/08</td>
</tr>
<tr>
<td>31,038</td>
<td>Coronel v. Banks</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,025</td>
<td>State v. Ellis</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,021</td>
<td>State v. Rayburns</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,020</td>
<td>State v. Hopkin</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,019</td>
<td>State v. Sandoval</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,017</td>
<td>State v. Torres</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,016</td>
<td>Gomez v. Board of Regents</td>
<td>3/24/08</td>
</tr>
<tr>
<td>31,015</td>
<td>State v. Demongey</td>
<td>3/20/08</td>
</tr>
<tr>
<td>31,009</td>
<td>State v. Hino</td>
<td>3/19/08</td>
</tr>
<tr>
<td>31,013</td>
<td>Truong v. Allstate Ins. Co.</td>
<td>3/19/08</td>
</tr>
<tr>
<td>31,003</td>
<td>State v. Emerson</td>
<td>3/17/08</td>
</tr>
<tr>
<td>31,000</td>
<td>State v. Nguyen</td>
<td>3/12/08</td>
</tr>
<tr>
<td>30,965</td>
<td>State v. Bowie</td>
<td>2/25/08</td>
</tr>
</tbody>
</table>

### Certiorari Granted but not yet Submitted to the Court:

<table>
<thead>
<tr>
<th>No.</th>
<th>Case</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>30,044</td>
<td>State v. O’Kelly</td>
<td>11/13/06</td>
</tr>
<tr>
<td>30,267</td>
<td>State v. Ortiz</td>
<td>4/2/07</td>
</tr>
<tr>
<td>30,318</td>
<td>State v. Trujillo</td>
<td>4/20/07</td>
</tr>
<tr>
<td>30,317</td>
<td>Muniz v. Janecka</td>
<td>7/6/07</td>
</tr>
<tr>
<td>30,463</td>
<td>State v. Williams</td>
<td>7/20/07</td>
</tr>
<tr>
<td>30,465</td>
<td>State v. Flores</td>
<td>7/20/07</td>
</tr>
<tr>
<td>30,467</td>
<td>State v. Verdugo</td>
<td>7/20/07</td>
</tr>
<tr>
<td>30,483</td>
<td>State v. Bettencourt</td>
<td>7/27/07</td>
</tr>
<tr>
<td>30,520</td>
<td>State v. Thompson</td>
<td>7/31/07</td>
</tr>
<tr>
<td>30,346</td>
<td>State v. Owens</td>
<td>8/7/07</td>
</tr>
<tr>
<td>30,542</td>
<td>State v. Rivera</td>
<td>8/8/07</td>
</tr>
<tr>
<td>30,575</td>
<td>State v. Zador</td>
<td>9/17/07</td>
</tr>
<tr>
<td>30,559</td>
<td>State v. Rodriguez</td>
<td>9/17/07</td>
</tr>
<tr>
<td>30,548</td>
<td>State v. Leyba</td>
<td>9/17/07</td>
</tr>
<tr>
<td>30,543</td>
<td>Primetime v. City of Albuq.</td>
<td>9/25/07</td>
</tr>
<tr>
<td>30,620</td>
<td>State v. Nozie</td>
<td>9/25/07</td>
</tr>
<tr>
<td>30,640</td>
<td>Dewitt v. Rent a Center</td>
<td>10/15/07</td>
</tr>
<tr>
<td>30,643</td>
<td>NM Public Schools v. Gallagher</td>
<td>10/29/07</td>
</tr>
<tr>
<td>30,654</td>
<td>State v. Belanger</td>
<td>10/29/07</td>
</tr>
<tr>
<td>30,656</td>
<td>Durham v. Guest</td>
<td>10/29/07</td>
</tr>
<tr>
<td>30,698</td>
<td>Ullrich v. Blanchard</td>
<td>11/5/07</td>
</tr>
<tr>
<td>30,657</td>
<td>State v. Nick R.</td>
<td>11/7/07</td>
</tr>
<tr>
<td>30,619</td>
<td>State v. Kincaid</td>
<td>11/8/07</td>
</tr>
<tr>
<td>30,663</td>
<td>State v. Hubble</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,685</td>
<td>State v. Barraza</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,709</td>
<td>State v. Marquez</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,710</td>
<td>Marbob v. NM Oil</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,715</td>
<td>State v. Garza</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,716</td>
<td>State v. Boyle</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,717</td>
<td>Cortez v. Cortez</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,722</td>
<td>State v. UU Bar Limited</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,723</td>
<td>State v. Carrasco</td>
<td>11/20/07</td>
</tr>
<tr>
<td>30,691</td>
<td>Platte v. First Colony</td>
<td>11/30/07</td>
</tr>
<tr>
<td>30,735</td>
<td>Salas v. Mountain States</td>
<td>12/4/07</td>
</tr>
<tr>
<td>30,747</td>
<td>Bianco v. Horror One</td>
<td>12/4/07</td>
</tr>
<tr>
<td>30,750</td>
<td>State v. Tafoya</td>
<td>12/10/07</td>
</tr>
<tr>
<td>30,766</td>
<td>State v. Jones</td>
<td>12/17/07</td>
</tr>
<tr>
<td>30,755</td>
<td>State v. Glasscock</td>
<td>1/7/08</td>
</tr>
<tr>
<td>30,789</td>
<td>State v. Olsson</td>
<td>1/11/08</td>
</tr>
<tr>
<td>30,800</td>
<td>State v. Gutierrez</td>
<td>1/16/08</td>
</tr>
<tr>
<td>30,808</td>
<td>Montoya v. Tecomote Land Grant</td>
<td>1/16/08</td>
</tr>
<tr>
<td>30,801</td>
<td>State v. Gutierrez</td>
<td>1/22/08</td>
</tr>
<tr>
<td>30,827</td>
<td>State v. Sims</td>
<td>1/22/08</td>
</tr>
<tr>
<td>30,851</td>
<td>Rodriguez v. Jaramillo</td>
<td>1/22/08</td>
</tr>
<tr>
<td>30,870</td>
<td>Redi Mix v. Scottsdale</td>
<td>2/8/08</td>
</tr>
<tr>
<td>30,866</td>
<td>State v. Higgins</td>
<td>2/8/08</td>
</tr>
<tr>
<td>30,897</td>
<td>State v. Sewell</td>
<td>2/19/08</td>
</tr>
<tr>
<td>30,862</td>
<td>State v. Satterfield</td>
<td>2/28/08</td>
</tr>
</tbody>
</table>
WRITS OF CERTIORARI

NO. 30,894 State v. Soto (COA 26,861) 2/28/08
NO. 30,903 Schwetmann v. Schwetmann (COA 26,905) 2/28/08
NO. 30,909 State v. Willie (COA 26,116) 2/28/08
NO. 30,916 State v. Quick (COA 27,013) 2/28/08
NO. 30,899 Bishop v. Evangelical Society (COA 25,510) 2/28/08
NO. 30,787 Cable v. Wells Fargo Bank (On reconsideration) (COA 26,357) 3/10/08
NO. 30,939 Grygorwicz v. Trujillo (COA 27,139) 2/11/08
NO. 30,953 State v. Santiago (COA 26,859) 3/19/08
NO. 30,937 State v. Garcia (COA 27,091) 3/25/08
NO. 30,956 Davis v. Devon (COA 28,147/28,154) 3/25/08
NO. 30,957 Ideal v. BP America (COA 28,151/28,152) 3/25/08
NO. 30,958 Smith v. Conocophillips (COA 28,151/28,152) 3/25/08
NO. 30,986 Snyder v. Sain (COA 27,854) 3/25/08
NO. 30,997 Bell v. Bell (COA 27,392) 4/1/08
NO. 30,993 State v. Myers (COA 26,837) 4/1/08
NO. 31,004 State v. Martinez (COA 26,893) 4/1/08
NO. 31,010 State v. Trossman (COA 26,576) 4/1/08

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

<table>
<thead>
<tr>
<th>Submission Date</th>
<th>Case Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 29,786</td>
<td>Case v. Hatch (12-501)</td>
</tr>
<tr>
<td>NO. 30,301</td>
<td>State v. Moreland (COA 25,831)</td>
</tr>
<tr>
<td>NO. 30,180</td>
<td>State v. Funderburg (COA 25,591)</td>
</tr>
<tr>
<td>NO. 30,272</td>
<td>State v. McClougherty (COA 24,409)</td>
</tr>
<tr>
<td>NO. 30,263</td>
<td>State v. Downey (COA 25,068)</td>
</tr>
<tr>
<td>NO. 30,258</td>
<td>State v. Ellis (COA 26,263)</td>
</tr>
<tr>
<td>NO. 30,209</td>
<td>Varoz v. Varoz (COA 25,935)</td>
</tr>
<tr>
<td>NO. 30,278</td>
<td>Sanders v. FedEx (COA 25,577)</td>
</tr>
<tr>
<td>NO. 30,225</td>
<td>State v. Montoya (COA 26,067)</td>
</tr>
<tr>
<td>NO. 30,292</td>
<td>Peters Corp. v. N.M. Banquest Investors Corp. (COA 25,276)</td>
</tr>
<tr>
<td>NO. 30,380</td>
<td>State v. Rowell (COA 26,429)</td>
</tr>
<tr>
<td>NO. 30,425</td>
<td>Computer One v. Grisham (COA 25,732)</td>
</tr>
<tr>
<td>NO. 30,199</td>
<td>State v. Stephen F. (COA 24,077)</td>
</tr>
<tr>
<td>NO. 30,523</td>
<td>State v. Lohberger (COA 26,195)</td>
</tr>
<tr>
<td>NO. 30,321</td>
<td>State v. Salas (COA 27,083)</td>
</tr>
</tbody>
</table>

NO. 30,381 State v. Bomboy (COA 26,687) 1/30/08
NO. 30,148 Cook v. Anding (On reconsideration) (COA 27,139) 2/11/08
NO. 30,169 Cook v. Anding (COA 27,139) 2/11/08
NO. 30,415 ACLU v. City of Albuq. (COA 26,143) 2/11/08
NO. 30,424 Fiser v. Dell (COA 25,862) 2/12/08
NO. 30,496 Wimberly v. City of Clovis (COA 26,219) 2/27/08
NO. 30,473 Hidalgo v. Ribble (COA 27,358) 2/27/08
NO. 30,269 State v. Martinez (COA 23,710) 2/27/08
NO. 30,490 Pincheira v. Allstate Ins. Co. (COA 26,044) 3/10/08
NO. 30,558 Beggs v. City of Portales (COA 26,903) 3/10/08
NO. 30,592 Gushwa v. Hunt (COA 26,887) 3/26/08
NO. 30,526 State v. Maddox (COA 25,404) 3/26/08
NO. 30,517 State v. Snell (COA 26,655) 4/14/08
NO. 30,568 Tafoya v. Rael (COA 26,774) 4/14/08
NO. 30,524 State v. Lee (COA 25,822) 4/15/08
NO. 30,555 State v. Silva (COA 24,273) 4/15/08
NO. 30,571 Salazar v. DWHB, Inc. (COA 25,928) 4/28/08
NO. 30,846 State v. Cobos (COA 28,001) 4/30/08
NO. 30,828 State v. Zaidi (COA 27,915) 4/30/08
NO. 30,533 State v. Sandoval (COA 25,841/25,842) 4/30/08
NO. 30,696 State v. Jose S. (COA 24,988) 4/30/08
NO. 30,693 Urrea v. Bosque Asset Corp. (COA 27,541) 5/12/08
NO. 30,608 Marchand v. Marchand (COA 26,558) 5/12/08
NO. 30,536 Cordova v. World Finance Corp. (COA 27,436) 5/13/08
NO. 30,474 State v. Burke (COA 27,109) 5/13/08
NO. 30,809 State v. Medina (COA 26,499) 5/28/08
NO. 30,540 State v. Sena (COA 24,156) 5/28/08
NO. 30,386 Colony Insurance Company v. McLean (COA 27,321) 5/28/08
NO. 30,564 State v. Ross (COA 26,239) 5/28/08

PETITION FOR WRIT OF CERTIORARI DENIED:
NO. 31,002 Lucero v. Luna (COA 27,737) 4/9/08
NO. 31,001 State v. Garcia (COA 27,644) 4/9/08
NO. 31,034 Bell v. Ulibarri (12-501) 4/9/08

WRIT OF CERTIORARI QUASHED:
NO. 30,849 State v. Ochoa (COA 27,674) 4/8/08
## PUBLISHED OPINIONS

<table>
<thead>
<tr>
<th>No.</th>
<th>Court District</th>
<th>Case Number</th>
<th>Plaintiff(s) vs. Defendant(s)</th>
<th>Outcome</th>
<th>Filed Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>27414</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-03-6847</td>
<td>J SHIVELY v AOA</td>
<td>affirm</td>
<td>4/7/2008</td>
</tr>
<tr>
<td>28069</td>
<td>4th Jud Dist San Miguel</td>
<td>CV-06-538</td>
<td>L CALLAHAN v CITY OF LAS VEGAS</td>
<td>reverse</td>
<td>4/7/2008</td>
</tr>
<tr>
<td>28123</td>
<td>2nd Jud Dist Bernalillo</td>
<td>DM-03-2046</td>
<td>C YSAIS v C YSAIS</td>
<td>affirm</td>
<td>4/7/2008</td>
</tr>
</tbody>
</table>

## UNPUBLISHED OPINIONS

<table>
<thead>
<tr>
<th>No.</th>
<th>Court District</th>
<th>Case Number</th>
<th>Plaintiff(s) vs. Defendant(s)</th>
<th>Outcome</th>
<th>Filed Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>27961</td>
<td>1st Jud Dist Santa Fe</td>
<td>CV-06-654</td>
<td>G LONG-KARRER v R CRUZ</td>
<td>affirm</td>
<td>4/9/2008</td>
</tr>
<tr>
<td>27966</td>
<td>11th Jud Dist San Juan</td>
<td>CR-07-92</td>
<td>STATE v D MAILMAN</td>
<td>affirm</td>
<td>4/9/2008</td>
</tr>
<tr>
<td>28124</td>
<td>5th Jud Dist Lea</td>
<td>CV-06-527</td>
<td>J WHITE v WAL-MART</td>
<td>affirm</td>
<td>4/9/2008</td>
</tr>
<tr>
<td>28126</td>
<td>1st Jud Dist Santa Fe</td>
<td>CV-07-1275</td>
<td>J GUNDERSON v C GRUYS</td>
<td>affirm</td>
<td>4/9/2008</td>
</tr>
<tr>
<td>26121</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-03-1478</td>
<td>G GUADANGO v H QUINTANA</td>
<td>affirm</td>
<td>4/11/2008</td>
</tr>
</tbody>
</table>

Slip Opinions for Published Opinions may be read on the Court’s Web site:
**CLE AT A GLANCE**

**MONTHLY GUIDE TO LEGAL EDUCATION PROGRAMS**

May - June 2008

**INTEGRATING MEDICAID AND MEDICARE: A PRACTICAL APPROACH**

**Thursday, April 24, 2008**

State Bar Center, Albuquerque

**Both Sessions (A.M. Session plus Legislative Update in P.M.) 3.7 General CLE Credits**

Health Law Section Member, Government, Legal Services Attorney, Paralegal $129

A.M. Session Only (2.7 General CLE Credits)

Health Law Section Member, Government, Legal Services Attorney, Paralegal $95

This program will give an overview of Medicaid and Medicare including its statutory origins; changes through its forty-plus years of implementation; and a proposal of integrating one of the nation's largest budgetary items. Analysis of significant statutes include: (1) the Social Security Act; (2) the Balanced Budget Act; and (3) the Medicare Modernization Act. Seminar participants will leave with a basic understanding of the Centers for Medicare and Medicaid Services (CMS), its regulations, and policy initiatives. Finally, presenters will discuss the proposed integrated model by using Medicare plans, specifically Special Needs Plans (SNP) and the contractual relationships between State Medicaid agencies. This integrated model removes the artificial barriers in a cost-efficient manner and, at the same time, provides dual-eligibles with more choices in addressing their individual health care needs.

**PROGRAM CANCELLATION:** Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given.

**TAKE RECORDING OF PROGRAMS IS NOT PERMITTED.**

**CLE AUDIT POLICY:** Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $10, space permitting. Course materials, breaks and/or lunch, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance and notify staff of their intent to audit. "Walk-in" auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events.

**SCHOLARSHIPS:** Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to a 20% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6020.
NEW MEXICO COLLABORATIVE LAW SYMPOSIUM
Friday, May 2 and Saturday, May 3, 2008
State Bar Center, State Bar of New Mexico, Albuquerque
Basic Track 10.2 General and 1.5 Ethics CLE Credits
Intermediate/Advanced Track 10.2 General and 1.5 Ethics CLE Credits
Standard Fee $339.00 • NMCPG Member $309.00

Taking Destruction Out of Divorce

BASIC TRACK
FRIDAY, MAY 2
9:00 a.m.
I. Collaborative Family Law (CFL) Defined
Jan Gilman-Tepper, Esq.
Tom Miller, CPA
c) Affairs
b) Important psychological tasks
a) The "leaver-leavee distinction"

2:30 p.m.
A. A brief overview of CFL
B. The critical elements of CFL
C. CFL distinguished from other options

1. Pro Se
2. Mediation
3. Traditional Litigation
4. Collaborative Family Law

II. Preparing to Practice Collaboratively
A. The paradigm shift
B. Skills development - Practice Groups

10:15 a.m.
10:30 a.m.
II. A Multidisciplinary Approach to Collaborative Family Law
Jan Gilman-Tepper, Esq., David Walther, Esq.,
Harry Tindall, Esq.

A. The Multidisciplinary Model
B. Role of the Collaborative Attorney
1. Educating and counseling the client
2. Helping the client select the best
3. The Child Specialist's Relationship
a. Parents
b. Children
c. Other Collaborative team members

E. Role of the Financial Specialist
Jerome Johnson, CPA, Thomas Burrage, CPA
1. Neutrality
2. Gathering information
3. The role of education throughout the process

4. Settlement Options Analysis
5. Communication
a) with Team Members
b) with Clients

6. Asset Valuation, Tax Advice, Investment Advice

3:15 p.m.
3:30 p.m.
Break
Break

II. Pienary – Advocacy & Ethics in the Collaborative Process
Gretchen Walther, Esq., Harry Tindall, Esq.

A. Scope of Representation and Informed Consent
B. Confidentiality and Privilege
C. Conflicts of Interest: Current Clients
D. Colorado: Ethics Opinion 115
E. American Bar Association: Formal Opinion 07-447, Ethical Considerations on Collaborative Law Practice

F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

5:00 p.m.
Adjourn

SATURDAY, MAY 3
9:00 a.m.
I. Case Screening
Jan Gilman-Tepper, Esq.,
Jerome Johnson, CPA, Judy Lay, Ph.D.,
Max August, MA

A. Identifying the Collaborative Case
B. Areas of Concern

II. Client Intake
A. Providing the client with process options
B. Helping the client select the best option

2:00 p.m.
2:15 p.m.
1.0 General CLE Credits • $180

NATIONAL SERIES
continued

NATIONAL VIDEO WEBCASTS • 11 a.m. MDT

APRIL
25
Creative Tax Planning for Real Estate (Live Video Webcast)
Tax considerations often drive the structure of real estate deals and busi-
nesses - and for good reason. Tax structure can have a substantial impact on
the economic outcomes of a deal and thus its very financial viability.
These issues have become more pronounced in an age of financial en-
geering and in a market environment where funding for deals has be-
come scarcer and default rates are creeping up. This program will provide
you an advanced discussion of important decisions your clients need to
make in structuring, restructing and selling real estate projects or busi-
esses, including choice of entity, issues involving overleveraged prop-
erty, techniques for the conversion of ordinary income into capital gain,
and Section 1031 Like Kind considerations, among many other topics.

3.0 General CLE Credits $180

MAY
23
Ethics After Qualcomm: Dramatic New Issues in Attorney Ethics (Live Video Webcast)
A recent ethics decision imposed a multi-million dollar judgment against six
lawyers for lapses in electronic discovery. The decision is sending
shockwaves through civil litigation, as litigators struggle to learn the les-
sions of the decision in Qualcomm. This program will closely review the
Qualcomm decision, individually each of the breaches in the discovery
process, including attorney failure to closely supervise the production
process, and review best practices on a going-forward basis.

3.0 Ethics CLE Credits $180

JUNE
11
Estate and Business Succession Planning for Family Businesses (Live Video Webcast)
Family businesses are sources of substantial growth and employment in
the national economy, but they come with their unique challenges, too.
Succession challenges can involve intra-family rivalries and other dis-
putes. Estate planning can involve funding challenges, charitable giving,
goals, and control issues. This program will take an integrated approach to
transferring a family businesses between generations, including both
succession planning and estate planning techniques.

3.0 General CLE Credits $180

25
Business and Tax Planning Opportunities with S Corps (Live Video Webcast)
This program will provide a practical guide to the business planning op-
portunities and challenges of working with S Corps, with particular em-
phasis on finance, operational and fringe benefit issues. The employment
tax planning opportunity of S Corps versus LLCs will also be discussed.
The program will focus on S Corp mergers.

3.0 General CLE Credits $180

STATE BAR VIDEO REPLAYS
State Bar Center, Albuquerque

APRIL 24
8:30 a.m.
6.5 G CLE Credits • $209

APRIL 25
24th Annual Bankruptcy Year in Review
8:30 a.m.
6.0 G & 1.0 E CLE Credits • $219

2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
10:30 a.m.
1.0 P CLE Credit • $49

10:30 a.m.
1.5 E & 1.0 P CLE Credits • $99

2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
10:30 a.m.
1.0 P CLE Credit • $49

Trust Accounting: It’s Not An Oxymoron
10:30 a.m.
1.5 E & 1.0 P CLE Credits • $99

MAY 20
DWI in New Mexico
8:30 a.m.
6.5 G CLE Credits • $209

2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
10:30 a.m.
1.0 P CLE Credit • $49

2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
10:30 a.m.
1.0 P CLE Credit • $49

9:00 a.m.
5.5 G CLE Credits • $189

9:00 a.m.
5.0 CLE Credits • $49

10:00 a.m.
1.5 E & 1.0 P CLE Credits • $99

10:30 a.m.
1.0 P CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49

1:00 p.m.
1.0 G CLE Credit • $49
Tax Planning for Educational Expenses

One of the largest goals of parents and grandparents is often providing for the educational expenses of children and grandchildren. Many states have adopted tax-favored plans that give parents and grandparents tax benefits for educational expenses. This program will examine both the income tax benefits and the estate planning opportunities for providing for educational expenses. 1.0 General CLE Credit $67

Ethics of Using Electronic Evidence (Live Replay)

Virtually all business and commercial documents are created and transmitted electronically, creating vast digital storehouses of information that is potentially discoverable in litigation. The discovery of all that information raises major ethical issues in civil litigation. This program will examine in detail how attorney ethics rules apply to the collection and production of electronic evidence, with an emphasis on preserving the attorney-client privilege, confidentiality issues, and liability in the event of inadvertent production. 1.0 Ethics CLE Credit $67

Buying and Selling Distressed Small Businesses

Growing turmoil in the credit markets and a general economic slowdown have caused a substantial increase in the number of real estate defaults and business failures. But where there is loss, there is also sometimes opportunity. This program will examine the substantive legal and financial challenges of helping your clients acquire or sell distressed assets, whether or those assets are residential, commercial, or even real estate one-offs, assets, or pure financial assets. The program will focus on acquisitions in and out of bankruptcy and default, avoiding successor liability in asset acquisitions, and using “loan to own” techniques to acquire businesses. 2.0 General CLE Credits $129

Real Estate: A Primer on Insurance (Live Replay)

Insurance coverage is a vitally important element of real estate development deals and real estate businesses. Failure to obtain and maintain first- or third-party insurance exposes a project or real estate business to risk of substantial loss which can fatally undermine the economics of a deal. This program, led by the co-author of the leading treatise on the subject, will guide real estate practitioners through the maze of different types of insurance policies, their practical use at each stage of development and for different types of real estate businesses, and the practical legal effect of various types of insurance for property owners, lenders, developers and others. The program is specifically designed for non-insurance specialists. 1.0 General CLE Credit $67

Business Divorce, Parts 1 & 2

As with personal divorces, businesses divorces can involve the harmonious separation of property between partners, or it can be protracted and acrimonious. This program focuses on the ethical and legal issues that arise when owners of a business elect to separate business assets among themselves. This part two program, will include a discussion of ethical, contractual, statutory and tax issues. 2.0 General CLE Credits $129

Estate Planning in Prenuptial Agreements (Live Replay)

The prevalence of divorce and remarriage have made the use of prenuptial agreements commonplace. The challenge for estate planners is to accommodate the provisions of a prenuptial agreement with effective estate planning for both parties to the agreement, and beneficiaries from earlier marriages. This program will cover the gamut of issues involving the prenuptial agreements into larger estate plans, including tax and non-tax issues arising during and after the marriage, and while both parties are alive and after one party has died. 1.0 General CLE Credit $67

“Green Law”: Regulation, Real Estate & Environmentally Friendly Projects

Federal and state law increasingly provides tax and other incentives to real estate developers and investors who develop real estate projects in a way that is environmentally friendly. This program will examine the tax, financial and other benefits available to developers and investors, and how they can be effectively implemented into a deal or project. 1.0 General CLE Credit $67

Ethics in Litigation, Parts 1 & 2 (Live Replay)

2.0 Ethics CLE Credits $129

JUNE

3/4 Estate Planning Update, Parts 1 & 2

This annual program an update on significant developments affecting your estate and trust planning, administration and controversy practice. The program will include federal legislative developments, case law and decisions from the IRS. The program will cover relevant income tax issues as well as estate and gift tax developments, including those affecting charitable giving. 2.0 General CLE Credits $129

5/6 Things Secured Parties Should Know, Do and Avoid When Forclosures on Collateral, Parts 1 & 2 (Live Replay)

This two-part program will provide a detailed examination of processes involved in the process of seizing and disposing of collateral property, and how to avoid the pitfalls paid to the role of UCC Article 9. The program will provide practical guidance on drafting security agreements in anticipation of foreclosures so as to increase enforceability and decrease foreclosure costs. 2.0 General CLE Credits $129

10 Planning for a Successful Real Estate Closings

No deal is done until it is closed. Even an executed contract is not done until money and title in a deal have changed hands. Closings can be fraught with many hurdles and are often the most critical of any deal’s timing and the costs at their most acute. Within the context of real estate deals, this program discuss the most important obstacles to closing a deal and how to plan around them or efficiently resolve them. 1.0 General CLE Credit $67

12 Real Estate Investment Trusts

Real Estate Investment Trusts, or REITs, are organizations that concentrate their investments in real estate - apartments, shopping centers, office complexes or other developments. They can have substantial tax advantages for clients, but along with those benefits they are subject to several important operating restrictions. This program will provide transactional counsel with a primer on the benefits of creating and using REITs for real estate development and finance. 1.0 General CLE Credit $67

C. Once a client chooses collaborative, what to do next

1. Attorney
2. Divorce Coach
3. Child Specialist
4. Financial Specialist
III. Establishing the Collaborative Team

Break

IV. For the First Meeting

Max August, MA, Gretchen Walther, Esq., Jerome Johnson, CPA, Judy Lap, PhD
A. Obtaining case & client information
B. The critical importance of client education
C. Identifying the major issues and hot buttons
D. Communication with other Collaborative Professionals

V. The Orientation Meeting

First Four-Way Meeting
A. Ensuring and understanding of CFL

E. American Bar Association, Formal Opinion 07-447, Ethical Considerations on Collaborative Law Practice
F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

AGENDA

I. Using your Financial Coach to Navigate Current Economic Support Issues

Midge Gold, CPS, CDFA, MSW

II. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. “Who I am” is as important as “What I can do”

Lunch (provided at the State Bar Center)

III. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. Improving your ability to: 1. Give feedback to other professionals
2. Receive feedback from other professionals
3. Deliver your professional skills to achieve the team goals

E. American Bar Association, Formal Opinion 07-447, Ethical Considerations on Collaborative Law Practice
F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

ADVENTURE TRACK

FRIDAY, May 2

9:00 a.m. I. Powerful Non-Defensive Communication: A Tool for Transformation with Families in Crisis

Sharon Strand Ellison, Author of “Taking the War Out of Our Words”

A. The Traditional “War Model” for Communication
B. The Powerful Non-Defensive Communication Model

Break

10:15 a.m. C. Non-Defensive Questions
Sharon Ellison
10:45 a.m.

D. Non-Defensive Statements
Sharon Ellison
11:00 a.m.

12:00 p.m. Lunch (provided at the State Bar Center)

1:00 p.m. E. Non-Defensive Prediction
Sharon Ellison
12:00 p.m.

3:00 p.m. F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

SATURDAY, May 3

9:00 a.m. I. Using your Financial Coach to Navigate Current Economic Support Issues

Midge Gold, CPS, CDFA, MSW

Break

II. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. “Who I am” is as important as “What I can do”

Lunch (provided at the State Bar Center)

III. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. Improving your ability to: 1. Give feedback to other professionals
2. Receive feedback from other professionals
3. Deliver your professional skills to achieve the team goals

ADVANCED TRACK

SATURDAY, May 3

9:00 a.m. I. Powerful Non-Defensive Communication: A Tool for Transformation with Families in Crisis

Sharon Strand Ellison, Author of “Taking the War Out of Our Words”

A. The Traditional “War Model” for Communication
B. The Powerful Non-Defensive Communication Model

Break

10:15 a.m. C. Non-Defensive Questions
Sharon Ellison
10:45 a.m.

D. Non-Defensive Statements
Sharon Ellison
11:00 a.m.

12:00 p.m. Lunch (provided at the State Bar Center)

1:00 p.m. E. Non-Defensive Prediction
Sharon Ellison
12:00 p.m.

3:00 p.m. F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

ADVANCED TRACK

FRIDAY, May 2

9:00 a.m. I. Powerful Non-Defensive Communication: A Tool for Transformation with Families in Crisis

Sharon Strand Ellison, Author of “Taking the War Out of Our Words”

A. The Traditional “War Model” for Communication
B. The Powerful Non-Defensive Communication Model

Break

10:15 a.m. C. Non-Defensive Questions
Sharon Ellison
10:45 a.m.

D. Non-Defensive Statements
Sharon Ellison
11:00 a.m.

12:00 p.m. Lunch (provided at the State Bar Center)

1:00 p.m. E. Non-Defensive Prediction
Sharon Ellison
12:00 p.m.

3:00 p.m. F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

SATURDAY, May 3

9:00 a.m. I. Using your Financial Coach to Navigate Current Economic Support Issues

Midge Gold, CPS, CDFA, MSW

Break

II. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. “Who I am” is as important as “What I can do”

Lunch (provided at the State Bar Center)

III. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. Improving your ability to: 1. Give feedback to other professionals
2. Receive feedback from other professionals
3. Deliver your professional skills to achieve the team goals

ADVANCED TRACK

FRIDAY, May 2

9:00 a.m. I. Powerful Non-Defensive Communication: A Tool for Transformation with Families in Crisis

Sharon Strand Ellison, Author of “Taking the War Out of Our Words”

A. The Traditional “War Model” for Communication
B. The Powerful Non-Defensive Communication Model

Break

10:15 a.m. C. Non-Defensive Questions
Sharon Ellison
10:45 a.m.

D. Non-Defensive Statements
Sharon Ellison
11:00 a.m.

12:00 p.m. Lunch (provided at the State Bar Center)

1:00 p.m. E. Non-Defensive Prediction
Sharon Ellison
12:00 p.m.

3:00 p.m. F. National Conference of Commissioners on Uniform State Laws: Uniform Collaborative Law Act

SATURDAY, May 3

9:00 a.m. I. Using your Financial Coach to Navigate Current Economic Support Issues

Midge Gold, CPS, CDFA, MSW

Break

II. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. “Who I am” is as important as “What I can do”

Lunch (provided at the State Bar Center)

III. There is an “I” in Team

Carl Michael Ross, MA, JD, LPC

A. Improving your ability to: 1. Give feedback to other professionals
2. Receive feedback from other professionals
3. Deliver your professional skills to achieve the team goals
WORKERS’ COMPENSATION LAW AND THE IMMIGRANT WORKER
State Bar Center, Albuquerque • Thursday, May 8, 2008
3.2 General CLE Credit
Co-Sponsor: Solo & Small Firm Practitioners Section
Standard Fee $119
Solo & Small Firm Practitioners Section Member, Government Legal Services Attorney, Paralegal $105
This CLE will focus on the rights of injured immigrant workers as they seek workers’ compensation benefits. Ms. Smith will lecture on the particular vulnerabilities of immigrant workers to workplace injuries, the landscape of workers’ compensation law as it relates to immigrants, the U.S. Supreme Court’s Hoffman decision and its impact on comp claims, immigration status discovery requests, and the ins and outs of processing immigrant worker comp claims.
8:00 a.m. Registration
8:30 a.m. CLE
10:00 a.m. Break
10:15 a.m. CLE (continued)
12:00 p.m. Noon
National Employment Law Project, Olympia, Washington
Please Note: No auditors permitted

5th ANNUAL ELDER LAW SEMINAR
Friday, May 16, 2008 • State Bar Center, Albuquerque
3.7 General CLE Credits
Co-Sponsor: Elder Law Section
Standard Fee $149
Elder Law Section Member, Government, Legal Services Attorney, Paralegal $129
12:30 p.m. Registration
1:00 p.m. Introductory Remarks
1:05 p.m. Trends, Tribulations & Triumphs in Administering Conservatorships & Trusts for the Elderly
Ted Labiche, Senior Trust Officer, Zia Trust, Inc.
Lauri A. Ebel, Esq., Assistant V.P., Wells Fargo Bank
Paul Vinikas, V.P., Wells Fargo Bank
1:55 p.m. Guardianship Task Force HJM 34:
Project for the NM Legislature
Dennis M. Drucker, Esq., Protection & Advocacy System, Inc.
Chair, Task Force Subcommittee
2:40 p.m. Break
2:55 p.m. New Financial Power of Attorney Act
Fletcher R. Catron, Esq., Catron, Catron & Pottow PA
3:25 p.m. Overview of the 2008 Legislative Session / Impact on the Elderly
Angeléca Auyeung, Esq., Executive Director, Senior Citizens Law Office
4:05 p.m. Bench View of Cases Involving the Elderly; Proceedings for Guardian & Conservatorships & Other Matters
Hon. Nan G. Nash, Civil District Court Judge, 2nd Judicial District Court
5:00 p.m. Adjourn and Reception (State Bar Center Lobby)
Please Note: No auditors permitted

LAS CRUCES VIDEO REPLAYS
3rd Judicial District Courthouse • 201 West Picacho Avenue

MAY 6
2008 Professionalism: Angels and Demons How Attorneys Help and Hinder ADR
9:00 a.m.
1.0 P CLE Credit
$49
Drafting Documents That Even Clients Might Appreciate
10:30 a.m.
1.0 G CLE Credit
$49
Trust Accounting: It’s Not An Oxymoron
1:00 p.m.
1.5 E & 1.0 P CLE Credits
$99

MAY 7
Basics of Family Law
8:30 a.m.
6.5 G CLE Credits
$209

Register by May 1 and Save!
In this appeal, we determine whether or not the trial court erred in finding Defendant, Dawna Cantrell, incompetent to stand trial. The facts surrounding Defendant’s situation are as follows:

Defendant’s delusion is confined to Grant County and the perceived conspiratorial influence of two individuals, the experts determined that her delusion can become aggravated to include other persons and circumstances. The experts concluded that this delusional disorder makes it difficult for Defendant to assist her attorney in her defense. As a result of these findings, the parties stipulated that Defendant understood the nature and significance of the criminal proceedings against her and had a factual understanding of the criminal charges, meeting the first two criteria for trial competency. See UJI 14-5104 NMRA.

The experts found that Defendant suffers from a persecutory delusional disorder that causes her to believe that there is a conspiracy against her. While finding that Defendant’s delusion is confined to Grant County and the perceived conspiratorial influence of two individuals, the experts determined that her delusion can become aggravated to include other persons and circumstances. The experts concluded that this delusional disorder makes it difficult for Defendant to assist her attorney in her defense. As a result of these findings, the parties stipulated that Defendant understood the nature and significance of the criminal proceedings against her and had a factual understanding of the criminal charges, meeting the first two criteria for trial competency. See UJI 14-5104 NMRA. The parties also stipulated that because Defendant was unable to assist her counsel in her defense, she was legally incompetent to stand trial under the third criterion for trial competency.

Finding Defendant incompetent to stand trial, the court ordered Defendant to submit to a dangerousness evaluation. Dr. Siegel conducted the evaluation and issued a report in which he concluded that Defendant was not considered a dangerous person. In that report, Dr. Siegel commented on Defendant’s competency to stand trial. Dr. Siegel noted that Defendant’s mood and cognition were clearer and more controlled than during his previous evaluation of her. Dr. Siegel ascribed this improvement to Defendant’s medication, which she had not been taking at the time of the previous evaluation. According to Dr. Siegel, Defendant seemed competent in a normal setting, but he believed that her anxiety would likely increase during courtroom proceedings, which would heighten her delusion. Dr. Siegel concluded that treatment with antipsychotic medication would strengthen Defendant’s “psychological defenses” and establish her competency to stand trial.

In response to Dr. Siegel’s report, the trial court appointed a new forensic evaluator, Dr. Gerald Fredman, to re-evaluate Defendant’s competency to stand trial. Dr. Fredman evaluated and interviewed Defendant and reviewed several records, including Dr. Westfried’s and Dr. Siegel’s evaluations. In his report, Dr. Fredman stated, “within a reasonable degree of medical certainty that [Defendant] understands the nature and significance of the proceedings against her,” but she would have difficulty assisting her attorney with her defense due to the nature of her delusion. However, it was Dr. Fredman’s opinion that Defendant would be able to assist her attorney if she...
were treated with antipsychotic medication.

Predicated on Dr. Fredman’s report, the State filed a motion asking the court to order Defendant to submit to a psychiatric examination for the purpose of prescribing antipsychotic medication and treating Defendant to trial competency. At the hearing on this motion, the court heard contrary testimony from two experts, Dr. Fredman, who testified for the State, and Dr. Westfried, who testified for Defendant.

Dr. Fredman testified that he based his expert opinion on his evaluation of Defendant and on his personal experience as a psychiatrist. Dr. Fredman is a licensed psychiatrist with a sub-specialty in forensic psychiatry who has several board certifications from both psychiatry and forensic psychiatry boards. Dr. Fredman has been qualified to testify as an expert in competency matters hundreds of times. Although Dr. Fredman has extensive experience, he is neither a researcher nor an author in the field of forensic psychiatry. Dr. Fredman has been in private practice for almost thirty years and estimated he has fifty to seventy-five patients. Over the course of his career, Dr. Fredman has treated ten patients who suffered from a delusional disorder.

Dr. Fredman’s testimony was the basis for the court’s finding that Defendant could be successfully treated to competency with antipsychotic medication. Dr. Fredman testified that Defendant would benefit from a combination of therapy and antipsychotic medication. Dr. Fredman stated that it was “more likely then [sic] not” that this treatment would restore Defendant’s competency to stand trial. Dr. Fredman based this conclusion on his own experience in treating patients suffering from delusional disorders. Dr. Fredman testified that over half of those patients responded favorably to treatment by showing a significant reduction in the level of their delusional symptoms.

Dr. Fredman also testified concerning the medications’ potential side effects that might disable defendant during trial. Dr. Fredman testified that “it’s more likely then [sic] not” that such side effects would not occur with Defendant. However, Dr. Fredman advised the need for a medical assessment prior to initiating treatment, including a consultation with a cardiologist.

Defendant’s expert, Dr. Westfried, offered testimony based on clinical and research knowledge. Dr. Westfried is an experienced forensic psychologist whose practice exclusively consists of forensic psychology. Dr. Westfried testified that he is one of four board-certified forensic psychologists in New Mexico, and one of four hundred in the United States. As explained by Dr. Westfried, forensic psychology addresses issues of the law with research and clinical evaluations. His experience includes over one thousand forensic evaluations since 1995.

Dr. Westfried’s analysis was largely based on his interpretation of Defendant’s thought process relating to treatment with antipsychotic medications. Dr. Westfried described Defendant as having a “tight” thought process, meaning that she could relate events in a logical, comprehensible order. Dr. Westfried explained that atypical antipsychotic medications (the type Dr. Fredman recommended for treating Defendant) are used to treat schizoaffective because they tighten the thought process by “diminish[ing] the frequency and severity of the looseness of associations.” Dr. Westfried believed that antipsychotic medications would not improve Defendant’s delusional symptoms because her thought process is not “loose.”

Dr. Westfried also countered Dr. Fredman’s assertions by explaining that there is a lack of scientific literature addressing the effects of antipsychotics on delusional disorders in the context of competency to stand trial. He stated that there was little literature indicating that the medications Dr. Fredman recommended would have any effect on a patient suffering from a delusional disorder. Dr. Westfried expressed concern that a person suffering from a delusional disorder could be made competent to stand trial through treatment with antipsychotic medications when there is no research addressing that specific question.

Relying on the United States Supreme Court’s analysis in Sell, the trial court granted the State’s motion. Sell articulates due process guidelines for ordering a defendant to submit to involuntary drug treatment for the purpose of achieving competency to stand trial. In this case, the trial court’s order was tailored to the Sell factors:

- THE COURT FINDS CLEAR AND CONVINCING EVIDENCE THAT:
  5) There is an important governmental interest in bringing the defendant to trial;
purpose of establishing Defendant’s trial competency.

{17} An individual has “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.” Washington v. Harper, 494 U.S. 210, 221-22 (1990). Due process prohibits deprivation of that liberty interest unless certain preconditions are met. See Sell, 539 U.S. at 179; Harper, 494 U.S. at 227. But see Riggins v. Nevada, 504 U.S. 127, 135 (1992) (“[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness.”). The criteria for determining whether involuntary treatment violates an individual’s due process rights has been developed primarily in two United States Supreme Court cases: Harper and Sell.

{18} In Harper, the Court upheld a state’s involuntary treatment policy for inmates. The policy permitted involuntary treatment with antipsychotic drugs where the prisoner (1) suffers from a mental disorder, and (2) is gravely disabled or poses a likelihood of serious harm to himself, others, or their property. Id. 494 U.S. at 215. The Court questioned whether the Due Process Clause conferred any greater rights upon the prisoner than those recognized by the policy. Id. at 221-22. The Court’s opinion emphasized that a due process analysis depends on the factual circumstances of the particular case. Id. at 220 (“[W]hat factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will[?]”).

{19} The Court in Harper considered three factors to evaluate the treatment policy: First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Second, a court must consider the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. Third, the absence of ready alternatives is evidence of the reasonableness of a prison regulation, but this does not mean that prison officials have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. Id. at 224-25 (internal quotation marks and citations omitted) (quoting Turner v. Safley, 482 U.S. 78, 89-91 (1987)). Relying on these factors, the Court held that the State’s interest in combating the danger posed by a person to both himself and others is both legitimate and important, particularly in a prison environment. “[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.” Harper, 494 U.S. at 227. Harper demonstrates that the due process analysis for involuntary drug treatment is a balancing of the circumstances and the parties’ interests in individual case.

{20} In Sell, the United States Supreme Court created a test for determining the constitutionality of an order requiring a defendant to submit to involuntary drug treatment when the defendant “(1) is not dangerous and (2) is competent to make up his own mind about treatment,” and the sole purpose is to make the defendant competent to stand trial. See Sell, 539 U.S. at 183. The Court in Sell recognized that these circumstances require a unique assessment because the parties’ interests are different than those where an individual poses a danger, as in Harper, or where antipsychotic drug treatment may be necessary for some other reason.

{21} The ultimate question in Sell was whether the “Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, [has] shown a need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it.” 539 U.S. at 183. To make that determination, the Court articulated a four-factor test: “First, a court must find that important governmental interests are at stake”; second, the court must conclude that involuntary medication will significantly further the government’s concomitant state interests of trying a defendant for a serious crime and providing a defendant with a fair trial; “[t]hird, the court must conclude that involuntary medication is necessary to further those interests”; and fourth, “the court must conclude that administration of the drugs is medically appropriate, i.e., in the patient’s best medical interest in light of [the patient’s] medical condition.” Id. Where treatment is sought solely for trial competency purposes, a court must first find these four factors before ordering a defendant to submit to involuntary drug treatment.

{22} Sell further required that “a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on [alternative] Harper-type grounds; and, if not, why not.” Id. Where a defendant is treated with antipsychotic medications for a different purpose, the issue of competency becomes unnecessary. Therefore, requiring the State to first seek an alternative justification for the treatment rarefies the instances in which the Sell factors are necessary. See id. (stating that due process permits involuntary drug treatment for the sole purpose of making the defendant competent to stand trial, “[b]ut those instances may be rare”). Also, different circumstances invoke different due process protections, and this initial determination helps focus the trial court’s inquiry on the proper questions when it is faced with the unique circumstances addressed in Sell.

{23} Sell recognized that under these unique circumstances, medical experts have the difficult task of “balance[ing] harms and benefits related to the more quintessentially legal questions of trial fairness and competence.” Id. at 182. When the trial court is assigned the difficult task of anticipating and ruling on medical probabilities, its considerations under these circumstances are necessarily distinct from those considerations where treatment is sought for a different purpose. Failure to consider the proper questions at the trial level may result in an improper deprivation of the defendant’s constitutionally-protected interest.

{24} For example, in Sell, the Supreme Court vacated the district court’s order imposing involuntary treatment on trial competency grounds. In Sell, a medical center where the defendant was being held first ordered the involuntary treatment, and a magistrate affirmed the order. Id. at 183-84. The medical center and the magistrate approved the treatment based on findings by the medical center’s experts and “substantially, if not primarily, upon grounds of Sell’s dangerousness to others.” Id. at 183. However, the district court and the Court of Appeals found “clearly erroneous” the magistrate’s conclusion that the defendant was dangerous, and both courts approved the treatment order solely on the grounds of rendering the defendant competent to stand trial. Id. at 184. According to the United States Supreme Court, because the magistrate’s inquiry focused on dangerousness, “the experts did not pose important questions—questions, for example, about trial-related side effects and risks—the answers to which could have helped determine whether forced medication was warranted on trial competency grounds alone.” Id. at 185. Moreover, the experts conceded that the proposed medications had “significant” side effects. Id. The Court recognized that where forced treatment is based on
achieving trial competency, any such order must consider additional important issues such as “whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions,” but that these considerations are “not necessarily relevant when dangerousness is primarily at issue.” Id. at 185. Because the record did not contain the appropriate considerations in Sell, the Court vacated the treatment order and defined the proper test for determining when a court can order a defendant to submit to involuntary drug treatment solely for trial competency purposes.

[25] We agree that the case before us was properly evaluated in the trial court and adopt the four-factor Sell test as the appropriate due process standard to determine whether appropriate circumstances exist to support an order requiring Defendant to submit to unwanted antipsychotic drug treatment solely for the purpose of establishing Defendant’s trial competency. To evaluate the constitutionality of the court’s order, we will first define the proper standards of review, then we will apply those standards to the facts of this case.

STANDARD OF REVIEW

[26] The Sell test depends on underlying factors composed of both legal and factual issues. We review legal conclusions de novo and factual findings for sufficiency of the evidence. See State v. Rodriguez, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737. A sufficiency of the evidence review involves a two-step process, reviewing factual questions in the context of the government’s burden: First, the evidence is reviewed in the light most favorable to the State, resolving all conflicts and inferences in favor of upholding the trial court’s decision; and second, a determination is made whether the evidence, viewed in this manner, could justify a finding by any rational fact-finder that each element has been established by clear and convincing evidence. State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994); see State v. Treadway, 2006-NMSC-008, ¶ 7, 139 N.M. 167, 130 P.3d 746 (The sufficiency of the evidence is reviewed pursuant to a substantial evidence standard.). Where we are confronted with mixed questions of law and fact, we give deference to the lower court’s factual findings, but we review the application of the facts to the law de novo. State v. Attaway, 117 N.M. 141, 144-45, 870 P.2d 103, 106-07 (1994). We must, therefore, designate the type of question presented by each Sell factor to determine the scope of our review and the level of deference we give to the trial court’s conclusions.

[27] The first Sell factor is a legal question. To satisfy this factor, “a court must find that important governmental interests are at stake.” Sell, 539 U.S. at 180. Adjudicating a defendant’s guilt or innocence for a serious crime is an important governmental interest, whether the crime is against a person or property. Id. However, courts must also consider special circumstances that may affect that interest. Id. For example, in Sell, the Supreme Court noted certain circumstances that diminished, but did not eliminate, the government’s interest. Id. at 186. In Sell, the defendant had been confined at a medical center for a long period of time, for which the defendant might receive credit toward a sentence for time served. Id. Also, the defendant refused to take antipsychotic drugs, which might result in further lengthy confinement and which could further reduce his likelihood of committing future crimes. Id.

[28] Under the second Sell factor, “the court must conclude that involuntary medication will significantly further [the government’s] concomitant state interests” of achieving a defendant’s trial competency and assuring that a defendant’s trial is a fair one. Id. at 180-81. To do so, the court “must find that administration of the drugs is substantially likely to render the defendant competent to stand trial,” and “that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense,” thereby rendering the trial unfair. Id. at 181. There is some debate over how this factor should be reviewed. In the federal Courts of Appeals, the Second and Fourth Circuits have interpreted the second Sell factor as a factual issue. See United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004) (“Whether the Government’s asserted interest is a legal question that is subject to de novo review. The district court’s findings with respect to the other Sell factors are factual in nature and are therefore subject to review for clear error.”); United States v. Evans, 404 F.3d 227, 240 (4th Cir. 2005) (“We review the district court’s resolution of Sell’s second and fourth parts for clear error . . . .”). In contrast, the Tenth Circuit has interpreted the second Sell factor as a legal issue that is to be reviewed de novo. See United States v. Bradley, 417 F.3d 1107, 1114 (10th Cir. 2005) (“We would expand the parameters of the legal question to include whether involuntary administration of antipsychotic drugs “is necessary significantly to further important governmental trial-related interests.”” (quoting Sell, 539 U.S. at 179)); United States v. Valenzuela-Puentes, 479 F.3d 1220, 1224 (10th Cir. 2007) (“Sell’s first factor—whether important governmental interests are at stake—is reviewed de novo, as is the second factor—whether involuntary medication will significantly further those state interests. . . . the remaining two Sell factors, which depend on factual findings, are reviewed for clear error.” (citation omitted)).

[29] Both parties urge us toward different standards of review. The State primarily relies on Gomes, and argues that the second Sell factor should be reviewed as a question of fact. Defendant argues that we should follow the Tenth Circuit and review the second Sell factor de novo.

[30] Because the second factor requires conclusions that depend on factual determinations from expert testimony, the trial judge is in the best position to weigh that testimony, and in doing so is free to accept or disregard that testimony. However, the requirements that “administration of the drugs is substantially likely to render the defendant competent to stand trial” and that the administration of the drugs “is substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense,” are legal standards. Thus, the second factor is a mixed question of law and fact. Sell, 539 U.S. at 181. Accordingly, we review the underlying factual findings for sufficiency of the evidence and determine whether the underlying facts meet those standards de novo.

[31] There is no dispute that the third and fourth Sell factors are questions of fact. The third factor requires a court to find that involuntary antipsychotic medication is necessary to further the State’s interest in providing the defendant with a fair trial by finding that “any alternative, less intrusive treatments are unlikely to achieve substantially the same results.” Id. The fourth factor requires the court to find that the proposed treatment is in the defendant’s best medical interest in light of the defendant’s medical condition. Id. These findings are of the more objective and straightforward inquiries, which the fact-finder is in the best position to determine.

[32] We also take this opportunity to clarify the government’s burden of persuasion because factual questions are reviewed in the context of that burden. The government’s burden of persuasion is to prove all facts by clear and convincing evidence. The Court in Sell did not specify the burden on the State, but courts that have considered the issue have held that facts supporting the Sell factors must be found by clear and convincing evidence. See, e.g., Valenzuela-Puentes, 479 F.3d at 1224; Bradley, 417 F.3d at 1114; Gomes,
387 F.3d at 160. We agree that the trial court must make all its findings of fact by clear and convincing evidence.

**ANALYSIS**

{33} Having determined the appropriate standards of review, we apply those standards to the facts and evidence adduced in this case. Defendant does not contest the trial court’s findings with respect to the first or third Sell factors. We do not analyze those factors here other than to note that this case is unique because Defendant is not presently incarcerated or otherwise confined, so that the circumstances of this case do not diminish the importance of the State’s interest. If anything, the State’s interest in trying Defendant is strengthened by these circumstances, because if Defendant is incompetent to stand trial, there will be no adjudication of Defendant’s guilt or innocence of a serious crime.

{34} Concerning the second Sell factor, the parties argue over the proper interpretation of the “substantially likely” and “substantially unlikely” requirements. Sell, 539 U.S. at 181. Defendant argues that these standards require the judge to have a high level of certainty as to the result and effects of the treatment to meet this standard. See, e.g., United State v. Cruz-Martinez, 436 F. Supp. 2d 1157, 1161 (S.D. Cal. 2006) (holding that testimony showing there was a seventy to eighty percent likelihood that defendant would be rendered competent was not sufficient to meet the “substantially likely” requirement); United States v. Rivera-Morales, 365 F. Supp. 2d 1139, 1141 (S.D. Cal. 2005) (holding that testimony of an “over 50%” probability that defendant would be rendered competent was not enough under Sell); United States v. Ghane, 392 F.3d 317, 320 (8th Cir. 2004) (holding that testimony showing a five to ten percent chance that defendant would be rendered competent by antipsychotic drugs did not meet the “substantially likely” standard); People v. McDuffie, 50 Cal. Rptr. 3d 794, 799 (Ct. App. 2006) (holding that testimony of a fifty to sixty percent chance defendant would be rendered competent was not enough under Sell). Defendant argues that even if the State’s expert were believed, under these cases, the State did not meet its burden to show by clear and convincing evidence that “administration of the drugs is substantially likely to render the defendant competent to stand trial” and “is substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.” Sell, 539 U.S. at 181.

{35} We do not find much guidance from the numerical conclusions drawn from these cases. Therefore, we decline to assign a number or percentage to the level of certainty by which a judge must find these two elements because we wish to avoid, to the extent possible, tailored expert testimonies. Although this Court recognizes the objectivity and predictability that could result from such an approach, we also recognize the necessity of preserving the distinct roles of experts and judges. A Sell hearing requires expert medical testimony on essentially legal questions. We must determine whether to place the responsibility of applying medical terminology and standards to legal conclusions on expert witnesses or on judges. If we were to place that responsibility on experts, the result would likely be testimony contoured to our formal requirements but lacking in substance. We prefer that judges interpret meaningful medical testimony in the context of the applicable legal standards.

{36} In the present case, the medical experts’ testimonies were based on their diverse perspectives as either a practitioner or a researcher. On one hand, Dr. Fredman based his testimony supporting treatment for Defendant on his experience as a practicing psychiatrist who has treated patients suffering from delusional disorders. On the other hand, Dr. Westfried’s perspective was that of an experienced research psychologist. Each provided a unique perspective and meaningful medical testimony to aid the trial court in its decision. In this case, the trial court favored Dr. Fredman’s practical experience over Dr. Westfried’s theoretical, research-based knowledge. Despite contradictory perspectives, the trial court can best interpret and evaluate medical evidence in the context of the applicable legal standards when the experts provide meaningful medical testimonies.

{37} The trial court made its factual findings by clear and convincing evidence. Giving the appropriate deference to the trial court’s findings of fact we find that the government met its burden with respect to the second Sell factor. Dr. Fredman testified that adding antipsychotic medications to Defendant’s current treatment regimen would, “more likely than not,” establish her competency to stand trial.

{38} Dr. Fredman’s testimony also allayed concerns that the antipsychotic medications’ side effects would prevent Defendant from assisting her attorney, which would prevent her from having a fair trial. Specifically, Dr. Fredman testified that it would be more unlikely than not that any of the medications’ side effects would prevent Defendant from assisting her counsel with her defense. It can be seen from the bench, the trial court acknowledged the “substantial likelihood” standard and distinguished that standard from a bright-line test, stating “whether the percentages are twenty percent or thirty percent or ten percent, is not for me to decide, there’s, just whether there’s substantial unlikely [sic] to have side effects.” Indeed, this testimony was sufficient to establish by clear and convincing evidence that administration of antipsychotic medication is substantially likely to render Defendant competent to stand trial and is substantially unlikely to have side effects which will interfere significantly with Defendant’s ability to assist counsel in conducting a defense.

{39} The fourth Sell factor is a purely factual finding by the trial court that administration of antipsychotic medication is medically appropriate and in the patient’s best medical interest. Dr. Fredman testified about the specific kinds of antipsychotics at issue and the different side effects and levels of success that could be anticipated. Based on this information, Dr. Fredman testified that if Defendant was his patient outside the legal context, he would treat her with antipsychotics in the same manner as he recommended for treating her to competency:

"[L]et’s assume her competency wasn’t an issue. It [sic] would still, as a psychiatrist treating somebody outside a forensic setting, antipsychotic medications would be indicated. So, even outside of a competent situation, if they, if I was treating Ms. Cantrell I would recommend an antipsychotic medications [sic] be used as part of the overall treatment. Based on Dr. Fredman’s testimony, there was sufficient evidence for the trial court to find that the suggested antipsychotic drug treatment was medically appropriate.

**CONCLUSION**

{40} We hold that the trial court’s order, that Defendant submit to a psychiatric evaluation for the purposes of selecting and monitoring treatment with antipsychotic medication and take the medication as prescribed, if medically appropriate, does not violate Defendant’s due process rights. We affirm the trial court’s order.

{41} IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
RICHARD C. BOSSON, Justice
RICHARD E. RANSOM (Pro Tem)
We consider in this appeal whether Defendant Charlie Trujillo is entitled to a homestead exemption in the foreclosure sale of his home when he did not appeal from the district court’s foreclosure decree until after the district court denied the claim of exemptions on execution form that he subsequently filed pursuant to Rule 1-065.1 NMRA. We hold that Defendant waived his homestead exemption claim by failing to pursue an appeal of the foreclosure decree within the time frame required by Rule 12-201(A)(2) NMRA.

Despite the fact that Defendant properly “set up” his claim of exemptions, the district court’s decree of foreclosure, while addressing the details concerning the distribution of the proceeds of sale to subject the property to the payment of the judgment. The statute requires such a suit “to be instituted and prosecuted in the same manner” as a suit for the foreclosure of a mortgage. Id. In this case, however, Plaintiff raised a valid claim of a homestead exemption, and his wife, Diana Trujillo. Plaintiff’s motion to foreclose, he properly raised a valid claim of a homestead exemption. See NMSA 1978, § 42-10-9 (1993) (amended 2007) (allowing a $30,000 homestead exemption when a judgment debtor’s dwelling house is foreclosed by a judgment creditor).
upon foreclosure, did not mention any homestead exemption. Defendant did not appeal from that order. Instead, he filed a claim of exemptions on execution form in the district court in which he and his wife, who was never joined as a party to the lawsuit, claimed various exemptions, including homestead exemptions.

On appeal, Defendant argues that he filed the claim of exemptions on execution form in reliance on the procedures of Rule 1-065.1, which he asserts were established in 1996 “to avoid [the] unconstitutional denial of exemption claims.” We agree with Defendant regarding the purpose of Rule 1-065.1. See generally Aacen v. San Juan County Sheriff’s Dep’t, 944 F.2d 691, 696-99 (10th Cir. 1991) (holding that New Mexico’s old post-judgment execution rule did not meet constitutional due process guarantees because of its failure to require the provision of adequate notice concerning exemption rights). However, we do not believe that Rule 1-065.1 is applicable in this case.

Rule 1-065.1 applies to writs of execution. It permits a judgment creditor to obtain a writ of execution from the clerk of the district court in order to seize property to satisfy a judgment. Rule 1-065.1(A). A sheriff then serves the writ and conducts a sale of the property. Rule 1-065.1(I)-(J). The rule provides a procedure for a judgment creditor to notify a judgment debtor of the right to claim exemptions from execution, for a judgment debtor to file a claim of exemptions, and for the district court to hold a hearing to resolve disputed claims. Rule 1-065.1(B)-(H). Our Supreme Court has approved forms to use in this procedure, and Defendant filed a claim of exemptions on execution form in compliance with the civil form approved in Rule 4-803 NMRA.

By its terms, however, Rule 1-065.1 applies to writs of execution obtained from the clerk of the court and executed by the sheriff. Rule 1-065.1(A), (I). Foreclosure, on the other hand, is a distinct procedure available to a judgment creditor to satisfy a judgment lien. See Heimann v. Adee, 122 N.M. 340, 344, 924 P.2d 1352, 1356 (1996) (stating that “execution in aid of a judgment and foreclosure on a lien” are different supplementary proceedings). As noted in Armstrong v. Csurilla, 112 N.M. 579, 590-91, 817 P.2d 1221, 1232-33 (1991), the two remedies have “different historical roots” and are distinguishable because “foreclosure sales are carried out under the supervision of a court, while execution sales are conducted simply by the sheriff, with no order of confirmation by a court required and no other occasion specified for judicial oversight.”

Without the supervision of the district court, the requirements of Rule 1-065.1 are essential to ensure that a judgment debtor is provided with adequate notice of recognized claims of exemption as well as a fair opportunity to assert them. See Aacen, 944 F.2d at 696-700. The district court intervenes only in the event of a dispute. Rule 1-065.1(F)-(H). In a court-supervised foreclosure suit, by contrast, a judgment debtor must plead claims of exemption. Section 39-4-15. Notice of such claims and an opportunity to address them are statutorily built into the pleading and hearing procedure. See § 39-4-13. As in this case, the notice requirements of Rule 1-065.1 do not apply when a judgment debtor (1) has statutory notice of the requirement to plead claims for exemption and (2) was involved in the court process prior to any court action concerning the judgment debtor’s property. The record in this case indicates that Defendant knew of his right to claim exemptions because he claimed them in accordance with Section 39-4-15. See Aacen, 944 F.2d at 696 (declining to address the constitutionality of New Mexico’s statutory notice of seizure provisions because the plaintiff had received sufficient notice). The procedure set out in Rule 1-065.1 does not apply in this case.

**Failure to Timely Appeal from the Decree of Foreclosure**

As discussed above, Plaintiff elected to proceed by way of foreclosure rather than by securing a writ of execution. At the November 30, 2006 hearing, both parties addressed the homestead exemption claim that Defendant raised in response to Plaintiff’s motion for foreclosure. Prior to the hearing, Plaintiff submitted proposed orders to both the district court and Defendant. Defendant specifically argued that Plaintiff’s proposed decree of foreclosure did not allow for a deduction of Defendant’s homestead exemption from the proceeds of sale. The district court stated that it believed that the proposed decree was appropriate and proceeded to enter it. By entering the decree of foreclosure, the district court delineated the distribution of the proceeds from the sale of the property and decided the issue of Defendant’s right to exemptions against Defendant.

By the conclusion of the November 30, 2006 hearing, the district court had made it clear to Defendant that it had decided to deny his claim of exemptions by entering the foreclosure decree submitted by Plaintiff. If Defendant wanted to contest the delineation of the decree and his rights in the property thereunder, he could have appealed. See Rule 12-201(A)(2) (allowing unsuccessful litigants to file a notice of appeal “within thirty (30) days after the judgment or order appealed from is filed in the district court clerk’s office”); Speckner, 86 N.M. at 277, 523 P.2d at 12 (stating that a dissatisfied party may appeal the portion of a foreclosure judgment that “declares the rights of the parties in the property at issue before the sale is finalized”). However, Defendant never appealed from the decree.

Our Supreme Court has analyzed the nature of finality in mortgage foreclosure proceedings as follows:

A judgment of foreclosure is always final in part and interlocutory in part; final as to determining the rights of the plaintiff under the mortgage; interlocutory with respect to the sale; final as to the amounts to be paid to the mortgagee; interlocutory with respect to the legality of the proceedings upon the sale, the proper distribution of the proceeds thereof and as to any rights in the distribution of any surplus.

Speckner, 86 N.M. at 277, 523 P.2d at 12 (internal quotation marks and citation omitted). When we consider this analysis under the circumstances of a foreclosure sale that does not involve a mortgage, as in this case, the district court’s determination in a decree of foreclosure of the creditor’s rights in the property and the amounts to be paid to the debtor is final for purposes of appeal. See id. The interlocutory matters pertain to the handling of the sale and the fulfillment of the court’s orders concerning the distribution of the proceeds. See id.

Entitlement to a homestead exemption is a debtor’s right that relates to the amount the debtor will be paid. See § 42-10-9. We consider a foreclosure decree to be final with regard to the issue of entitlement to an exemption when it has been properly raised. When there is no appeal from such a decree setting forth the rights of the parties to a foreclosure action, the decree becomes final if no action is taken to modify it within thirty days. Speckner, 86 N.M. at 277, 523 P.2d at 12; see also Rule 12-201(A)(2). Indeed, the efficiency of the foreclosure process would suffer if the rule were otherwise,
and parties could sit on their rights pending the outcome of the foreclosure sale or vary their position from the one they took prior to the sale. By failing to appeal from the decree of foreclosure, Defendant effectively waived his right to contest it on appeal. See Speckner, 86 N.M. at 277, 523 P.2d at 12 (concluding that a district court’s initial judgment in a foreclosure suit delineating the parties’ respective rights in the property at issue becomes binding unless it is timely appealed from the date of its issuance); see also Trujillo v. Serrano, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994) (defining the timely filing of a notice of appeal as a “mandatory precondition” to the exercise of appellate jurisdiction and stating that “[o]nly the most unusual circumstances beyond the control of the parties—such as error on the part of the court—will warrant overlooking procedural defects”).

{16} Further, Defendant’s subsequent filing of the claim of exemptions on execution form under Rule 1-065.1 does not bear upon the district court’s foreclosure decree. Incorrectly, Defendant proceeded as if Plaintiff had obtained a writ of execution. After a hearing on January 9, 2007, the district court granted Plaintiff’s motion to dismiss Defendant’s claim of exemptions on execution. Although the district court did not specifically state the basis for its ruling on Defendant’s claim of a homestead exemption at the hearing, the court did not err in its ruling because foreclosure, not execution, was the operative procedure, and Defendant did not timely appeal from the district court’s foreclosure decree. See State v. Barber’s Super Market, Inc., 74 N.M. 58, 58, 390 P.2d 439, 439 (1964) (“A reviewing court’s primary function is to correct an erroneous result rather than to approve or disapprove the grounds upon which it is based, so that where the record, as in this case, is silent as to the reason for a ruling, it will be sustained if it is correct upon any proper theory.”); see also Meiboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (“[E] ven if the district court offered erroneous rationale for its decision, it will be affirmed if right for any reason.”). If we were to hold otherwise and permit Defendant to file a later claim for exemption after the district court’s decree of foreclosure, we would not only compromise the efficiency of the foreclosure procedure, but we would also afford Defendant the opportunity to manipulate the process in order to seek an advantage. We will not do so.

THE RECORD SUPPORTING THE DECREES OF FORECLOSURE

{17} Defendant makes additional arguments based on Plaintiff’s pleadings and arguments that bear mentioning. He contends that Plaintiff based her motion for foreclosure on her filed notice of lis pendens, and, as a result, Plaintiff did not have a “foreclosable lien” on the property. Defendant’s argument follows that the decree of foreclosure “was based upon the judgment for money damages.” See § 39-4-13 (allowing a person holding a judgment lien on real estate to institute a foreclosure suit to subject the real estate to the payment of the judgment). At the November 30, 2006 hearing, however, Plaintiff acknowledged that a notice of lis pendens is insufficient to pursue foreclosure and rested her argument upon the transcript of judgment that she had filed with both the county clerk and the district court. See NMSA 1978, § 39-1-6 (1983) (providing that a money judgment “shall be a lien on the real estate of the judgment debtor from the date of the filing of the transcript of the judgment in the office of the county clerk of the county in which the real estate is situate”).

{18} At the hearing, Defendant agreed with Plaintiff’s position but argued that Plaintiff had not followed the proper procedure under Section 39-4-13 to bring the foreclosure before the district court because Plaintiff had not filed a new action that would enable Defendant to raise his claim of exemptions. Defendant did not argue that Plaintiff did not timely file a transcript of judgment with the county clerk. As such, Defendant did not preserve the argument that Plaintiff did not have a proper lien to allow for foreclosure. See, e.g., Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.”). Regardless, the district court found that Plaintiff filed the transcript of judgment and had a judgment lien. Even though Plaintiff had not filed the transcript of judgment with the county clerk at the time she filed her motion for foreclosure, her subsequent filing created the record for the district court’s finding. Therefore, the district court had a proper basis to issue the decree of foreclosure.

CLAIM OF HOMESTEAD EXEMPTION ON BEHALF OF DEFENDANT’S WIFE

{19} In Defendant’s December 4, 2006 claim of exemptions filing, he asserted that his wife, Diana Trujillo, was entitled to a homestead exemption on behalf of Defendant’s wife. In Defendant’s December 4, 2006 claim of exemptions filing, he asserted that his wife, Diana Trujillo, was entitled to a homestead exemption and later claimed that she was also entitled to the value of half of her community property interest in the foreclosed property. It is uncontested that Mrs. Trujillo never asserted any rights concerning the foreclosure by intervening in this case. Moreover, Mrs. Trujillo has not sought to assert any claim in this appeal. Because issues concerning Mrs. Trujillo’s rights are not before us, we do not consider them.

CONCLUSION

{20} We affirm the district court’s order.

{21} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge


Certiﬁorari Granted, No. 30,953, March 19, 2008

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-041

STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
LUIS SANTIAGO,
Defendant-Appellee.
No. 26,859 (filed: January 31, 2008)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ROSS C. SANCHEZ, District Judge

GARY K. KING
Attorney General
Santa Fe, New Mexico
JAMES W. GRAYSON
Assistant Attorney General
Albuquerque, New Mexico

for Appellant

JOHN BIGELOW
Chief Public Defender
Santa Fe, New Mexico
J.K. THEODOSIA JOHNSON
Assistant Appellate Defender
Santa Fe, New Mexico

for Appellee

OPIION

MICHAEL E. VIGIL, JUDGE

1 The State appeals the district court’s order granting Defendant’s motion to suppress. Defendant was searched outside of a shopping mall by private mall security guards after he was maced, thrown to the ground, and handcuffed, because he had a verbal confrontation with a peer within the mall. As a result of the search, the mall security guards discovered a pill bottle in Defendant’s pants pocket containing cocaine. The district court concluded that the search and seizure conducted by the mall security guards is governed by the Fourth Amendment. Further, the district court concluded the search and seizure to be unreasonable under Fourth Amendment standards, and it ordered that the physical evidence be suppressed, as well as all other evidence discovered as a result of the search and seizure under the fruit of the poisonous tree doctrine. We affirm.

FACTS AND PROCEDURAL HISTORY

2 Defendant testified he was at the Coronado mall when his girlfriend’s ex-boyfriend came up behind him, and grabbed his visor. They cussed and yelled at each other, but there was no actual fight. Defendant grabbed his visor back and started walking up the escalator at a fast pace to leave the mall. Half-way up the escalator, Defendant heard a mall security guard yell, “Hey.” Since his car was right outside, and he was already leaving the mall, he started a “light jog” towards his car. Two mall security guards were waiting for Defendant outside, and they told him to get on the ground. When he heard them tell him to get on the ground, Defendant held his arms straight out, asking them why, and testified, “I never took an aggressive step or anything toward them.” However, the mall security guards threw him down face-first onto the pavement, cutting his chin. Defendant testified, “I was facing down. I was facing down on my stomach. I was on my stomach. My head was turned to the left, and my hands were behind me, and there was one [mall] security guard— one [mall] security guard was holding my hands; the other [mall] security guard had his knee in my neck. . . . And the other one was searching me.” Defendant further testified that while he was being searched, “I was yelling at him to stop because, I mean, I thought it wasn’t legal to search anybody, you know, without any consent, you know. So he started searching me. I was yelling at him he couldn’t search me. He was telling me to shut up, and he took everything out of my pockets.” When he was asked if this was a pat-down search, Defendant replied, “I didn’t feel no patting down. I felt his hands go straight into my pockets.” Defendant then heard the mall security guard say, “Look what we have here. Call APD [Albuquerque Police Department].”

3 Security Guard Ryan Martin testified he works for Valor Security, which provides security for the Coronado Mall. The mall security guards wear a uniform, “which kind of looks like Albuquerque Police Department’s uniform with the exception of the badge and the Smokey Bear hats.” Security Guard Martin was in the parking lot in one of the marked mobile patrol vehicles used by the security guards when he heard a radio dispatch, and he went to the south patio main entrance area of the mall. He saw Defendant running out of the entrance and Security Guard Richard Timmons following him while giving Defendant verbal commands to stop and get down to the ground. Defendant stopped and turned around toward Security Guard Timmons. Security Guard Martin interpreted his action as taking “an aggressive stance towards him.” Security Guard Martin also commanded Defendant to get to the ground, but he did not comply, and Security Guard Timmons sprayed mace towards Defendant’s face. Defendant then turned back towards Security Guard Martin to run from the mace and Security Guard Martin grabbed his right arm to take Defendant to the ground. As they struggled, Security Guard Martin sprayed mace into Defendant’s face. At this time Valor Security Sergeant George Rodriguez showed up on the scene and put hand restraints on Defendant. When asked whether Defendant was arrested Security Guard Martin answered, “We are to advise anybody that we place in hand restraints that they are under citizen’s arrest and we did so.” In his report Security Guard Martin noted that Defendant was told he was under citizen’s arrest “for breach of the peace.” When asked what his understanding of a citizen’s arrest is, Security Guard Martin answered, “It’s a citizen detaining an individual, private citizen detaining an individual for a crime until APD arrives.” The Valor Security mall dispatcher is just inside the glass doors where the struggle took place and Security Guard Martin said the Valor dispatcher “called via our radio to the Albuquerque Police Substation and contacted Ofﬁcer Newbill on the radio and advised that we needed back up[.]” The Valor security guards use two-way walkie-talkie radios at the mall, and the APD has one of these radios in its substation. After the incident outside the mall door, Security Guard Martin followed the police ofﬁcers to the APD substation to exchange information with the APD ofﬁcers to complete his report.

4 The Coronado Mall furnishes the APD

Bar Bulletin - April 21, 2008 - Volume 47, No. 17 25
with a police substation. Officer Keith Newbill of the APD testified that he had been working with mall security for about two years and that “I am the Coronado Mall officer.” He was working at Coronado Mall and overheard on the Coronado Mall security radio he had that there was a fight on the lower level of the mall. He was then asked to assist, “because the fight had moved out to the south patio and they were struggling with an individual.” When he first arrived at the scene, he took Defendant to his police car, set Defendant inside of it, and then went back to find out what was happening. When he placed Defendant in his police car, Defendant was not free to leave, “because I needed to identify him and determine whether or not I was—mall security was going to want a criminal trespass notification.” This coincided with Officer Newbill’s understanding of an arrest. “[M]ost generally what happens in these type of scenarios is they’re issued criminal trespass notifications saying they can’t return, and I send them on their way. It requires a short little report, and it’s a quick process.” However, in this case, Detective Bruce Arbogast of the APD came to the car holding a pill bottle he indicated he had picked up along with other property that belonged to Defendant, opened it up, and said, “Look at this.” Officer Newbill looked inside and saw five little baggies with white powder, so they decided to go the APD substation and field test the substance.

Detective Arbogast testified he was at the Coronado Mall when Officer Newbill received a radio call from Coronado security requesting the APD to respond to a fight. Each driving their own police unit, he and Officer Newbill, “drove over there as fast as we could to help assist in the fight and break it up and sort out the situation.” Upon arriving, he saw Defendant on the concrete face down and handcuffed with mall security standing around him. Detective Arbogast testified, “It happened within a matter of seconds upon our arrival and the time they had him down on the ground.” A cell phone and pill bottle were laying next to his body. Detective Arbogast said, “I picked [Defendant] up with mall security and we transported him over to Officer Newbill’s car. At the same time I picked up what was his property—or he stated was his property off the ground and took it into my possession.” While he and the mall security guard were taking Defendant to the police car, Defendant said he found the bottle outside the mall and he was going to give the contents to some friends he was meeting later at the mall. Defendant was then transported to the APD mall substation. At the APD mall substation the contents of the bottle were field tested, and they were positive for cocaine.

Defendant filed a motion to suppress the cocaine and statements he made regarding the cocaine after it was seized. After an evidentiary hearing, the district court entered findings of facts and conclusions of law and granted the motion to suppress. The district court applied the factors set forth in State v. Murillo, 113 N.M. 186, 824 P.2d 326 (Ct. App. 1991) to determine the applicability of the Fourth Amendment, and concluded that because the search by the security guards went beyond the scope of protecting their employer’s property rights, it was unreasonable under the Fourth Amendment. Defendant’s motion to suppress was therefore granted, and under the fruit of the poisonous tree doctrine, Defendant’s inculpatory statements were also suppressed. The State appeals, arguing that the security guards were not state actors and therefore not subject to Fourth Amendment restrictions.

STANDARD OF REVIEW

In reviewing the denial of a motion to suppress, the appropriate standard is whether the law was correctly applied to the facts, viewing them in a light most favorable to the court’s ruling.” State v. Ingram, 1998-NMCA-177, ¶ 5, 126 N.M. 426, 970 P.2d 1151. We view the facts as determined by the district court in the light most favorable to its ruling, and we disregard all evidence and inferences to the contrary. State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856. “Determining the reasonableness of a search, however, is a matter of law.” In re Josue T., 1999-NMCA-115, ¶ 14. We therefore apply a de novo review to the district court’s determination that the search in this case was unreasonable. Id.

ANALYSIS

The Fourth Amendment to the United States Constitution provides in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” U.S. Const. amend. IV. Had the search of Defendant’s pants pockets and the seizure of their contents been undertaken by the APD officers, the results would not be admissible in a criminal trial under established precedent, and the State does not argue otherwise. See Ingram, 1998-NMCA-177, ¶ 6, 126 N.M. 426, 970 P.2d 1151 (“It is well-established doctrine that a police officer, in an encounter with a citizen, may conduct a protective search, known as a Terry [v. Ohio, 392 U.S. 1, 24 (1968)] search, to ensure that the individual is not armed.”); State v. Eskridge, 1997-NMCA-106, ¶ 24, 124 N.M. 227, 947 P.2d 502 (stating that a police officer concerned about his personal safety during an investigatory stop may check for weapons when he reasonably believes the individual may be armed and dangerous, but the officer is only permitted to pat down the outer clothing of the individual to feel for weapons); State v. Flores, 1996-NMCA-059, ¶ 17, 122 N.M. 84, 920 P.2d 1038 (stating that such a protective search is allowed for the limited purpose of protecting the investigating officer and absent probable cause, such a search for weapons may not be expanded into a search for evidence of a crime). In the case before us, the district court found the mall security guard did not perform a pat down search for weapons; he reached into Defendant’s pockets and removed items, none of which could have been mistaken as weapons.
their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure.”). Thus, we have held that the Fourth Amendment applies to “searches effected by a private party who is acting ‘as an instrument or agent of the Government.’” Murillo, 113 N.M. at 189, 824 P.2d at 329 (quoting Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 614 (1989)).

10. We therefore determine whether the mall security guards in this case were acting “as an instrument or agent of the Government” when they seized and searched Defendant. This requires an analysis to determine whether, and to what extent, police officers of the State were involved with, or connected to, the conduct of the mall security guards. If that involvement or connection is sufficient to conclude that the State was involved, then the conduct will be deemed “state action” with the consequence that its validity will be scrutinized by Fourth Amendment standards.

A. State Action Under the Murillo Test

11. Murillo involved a search conducted by an off-duty investigator employed by the district attorney’s office while he was on duty as a private security guard. Murillo, Id. at 187, 824 P.2d at 327. We recognized that a commissioned police officer may have incentives to obtain convictions even while he is acting for a private employer. Id. at 191, 824 P.2d at 326. Under these circumstances, we concluded that the burden is on the State to show that the officer was acting in a truly private capacity, and to make this determination, we considered the four factors enunciated by the Supreme Judicial Court of Massachusetts in Commonwealth v. Leone, 435 N.E.2d 1036, 1041-42 (Mass. 1982). Murillo, 113 N.M. at 191, 824 P.2d at 331. Those factors are: “(1) whether the guard acted under the control of his private employer; (2) whether the guard’s actions clearly related to his private employer’s private purposes; (3) whether the search was conducted as a legitimate means of protecting the employer’s private property; and (4) whether the methods and manner of the search were reasonable and no more intrusive than necessary.” Id. In this case, however, there is no indication in the record that any of the Coronado Mall security guards were off-duty police officers. In fact, Security Guard Martin testified he is not a police officer, and he never has been one. Thus, while the factors to be considered by Murillo are helpful, they are not dispositive in answering the question posed in this case. Nevertheless, we do consider them for guidance in resolving the ultimate issue before us.

12. The first Leone factor is whether the guard acts under the control of his private employer. Leone, 435 N.E.2d at 1041. If the investigation exceeds the guard’s private duties or authorization, he may be considered a government actor. Id. The record in this case does not reveal what specific duties the Coronado Mall security guards were authorized to perform. However, most courts reason that “the primary function and concern of privately employed security officers is protection of their employers’ property, rather than conviction of wrongdoers.” Id. at 1039-40. Defendant did not threaten to damage any Coronado Mall property; Defendant did not damage any Coronado Mall property; Defendant did not shoplift property from any Coronado Mall store; and Defendant did not otherwise pose a threat to any Coronado Mall property or patrons. The mall security guards exceeded their private duties by chasing Defendant, throwing him to the ground, handcuffing him, and searching him. When they engaged in these activities the mall security guards were not doing anything to safeguard mall property or patrons.

13. Moreover, the State’s assertion that the mall security guards executed a valid citizen’s arrest does not withstand scrutiny. Historically, a citizen’s power to arrest has been limited to felonies. See State v. Barreras, 64 N.M. 300, 304, 328 P.2d 74, 76 (1958) (stating that “‘any person’ may, without a warrant, arrest a felon”). There is no claim that Defendant committed a felony that justified the mall security guards in ordering, then throwing Defendant to the ground, handcuffing him, and searching him. We have also noted that at common law a private person could arrest for a breach of the peace committed in his presence. Downs v. Garay, 106 N.M. 321, 323, 742 P.2d 533, 535 (Ct. App. 1987). Here, Defendant did not commit a breach of the peace in the presence of the mall security guards. Even if Defendant had committed a breach of the peace within their presence, it is questionable whether the mall security guards could have made a valid citizen’s arrest. See State v. Emmons, 2007-NMCA-082, ¶ 15, 141 N.M. 875, 161 P.3d 920 (“[T]he Supreme Court [has] specifically declined to favor citizens’ arrest for breaches of the peace, stemming from their concern that such an expansion of citizen power might likely lead to more breaches of the peace and encourage vigilantism.”).

14. Secondly, we consider whether the actions of the mall security guards clearly related to the private employer’s private purposes. Leone, 435 N.E.2d at 1041. A private purpose to be served by an arrest and search might be to detain a shoplifter or to recover merchandise stolen from a store within the Coronado Mall. However, “[a]n investigation that goes beyond the employer’s needs cannot be justified as an incident of the guard’s private function.” Id. The conduct of the mall security guards in this case clearly exceeded any private legitimate needs of the Coronado Mall.

15. Finally, we consider whether the method and manner of the search performed by the mall security guards was reasonable and no more intrusive than necessary. Security Guard Martin testified that it is customary for the mall security guards to conduct a pat down for weapons when there is a confrontation or if a felony has been committed. He also testified: “The only time we’re allowed to move something off someone’s person is when it poses a threat, like a knife, a gun, something of that nature.” The search of Defendant’s pockets cannot be characterized as a pat down for weapons, because the pill bottle was clearly not a weapon, and there was no legitimate reason for opening the pill bottle. See People v. Zelinski, 594 P.2d 1000, 1006 (Cal. 1979) (en banc) (concluding that while waiting for the police to arrive, private store security guards who removed a stolen blouse, together with a pill vial from the defendant’s purse and opened the pill vial, thereby discovering a fine, powdery substance, later determined to be heroin, “went beyond their employer’s private interests”).

16. The mall security guards exceeded their private duties or authorization. They
were not protecting their employer’s property, nor did they execute a lawful citizen’s arrest. If the mall security guards had been off-duty police officers, they would be deemed to be acting as an instrument or agent of the Government, and their conduct would be subject to the Fourth Amendment under Murillo.

B. State Action Under the Public Function and Government Agent Tests

{18} The conduct of private security guards who are not off-duty police officers may also be measured under Fourth Amendment constitutional standards in appropriate cases. “When they perform a public function or act as agents of a government investigation, their activities may therefore become state action for constitutional purposes.” Murillo, 113 N.M. at 189, 824 P.2d at 329. Whether the private officers are performing a public function or are acting as agents of the government is determined as a question of fact. See id. at 190, 824 P.2d at 330 (“The general rule appears to be that whether a ‘private’ person is acting as an agent of the government is determined as a question of fact in light of all the circumstances.”).

1. The Mall Security Guards Exercised Public, Police Functions

{19} We conclude the evidence supports a finding that the mall security guards were performing public, police functions in this case. It is evident that “[s]ecurity personnel hired to protect private business premises are performing traditional police functions when they arrest, question, and search for evidence against criminal suspects.” Murillo, 113 N.M. at 189, 824 P.2d at 329.

{20} We have recognized, as have other courts, that the use of private security forces is expanding in the United States. Id. at 190, 824 P.2d at 330. See Zelinski, 594 P.2d at 1005 (“We are mindful, however, of the increasing reliance placed upon private security personnel by local law enforcement authorities for the prevention of crime and enforcement of the criminal law and the increasing threat to privacy rights posed thereby.”). People v. Elliott, 501 N.Y.S.2d 265, 267-68 (N.Y. Sup. Ct. 1986) (noting the increasing number of businesses, governmental agencies, neighborhoods, and individuals that are giving private security entities a new role that spills over into public law enforcement areas). The Zelinski court notes from a report prepared by the Private Security Advisory Council to the United States Department of Justice, that “the private security sector has become the largest single group in the country engaged in the prevention of crime.” Zelinski, 594 P.2d at 1005 (internal quotation marks and citation omitted). One study of private policing has recently concluded that today, “private police participate in much of the policing work that their public counterparts do.” Elizabeth E. Joh, The Paradox of Private Policing, 95 J. Crim. L. & Criminology 49, 51 (2004).

{21} It is clear that, like the public, private security guards have the potential to violate citizens’ constitutional rights. Murillo, 113 N.M. at 189, 824 P.2d at 329. It is also evident that a serious danger to constitutional liberties would result if private security guards were allowed to perform these traditional police functions such as arresting, questioning, and searching for evidence, without applying any constitutional protections. See 1 Wayne R. LaFave, Search and Seizure § 1.8(a), at 260 & n.29 (4th ed. 2004) (“The grave danger exists that the general admissibility of such evidence may create an atmosphere encouraging government officials to act in clandestine concert with private persons; while concerted activity would undoubtedly taint such evidence and require its exclusion in a criminal action, the problems of proof are obvious.” (quoting Note, 63 Colum. L. Rev. 168, 174-75 (1963))); David Alan Sklansky, Private Police and Democracy, 43 Am. Crim. L. Rev. 89 (2006) (expressing concerns about privatized policing for American democracy).

{22} These concerns are very real in this case. The website for Coronado Mall (http://www.ggp.com/Content/Data/ mallfacts/Coronado%2Center_mallfact.pdf) describes it as New Mexico’s largest enclosed bi-level mall with over 150 retail stores and 5 anchors within 1,153,954 square feet. The mall has 5,489 parking spaces, employs 19,443 people, and more than 12 million people visit the mall each year. Thus, the mall security guards in this case are responsible for a very large, public area in which millions of people come and go each year. The magnitude of the responsibilities performed by the mall security guards in providing security for the Coronado Mall easily equals or exceeds that of sworn police officers in many towns, cities, and counties in New Mexico.

{23} We therefore align New Mexico with other courts that have expressed realistic concerns about safeguarding our constitutional rights where private police forces are used. To determine whether private security guards are performing public, police functions, we adopt the following test enunciated by Elliott, 501 N.Y.S.2d at 269:

These few concerned courts have fashioned a realistic ‘public function or acting in the public interest test’ which maintains that where organized and structured private security entities or agents assert the power of the state to investigate or make an arrest, or detain persons for subsequent transfer of custody to the state, or subsequent state law enforcement and the state has acquiesced or allowed such use of public power, such private organized action, in contemplation of state involvement, is sufficient to enable a court to apply constitutional restraints[].

{24} The mall security guards are structured and organized. They provide security services for businesses and patrons within Coronado Mall. Maintaining public order and keeping the public peace are traditional police functions. The mall security guards wear uniforms which look like APD uniforms; they are called “officers”; and they have rank designations such as sergeant that are similar to those used by a police force. In this particular case, the mall security guards responded to the initial (but erroneous) report of a fight, without APD assistance. The mall security guards then called the APD for “backup,” and arrested Defendant, calling the arrest a “citizen’s arrest” for disturbing the peace. They kept Defendant under arrest until APD arrived, pursuant to their policy. Simultaneous with the arrest, a mall security guard forcibly searched Defendant, on his own, and upon seizing the pill bottle from Defendant and opening it, said, “Look what we have here. Call APD.” We therefore conclude the totality of the circumstances support a finding that the mall security guards were performing public, police functions.

2. The Mall Security Guards Acted as Instruments or Agents of the Police

{25} We also conclude that the evidence supports the conclusion that the mall security guards were acting as instruments or agents of the police. The mall security guards employed by Valor Security and the APD work in conjunction with each other in providing security for the Coronado Mall. The APD is provided with a substation in the mall, and the APD assigns police officers to work on the mall premises to provide security. The police officers working at the mall have radios used by the private security guards employed by Valor Security, which enables both forces to communicate directly with each other. In this particular case, Officer Newbill heard the initial report of a disturbance in the
mall, but the Valor Security guards apparently intended to handle the matter on their own. When they wanted “backup” the Valor Security dispatch requested APD assistance over its own radio, which two APD officers heard, and they responded in their police units immediately.

[26] Defendant was arrested by the mall security guards with the intent of detaining Defendant until the APD officers arrived, and when the APD officers did arrive, they continued Defendant’s arrest by putting him in the APD police unit while still in the handcuffs placed on Defendant by the mall security guards. Once they took custody of Defendant, the intent of the APD officers was to determine if the mall security guards wanted a criminal trespass arrest. Upon arrival, APD officers were to determine if the mall security guards wanted to arrest Defendant. If that was their desire, the APD officers would have issued Defendant the notification, telling him he could not return to the mall.

[27] In the meantime, an APD officer picked up the property that the mall security guards had taken from Defendant, and took it into their own possession. An APD officer then opened the pill bottle seized from Defendant, and decided to field test its contents. This action effectively ratified its seizure by the mall security guards. The mall security guard went to the APD substation in the mall to exchange information with the APD officers so he could complete his report.

[28] The evidence in this case demonstrates that the mall security guards and APD were acting cooperatively in a coordinated, concerted undertaking. The conduct of the mall security guards is sufficiently interconnected with the conduct of APD to conclude that they were acting as a team and as an instrument or agent of each other to an extent that makes it appropriate to measure the conduct of the mall security guards by constitutional standards.

C. Suppression of the Evidence and Its Fruits

[29] We have determined that the search of Defendant must be measured by Fourth Amendment standards for three different reasons, each of which alone is sufficient. Since the search and seizure did not comply with the Fourth Amendment, all evidence discovered as a result of the search and seizure is not admissible in a criminal trial against Defendant. Ingram, 1998-NMCA-177, ¶ 9 (“Evidence which is obtained as a result of an unconstitutional search or seizure may be suppressed under the ‘exclusionary rule.’”).

[30] While the cocaine itself is clearly the fruit of the unlawful search, the State argues that Defendant’s statements should not have been suppressed because there was a sufficient break in the causal chain between the search and Defendant’s statements. “Evidence which is obtained by exploitation of a ‘primary illegality’ will be the fruit of that search and will be suppressed, unless an ‘intervening independent act of a free will’ can purge the taint of the illegally seized evidence.” State v. Bedolla, 111 N.M. 448, 455, 806 P.2d 588, 595 (Ct. App. 1991) (quoting Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

[31] The State argues that the causal chain was broken because the Defendant voluntarily made the statements to the APD officers, the officers were not present during the search, and the APD’s discovery and testing of the drugs were in response to Defendant’s statements rather than the search of the mall security guards. We disagree. The mall security guards and the APD officers were acting as a team. The APD officers had a radio monitoring the security guard’s frequency. As a result, they knew about the incident and requested police officers to complete the test.

[32] In analyzing the issue of whether the activity of the security guards was subject to the Fourth Amendment, the majority properly determines that the security guards were acting as instruments or agents of the government when seizing and searching Defendant. In reaching that conclusion, the majority relies on three independent grounds: that the security guards exceeded their private duties or authorization using the test applied in Murillo; that the security guards were performing public, police functions under the totality of circumstances; and that the security guards acted as instruments or agents of the APD officers.

[33] I would simply rely on the third ground because it is supported by our analysis in prior opinions and does not require an unnecessary extension of our case law. We have recognized in both Murillo and State v. Hernandez, 116 N.M. 562, 565, 865 P.2d 1206, 1209 (Ct. App. 1993), a case, in contrast to Murillo, involving a private security guard who was not also a commissioned law enforcement officer, that a private security guard’s actions may constitute governmental action if the guard is “acting as a government agent or instrument.” The majority’s third ground correctly decides this case on this basis. We need say nothing more. See Gabaldon v. Erisa Mortgage Co., 1997-NMCA-120, ¶ 3, 124 N.M. 296, 949 P.2d 1193 (stating this Court’s “general desire to decide cases on narrow rather than broad grounds”), rev’d in part on other grounds, 1999-NMSC-039, 128 N.M. 84, 990 P.2d 197.

JAMES J. WECHSLER, Judge

CONCLUSION

[33] The order of the district court is affirmed.

[34] IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

JAMES J. WECHSLER, Judge

(sp specially concurring)

WECHSLER, Judge

(sp specially concurring).

[35] I concur with the majority in affirming the district court’s order suppressing the evidence obtained by the mall security guards. I do not, however, concur in much of the majority’s analysis in reaching the conclusion that the security guards’ activity was subject to the Fourth Amendment.

In analyzing the issue of whether the activity of the security guards was subject to the Fourth Amendment, the majority properly determines that the security guards were acting as instruments or agents of the government when seizing and searching Defendant. In reaching that conclusion, the majority relies on three independent grounds: that the security guards exceeded their private duties or authorization using the test applied in Murillo; that the security guards were performing public, police functions under the totality of circumstances; and that the security guards acted as instruments or agents of the APD officers.
CERTIORARI NOT APPLIED FOR

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-042

CONCERNED RESIDENTS OF SANTA FE NORTH, INC., Plaintiff-Appellee/Cross-Appellant, versus SANTA FE ESTATES, INC., Defendant-Appellant/Cross-Appellee, and THE CITY OF SANTA FE and THORNBURG COMPANIES, Defendants.

No. 26,428 (filed: February 6, 2008)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Timothy L. Garcia, District Judge

RONALD J. VANAMBERG
VANAMBERG, ROGERS, YEPA & ABEITA, L.L.P.
Santa Fe, New Mexico
for Appellee

MARK F. SHERIDAN
KRISTINA MARTINEZ
HOLLAND & HART, L.L.P.
Santa Fe, New Mexico
for Appellant

OPINION

JONATHAN B. SUTIN, CHIEF JUDGE

{1} The parties in this real estate development dispute are Concerned Residents of Santa Fe North, Inc. (Residents), Santa Fe Estates, Inc. (Estates), the City of Santa Fe (the City), and Thornburg Companies (Thornburg).

OVERVIEW

{2} A 1996 settlement agreement resolved an action filed in 1996 (the 1996 action) by Residents against the City and Estates to resolve issues relating to a 1995 master plan and relating to Estates’ property. When the City Council ratified a 1996 master plan incorporating elements of the settlement agreement, Residents stipulated to a dismissal of the 1996 action.

{3} In 2003 Thornburg, under contract with Estates to purchase and develop Estates’ property for an office complex, filed an application for the development of a proposed commercial area of Estates’ property (the Thornburg plan). The Thornburg plan was reviewed and approved by the City Planning Commission. Residents, who opposed the Thornburg plan, appealed this decision of the Planning Commission to the City Council, and in early 2004 the City Council approved the Thornburg plan. Asserting that the Thornburg plan and the City’s approval of the plan violated the settlement agreement and the 1996 master plan, Residents in early 2004 filed a district court action against Thornburg, Estates, and the City (collectively, Defendants) alleging breach of the settlement agreement and seeking declaratory and injunctive relief. We will refer to this action as “the contract action.”

{4} Also in early 2004, soon after filing the contract action, Residents filed four additional district court actions, each an administrative appeal filed pursuant to Rule 1-074 NMAC, to overturn unfavorable decisions of the City Planning Commission and the City Council. The district court judge who heard and decided the contract action was not the same judge who entered the final order deciding the administrative appeals. The four administrative appeals were consolidated, after which, on October 18, 2004, in a memorandum opinion, and on November 3, 2004, in a final order and judgment, the court reversed the appeals and affirmed the City Planning Commission’s decision favoring the Thornburg plan. We will refer to these consolidated administrative appeals as “the administrative appeals.”

{5} Defendants in the contract action filed motions for summary judgment in April 2005. The district court dismissed Residents’ claims against the City and Thornburg on grounds not pertinent to the appeals now before this Court. The court denied Estates’ summary judgment motions, which were based on res judicata and contract interpretation.

{6} Afterwards, the contract action was tried. Among other determinations in its final judgment, the district court held that certain design and development restrictions in the parties’ settlement agreement created enforceable contractual rights or restrictions in favor of Residents regarding the commercial property. The court also declared that Residents had a “right to enforce the creation and recordation of the restrictive covenants against [Estates’] Commercial Property.” In addition, the court denied Estates’ affirmative defense of res judicata. It is from this final judgment that Estates appeals and Residents cross-appeals. We affirm.

BACKGROUND

{7} In connection with the 1996 action, the City, Estates, and Residents engaged in negotiations as to changes to be made in the 1995 master plan. As part of the negotiations, on June 10, 1996, Residents’ attorney, Michael Gross, wrote to the City’s attorney summarizing the major points Residents sought in a possible settlement of the 1996 action in regard to the commercial property owned by Estates. The letter stated, among other things, “[Residents] also requests that the master plan specify the types of businesses, uses, hours of operation, signing and lighting that are to be permitted so that they will be limited and of low-impact.”

{8} The City’s staff thereafter indicated their proposed changes in a document dated July 17, 1996, which referred to and discussed “neighborhood commercial use tracts.” The parties refer to these proposed changes as the City’s master plan conditions.

{9} On July 18, 1996, Gross wrote to the attorneys for the City and Estates stating major concerns. Gross pointed out that the commercial area was to be “four acres or less and . . . encompass uses which are appropriate for the area and in keeping with present City ordinances.” In his September 5, 1996, letter, Estates’ representative Bruce Geiss referred to various meetings of the interested parties that had occurred, addressed Residents’ concerns and the City’s master plan conditions relating to the commercial area, and identified the changes in the 1995 master plan that Estates was willing to accept (the Geiss letter). Among Residents’ issues that Geiss addressed were “Use and Design Restrictions on the Commercial Area.” Attached to the Geiss letter was a
“Vision Statement” developed by Estates at Residents’ request, which proposed specific use and design concepts for the commercial area, and which, Estates stated, “shall serve as the basis for the ultimate design of the commercial area.”

9. The vision statement stated Estates’ intent “to provide an economically viable, socially lively, pedestrian based commercial district.” Estates “visualized . . . a small scale, neighborhood commercial district, with design covenants dictating buildings which are compatible with nearby residential structures and limited to two story heights,” in which “[l]arge scale retail users, such as Wal-Mart, Price Club and Smith’s Superstores, will not be permitted.” The statement also established that “[d]esign standards and covenants will limit commercial development to the New-Old Santa Fe Pueblo or Spanish style of architecture.” Further, it stated that “[d]esign covenants will also limit signage to similar styles and all lighting shall be shielded and spill controlled.” Interspersed throughout the vision statement were several less specific uses and designs that Estates “anticipated” for the commercial area. Finally, the vision statement concluded with the statement that “[t]he actual development plan for the Village Center will be submitted to a review process that will require approval of the Santa Fe Planning Commission which provides for public review and comments by all interested parties.”

10. A September 10, 1996, letter from Gross to Estates’ attorney and the City’s attorney (the Gross letter) stated that, with certain changes and clarifications, the Geiss letter, which modified the City’s master plan conditions, was “accepted by each of the parties.” The Gross letter attached the City’s master plan conditions and the Geiss letter, incorporating these documents as part of the settlement agreement. The Geiss and Gross letters and attached documents formed the parties’ settlement agreement. The City approved the settlement agreement and adopted the 1996 master plan, which amended and modified the 1995 master plan. Based on the settlement agreement, which included the vision statement, the parties stipulated to the dismissal of the 1996 action.

11. In 2003 Thornburg presented the Thornburg plan to the City Planning Commission for approval. The City administrative proceedings resulted in approval by the City of the Thornburg plan. In early 2004, Residents filed its contract action first, followed by its administrative appeals to the district court. The thrust of both the administrative appeals and the contract action was to defeat the Thornburg plan because, according to Residents, the plan violated the settlement agreement in that it lacked use and design restrictions that were required pursuant to the settlement agreement. The district court which entertained the administrative appeals decided the appeals against Residents and affirmed the City’s approval of the Thornburg plan. Residents did not appeal from this unfavorable judgment. The district court handling the contract action denied Estates’ motions for summary judgment (res judicata and contract interpretation) and after a bench trial decided the issues, for the most part, in favor of Residents.

12. In the contract action, the district court’s conclusions of law established enforceable contractual rights and restrictions in favor of Residents. The court based its conclusions on its finding that the settlement agreement was ambiguous and its interpretation of that ambiguity such that the settlement agreement created enforceable contract rights with “binding and continuing restrictions upon the future development” of the commercial property. These restrictions included restrictions on building height, exclusion of large scale retail users, limitations on the style of architecture for buildings and signage, and a requirement for shielded and spill-controlled lighting. In addition, the court found that the foregoing four restrictions “must be placed as permanent restrictions” by Estates as soon as legal lots or parcels of record are established.

13. In its conclusions of law, the court reiterated the four “binding and continuing restrictions upon the future development” that it enumerated in its findings of fact number 25. In addition, the court stated that Estates’ “continuing contractual obligation to create and record the restrictions against the Commercial Property . . . are enforceable obligations under the [settlement agreement].” In its final judgment in the contract action, the district court first stated that “[c]ertain design and development restrictions within the Vision Statement . . . created enforceable contractual rights or restrictions in favor of [Residents].” The judgment then repeated the same four specific contractual rights and restrictions regarding the commercial property that were set out in its findings and conclusions of law. Referring to the four contractual rights and restrictions, the judgment stated, these “rights and restrictions . . . must become restrictive covenants upon the . . . Commercial Property, binding upon the heirs, successors and assigns of [Estates].”

14. In its judgment, the court also referred to these restrictive covenants as “permanent restrictive covenants” to be placed by Estates “as soon as legal lots or parcels of record are established for the Commercial Property and prior to any transfer of the Commercial Property to any purchaser or owner of the Commercial Property as it may be severed from the remaining larger parcel of property identified in the 1996 Master Plan.” The court granted Residents a declaratory judgment which recognized Residents’ “continuing right to enforce the 1996 Settlement Agreement obligations of [Estates],” that is, its “right to enforce the creation and recording of the restrictive covenants against the Commercial Property” that the court set out in the judgment “once legal lots or parcels of record for the Commercial Property have been established, subject to any enforceable rights which might be established under Paragraph 8” of the judgment. The court stated that Estates’ obligations were “continuing in nature” and that “[t]he time for creating and recording the restrictive covenants is prior to any sale or transfer of the Commercial Property or portion thereof by [Estates].” Paragraph 8 of the judgment stated, “In entering this judgment, the Court has determined that it is premature at this time and has not ruled whether [Residents] has any rights to enforce the restrictive covenants that [Estates] is required to create and record hereunder.” The judgment denied Estates’ res judicata defense.

15. Estates appeals the adverse determinations in the contract action and asserts: (1) the district court erred in denying its motion for summary judgment on res judicata grounds, in that the final disposition in favor of the Thornburg plan in the administrative appeals precluded the contract action; and (2) the district court erred in holding that the settlement agreement created contractually enforceable restrictive covenants running with the land and imposed a duty on Estates to create and record restrictive covenants against the commercial area. Residents cross-appeals, faulting the district court for not confirming in Residents additional contract rights to enforce all use and design restrictions and covenants in the vision statement. We first address Estates’ appeal and then Residents’ cross-appeal.

ESTATES’ APPEAL

16. Estates argues that the district court
judgment in the administrative appeals proceeding precluded the contract action on res judicata grounds. Estates also argues that the district court erred in holding that the settlement agreement was ambiguous, and then finding, without substantial evidence, that the settlement agreement gaveResidents enforceable contract rights, placed binding and continuing restrictions on future development, and required Estates to record restrictive covenants.

I. Res Judicata and Acquiescence

A. Res Judicata

{20} Residents maintains that waiver and acquiescence are issues of fact to be found by the district court and upheld if supported by substantial evidence, citing Garcia v. Marquez, 101 N.M. 427, 431, 684 P.2d 513, 517 (1984), which states that “[w]ether an affirmative defense of waiver has been proven is a factual question for the trier of fact, the determination of which will not be disturbed if based on substantial evidence,” and also citing Romero v. Bank of the Southwest, 2003-NMCA-124, ¶¶ 17-18, 135 N.M. 1, 83 P.3d 288. In Romero, this Court was faced with similar opposing positions on the applicable standard of review when we considered a district court’s decision on the question of ratification. Id. ¶ 17. One party urged de novo review, “arguing that the district court misapplied the law of ratification to the undisputed facts.” Id. The other party argued “that the question of ratification is a question of fact which should be reviewed for substantial evidence.” Id. The district court found that the agreement in question was not ratified. Id. We stated, “[w]e believe ratification is best reviewed as an issue of fact” and we reviewed the court’s finding for substantial evidence.

B. Acquiescence

{21} In the present case, the district court denied Estates’ res judicata (claim-splitting) summary judgment motion before the issues of contract interpretation were tried. After trial, in its conclusions of law, the court stated, without any reference to any particular defense, that “[a]ll other affirmative defenses asserted by either party herein are denied.” The parties did not submit requested findings of fact and conclusions of law on the question of res judicata or acquiescence. Nor did the court enter findings of fact or conclusions of law specifically in regard to res judicata or acquiescence.

{22} It appears from this record that the district court determined the validity of the defense of res judicata by considering undisputed facts set forth in the summary judgment proceeding and determining from those facts that Estates waived its res judicata defense by acquiescing in Residents’ alleged claim-splitting. The facts, together with a waiver and acquiescence argument, were set out in Residents’ answer brief in opposition to the res judicata motion. In a reply, Estates responded to Residents’ waiver and acquiescence argument not by discussing facts or arguing the existence of factual issues, but by contending that Cagan v. Village of Angel Fire, 2005-NMCA-059, 137 N.M. 570, 113 P.3d 393, controlled the issue and required the district court to rule as a matter of law that Estates’ assertion of the res judicata defense in its answer was sufficient to overcome arguments of waiver and acquiescence. Facts were argued at the hearing on the res judicata summary judgment motion as though they were not in dispute. The court stated that the case was “a classic claim splitting case,” concluding the actions were “separate matters” because the judge hearing the administrative appeals “would have never been able to have heard the original jurisdiction case with the appeal.” The court ended by also stating that “I think there has been a sufficient acquiescence and waiver by [Estates].” The parties did not argue that genuine issues of material fact existed on the issue of waiver and acquiescence. We will review the issue of waiver and acquiescence de novo.

2. Estates’ Acquiescence as to the Asserted Claim-Splitting

{23} The important court-filed documents for consideration on the issue of acquiescence consist of the contract action complaint, filed on February 20, 2004; the administrative appeals, filed in February and March 2004; Estates’ answer to the contract action, which included its affirmative defense of res judicata, filed on April 15, 2004; the court’s October 18, 2004, memorandum opinion and its November 3, 2004, final order and judgment deciding the administrative appeals; and Estates’ motion for summary judgment on res judicata grounds, filed in the contract action on April 12, 2005.

{24} Residents argues that Estates acquiesced in claim-splitting and waived any res judicata defense by participating in the merits of the administrative appeals and in the contract action from February 27, 2004, until April 11, 2005, without making any claim-splitting objection. Residents also argued below and also now argues on appeal that Estates should be estopped from asserting res judicata, based on an in-court statement of Estates’ attorney in opposition to a motion by individual property owners to intervene in the contract action. That motion to intervene was filed on March 21, 2005, several days before Estates’ April 12, 2005, res judicata motion for summary judgment. In a response filed on April 7, 2005, just five days before its res judicata motion, in opposition to the motion to intervene, Estates stated that “[i]t can hardly be argued that the existing Plaintiff will not adequately represent the interests of the

---

32 BAR BULLETIN - April 21, 2008 - Volume 47, No. 17
proposed intervenors.” During argument related to res judicata on June 8, 2005, the court focused on this statement made in opposition to the motion to intervene, as well as on the general and conditional nature of the defense, during a colloquy between Estates’ attorney and the court.

[Mr. Sheridan:] That’s precisely the situation here. [Residents] filed their contract claim on February 26th; they filed their administrative appeal on February 27th; we answered the contract action in April, and asserted the affirmative defense of res judicata in April. [Residents’ attorney] never served any discovery saying, on what do you base – on what facts do you raise the res judicata defense?

THE COURT: Well, let’s answer that question today. There was no judgment when you served your answer on which to base res judicata on, except the 1996 judgment.

MR. SHERIDAN: That’s correct.

THE COURT: So you had no basis for res judicata of having collateral effect of these proceedings, because you hadn’t won the other case, you had no basis to know that there was going to be any res judicata potentially effective.

MR. SHERIDAN: Respectfully, Your Honor, the filing of the res judicata as a defense puts the defendant on notice, that is precisely what Cagan held.

THE COURT: Well, it puts them on notice that there may be a res judicata effect, to the extent there was a judgment now that may have res judicata effect.

MR. SHERIDAN: No, no, Your Honor, it puts him on notice that he is in danger of having the judgment in the case in which you had raised the defense used to bar a simultaneously pending case.

THE COURT: Pending cases, yes, unless – unless you are acquiescing, and then how do you overcome the intervening language that was imposed by the defendant which basically says, no, they have every right to proceed and resolve these issues, and they will do so on behalf of the parties that wish to intervene . . . .

THE COURT: – how can you make both arguments?

. . . .

THE COURT: But it has—it has nothing to do with their motion; it has to do with the[] position taken by defendants regarding that motion.

After hearing argument on Estates’ motion for summary judgment on res judicata grounds, the district court simply stated on the record that there was “sufficient acquiescence and waiver by [Estates].” In its reply brief on appeal, Estates argues that we should disregard the district court’s views regarding the statement in the intervention proceeding, because the intervenors’ claims were dissimilar to Residents’ and did not implicate or give rise to Estates’ res judicata defense.


When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Section 24 also states that “[t]he general rule of this [s]ection . . . is subject to the exceptions stated in [Section] 26.” (Emphasis omitted.)

{26} Restatement (Second) of Judgments § 26(1)(a) (1982), provides, in pertinent part, that:

(1) When any of the following circumstances exists, the general rule of [Section] 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein.

Comment (a) to Section 26 states that, because the main purpose of the general rule stated in Section 24 is to protect a defendant from being harassed by repetitive actions based on the same claim, the rule in Section 24 is not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.” Comment (a) further states:

Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff’s claim is effective as an acquiescence in the splitting of the claim.

{27} Acquiescence will defeat a res judicata defense. See Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 734 (8th Cir. 1997) (holding that, based on Restatement (Second) of Judgments § 26(1)(a), a defendant’s failure to object to claim-splitting until after judgment is entered in one action can be regarded as acquiescence in the splitting of the claim); Ill v. District of Columbia, 665 A.2d 185, 193 (D.C. 1995) (same); see also Cagan, 2005-NMCA-059, ¶¶ 32-33 (acknowledging Restatement (Second) of Judgments § 26(1)(a), but determining not to apply it to preclude a res judicata defense because the defendant raised res judicata as a defense in a pleading).

{28} Estates claims that the district court erred in determining that it acquiesced in or waived Residents’ claim-splitting, arguing that there could be no acquiescence or waiver because it asserted the defense of res judicata in its answer to Residents’ complaint. Estates principally relies on Cagan, 2005-NMCA-059, ¶ 33. Estates also relies on two out-of-state cases. See Wilkins v. Jakeway, 993 F. Supp. 635, 651 (S.D. Ohio 1998) (holding that by raising the defense of res judicata at the earliest possible time, the defendants did not acquiesce in claim-splitting but put the plaintiff “on notice that he should either move to consolidate or amend his pleadings in order to avoid the potential of res judicata”), rev’d on other grounds, 183 F.3d 528 (6th Cir. 1999); see also Davis v. Sun Oil Co., 148 F.3d 606, 612-13 (6th Cir. 1998) (per curiam) (holding that the affirmative defense of res judicata raised in an answer precluded
finding that that party had acquiesced in or waived the splitting of the cause of action). The issue is whether Estates’ assertion of res judicata in its answer to the contract action complaint was sufficient by itself as a matter of law to overcome Residents’ waiver and acquiescence argument.

{29} The circumstances in the present case require us to analyze the theory of acquiescence in some greater detail than appears to have occurred in Cagan and the other cases on which Estates relies. Estates asserted its res judicata defense in its answer filed in April 2004, which was within two months of the filing of the contract action. The defense, which was one among thirteen others listed, read, “[Residents’] complaint must be dismissed because it is barred by the doctrine of res judicata and/or collateral estoppel.” The defense was asserted about six months before October 18, 2004, the date on which the issues in the administrative appeals were decided. At no time until its motion for summary judgment in the contract action in April 2005 did Estates indicate to what the res judicata defense asserted in its answer specifically pertained. As indicated earlier in this opinion, at the argument on Estates’ summary judgment motion in June 2005, the district court in fact pointed out that one might perceive that the defense was intended to be based on the judgment in the 1996 action. The court stated:

There was no judgment when you served your answer on which to base res judicata . . . , except the 1996 judgment. . . . So you had no basis for res judicata of having collateral effect of these proceedings, because you hadn’t won the other case, you had no basis to know that there was going to be any res judicata potentially effective.

Further, as indicated earlier in this opinion, just before Estates filed its res judicata summary judgment motion, Estates opposed intervention of individual property owners on the ground that Residents could adequately represent their interests. The district court questioned this, apparently feeling that Estates could not lead the court down that path and then shortly afterward veer in a different direction.

{30} As an introductory matter, under the circumstances of claim-splitting in this case, we do not see the issue as one of waiver; instead, we focus on acquiescence under Section 26(1)(a). See Davis, 148 F.3d at 612-13 (addressing both waiver and acquiescence under Restatement (Second) of Judgments § 26(1)(a)); 18 James Wm. Moore, Moore’s Federal Practice § 131.24[1], at 74 (3rd ed. 2007) (indicating that “[w]aiver by acquiescence” is a form of acquiescence, but different than simply allowing two simultaneous actions on the same claim to proceed without objection). It is clear that the barrier Residents faces in asserting acquiescence is our decision in Cagan. We therefore discuss Cagan in some detail. We also discuss Davis and Wilkins.

{31} In Cagan, having faced attacks on their February 2000 42 U.S.C. § 1983 (1996) action for failure to prosecute, on September 13, 2002, the plaintiffs in Cagan filed a second action asserting breach of contract and other claims. Cagan, 2005-NMCA-059, ¶ 1-4. On November 13, 2002, the defendants asserted their res judicata defense to the second action. Id. ¶ 5. The first action was dismissed on December 4, 2002. Id. Within two months of the dismissal of the first action, the defendants filed a motion for a protective order and a motion to stay discovery in the second action, at the same time stating their intention to file a motion for summary judgment asserting the res judicata bar. Id. ¶¶ 5, 33. The defendants then filed their motion for summary judgment based on res judicata two months after the dismissal. Id. ¶ 5.

{32} This Court in Cagan rejected the plaintiffs’ argument that the defendants consented to claim-splitting by failing to inform the district court at a hearing on dismissal of the first action that res judicata might bar the second action. Id. ¶ 33. This Court stated:

Although [the p]laintiffs argue that the [defendants’] motion for protective order and subsequent summary judgment motion did not constitute an objection to claim splitting because they were filed after [the first action] was dismissed, the [defendants] raised the affirmative defenses of collateral estoppel and res judicata in its answer, which was filed while both cases were pending. The [defendants’] acts were sufficient to bring to the attention of the district court and [the p]laintiffs that the [defendants] objected to claim splitting.

Id. It appears that, in referring to “[t]he [defendants’] acts,” this Court was including not only the assertion of the affirmative defense of res judicata, but also the defendants’ acts to specifically bring to the attention of the district court that they objected to claim-splitting, i.e., the defendants’ motions for stay and for protective order.

{33} In Davis, the plaintiffs sued the defendant in state court in May 1991, alleging nuisance, breach of contract, and fraud. 148 F.3d at 608. A referee tried the state court case in September 1993 and issued a report to the court in December 1993 recommending judgment against the defendant for damages for breach of contract. Id. In between the trial and the report in this state court action, the plaintiffs in October 1993 filed a federal court hazardous waste action under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a) (1)(B). Davis, 148 F.3d at 608. In its answer in the RCRA action, the defendant relied on the doctrine of res judicata as a defense. Id. at 613.

{34} In July 1994, following a pretrial conference, the federal court in Davis “issued the first of a series of orders staying proceedings pending the resolution of the litigation in state court.” 148 F.3d at 608. In March 1995, the state court issued a decision adopting the referee’s recommendations, and this decision was affirmed in the state court of appeals in January 1996. Id. At some point, the federal district court, relying on the defendant’s pleading asserting res judicata, held that res judicata applied. Id. at 612-13. In the Davis opinion, the dissent asserted that the defendant had acquiesced and that the district court’s application of res judicata was erroneous. Id. at 613 (Boggs, J., dissenting in part). In response to the dissent, the majority in Davis stated that the district court did not err in holding that the res judicata doctrine applied and further stated: “We conclude, moreover, that the defense was not waived in the district court. Having stated in its answer that ‘[the p]laintiffs’ claims are barred by the doctrine of res judicata,’ [the] defendant may rely on this defense and we find no error in the district court’s determination.” Id. at 612. Further, in discussing Section 26 of the Restatement (Second) of Judgments relating to acquiescence, the majority in Davis stated that the defendant “defended on the doctrines of both waiver and res judicata,” and that “[the] plaintiffs were not treated unjustly and that they had fair notice of the defendant’s claim of res judicata.” Id. at 612-13 (emphasis omitted).

{35} In Wilkins, the plaintiff filed a civil rights action in federal court in December
sought to be dismissed. The defendants

059, ¶¶ 4-5, 33. In the present action,
simultaneous actions, September 13, 2002,
some four or five months after the start of
the defendants filed res judicata defenses
involving the same transaction. The defendants in
Cagan sat for somewhere between three to
five months before acting to preclude the
continuing claim-splitting; whereas, in the
present case, Estates sat for a year and two
months before acting. The period of inac-
tion in Davis was several months longer
than in Cagan. Also significant in our view
is that neither Cagan nor Davis discusses the
extent of the litigation activity that oc-
curred in the actions that the defendants
sought to dismiss under res judicata. In the
present case, both sides actively litigated
both actions, and in particular, from Febru-
ary 2004 until Estates filed its res judicata
motion in April 2005, the parties pursued
considerable activity in the contract action,
one of which was aimed at relief from the
disadvantages to Estates of claim-splitting.
Indeed, Estates acknowledges that Resi-
dents has “alleged ‘vigorous participation
in both actions without objection for more
than a year,’” and further indicates that this
and other facts “are undisputed.” Further,
neither Cagan nor Davis analyzes why an
objection to claim-splitting need not be
made or a stay of proceedings should not be
pursued, or why a defendant, the recipi-
ent of protection by objecting early-on to
claim-splitting, should be permitted to sit
by and take no affirmative action to obtain
relief from claim-splitting.

Wilkins, in our view, is also distin-
guishable. The Wilkins court determined both
that a specific claim-splitting objection
was made by the defendants and specific
objections to consolidation were made by
the plaintiff in a joint motion before the
court, and importantly, the court also deter-
mined that the defendants acted at the earli-
est possible time. 993 F. Supp. at 651.

If Cagan stood for the proposition that
including a res judicata affirmative defense
in an answer is sufficient by itself to over-
come any claim of acquiescence or waiver,
we would be hard pressed to overcome it.
However, we do not read Cagan to set such
a bright-line rule on the issue. Rather, we
think it the better policy to consider each
case on its own particular facts. Cagan does
not tell us why the generally stated defense of
res judicata, when claim-splitting is
specifically at issue, should remain effec-
tive without time limitations where there is
no action on the part of the defendants
to obtain expeditious relief from the claim-
splitting. The doctrine of res judicata, when
claim-splitting is involved, exists, after all,
primarily for the protection of a defendant,
such as Estates, from the burdens of mul-
tiple litigation of the same claims, including
unnecessary expense and the possibility of
inconsistent results. Moore, supra, at 73
(“One of the primary purposes of the claim
preclusion doctrine is to protect a defendant
from being harassed by repetitive actions
based on the same claim. This purpose is
not operative when a defendant agrees,
expressly or impliedly, to split the claim. . .
. Acquiescence . . . occurs when a defendant
allows two simultaneous actions on the
same claim to proceed without objection.”
citation and footnotes omitted)). Cagan
does not discuss this policy. Other than to
cite Cagan, Davis, and Wilkins, Estates
has not presented any policy or rationale to
support its inordinate delay.

Furthermore, we fail to see why a
burden to expeditiously seek relief should
not be placed on a defendant who objects
to claim-splitting. The defense is available
principally to protect a defendant from
having to expend resources to defend two
claims arising from the same transaction.
In many instances whether alleged claim-
splitting is objectionable is anything but
a simple issue. If a defendant sees two actions
as detrimental to the defendant’s interests,
it should be incumbent on the defendant
to specifically attack the claim-splitting
by obtaining court relief at the earliest
feasible point.

Under the circumstances in the pres-
cent case, we therefore have considerable
difficulty permitting Estates’ generally
stated defense of res judicata to withstand
Residents’ acquiescence argument. Estates’
conduct was antithetical to the purpose for
the doctrine of res judicata, as expressed in
Myers v. Olson, 100 N.M. 745, 747, 676
P.2d 822, 824 (1984), that the res judicata
doctrine is invoked to protect litigants from
the burden of multiple litigation and to
promote judicial economy.

The analysis in Klipsch, Inc. is con-
sistent with our view in the present case
that Estates acquiesced. In Klipsch, the
plaintiff filed its first action for debt in July

1993 and filed an amended complaint in
March 1994. 993 F. Supp. at 641. The
pendent state court claims were dismissed
by the federal court in September 1994.
Id. A determination granting qualified im-
unity was appealed to the federal circuit
court which, in February 1996, affirmed
the lower court’s ruling. Id. In the interim,
in January 1994, the plaintiff filed a False
Claims Act complaint in federal court. Id.
at 641-42. In March 1995, the plaintiff
filed a second amended complaint in that
second action. Id. at 642. In January 1996,
the defendants in the second action filed
an answer and asserted the defense of res
judicata. Id. Also, in January 1996, just
before the circuit court’s ruling in February
1996 in the first action, in a motion in the
second action, the defendants indicated that
there were serious res judicata difficulties
with the plaintiff pursuing separate claims
involving the same transaction. Id. at 642,
651. From this indication and from the
plaintiff’s opposition to consolidation of
the cases, the court in Wilkins determined
that the plaintiff had “notice of the possibil-
ity of claim preclusion,” and also that the
plaintiff should have been on notice that a
judgment in either of the two cases could
bar the claim in the other case. Id. at 642,
651. The court held that the defendants’
defense and claim-splitting concern in
January 1996 “put [the p]laintiff on notice
at the earliest possible time that [the d]
fendants opposed [the p]laintiff’s tactic
of trying two cases in the same forum.”
Id. at 651.

In both Cagan and the present case
simultaneous actions existed, and in each
the defendants filed res judicata defenses
two months after the filing of the action
sought to be dismissed. The defendants in
Cagan then filed a motion for a protec-
tive order and a motion to stay discovery,
and then a motion for summary judgment,
some four or five months after the start of
simultaneous actions, September 13, 2002,
to January or February 2003. 2005-NMCA-
059, ¶¶ 4-5, 33. In the present action,
Defendants filed a motion for summary
judgment a year and two months after the
start of simultaneous actions, from Febru-
ary 2004 to April 2005.

In Davis, the first (state court) action
was filed in May 1991; the second (federal
court) action was filed in October 1993.
148 F.3d at 608. We do not know when
the answer was filed in the federal court action
raising res judicata, but one can assume it
was filed as early as November 1993. In
July 1994, the court in the federal action

Bar Bulletin - April 21, 2008 - Volume 47, No. 17 35
On August 15, 1995, the defendant paid the debt and the court dismissed the action on November 6, 1995. Id. at 732, 734. The plaintiff filed its second action, for trademark infringement, on August 15, 1995. Id. Thus, both actions were proceeding simultaneously until November 6, 1995. Id. at 734. Not until September 17, 1996, more than a year after the plaintiff had filed its second action and some ten months after dismissal of the first action, did the defendant specifically assert that the second action was barred by the dismissal of the first action. Id. at 732.

[44] Based on the Restatement (Second) ofJudgments § 26(1)(a), the court in Klipsch held that the defendant acquiesced and stated that “[i]f a defendant chooses not to make the objection that another action based on the same claim is pending, that defendant has waived this protective aspect of res judicata and acquiesces to the splitting of the claim.” 127 F.3d at 734-35. In support of its holding, the court determined that the defendant “had ample opportunity to object” before the judgment in the first action and then waited a lengthy period of time before actually moving to bar the second action based on res judicata. Id. at 735. We think that the Restatement’s specific claim-splitting rule is intended to require defendants to act expeditiously to object to claim-splitting and to not simply rely on a generally stated res judicata defense for protection against assertions of waiver and acquiescence. Klipsch drives this notion home. See also Funkhouser v. Hurricane Fence Co., 524 S.W.2d 780, 783 (Tex. App. 1975) (“By failing to file in either action a plea of another cause pending, or to move for consolidation, or in any manner to bring to the attention of the trial court and the plaintiff the fact that the defendant objected to the splitting of the cause of action, the defendant has consented to the splitting of the cause of action.”).

[45] We apply Section 26(1)(a) to preclude Estates’ res judicata defense. We disapprove ofCagan to the extent it can be read to stand for the proposition that an affirmative defense is sufficient by itself to overcome a claim of acquiescence.

II. Ambiguity and Interpretation of the Settlement Agreement

A. Revisiting the Parties’ Positions and the Rulings in the District Court Proceedings

[46] Residents and Estates attached different meanings to the settlement agreement. At their essential levels, the parties’ positions in the litigations were as follows. Residents’ position was that the settlement agreement was ambiguous and, properly interpreted, reflected an intent that the vision statement constituted restrictive covenants to run with the land in the commercial area. Estates’ position was that the settlement agreement was unambiguous. The development plan process through the City’s administrative considerations and public hearings would be determinative as to what types of use and design restrictions would be required for the commercial area. Estates sought and obtained City approval of the Thornburg plan as it was presented.

[47] The district court indicated in the summary judgment proceeding on contract interpretation that it did not see the circumstances as “contract zoning,” noting that “Thornburg may be fully entitled now to build their project under what is the existing master plan . . . yet, plaintiff[] may still have damages . . . for breach of what are contract . . . provisions that were never effectuated and carried out.” Thus, the court did not think it could enjoin the City or the project based on the master plan; instead, the court thought that the project could move forward, leaving Residents to its contract claim. In the court’s view, the City was not affected or bound by the contract provisions. The issue to be determined, necessitating a trial, was whether, as between Estates and Residents, the settlement agreement created covenants and restrictions that ran with the property and attached to it as against any successor in interest.

[48] In its findings of fact and conclusions of law, the court saw the issues for decision as (1) whether the settlement agreement created any enforceable contract rights in favor of Residents, and (2) whether any contract rights survived the approval and recording of the 1996 master plan. The court clarified how it viewed the parties’ principal assertions, namely, that: Residents had asserted that the vision statement created contractual rights and restrictions which survived the recording of the master plan and constituted covenants running with the land; and that Estates had asserted that the vision statement only created the conceptual guidelines to be included in the master plan and did not create any enforceable rights or restrictions in favor of Residents which survived the recording of the master plan. After finding that the settlement agreement was ambiguous, the court then expressly found that the language in the settlement agreement and parol evidence established that the settlement agreement “created enforceable contract rights in favor of [Residents] and restrict the Commercial Property.” The court found that these “binding and continuing restrictions upon the future development of the Commercial Property . . . survived the approval and recording of the [master plan],” and further found that the restrictions “must be placed as permanent restrictions on the Commercial Property by [Estates] . . . as soon as legal lots or parcels of record are established for the Commercial Property.”

[49] The court followed with conclusions of law basically repeating these findings and concluded, as well, that “[t]he contractual rights and restrictions . . . constitute restrictions and covenants running with the land in perpetuity, binding upon the heirs, successors and assigns of [Estates].” The court also expressed Estates’ duties as being “to create and record the restrictions” and stated these duties “are enforceable obligations under the [settlement agreement].” Because another division of the district court had already affirmed the City’s approval of the Thornburg plan, and noting that the Thornburg plan as approved did not create legal lots or parcels of record against the commercial property, the court concluded that Estates’ obligation had not yet matured or run. The restrictions were to be placed as permanent restrictions as soon as legal lots or parcels of record were established and before “any transfer . . . to any purchaser or owner . . . as it may be severed from the remaining larger parcel of property identified in the [master plan].”

[50] Through these findings and conclusions, the court essentially determined that Estates agreed that certain restrictions in the vision statement, although incorporated in the master plan, would nevertheless be considered restrictive covenants running with the land that would have to be recorded by Estates at a future date; yet other restrictions in the vision statement which were also incorporated in the master plan would only bind the property if required by the City in the development proceedings.

B. Contract Interpretation—Rules and Standard of Review

[51] In contract interpretation, our Supreme Court abandoned the plain meaning or four-corners standard described in C.R. Anthony Co. v. Loretta Mall Partners, 112 N.M. 504, 817 P.2d 238 (1991). See Mark V, Inc. v. Mellekas, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). The standard for determining the intent of parties as to contracts, even unambiguous ones, is enunciated in Mark V, 114 N.M. at 781, 845 P.2d at 1235. In determining intent, courts can
“consider extrinsic evidence to determine whether the facially unambiguous terms of the release are in fact ambiguous.” Hansen v. Ford Motor Co., 120 N.M. 203, 206, 900 P.2d 952, 955 (1995) (deriving this statement from Mark V and C.R. Anthony). Thus, a court may go beyond the four corners and consider evidence outside the contract itself to explain the purposes or context of the contract. This is called “the contextual approach to contract interpretation, in recognition of the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding.” Mark V, 114 N.M. at 781, 845 P.2d at 1235 (internal quotation marks and citation omitted). As stated by our Supreme Court in Mark V:

[W]e held in C.R. Anthony that even if the language of the contract appears to be clear and unambiguous, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance, in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear. Id. (internal quotation marks and citation omitted). Mark V states the methodology in detail as follows.

The question whether an agreement contains an ambiguity is a matter of law to be decided by the trial court. The court may consider collateral evidence of the circumstances surrounding the execution of the agreement in determining whether the language of the agreement is unclear. If the evidence presented is so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law. If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists. At that point, if the proffered evidence of surrounding facts and circumstances is in dispute, turns on witness credibility, or is susceptible of conflicting inferences, the meaning must be resolved by the appropriate fact finder.[4]

Once the agreement is found to be ambiguous, the meaning to be assigned the unclear terms is a question of fact. . . . In order to determine the meaning of the ambiguous terms, the fact finder may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties’ intent. Id. at 781-82, 845 P.2d at 1235-36 (citations omitted).

C. The Ambiguity Issue

[52] Estates presents several arguments. Pointing to paragraph 1 of the Gross letter and to the “[t]he context in which the Settlement Agreement was negotiated[,]” Estates argues that the plain language of the settlement agreement documents shows that the parties only agreed to amend the 1995 master plan. Estates asserts that because Residents’ 1996 action challenged the 1995 master plan, it would be reasonable to expect that an agreement resolving that lawsuit would provide for modifying the 1995 master plan. Estates also asserts that the Geiss letter and the master plan conditions that the letter modified were incorporated into the settlement agreement only for the specific purpose of identifying the modifications to the 1995 master plan; and that the Geiss letter was irrelevant for any purpose other than the specific purpose of identifying those modifications. Referring specifically to earlier Gross letters dated June 10 and July 18, 1996, Estates further asserts that in negotiations Residents “repeatedly sought . . . only to modify the 1995 Master Plan provisions relating to [the commercial area].” Estates further asserts that “Residents did not seek any contractually enforceable restrictive covenants as to the [commercial area],” yet, significantly, at the same time actually required restrictive covenants in connection with the 1995 master plan, namely, buffer zone and terrain management areas, by demanding in the Gross July 18, 1996, letter that Estates “make an enforceable agreement which burdens the land” as to those two specified areas. If Residents had sought restrictive covenants in the commercial area, Estates argues, Residents “could easily have requested and the parties could easily have documented any future obligation on . . . Estates to create and record specific design covenants.”

[53] In addition, Estates asserts that the parties’ course of performance demonstrated “that paragraph 1 of the Gross letter constituted solely an agreement to revise the 1995 Master Plan.” Estates shows that the parties proceeded to revise the 1995 master plan to reflect agreed-upon changes and created the 1996 master plan which was submitted along with the settlement agreement to the City Council for ratification and adoption. Following that ratification and adoption, Residents dismissed its lawsuit seeking to amend the 1995 master plan. [54] With respect to paragraph 4 of the Geiss letter which refers to Estates’ vision statement, and on which Residents rely as being “self-contained” and constituting “an independent, categorical restriction[,]" Estates maintains that, when construed in light of paragraph 1 of the Gross letter, there exist “no objective manifestations of any intent to establish self-contained independent categorical restrictive covenants on the Commercial Area.” All that the Geiss letter can be read to provide, Estates argues, is revision language for the 1995 master plan; whereas, “paragraph 1 of the Gross letter is completely silent on the alleged grant of enforceable restrictive covenants upon the Commercial Area.”

[55] Finally, Estates argues that to create, in a contract, a restrictive covenant to run with the land requires a clear expression of intent in plain and direct language, and that, because restrictive covenants are not favored, doubts or ambiguities regarding their existence and enforcement will be resolved against restriction. Thus, Estates concludes that the lack of any clearly expressed intention to create a restrictive covenant related to the commercial area requires a determination that the settlement agreement is unambiguous, and that no such intention can or should be implied.

[56] Residents relies not only on the documentary history leading up to the settlement agreement and its approval by the City along with adoption of the 1996 master plan, but also on the testimony of Residents’ president, Lewis Pollock, to support the court’s determination that the settlement agreement was ambiguous and also that the settlement agreement created contractually enforceable covenants. Pollock testified that, in discussions leading up to the settlement agreement, he informed Estates’ owners that Residents required an agreement it could enforce against Estates in regard to the commercial area, including building size and architecture. Pollock further testified that he specifically discussed paragraph 4 in the Geiss letter, which relates to restrictions on the commercial area, among other things, and that it constituted a significant aspect of the settlement agree-
ment. Pollock required this because the City was a partner with Estates and therefore had an irreconcilable conflict and, thus, the City was not likely, in Residents’ view, to enforce any of Residents’ rights against Estates. Pollock understood Estates to have promised, and expressed that he believed Residents could rely on the statement in paragraph 4 of the Geiss letter, that “[the] Vision Statement shall serve as the basis for the ultimate design of the commercial area.” Feeling that the Geiss letter was “the main cog” of the settlement agreement, Pollock discussed its content with Estates’ representatives, explaining during the discussions why Residents needed a private right of enforcement because of the City’s position as a partner with Estates. Pollock understood that what he was discussing with Estates was agreeable to Estates.

We cannot say that the district court erred in holding that the settlement agreement was ambiguous. While it is clear that the parties intended at the time of the settlement agreement to obtain amendment of the 1995 master plan, it is reasonable to conclude that the contractual process clouded the question of the full extent of what the parties intended to accomplish. The settlement agreement refers specifically to “Use and Design Restrictions on the Commercial Area.” The vision statement was an integral part of the negotiations and the settlement agreement. The agreement indicates that the vision statement “shall serve as the basis for the ultimate design of the commercial area.” The vision statement “visualized” the area “with design covenants dictating buildings which are compatible with nearby residential structures and limited to two story heights.” (Emphasis added.) The vision statement sets out specific examples of uses and categorically says that they “will not be permitted.” (Emphasis added.) Further, the vision statement states that “[d]esign standards and covenants will limit commercial development” to a certain specific style of architecture and “will also limit signage . . . and all lighting” in certain respects. (Emphasis added.) Although the vision statement ends by saying that the actual development plan will be submitted to an administrative review process, the statement does not indicate that the design standards and covenants specifically mentioned, if not mandated, could be ignored by either Estates or, for that matter, even the City. Moreover, given his concern about the relationship between the City and Estates, it was apparent from Pollock’s testimony that Residents wanted assurance that the City would require Estates to abide by the standards and covenants.

Taking into consideration the conglomeration of documents comprising the settlement agreement, the lack of clarity as to the purpose and meaning of the documents, and the apparent lack of serious resistance to Pollock’s concerns that Residents be able to enforce design covenants in the vision statement, we hold that the district court did not err in concluding that the settlement agreement was ambiguous.

D. The Interpretation Issue

A more difficult issue is whether the settlement agreement created specific restrictive covenants running with the land in favor of Residents that Estates was contractually required at some point to record in order to bind subsequent transferees. Estates contends that the court’s findings lacked substantial evidence. Estates argues that the only evidence that is pertinent is the text of the vision statement and the testimony of Geiss that was responsive to questions that the court had regarding implementation of the provisions of the vision statement. In Estates’ view, the documents and Geiss’s testimony show that Estates agreed to nothing more than to make the vision statement a part of the master plan, as one of several modifications to the 1995 master plan. Estates sets out several parts of the testimony of Geiss in which he says that the parties did not discuss restrictive covenants and that the discussions centered on modifying the 1995 master plan. According to Geiss, the parties were only trying to find a way to resolve the conditions of approval relating to the 1995 master plan and, in doing so, “find ways to comfort [Residents] on their issues.”

Estates quotes what it considers critical Geiss testimony in response to the court’s question, “At what point in the development stage do [Estates’] promises have to be implemented?” Geiss stated: It is typical in the process at the City . . . that covenants[,] conditions and restrictions be filed with a development plan, because you have enough specific information that has been approved by the Planning Commission. Again, Your Honor, once you get your approval at the Planning Commission, you have to record it, and it’s in that process of working that out, that these get written. . . . [T]he Planning Commission has stated that the Thornburg Development Plan complies and meets the criteria of the Vision Statement. In the process that follows, it is the function of the City staff to match up the requirements imposed by the master plan or any conditions of the actual approval, so that all of the requirements are met by the time that . . . the development plan is recorded.

I guess what I’m trying to say is, if we could just get out of this court and get on with the development of the Thornburg building, we would be on our way to recording covenants that are implied by this Vision Statement. Estates’ position is thus made clear: the documents and Geiss’s testimony, being what Estates views as the only evidence on the issue, require the conclusion that “responsibility for creating the design covenants referenced in the Vision Statement resides with the developer and the City in its approval and recording of a development plan.” This position rules out any rights of Residents beyond that of opposing the Thornburg plan in the City administrative process. All Estates agreed to do, according to Estates, was to make the vision statement part of the master plan, and to leave recording of design covenants solely up to the City administrative process. Estates’ interpretation, of course, leaves no room for an interpretation based on the evidence that the settlement agreement, including the vision statement, contractually creates restrictive covenants that run with the land and that requires Estates to record no matter what the City approves with respect to the development plan.

Also in support of its lack of substantial evidence argument, Estates further argues that the interpretation given the settlement agreement by the court is contrary to the presumption in contract law that one is not to read into a document a term that could easily have been included but was not included. Estates also argues that courts are not to read restrictions on the use and enjoyment of land into a covenant by implication, citing Hill v. Community of Damien of Molokai, 1996-NMSC-008, 121 N.M. 353, 911 P.2d 861, in which, in considering the applicability of an existing restrictive covenant to certain property, our Supreme Court stated that it was to be “guided by certain general rules of construction.” Id. ¶ 6. One rule was that “if the language is unclear or ambiguous, we will resolve the restrictive covenant in favor of the free enjoyment of the property.
and against restrictions.” *Id.* Another was that the Court would “not read restrictions on the use and enjoyment of the land into the covenant by implication.” *Id.*

[63] The problem with Estates’ entire approach is that the primary evidence before the district court on the issue at hand was the combination of documents constituting the settlement agreement, together with the testimony of Geiss and Pollock. It is the reasonable inferences to be drawn from the documents and testimony that, in this case, tells the tale in regard to whether there was substantial evidence to support the district court’s findings. The parties obviously attach different meanings to the settlement agreement. The Geiss letter referred to and attached Estates’ vision statement, which was to satisfy Residents’ requirements related to use and design restrictions, in that the restrictions would serve as the basis for the ultimate design. Although the vision statement indicated it was how Estates “visualized” the commercial area, the statement contained specific standards by Estates using mandatory language indicating that the design “covenants” would dictate “buildings which are compatible with nearby residential structures and limited to two story heights,” and further stating “buildings which ...” and against restrictions.” *Id.* Another was that the Court would “not read restrictions on the use and enjoyment of the land into the covenant by implication.” *Id.*

[65] We are not persuaded by this over-technical interpretation of the complex and drawn out proceedings. Estates was not denied the opportunity to present evidence or argument on the contractual issue. Estates does not claim that it was denied any such opportunity. Evidence was before the court, and the court could consider the evidence on any issue that was fairly litigated. The distinction Estates advances is, to us, one without a difference under the circumstances.

[66] We adhere to our substantial evidence review standards. “[W]hen considering a claim of insufficiency of the evidence, the appellate court resolves all disputes of fact in favor of the successful party and indulges all reasonable inferences in support of the prevailing party.” *Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” *Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990).

“[W]hen there is a conflict in the testimony, we defer to the trier of fact.” *Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33. In reviewing a substantial evidence claim, “[t]he question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.” *Las Cruces Prof’l Fire Fighters*, 1997-NMCA-044, ¶ 12. “Additionally we will not reweigh the evidence nor substitute our judgment for that of the fact finder.” *Id.* In reviewing a sufficiency of the evidence claim, the reviewing court views the evidence in the light most favorable to the prevailing party, and disregards evidence and inferences to the contrary. *Weidler v Big J Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089. While Estates’ position is arguable, it is not the only reasonable construction of the documents and testimony that is possible. We hold that there exists substantial evidence from which the district court could draw reasonable inferences to support its interpretation of the settlement agreement.

**RESIDENTS’ APPEAL**

[67] Residents complains that the district court erred in failing to include as binding and enforceable restrictive covenants running with the land all of the design and development standards discussed in the vision statement. Residents asserts that there can be no logical or legal distinction between the four specific restrictions the
court determined were binding and enforceable and the others in the vision statement. Residents states that paragraph 4 of the Geiss letter references the vision statement “in its entirety as being the restrictions” and states that the use and design restrictions in the vision statement make up a single set of standards. That is, the vision statement was a single document that established use, design, size, and scale standards for the development of the entire commercial area and, once the court determined the parties’ intent and that Residents had contract rights in regard to the design and development standards in the vision statement, “as a matter of law these rights extended to all design and development standards within the Vision Statement.’ Thus, in Residents’ view, there was no legal justification for not including all such standards in the court’s ruling as to binding and continuing restrictions running with the land to be recorded by Estates. To unbundle Residents’ rights, Residents argues, is illogical.

{70} This issue raises only questions of law, which we review de novo. See Strata Prod. Co. v. Mercury Exploration Co., 121 N.M. 622, 627, 916 P.2d 822, 827 (1996) (stating that the appellate court is deferential to facts found by the trial court but reviews conclusions of law de novo); Ferrell v. Allstate Ins. Co., 2007-NMCA-017, ¶ 7, 141 N.M. 72, 150 P.3d 1022 (stating that whether the court made a legal error is reviewed de novo), cert. granted, 2007-NMCCERT-001, 141 N.M. 164, 152 P.3d 151.

{71} The district court carefully chose to divide the restrictions into those that were “satisfied” by their incorporation into the master plan and those that “survived” their incorporation into the master plan.

22. The Court . . . finds that the majority of the enforceable contract rights in favor of [Residents] and place binding and continuing restrictions upon the future development of the Commercial Property which survived the approval and recording of the 1996 Masterplan.

The court obviously examined the fact that conditions became a part of the 1996 master plan. As Estates points out, a city-approved master plan such as the 1996 master plan serves “as a policy guide in the decision-making process” in land development proceedings. W. Bluff Neighborhood Ass’n v. City of Albuquerque, 2002-NMCA-075, ¶ 33, 132 N.M. 433, 50 P.3d 182, overruled in part on other grounds by Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806. The court also examined the Geiss and Gross letters and the vision statement, and concluded that the parties were agreeing to something beyond their reliance solely on how city planners would apply the master plan to a proposed development. The court appears to have resolved the confusing facts and opposite meanings attributed by the parties to those facts by distinguishing the more defined and specific covenants from the less defined and more conceptual covenants—the latter being incorporated into the 1996 master plan solely for administrative treatment, and the former constituting residual, enforceable contract rights that “survived” their incorporation in the master plan to become contractually binding on Estates and the land.

{72} We will not quarrel with the creative and, we think, reasonable manner in which the district court resolved the ambiguities and differences. This was a complicated property development case because of the intermixture of incorporation of design and use concepts in a master plan and statements as to specific restrictions in a private contract. The parties created the complexity and ambiguity, and the district court engaged the issues with deliberation, giving the parties full opportunity to present the evidence and argue their positions. How to decide the issues in this case was no easy task. It is likely that the case could have gone either way and that the result either way would have been supported by substantial evidence and law. As this case stands, the district court reasonably determined that the settlement agreement was ambiguous, and the court’s interpretation of the terms of the contract was reasonable and supported by substantial evidence. Residents has not convinced us through argument or any persuasive authority that the court erred in the distinction it made with respect to the restrictions.

III. The Rule 12-213(A)(3) Issue

{73} Residents attacks Estates’ brief for noncompliance with Rule 12-213(A)(3) NMRA by failing to include in the summary of proceedings the substance of the evidence bearing on the proposition the party is advancing. See id. Estates contends that it primarily advances the proposition that the court erred in denying its motion for summary judgment, and that Rule 12-213(A)(3) does not apply because it applies only when a party challenges “a verdict, judgment or finding of fact.” According to Estates, the rule applies only to that part of the court’s determinations that followed trial and involved findings of fact, and in that regard Estates argues that it has complied with the rule.

{74} Whether the rule applies to asserted error in denying summary judgment, and if it does, whether the evidence Estates sets out in its brief in chief complied with the rule, we do not see a reason for us to address the legal issue raised. We are satisfied that the substance of the evidence was sufficient for us to address the issues presented in this appeal.

CONCLUSION

{75} We affirm. The district court did not err in denying Estates’ motion for summary judgment based on res judicata on grounds of waiver and acquiescence. Nor did the district court err in its determinations with respect to restrictive covenants.

{76} IT IS SO ORDERED.

JONATHAN B. SUTIN, 
Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge
MONTGOMERY & ANDREWS
Is Pleased to Announce

J. Scott Hall has recently joined the Firm as Of Counsel. Mr. Hall practices in the Firm’s Natural Resources department. His practice is limited to oil and gas law. Mr. Hall is admitted to practice in New Mexico and Oklahoma, U.S. District Court, the U.S. Court of Appeals for the 10th Circuit and the U.S. Court of Claims.

MONTGOMERY & ANDREWS
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW
ESTABLISHED 1937

325 Paseo De Peralta
Santa Fe, NM 87501
(505) 982-3873

6301 Indian School Road NE, Suite 400
Albuquerque, NM 87110
(505) 884-4200

www.montand.com
Listening...the Key to Being a Trusted Advisor.

Tom Popejoy, SVP of the Wealth Management Group, says he begins and continues every relationship with his clients by asking questions and listening. Only after uncovering each client’s unique needs and concerns can he begin to offer specific solutions.

More than a financial consultant, Tom becomes a trusted advisor.

Be heard...call Tom today at 830-8106 to learn more about the benefits of the Wealth Management Group.

NEWMEXICO
BANK & TRUST

Unique Needs. Specific Solutions.

320 Gold Avenue SW | Albuquerque | 505.830.8100 | www.nmb-t.com

ALBUQUERQUE — RIO RANCHO — LOS LUNAS — SANTA FE — CLOVIS — PORTALES — MELROSE

ALBUQUERQUE JOURNAL

Albuquerque Journal Business Subscription

Have the Albuquerque Journal delivered directly to your office Monday through Friday.

6 mo. $70.50
1 yr. $141.00

Call today to subscribe 1-800-577-8683 or visit ABQjournal.com/offers

Be sure to mention or enter code: SBNMB

LAW OFFICES OF

ROBERT L. THOMPSON

Mediations
Arbitrations
Special Master

P.O. Box 27244
Albuquerque, NM 87125-7244
Phone (505) 681-4482
Fax (505) 243-0179
Email
robertlthompson@gmail.com

TRUST

...it’s the foundation of our relationship with our customers.

Thomas L. Popejoy
Senior Vice President
Wealth Management Group
505.830.8106
A POLYGRAPH GROUP
Specializing in Court Qualified Polygraph Examinations, Background checks and Interviewing

Offices in Albuquerque & Farmington
Or we can come to your location

505-891-4403 • apolygraphgroup@yahoo.com

MARTINEZ & HART, P.C.
Congratulates Steven Vogel as he opens his new office April 1, 2008, at 10400 Academy Rd. NE, #240, Albuquerque, NM 87111, (505) 293-8888. He is no longer “of counsel” to the firm of Martinez & Hart, P.C., but will continue accepting referrals in insurance coverage disputes as “of counsel” to The Revo Law Firm.

David Stotts
Attorney at Law

• Business Litigation
• Real Estate Litigation

505-242-1933

Mediation/Arbitration
Special Master
(Statewide)

Gary Don Reagan

* AV rated
* 42 years experience - both Plaintiff and Defendant
* Former President of the State Bar of New Mexico
Available in wrongful death, personal injury, municipal, governmental, insurance, employment, estate, commercial, business, real estate, and oil and gas disputes.

Reagan & Sanchez, P.A.
1819 North Turner, Suite G
Hobbs, NM 88240-3834
Phone: 575-397-6551
Fax: 575-393-2252
lgrean@nm.net

Karen S. Mendenhall
MEDIATION
Civil Litigation Matters
(505) 888-4300

www.eavesandmendenhall.com

PRE-EMPLOYMENT SCREENING
Full Screening Services
R. Miller & Associates, LLC
Licensed Private Investigators
Since 1982 - NM PI Lic# 676
505-345-4100 rmlocate@aol.com

In need of legal research, but do not want to hire another associate?
THE BEZPALKO LAW FIRM
Legal Research and Writing
(505) 341-9353
www.bezpalkolawfirm.com

Karen S. Mendenhall
MEDIATION
Civil Litigation Matters
(505) 888-4300

www.eavesandmendenhall.com

Pamela Crane
Intellectual Property,
Internet & Technology Law
505-217.5258 www.pcrane.com
R. LAR THOMAS
B.S. Animal Science/International Agriculture
J.D. with over 17 years experience
Certified Equine and Livestock Appraiser

505-450-7673
Consultant/Expert Witness for equine and livestock matters.
Dissolution, liquidation and liability cases considered.

IT’S A TOUGH JOB
BUT SOMEBODY’S GOTTA DO IT.

Every week, New Mexico Business Weekly delivers the latest local business news, tips and insight you won’t find anywhere else. Put the New Mexico Business Weekly to work for you.

You’re Hired! Subscribe today by faxing the form below or by calling 505-348-8318.
You can also order online at www.bizjournals.com/subscribe/newmexico/.

☐ YES! I want New Mexico Business Weekly.
☐ 3-year subscription (156 issues*) at $179 (Best value!) ☐ 1-year subscription (52 issues*) at $79
Name ____________________________ Company ____________________________
Address __________________________ City ______________ State ___ Zip ____________
Phone ( ____ ) ___________ Email __________________________________________

* Includes the BOOK OF LISTS and free online access to print content. Fax your order to: 1.505.998.5764
116 Central Ave. SW, Suite 202, Albuquerque, NM 87102

BOOK OF LISTS
Subscribe today by faxing the form below or by calling 505-348-8318.
(156 issues*) $179
MONEY BACK GUARANTEE: You may cancel at any time and receive a refund for all unmailed issues.

Attorney
Sutin Thayer & Browne seeks an attorney with between four and eight years experience in estate planning to join our Albuquerque office. Additional experience in employee benefits and commercial transactions preferred. Applicants must be licensed in New Mexico. All replies will be kept confidential. Please send a letter of interest, resume, writing sample and transcript to Recruiting Coordinator, Sutin Thayer & Browne, P. O. Box 1945, Albuquerque, NM 87103 or email dsh@sutinfirm.com or fax to 505-888-6565.

Experienced Attorney
General civil practice law firm with offices in Santa Fe and Albuquerque seeks experienced attorney for either office. Background in any of the following areas advantageous: litigation, family law, business, real estate, corporate and estate planning. Position available full-time has full benefits including health & disability insurance, and simple IRA with firm contribution. Part-time work may also be available. Firm is in growth mode, and flexibility and ability to take on new practice areas desirable. Email resume and salary requirements to bsutherland@jaygoodman.com.

Attorneys
White, Koch, Kelly & McCarthy, P.A. seeks an attorney with an established practice to join the firm “of counsel” and share low overhead, excellent partners, staff and location. Also seeking an associate with 3-5 years experience, to work with attorneys in real estate and commercial litigation/transaction and water/utility law. Send resume to ajwolf@wkkm.com

Fifth Judicial District Court
Notice to Receive Bids
In accordance with the appropriate sections of the State of New Mexico Procurement Code, the Fifth Judicial District Court, Counties of Chaves, Eddy and Lea, is accepting proposals (bids) from licensed New Mexico attorneys or firms to furnish professional services for indigent persons in each county by serving as a (1) guardian ad litem, or (2) attorney for conflict custodian(s) or (3) attorney for conflict guardian ad litem, or (2) attorney for primary respondent(s), or (3) attorney for conflict custodian(s) for the FY2009, beginning July 1, 2008 and ending June 30, 2009. Bids are to be sealed and marked “BID” on the envelope. Bids are due in the Court Administrator’s Office by 5:00 P. M., on Friday, May 16, 2008. For further information on case statistics, costs, contract requirements, bid and resume information requested, contact the Court Administrator’s Office, P. O. Box 1776, Roswell, NM 88202-1776, or 505-622-2565.
Assistant City Attorney
The City of Farmington, New Mexico is currently hiring for Assistant City Attorney. The hiring range for this position is $4,221.51 - $5,002.20 per month. This position performs a variety of complex, high level administrative, technical and professional work in prosecuting crimes, conducting civil lawsuits, drawing up legal documents, advising city officials as to legal rights, obligations, practices other phases of applicable local, state and Federal law. Qualifications include graduation from an accredited law school with a Juris Doctor degree in law. A license to practice law in New Mexico; member in good standing of the state Bar Association. The City of Farmington is a vibrant and progressive community dealing with continued, planned growth. Recreational opportunities are abundant in and around Farmington. The moderate sunny climate makes an ideal home for the outdoor enthusiast. Hiking, camping, biking, and snow skiing are just some of the activities that are within easy reach; not to mention the world class fly fishing and our nationally acclaimed golf course. Farmington is a culturally diverse community of approximately 43,000 residents and serves as a major retail trade area for the entire Four Corners area. For an application contact the City of Farmington, Human Resources, 800 Municipal Drive, Farmington, NM 87401, 505-599-1132, email personnel@fmtn.org, or visit our website at www.farmington.nm.us. An Equal Opportunity Employer, M/F.

Natural Resources Attorney
Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 5-7 years experience in natural resources, water and environmental law. Prefer New Mexico practitioner with strong academic credentials and broad natural resources law background. Firm offers excellent benefit package. Salary commensurate with experience. Please send resume, references, law school transcript and a writing sample to Ann Mackey, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Senior Trial Attorney
Tenth Judicial District Attorney’s Office
Senior Trial Attorney wanted for employment with the Tenth Judicial District Attorney’s Office, which includes Quay, Harding and De Baca Counties. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. (Salary is up to $52,000.00, depending on experience). Would consider out of state licensed attorney or newly licensed New Mexico attorney for position. Start date for position is negotiable. Resumes can be faxed to Tenth Judicial District Attorney Ronald W. Reeves at (505) 461-3966, or mailed to P.O. Box 1141, Tucumcari, NM 88401. The Tenth Judicial District Attorney’s office is an Equal Opportunity Employer.

Assistant City Attorney
Full Time/Hiring Range: $51,958.00-$64,947.00 plus benefits
Salary Range: $51,958.00-$77,936.00 (DOE)
Open until filled
The City of Las Cruces has an opening for an Assistant City Attorney. This position primarily prosecutes DWI and related proceedings in Magistrate and District Courts. Excellent opportunity for jury trial experience. Additional Job Functions: Represents the City of Las Cruces in a variety of legal proceedings at the local, state and federal levels. Attends meetings of municipal bodies and provides legal advice to City staff by interpreting laws, rulings, and regulations. Experience: Some experience as a law clerk or practicing lawyer or a combination of both. Education: Juris Doctor Degree. Licenses/Certification: Member of the New Mexico State Bar Association and licensed to practice law in the state of New Mexico; valid NM Class D driver’s license is desirable. A complete job description and the application form is available at www.las-cruces.org.

Experienced Litigator
For a successful and busy southern NM law practice. Excellent salary and benefit package. Great working environment. Ownership potential. Business, Real Estate and/or Municipal experience preferred. Send resume with professional and personal references to: Office Manager, 103A Metz Drive, Ruidoso, NM 88345.

Senior Trial Attorney - Valencia County
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Senior Trial Attorney in the Valencia County Office, Belen, NM. This position requires handling of a full-time felony caseload composed of murders, rapes and other serious crimes. Experience in death penalty cases is preferred. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Carmen Gonzales, Human Resources Coordinator, 333 Rio Rancho Blvd. Suite 201, Rio Rancho, New Mexico 87124, or via E-Mail to: CGonzales@da.state.nm.us. Deadline for submission of resumes: Open until position is filled.

Real Estate Transactional Attorney
Premier New Mexico Commercial Real Estate Development & Management Company located in Albuquerque is seeking an experienced in-house Real Estate Transactional Attorney. Primary responsibilities include sophisticated commercial lease negotiating and drafting for a broad range of national tenants, ground leases, brokerage agreements, easement and CC&R documents, construction contracts, basic purchase and sale agreements, and some loan documentation. The ideal candidate will have a minimum of five years of complex commercial transactional experience, strong academic background and steady work history. Unusual opportunity with very strong future for a motivated, career oriented individual. Resumes can be sent to: dountas@goodmanrealty.com

Assistant District Attorney
The Second Judicial District Attorney’s office in Bernalillo County is looking for both entry-level and experienced prosecutors. Qualified applicants may be considered for positions in Violent Crimes, Crimes Against Children, Metropolitan Court, and other divisions in the office. Salary and job assignments will be based upon experience and the District Attorney Personnel and Compensation Plan. Interested applicants should mail/fax/e-mail a resume and letter of interest to Jeff Peters, Human Resources Director, District Attorney’s Office, 520 Lomas Blvd., N.W., Albuquerque, NM 87102. Fax: 505-841-7245. E-mail: jepeters@ da2nd.state.nm.us. Resumes must be received no later than 5:00 pm on Friday April 25, 2008 to be considered.
Legal Assistant/Legal Secretary
Legal Assistant/Legal Secretary needed for small law firm. Legal experience required; bankruptcy experience a plus. Microsoft Outlook and experience calendaring a plus. You must have reliable transportation and current auto insurance. You must be self motivated, organized, detail-oriented, and be willing and able to work fast. Salary DOE. Benefits offered. Please send cover letter, references, resume, salary requirements and history to: Puccini & Meagle, P.A., Attention: Laura Peek, PO Box 30707, Albuquerque, NM 87190-0707.

Associate Attorney
Busy insurance defense firm is interested in hiring an attorney with at least five years experience in insurance defense litigation. Salary commensurate with experience and qualifications. Excellent benefits. Please send fax or email resume to: 6000 Indian School NE, Suite #200, Albuquerque, NM 87110 Fax (505) 883-3232. Email: archibeque@obrienlawoffice.com

Executive Director
The New Mexico Women’s Justice Project, Inc., a non-profit advocacy organization focusing in a legal office and professional certification. Highly professional Paralegal you can perform multi-tasks in a high volume, fast paced practice. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd, NE, Albuquerque, NM 87113 or email to fruiz@ylawfirm.com. No phone calls please.

Administrative Assistant Support Services
The Litigation & Adjudication Program (LAP) of the New Mexico Office of the State Engineer (OSE) is looking for an individual with excellent paralegal and administrative support skills to provide the agency’s Chief Counsel expert administrative assistant support services. The successful candidate will possess exceptional organizational and legal office administration skills, superior oral and written communications abilities, and be an accomplished legal researcher. Prefer at least 5 years experience in a legal office and professional certification. Please submit a resume to Joe Schleicher, LAP Deputy Director, P.O. Box 25102, Santa Fe, NM 87504-5102

Litigation Legal Secretary
The Rodey Law Firm is accepting resumes for litigation legal secretary to support attorney in commercial litigation practice. Will also assist attorney working in real estate practice. Position requires minimum of five years litigation experience in law firm setting. Excellent organizational skills needed. Must demonstrate initiative, resourcefulness, flexibility, attention to detail, with ability to assess priorities. Responsible for calendaring court deadlines. Heavy workload, some overtime necessary. Superior technical skills required with advanced knowledge of WordPerfect 9.0 and MS Word. Firm offers comprehensive benefit package and competitive salary. Please send resume to hr@rodey.com or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103. EOE Employer.

Immediate Position for an Experienced Santa Fe Paralegal
An Immediate position for an Experienced Santa Fe Paralegal with a small, very established (25yrs) Santa Fe Law Firm is now available. We are a small Santa Fe law firm — growing slowly — and we need a bright, conscientious, hardworking, energetic, mature, meticulous and experienced (5+ years) Paralegal. You will have very substantial client contact, you must have great ‘people skills’. Excellent writing, communication and organizational skills also required. We pride ourselves on our professionalism, and as a professional Paralegal you should have the same pride in your work and job as we do. Our firm is computer intensive, informal, non-smoking and a fun place to work. We are all on the same team, and we want another ‘team player’. Current law firm experience required. An appropriate educational and professional background is necessary. Highly Competitive Compensation Package. Excellent annual salary plus substantial monthly bonus, 100% paid Medical/Hosp; parking; paid holidays + sick and personal leave, and other exceptional benefits based upon tenure. All responses are strictly confidential. Please send us your Resume with a cover letter please to P.O. Box 4817, Santa Fe, NM 87502-4817.

Full Time Legal Secretary
Established medium-sized law firm seeks full time legal secretary. Applicants should have 3 years legal experience. Workers compensation experience helpful. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd, NE, Albuquerque, NM 87113 or email to fruiz@ylawfirm.com. No phone calls please.

MINOR SETTLEMENT GAL SERVICES
Alysan Boothe Collins is accepting cases as Guardian Ad Litem in Minor Settlement Cases. References are available. For information, please contact Alysan at Collins & Collins, P.C. at (505) 242-5958 or alysancollins@comcast.net.

OFFICE SPACE
Office Space Available June 1st
Attractive Santa Fe professional office in new bldg., near hospital, shared conf. rooms, kitchen, patio, other facilities $600 month. Contact Amelia Martinez at 505-989-1434.

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.

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
1-40 at Rio Grande. Please call 866-698-7435 for details.

NEW Office Space for Lease
Business Office Condo near Jefferson/McLeod NE; Large office 179 sq. ft., and small office 100 sq. ft. Utilities included. Lease includes use of reception area, conference room, bathroom w/shower and kitchen. Easy access to I-25. Call 883-8787.

Shared Office Space Available in Uptown Area
Building is 2,850 sq feet with 1400 sq feet available (or half). Other tenant is a CPA firm established in 1990. High quality building finishes, breakroom, file room, 2 restrooms (women and men), plenty of parking, nicely decorated reception room. For more information call Nick at 884-8744.

Downtown Office for Lease/Sale on 5th St
1200sf @ $1250/mo close to everything. Joe Olmi (505) 620-8864
Ethics Advisory Opinions

View ethics advisory opinions and topical index on the State Bar Website,* www.nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

Easy to Use

- Select Attorneys/Members/Member Services/Ethics Advisory Opinions.

More Resources

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

* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
WE’VE SPROUTED A NEW BEAN

WE ARE EXCITED TO ANNOUNCE OUR 2ND ALBUQUERQUE LOCATION

BEAN & ASSOCIATES, INC.
PROFESSIONAL COURT REPORTING & VIDEOCONFERENCE CENTER

Dedicated, professional, certified reporters committed to quality and service
Having over 30 years of experience, we proudly offer the following services:

- Full litigation support, including in-house Videography
- Real-Time, E-Transcripts,™ and other digital formats
- Condensed Transcripts and Word Index
- LiveNote™
- Summation™
- CaseView™
- Video/Transcript synchronization
- Domestic and International Videoconferencing utilizing ISDN, IP and T-1
- Conference rooms of all sizes
- Complimentary refreshments
- Near major restaurants, hotels, and airports

Main
500 Marquette NW #280
Albuquerque NM 87102
505-843-9494

Hyatt Professional Tower
201 Third NW #1830
Albuquerque NM 87102

Santa Fe
119 East Marcy #110
Santa Fe NM 87501

www.info@litsupport.com - 1-800-669-9492 - www.beanandassociates.com