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Special Insert:
New Mexico Lawyer

www.nmbar.org
2008 Ramo Lecture on International Law and Justice
"First Peoples and Human Rights, a South Seas Perspective"
Presented by the Right Honorable Dame Sian Elias
Chief Justice of the Supreme Court of New Zealand
Thursday, October 23, 2008, 5:00 p.m.
Reception immediately following sponsored by Modrall Sperling law firm
UNM School of Law, 1117 Stanford NE, Albuquerque
1.0 General CLE Credit - $20 in advance or $25 at the door (free if not attended for credit)
Free parking in the Law School “L” lot

Justice Elias will explore, through the framework of human rights, why addressing indigenous claims and interests continues to challenge legal systems in which first peoples are a minority. The Chief Justice will compare contemporary issues faced by New Zealand’s native Māori people with those faced by the first peoples of the U.S., Canada, Australia and the Pacific.

A native of England, Dame Sian earned her LL.B. with honors at Auckland University, and a Master’s in jurisprudence at Stanford Law School. She practiced in both the private and public sector and was appointed Queen’s Counsel in 1988, a prestigious honor in Commonwealth countries. She earned great renown for her representation and defense of New Zealand’s indigenous Māori people in treaty claims and litigation concerning fisheries, land transfers, elections, broadcasting, and other matters. In 1995, Elias was appointed to New Zealand’s High Court. She became Chief Justice in 1999 with the goal to support a judiciary that was both rigorous and open, holding to what was best in its tradition.

The Ramo Lecture on International Law and Justice was established in 2004 through a gift from Roberta Cooper Ramo and Dr. Barry Ramo. Its purpose is to bring internationally distinguished jurists to UNM to enrich the intellectual life of the entire campus and community, with a special emphasis on students.

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

Name ____________________________________________________________ NM Bar #________
Street ____________________________ City/State/Zip ________________________________

VISA ___ MC ___ Card # __________________________ Exp. Date ________ Total: $________

Signature ____________________________ Check enclosed ___ (payable to UNM School of Law)

Attn: Claire Conrad, UNM School of Law, MSC11-6070, Albuquerque, NM, 87131-0001
Phone: 505-277-0080 Fax: 505-277-4165 http://lawschool.unm.edu/
REQUEST
If you would like to receive the Bar Bulletin as a PDF via e-mail, contact State Bar Systems Manager Chris Baum at address@nmbar.org to subscribe to this new and convenient service. Please be sure to provide your email address in case the email address is not on file.

RECEIVE
Members who opt-in will receive both paper and electronic copies of the Bar Bulletin for one month. After the one-month period, you will receive only the electronic copy via e-mail, unless you tell us to cancel the electronic subscription.

SYSTEM RECOMMENDATIONS
The State Bar recommends that you have cable or satellite connections so the publication will download in a matter of seconds. If you are using a dial-up connection, downloading should take between one and five minutes.

DEADLINE TO OPT-IN
Members requesting the electronic format can subscribe any Wednesday at 5 p.m., one week prior to the starting publication date.
24th ANNUAL FAMILY LAW INSTITUTE - High Conflict Divorces

Friday and Saturday, October 17-18, 2008 • State Bar Center, Albuquerque
10.0 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits
Co-Sponsor: Family Law Section

☐ Standard $339  ☐ Family Law Section Member, Government, Legal Services, Paralegal $309

FRIDAY OCTOBER 17, 2008
8:25 a.m. Introductory Remarks
Jon A. Feder, Esq., Atkinson & Kelsey P.A.
Chair, Family Law Section

8:30 a.m. High Conflict Divorces (Part 1)
William Eddy, Esq., L.C.S.W.
High Conflict Institute, San Diego, California
Founding Fellow, International Academy of Matrimonial Lawyers
Part 1: High Conflict Personalities: DSM-IV criteria for Borderline, Narcissist, Histrionic and Antisocial Personality Disorders, and how they appear in Family Court cases, including how they interact with their children in general and how they involve them in custody and visitation disputes.

10:00 a.m. Break

10:15 a.m. High Conflict Divorces (Part 2)
William Eddy, Esq., L.C.S.W.
Part 2: Managing High Conflict Clients: 10 tips for handling these clients to help them reach agreements, be more reasonable in court, or at least reduce the conflict. Methods will address managing clients and managing opposing parties in litigation, negotiation, and collaborative divorce.

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

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

1:00 p.m. High Conflict Divorces (Part 3)
William Eddy, Esq., L.C.S.W.
Assessing True and False Reports of Abuse: High conflict clients regularly distort information about all subjects, and many are abusive. Factors will be considered which assist in distinguishing among reports that are true, false but honestly believed, and knowingly false. Teamwork and Professional “Splitting” in handling these highly emotional cases will be addressed, as well as the issue of “Confirmatory Bias.”

2:15 p.m. Break
2:30 p.m. High Conflict Divorces (Part 4)
William Eddy, Esq., L.C.S.W.
Alienation, Child Sexual Abuse and Domestic Violence: These are three of the most high conflict issues in family law cases. They will be addressed in terms of the long-term conscious and unconscious behavior of parents with personality disorders or traits. Child alienation will be addressed as a family systems problem existing well before the divorce. Child sexual abuse will be addressed in terms of personality-disordered behavior. Different types of domestic violence (intimate partner violence) will be addressed with different approaches for court orders and treatment.

4:00 p.m. Ethical Considerations in High Conflict Divorces (1.0 E)
Virginia Ferrara, Chief Disciplinary Counsel

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

SATURDAY OCTOBER 18, 2008
8:30 a.m. Interplay of Court Systems – Domestic Violence, Criminal and Domestic Relations
Daniel A. Ivey-Soto, Esq.

10:30 a.m. Break

10:45 a.m. Dealing with Opposing Counsel in High Conflict Divorces (1.0 P)
Samuel Roll, Ph.D.

11:45 a.m. Lunch (provided at the State Bar Center (45 min.)

12:30 p.m. Working with CYFD where Abuse/Sexual Abuse is Charged
Oneida L’Esperance, Esq., Regional Managing Attorney, Children, Youth and Families Department

2:30 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 _______________________________________________________________________________________________
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Professionalism Tip

With respect to the courts and other tribunals:

Before dates for hearings or trials are set, or immediately after dates have been
set, I will verify the availability of participants and witnesses, and I will also notify
the court (or other tribunal) and opposing counsel of any problems.

Meetings

October
  6  Attorney Support Group, 5:30 p.m., First United Methodist Church
  8  Children’s Law Section Board of Directors, noon, Juvenile Justice Center
  9  Intellectual Property Section Board of Directors, noon, Lewis and Roca LLP
  9  Public Law Section Board of Directors, noon, Risk Management Div., Santa Fe
  11 Ethics Advisory Committee, 10 a.m., State Bar Center
  13 Taxation Section Board of Directors, noon, via teleconference

State Bar Workshops

October
  16  Lawyer Referral for the Elderly Workshop 10:30 a.m., Presentation
      1:00 p.m.–3:00 p.m., Clinics
      Los Lunas Senior Center
  22  Consumer/Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
  23  Consumer/Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

November
  12  Estate Planning/Probate Workshop 6 p.m., State Bar Center, Albuquerque

Albuquerque and Las Cruces Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney.

Cover Artist: Lynn Hartenberger works in dry pastel and oil from her studio/home in Placitas. The subjects of her paintings are primarily landscapes of the West, but she also paints still lifes. Visit her Web site at lynnhartenberger.com. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
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>
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<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits filed with the court, in adoptions, children’s court, criminal, civil, domestic, and probate cases</td>
<td>1973 to 1985</td>
<td>Nov. 28</td>
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<tr>
<td>(505) 827-4735</td>
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<tr>
<td>2nd Judicial District Court</td>
<td>Exhibits filed in probate, guardianship, and conservatorship cases</td>
<td>1999–2008</td>
<td>Oct. 30</td>
</tr>
<tr>
<td>(505) 841-7596/5452</td>
<td>Tapes filed in criminal cases</td>
<td>1981–1982</td>
<td>Oct. 17</td>
</tr>
<tr>
<td>(505) 841-6717</td>
<td></td>
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<tr>
<td>9th Judicial District Court</td>
<td>Exhibits filed in domestic relations cases</td>
<td>1998–2005</td>
<td>Nov. 3</td>
</tr>
<tr>
<td>(575) 762-9148</td>
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<td></td>
<td>Unmarked exhibits, oversized poster boards/maps and diagrams filed with the court in criminal, civil, children’s court, domestic, competency/mental health, adoption and probate cases.</td>
<td>1952–2006</td>
<td>Dec. 18</td>
</tr>
<tr>
<td></td>
<td>Tapes filed in criminal, civil, children’s court, domestic, competency/mental health, adoption and probate cases</td>
<td>1975–2006</td>
<td>Dec. 18</td>
</tr>
<tr>
<td>(575) 356-4463</td>
<td></td>
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<tr>
<td>10th Judicial District Court</td>
<td>Tapes in criminal cases</td>
<td>1989–1993</td>
<td>Dec. 10</td>
</tr>
<tr>
<td>(575) 461-2764</td>
<td>Tapes in juvenile cases</td>
<td>1988–2001</td>
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<td>Tapes in grand jury cases</td>
<td>1997–2001</td>
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<td>Tapes in incompetency, mental health and competency cases</td>
<td>1989–2001</td>
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<td>Tapes in adoption cases</td>
<td>1992–2001</td>
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<td>Tapes in probate cases</td>
<td>1988–2001</td>
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- Board of Bar Examiners ................................................................. 3
- MCLE .......................................................................................... 1
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- Code of Judicial Conduct .............................................................. 1
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  (1 metro court judge, 1 district court judge)
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  (1 metro court judge, 1 magistrate court judge, 1 tribal court judge)
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Attorneys interested in volunteering their time on any of these committees/boards may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters/resumes is Oct. 24. Interested attorneys should describe why they believe they are qualified and shall prioritize no more than three committees of interest.
**Court News**

**N.M. Supreme Court Board Governing the Recording of Judicial Proceedings**

**Reporter Monitor Problems**

The Supreme Court Board Governing the Recording of Judicial Proceedings ensures that outstanding reporting/recording services are provided to members of the State Bar and to hearing agencies. If any user of recording services encounters a reporter/monitor problem, the Board requests counsel notify it with the following information: the date and type of hearing, the person or service that recorded the hearing and the nature of the problem. E-mail notifications to Board Administrator Linda McGee, ccr@ccrboard.com; mail to PO Box 92648 Albuquerque, NM 87199-2648; or call (505) 821-1440.

**N.M. Court of Appeals Judicial Nominating Commission**

Forty applications have been received in the Judicial Selection Office as of 5 p.m., Sept. 26, for the judicial vacancies on the New Mexico Court of Appeals due to the retirements of the Honorable Ira Robinson and the Honorable A. Joseph Alarid and the resignation of the Honorable Lynn Pickard. The Judicial Nominating Commission will meet at 9 a.m., Oct. 14–15, at the Supreme Court Building, Santa Fe, to evaluate all applicants for this position. The meeting is open to the public on both days. Those wishing to make public comment are requested to be present at the opening of the first day of the meeting. The names of the applicants in alphabetical order are:

- Lillian G. Apodaca
- Manuel I. Arrieta
- Honorable Gerald E. Baca
- Kristina Bogardus
- William H. Brogan
- Honorable Carl J. Butkus
- Sophie I. Cooper
- Thomas L. Dunigan
- John E. Farrow
- Allen R. Ferguson
- Emily A. Franke
- Caren I. Friedman
- Harvey B. Frauman
- Honorable Timothy L. Garcia
- Honorable Gregory D. Griego
- Sandra A. Grisham
- Sue A. Herrmann
- Amme M. Hogan
- James C. Jacobson
- John J. Kelly
- G. T. S. Khalsa
- Sheila Lewis
- Lindsay A. Lovejoy, Jr.
- Andrew S. Montgomery
- Dennis P. Murphy
- Paul R. Ritzen
- Honorable Robert E. Robles
- Andrew G. Schultiz
- Robert L. Schwartz
- John L. Sullivan
- Steven S. Suttle
- Nathaniel V. Thompkins
- Daniel P. Ulbricht
- Henry R. Valdez
- Honorable Linda M. Vanzi
- Susan O. Weckesser
- Elliott L. Weinreb
- Norman E. Weitz
- Duff H. Westbrook
- Jane B. Yohalem

**First Judicial District Court Criminal Law Brown-Bag Meeting**

The 1st Judicial District Court Criminal Law Bench and Bar will have a brown-bag meeting at noon, Oct. 14, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim in the Criminal Division, (505) 827-5047.

**Second Judicial District Court Amended Announcement of Vacancies**

Two vacancies on the 2nd Judicial District Court will exist in Albuquerque as of Jan. 1, 2009, upon the resignation of the Honorable Richard J. Knowles and the expiration of the term of the Honorable Ernesto J. Romero.

The chair of the 2nd Judicial District Judicial Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at 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., Oct. 24.

**State Bar Section Elections 2008**

Section elections have begun. Members of any of the 19 State Bar practice sections interested in obtaining a position on any of the boards of directors should visit www.nmbar.org and select About Us/Sections to view the open positions and contact information for the nominating committee chair. Candidates should be prepared to submit a three-to-five sentence biography and should contact the nominating committee chair by Oct. 10.

Applications received after that date will not be considered.

The Judicial Nominating Commission will meet 9 a.m., Nov. 13, at the County Courthouse, 400 Lomas NW, Albuquerque, to evaluate all applicants for this position. The meeting is open to the public.

**Family Court Meeting**

All family law practitioners are invited to attend the Family Court judges/attorneys’ meeting at noon, Oct. 6, 3rd Floor Conference Room, Bernalillo County Courthouse, 400 Lomas NW, Albuquerque.

**State Bar News**

**Attorney Support Group**

- Afternoon groups meet regularly on the first Monday of the month: Oct. 6, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month: Oct. 20, 7:30 a.m.

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 Spanish Referrals**

The Bankruptcy Law Section board of directors has recently created a brochure in English and Spanish on filing bankruptcy in New Mexico. Before the Spanish version is distributed to the public, it is imperative that we find bankruptcy attorneys who speak Spanish. Contact Marilyn Kelley, mkelley@nmbar.org or (505) 797-6048, at the State Bar if you are able to take referrals.
Meeting Summary
The Board of Bar Commissioners met on Sept. 12 at the State Bar Center. Action taken at the meeting follows:

- Approved the July 17 meeting minutes;
- Accepted the July 2008 financials and executive summaries;
- Reviewed the accounts receivable aging report as well as the directors’ travel reimbursements and credit card file;
- Approved maintenance to the Bar Center to repair the stucco on the east side of the building at a cost of approximately $2,000;
- Approved the 2009 Budget Worksheet;
- Approved refinancing the Bar Center to cover the current mortgage on the building, accounting software, teleconferencing equipment, and previously purchased building and computer upgrades;
- Reviewed the Lawyers Professional Liability Committee’s recommendation and proposed Rule 16-104(C) regarding disclosure of professional liability insurance and formed a committee to address the Board’s concerns for the LPL Committee to incorporate into the rule;
- Pursuant to the sunset provision in the State Bar Bylaws, continued the Committee on Diversity in the Legal Profession, Law Office Management, and Lawyers Professional Liability committees; the Bankruptcy Law, Employment and Labor Law, Taxation and Trial Practice sections; retired the Quality of Life Committee and the Commercial Litigation Section; and continued the Criminal Law Section for one year with conditions;
- Approved the Natural Resources, Energy and Environmental Law Sections’ request to amend its bylaws regarding student membership and denied the section’s request to amend its bylaws to allow for an increase in their carryover funds at year-end;
- Approved the Business Law Section’s request to amend its bylaws to allow the chair to serve for more than one year;
- Provided thirty days’ notice of a bylaw amendment to Article II, Section 2.2, Inactive Status Member, to provide the Bar Bulletin to inactive members free of charge electronically or a hard copy upon payment of a publication fee;
- The 2009 officers were elected by acclamation as follows: Hans William Voss, Secretary-Treasurer; Jessica Perez, Vice President; and Steve Shanor, President-elect;
- Discussed the unauthorized practice of law legislative effort and referred it to the Client Protection Fund Commission;
- Reported that the Know the Law Before the Law Knows You video and information for teens and young adults has been distributed to all New Mexico schools;
- Received the 2009 meeting dates as follows: Feb. 27, May 8, July 9 (in conjunction with the Annual Meeting in Pojoaque), Sept. 11, and Dec. 4;
- Received the 2008 Board of Bar Commissioners election schedule for eight positions on the Board; nomination petitions are due Oct. 17 and the ballots will be mailed to the membership Oct. 31;
- Received an update from the Bar’s general counsel on pending litigation;
- Approved the governance section of the Bar’s Strategic Plan;
- Approved amendments to the Family and Medical Leave Act of the Employee Handbook to clarify that any prior years’ frozen sick leave and PTO will run concurrently with the FMLA leave; and
- Received the ABA Operational Assessment Report of the State Bar’s programs and operations; the directors will review the report and bring any recommended policies to the Board for approval.

Note: The minutes in their entirety will be available on the State Bar’s Web site (www.nmbar.org) following Board approval at the Oct. 24 meeting.

Business Law Section
Business Lawyer of the Year Award
Since 2002, the Business Law Section has presented the annual Business Lawyer of the Year Award to a lawyer who has made significant contributions to the practice of business law in New Mexico. Past recipients have been Robert J. Desiderio (2002), Graham Browne (2003), John (Jack) P. Burrton (2004), Charles L. Moore (2005), James J. Widland (2006) and Theodore Parnall (2007). The award is presented during the section’s annual meeting and reception, which will be from 5 to 7 p.m. Nov. 19, at the Albuquerque Country Club, 601 Laguna Blvd. SW, Albuquerque. Hors d’oeuvres will be served. Submit nominations for the 2008 award by Oct. 24 to Christine Morganti, PO Box 92860, Albuquerque, NM 87199, fax (505) 828-3765; or e-mail cmorganti@nmbar.org.

Employment and Labor Law Section
Annual Meeting and CLE
The Employment and Labor Law Section will hold its annual meeting at 1 p.m., Oct.
10, in conjunction with Employment and Labor Law Update with Employee Free Choice Act at the State Bar Center. Agenda items should be sent to Chair Greg Williams, gwilliams@dineslaw.com or (505) 889-4050. The cost of the CLE program is $199; $169 for section members, government and legal services attorneys and paralegals. Lunch will be provided and attendees will earn 5.7 general CLE credits. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Family Law Section Annual Meeting and CLE
The Family Law Section will hold its annual meeting at noon, Oct. 17, in conjunction with the 24th Annual Family Law Institute. All section members are encouraged to attend. Agenda items should be sent to Chair Jon Feder, jaf@atkinsonkelsey.com or (505) 883-3070. The cost of the CLE program is $339; $309 for section members, government and legal services attorneys and paralegals. Lunch will be provided. See the “CLE At-a-Glance” insert in the Aug. 25 (Vol. 47, No. 35) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Financial Planning Workshops
Free for Members, Staff, Law Students and Faculty
The third in a series of four workshops presented by the New Mexico Project for Financial Literacy will be held from 6 to 7 p.m., Oct. 16, at the State Bar Center. The workshop is for those in their 40s and older, particularly couples, who may not have thought much about some of the lifestyle aspects of retirement. This workshop asks provocative questions and is designed to help people better envision the nonfinancial as well as the financial aspects of retirement. R.S.V.P. by Oct. 15 to Chris Morganti, cmorganti@nmbar.org or (505) 797-6028, so that a sufficient number of handouts may be prepared.

The final workshop will be held Oct. 30 and is for those in or on the verge of retirement. It includes information about Social Security and Medicare as well as decumulation strategies for retirement income. The workshop will also cover sophisticated strategies for managing retirement funds for those who may live 30 or 40 years after retiring.

International and Immigration Law Section CLE Program
The International and Immigration Law Section, the Children's Law Section, and the Criminal Law Section are co-sponsoring the first annual CLE program focused on the intersections of immigration law and each of the sections' respective fields and the resulting challenges of representing immigrant clients. Practicing Law on the Border: The Challenges of Immigrant Representation will take place Oct. 10 at the State Bar. The cost of the CLE program is $229; $199 for section members, government and legal services attorneys and paralegals. Lunch will be provided. See the “CLE At-a-Glance” insert in the Aug. 25 (Vol. 47, No. 35) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

A silent auction that will fund the UNM School of Law service learning opportunities, aimed at improving the representation of indigent immigrants in New Mexico, will also be held.

The section will also hold its annual meeting at 12:30 p.m., Oct. 10. All section members are encouraged to attend. Agenda items should be sent to Chair Jennifer Landau, jlandau@dmrs-ep.org or (505) 797-6049.

Paralegal Division Monthly Brown-Bag CLE for Attorneys and Paralegals
The Paralegal Division invites members of the legal community to bring a lunch and attend Prosecuting Domestic Violence Cases in New Mexico, presented by Rosemary Traub, assistant district attorney for Sandoval County. The program will be held from noon to 1 p.m., Oct. 8, at the State Bar Center and is approved for 1.0 general CLE credit for attorneys and paralegals. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys, $15 for paralegals, and $10 for Paralegal Division members. For more information, contact Cheryl Passalaqua, (505) 872-7469 or Evonne Sanchez, (505) 222-9356.

Technology Committee Using an Apple Computer In Your Legal Practice For Attorneys, Paralegals, and Staff
The Technology Committee will hold a free discussion from 5 to 6 p.m., Oct. 8, at the State Bar Center. The discussion will focus on the use of Macs by attorneys. This introductory presentation will cover the difference between Windows and the Mac operating system, legal software written for the Mac, and much more. A representative from the Apple Store will show the different types of Macs that are available. Attorneys, paralegals, and support staff are all invited to attend. Reservations should be made by Oct. 7 with Tony Horvat, membership coordinator, thorvat@nmbar.org or (505) 797-6033.

Trial Practice Section Annual Meeting and CLE
The Trial Practice Section will hold its annual meeting at noon, Nov. 19, following Evidentiary Issues for the Civil Trial Practitioner in State and Federal Courts, presented by Professor Barbara Bergman, associate dean for academic affairs and professor at law, UNM School of Law. Agenda items for the section's annual meeting should be sent to Chair Eric Dixon, dixonlawoffice@qwestoffice.net, or (575) 359-1233.

Attendees will earn 2.7 general CLE credits. The cost of the CLE program is $109; and $95 for section members, government attorneys and paralegals. Lunch will be provided. To register call (505) 797-6020; fax (505) 797-6071; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Young Lawyers Division Dismas House Project Seeks Attorney Volunteers
The New Mexico Young Lawyers Division is seeking volunteers to provide legal presentations to the residents of Dismas House, a transition home for non-violent parolees. Attorneys are needed to provide presentations on Oct. 16 (topic: drivers' license restoration) and on Nov. 13 (topic: child custody and family law issues). To volunteer, e-mail Briana Zamora, zamoralawfirm@yahoo.com.
Division Election

All members of the State Bar who have practiced law for five years or less or are under the age of 36 are eligible to serve on the YLD board of directors. The following positions are currently available: director-at-large, position 2; director-at-large, position 4; region 2 director (8th, 4th, 8th, and 10th Judicial districts); and region 4 director (3rd, 6th, and 12th Judicial districts and Sierra County). For more information and to obtain a nomination petition, visit www.nmbar.org and select About Us, Divisions, Young Lawyers and click on “Election.” Petitions must be received in the State Bar office by 5 p.m., Oct. 17. Should any of the positions be contested, ballots will be mailed Oct. 27.

Other Bars

Albuquerque Bar Association Luncheon and CLE

The Albuquerque Bar Association’s Membership Luncheon will be held at noon, Oct. 7, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The luncheon will feature a candidates’ forum including Martin Heinrich, Judge Reed Sheppard, Judge Kevin Fitzwater, and Albuquerque district attorney candidates.

The CLE (1.0 general CLE credit, 1.0 ethics credit) will immediately follow the luncheon from 1:30 to 3:30 p.m. Mel E. Yost and William R. Keleher will present the topic Mediation: When, How and Why with an Emphasis on New Mexico Law and Practice.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $40 members/$60 non-members with reservations. Register for lunch by noon, Oct. 3. Those unable to register prior to the luncheon will be charged an additional $5 at the door. To register:

1. Log on to www.abqbar.com
2. By e-mail to abqbar@abqbar.com
3. Call (505) 842-1151 or 243-2615
4. By mail to PO Box 40, Albuquerque, NM 87103.

Nominations for Awards

The Albuquerque Bar Association is entertaining nominations for the outstanding attorney and outstanding judge of 2008. The committee will consider the following criteria: personal integrity, legal skills and professional competence, contributions to the bar, contributions outside the profession (e.g., service to the community or a civic organization), a legal achievement particularly noteworthy or courageous, and any other accomplishment that improves the image of the legal profession. E-mail nominations with supporting information by Oct. 14 to abqbar@abqbar.com; mail to Albuquerque Bar Association, PO Box 40 Albuquerque, NM 87103-0040; or fax to (505) 842-0287. The awards will be presented at the Dec. 2 luncheon meeting.

American Bar Association Luncheon and CLE Regional Workshop and CLE Program

Practices, Programs and Pipeline Diversity, an intensive half-day regional workshop and CLE program, will be presented by the American Bar Association Presidential Advisory Council on Diversity and its collaborative partners, including the UNM School of Law Pipeline Committee, the N.M. Hispanic Bar Association, and the Hispanic National Bar Association. The workshop will be from 12:45 to 5 p.m., Oct. 10, at the UNM School of Law, Room 2402. For more information, contact Robin L. Rone, (312) 988-5137, or visit http://www.abanet.org/op/councilondiversity/home.html.

N.M. Criminal Defense Lawyers Association CLE Program

The New Mexico Criminal Defense Lawyers Association will present MMA-Mixed Misdemeanor Arts: Defending DWI and DV Cases Statewide (6.0 general CLE credits) on Oct. 17 at the UNM Continuing Education Center in Albuquerque. Speakers include Ousama Rasheed, Ryan Villa, Kari Morrissey and David Crum, plus a panel of attorneys who practice in varying jurisdictions. Other topics focus on DRE, under-the-limit arrests, emerging technologies, DV defense in jury trials, orders of protection, and probation violations. For registration information, call (505) 992-0050, e-mail info@nmcdla.org, or visit www.nmcdla.org. Criminal defense lawyers in practice under the age of 36 are eligible to serve on the YLD board of directors. The following positions are currently available: director-at-large, position 2; director-at-large, position 4; region 2 director (8th, 4th, 8th, and 10th Judicial districts); and region 4 director (3rd, 6th, and 12th Judicial districts and Sierra County). For more information and to obtain a nomination petition, visit www.nmbar.org and select About Us, Divisions, Young Lawyers and click on “Election.” Petitions must be received in the State Bar office by 5 p.m., Oct. 17. Should any of the positions be contested, ballots will be mailed Oct. 27.

Other News

N.M. Legal Aid Pro Bono Opportunity

Albuquerque will host a homeless veterans’ “stand down” Oct. 17–18. Approximately 400 homeless vets are expected to attend from around the state, most with a long list of needs. Attorneys are needed to staff a pro bono advice clinic both days in two-hour to four-hour shifts as their schedules allow. Lawyers experienced in criminal defense, estate and health care planning, consumer and bankruptcy, personal injury, property, and family law are needed. New Mexico Legal Aid will provide malpractice coverage for participating attorneys and screen potential clients on site for conflicts of interest with volunteer attorneys. Also on site will be the city’s homeless court where fines and penalties can be negotiated into community service, helping at least some vets to leave the site warrant-free. This event represents an opportunity to recognize and support those who have sacrificed for our country. To participate, call (505) 768-6124 to be scheduled.

Red Mass Celebration

The annual Red Mass will be held at noon, Oct. 24, at Immaculate Conception Church in Albuquerque. All members of the legal community and law enforcement are invited to attend. The Red Mass is celebrated annually in the Roman Catholic Church and requests guidance for all who seek justice.
6  Sox May Yet Knock Your Socks Off  
   Teleconference  
   TRT  
   2.0 E  
   1-800-672-6253  
   www.trtcle.com

7  Workers’ Compensation Law  
   and the Immigrant Worker  
   VR, State Bar Center  
   Center for Legal Education of NMSBF  
   3.2 G  
   (505) 797-6020  
   www.nmbarcle.org

10  Employment and  
    Labor Law Update  
    State Bar Center  
    Center for Legal Education of NMSBF  
    5.7 G  
    (505) 797-6020  
    www.nmbarcle.org

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

8  Internet Security  
   State Bar Center  
   Center for Legal Education of NMSBF  
   2.0 G  
   (505) 797-6020  
   www.nmbarcle.org

10  Practicing Law on the Border:  
    The Challenges of Immigrant  
    Representation  
    State Bar Center  
    Center for Legal Education of NMSBF  
    5.2 G, 1.0 E, 1.0 P  
    (505) 797-6020  
    www.nmbarcle.org

7  Basics of Real Estate  
   Transactions (2005)  
   VR, State Bar Center  
   Center for Legal Education of NMSBF  
   4.6 G, 0.8 E  
   (505) 797-6020  
   www.nmbarcle.org

8  Impact of Aging, Senility and  
   Substance Abuse on Practitioners  
   Teleconference  
   TRT  
   1.0 E, 1.0 P  
   1-800-672-6253  
   www.trtcle.com

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

7  Triple LP Comes to New Mexico  
   (2007)  
   VR, State Bar Center  
   Center for Legal Education of NMSBF  
   1.0 G  
   (505) 797-6020  
   www.nmbarcle.org

8  Prosecuting Domestic Violence  
   Cases in New Mexico  
   Albuquerque  
   Paralegal Division, Albuquerque  
   1.0 G  
   (505) 872-7469 or (505) 222-9356

14  Elder Law: Reverse Mortgages,  
    Long-term Care Insurance,  
    and Planning for old Age  
    Telegraph  
    Center for Legal Education of NMSBF  
    1.0 G  
    (505) 797-6020  
    www.nmbarcle.org

7  Unique Ineffective Assistance  
   Claims and Rulings  
   Teleconference  
   TRT  
   2.0 E  
   1-800-672-6253  
   www.trtcle.com

9  Expert Work Product  
    and Discovery  
    Teleconference  
    TRT  
    2.0 G  
    1-800-672-6253  
    www.trtcle.com

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

7–8  Wealth Preservation  
    Planning, Parts 1 and 2  
    Teleseminar  
    Center for Legal Education of NMSBF  
    2.0 G  
    (505) 797-6020  
    www.nmbarcle.org

9  Handling the Federal  
   Juvenile Case  
   Albuquerque  
   United States District Court  
   of New Mexico  
   4.2 G  
   (505) 348-2001

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

15  NITA Trial Skills Training  
    Albuquerque  
    New Mexico Coalition of Sexual  
    Assault Programs  
    19.0 G  
    (505) 883-8020

G = General  E = Ethics  
P = Professionalism  VR = Video Reply
Programs have various sponsors; contact appropriate  
sponsor for more information.
15 Troubleshooting Title and Title Insurance Problems in New Mexico
Santa Fe
National Business Institute
6.0 G, 1.0 E
1-800-930-6182
www.nbi-sems.com

16 Corporate Counsel's Moral Compass
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

16 Drafting Employee Handbooks
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

16 2008 Administrative Law Institute
VR, State Bar Center
Center for Legal Education of NMSBF
5.6 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

16 Voices for the Voiceless: The Basics of Animal Law
State Bar Center
Center for Legal Education of NMSBF
6.0 G
(505) 797-6020
www.nmbarcle.org

16 Troubleshooting Title and Title Insurance Problems in New Mexico
Santa Fe
National Business Institute
6.0 G, 1.0 E
1-800-930-6182
www.nbi-sems.com

17 Discovery of Electronically Stored Information: Practical Methods
Teleconference
TRT
2.0 G
1-800-672-6253
www.trtcle.com

17 Real Property Foreclosure: A Step-by-Step Workshop
Albuquerque
National Business Institute
5.0 G, 1.0 E
1-800-930-6184
www.nbi-sems.com

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

17 Annual New Mexico Water Law Conference
Albuquerque
New Mexico Water Resources Research Institute
8.9 G
(575) 646-4337
www.nmsu.edu

17 Avoiding Malpractice in Trust and Estate Planning
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

17 DWI in New Mexico
VR, State Bar Center
Center for Legal Education of NMSBF
6.5 G
(505) 797-6020
www.nmbarcle.org

17 24th Annual Family Law Institute: High Conflict Divorces
State Bar Center
Center for Legal Education of NMSBF
10.0 G, 1.0 E, 1.0 P
(505) 797-6020
www.nmbarcle.org

17 Sox May Yet Knock Your Socks Off
Teleconference
TRT
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1-800-672-6253
www.trtcle.com

18 Prosecutorial Ethics in the Cross Hairs
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

18 Utilizing Forensic Accounting and Analysis in Litigation and Valuation Matters
State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

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

18 Annual Labor and Employment Law Update
Santa Fe
Texas State Bar
8.3 G, 0.7 E
(956) 682-5501

18 Climate Change in New Mexico: The Impact of Climate Change on New Mexico and Initiatives to Address the Problem
State Bar Center
Center for Legal Education of NMSBF
5.0 G
(505) 797-6020
www.nmbarcle.org

19 Avoiding Deceptive Advertising
Teleconference
TRT
2.0 G
1-800-672-6253
www.trtcle.com

19 24th Annual Bankruptcy Year in Review
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

20 Corporate Counsel's Moral Compass
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## Writs of Certiorari

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

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

**Effective October 6, 2008**

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

<table>
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<tr>
<th>NO.</th>
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<td>Johnston v. Marshall</td>
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### Certiorari Granted but not yet Submitted to the Court:

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NOTES:

- (Parties preparing briefs)
- Date Writ Issued
- (On reconsideration)
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**CERTIORARI GRANTED AND SUBMITTED TO THE COURT:**

(Submission = date of oral argument or briefs-only submission)

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**PETITION FOR WRIT OF CERTIORARI DENIED:**

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PUBLISHED OPINIONS

No. 27364 4th Jud Dist San Miguel CR-05-169, STATE v L LUCERO (vacate and remand) 9/22/2008
No. 27489 1st Jud Dist Santa Fe CV-04-242, V JOLLEY v ENERGEN RESOURCES (affirm) 9/22/2008
No. 27654 5th Jud Dist Eddy CR-06-110, STATE v S RAMIREZ (affirm in part, reverse in part and remand) 9/24/2008
No. 27654 11th Jud Dist San Juan CV-75-184, STATE ENGINEER v USA (affirm) 9/24/2008

UNPUBLISHED OPINIONS

No. 27087 1st Jud Dist Santa Fe CV-96-1601, R LENHAM v DAV (affirm) 9/23/2008
No. 27221 5th Jud Dist Eddy JR-06-77, STATE v JOSHUA C (affirm) 9/23/2008
No. 28446 5th Jud Dist Chaves JQ-06-61, CYFD v RACHEL T (affirm) 9/23/2008
No. 28508 WCA 03-5866, C SCHULTZ v POJOAQUE TRIBAL (dismiss) 9/23/2008
No. 28361 2nd Jud Dist Bernalillo JQ-07-21, CYFD v JIVONNE E (reverse and remand) 9/24/2008
No. 28451 12th Jud Dist Otero CR-05-419, STATE v J SMITH (affirm) 9/24/2008
No. 28514 2nd Jud Dist Bernalillo CR-06-147, STATE v W HUNTER (affirm) 9/24/2008
No. 28528 5th Jud Dist Chaves CR-07-195, STATE v R MARTINEZ (affirm) 9/24/2008
No. 28564 11th Jud Dist San Juan LR-07-86, STATE v V CLYDE (affirm) 9/24/2008
No. 27995 WCA-04-62534, P WASHAM v HSD (reverse and remand) 9/25/2008
No. 28336 2nd Jud Dist Bernalillo JQ-06-52, CYFD v DESIREE G (affirm and remand) 9/25/2008
No. 28415 10th Jud Dist Quay JQ-07-6, CYFD v DAVID V (affirm) 9/26/2008
No. 28684 5th Jud Dist Chaves CR-08-109, STATE v D GLADU (affirm) 9/26/2008

Slip Opinions for Published Opinions may be read on the Court’s Web site:
The devil is in the details – especially in intellectual property law. When you need intellectual property counsel, you need advisors schooled and experienced in the details of patent law. Rodey’s team of registered patent attorneys have the education, experience and certification to ensure your invention will be protected. Whether you want an assessment of your project or need to prosecute a matter before the U.S. Patent & Trademark Office, please contact Rodey’s IP attorneys. And leave the details to us.

- Infringement litigation (patent, trademark and copyright)
- Trade secret misappropriation
- Unfair practices
- Validity and enforceability opinions

Rodey, Dickason, Sloan, Akin & Robb, PA
Offices in Albuquerque and Santa Fe
505.765.5900 • www.rodey.com
Your client owns a local auto body shop called Bodyworks, Inc. He comes to see you to review a lease agreement because his business is growing and he needs to expand his shop floor. As you read the lease agreement, your client makes this offhand remark: “We’re expanding because this new process we developed for applying paint to cars is so efficient we’ve been able to drop our prices. The other body shops in town just can’t compete! In fact, I’m about to open a shop in Phoenix.” If you understood the basics of intellectual property law, you would stop reading the lease and start asking questions because you would realize your client may need much more than a good lease agreement.

Introduction to Intellectual Property Law

Members of the Intellectual Property Law Section author this issue of the New Mexico Lawyer for two purposes: (1) to give business lawyers a basic education in a fairly esoteric area of law, and (2) to introduce the newly formed Intellectual Property Law Section of the State Bar of New Mexico.

This article gives a very basic explanation of intellectual property, or “IP.” It also introduces the three most common ways to protect intellectual property and frames the subject in the context of New Mexico business.

Since businesses today rely heavily on the Internet for advertising and sales, one article addresses legal issues related to Web page design, cybersquatting, Web game design, and using meta-tags, the hidden text that allows search engines like Google® to find a Web page.

With the film industry growing so rapidly in our state, we also include an article on the top legal issues in that industry with which business lawyers should be familiar. When New Mexico businesses expand out of state, federal trademark registration is often desirable so helping your client choose a strong mark is the subject of another article.

When your client has an invention or unique business method that gives her that competitive edge, she should understand the pros and cons of protecting her IP by either obtaining a utility patent or by keeping it a trade secret, and so we include an article on that subject as well.

Finally, we address what we believe employment lawyers should know about protecting their business clients’ IP, such as the “work for hire” doctrine.

The Big Three of IP: Patents, Trademarks and Copyrights

The purpose of intellectual property law is to protect certain intangible creations of the mind. The most common means of protection are patents, trademarks and copyrights.

The Intellectual Property Law Section of the State Bar of New Mexico!

The Intellectual Property Law Section was formed Jan. 1, 2008. The section focuses on patents, trademarks, copyrights, trade secrets, licensing, entertainment and other aspects of intellectual property law. Like other sections, it provides networking and educational opportunities to members through continuing legal education programs, newsletters, and other forums. All State Bar members are eligible to join.

The section is governed by a board of directors that includes Jeffrey H. Albright (chair), Gina T. Constant (chair-elect), Ian Bezpalko (secretary), Anthony Couture (treasurer and YLD liaison), Charles A. Armgardt, Alberto A. Leon, Suzanne Christina Odom, Luis M. Ortiz, Diane Elizabeth Albert and Simone M. Seiler. To join the section, use this link and follow the instructions: http://www.nmbar.org/AboutSBNM/sections/IP/IPsection.html.
Patents

If your client’s business involves an invention, a patent attorney can help determine whether to apply for patent protection and to ensure that there is no infringement on someone else’s patent. The first step will be a patent search on the Web site of the U.S. Patent and Trademark Office (USPTO). Depending on the complexity, a patent can cost thousands of dollars and take more than two years to obtain. A patent gives the owner the right to promote commerce, first by preventing others from making, using or selling the invention for 20 years, and second by providing the right to license an invention. A patent attorney can help determine if the cost is worth the benefits.

Before exploring the possibility of applying for a patent, your client should not:

• “test the market” first by putting the invention on eBay® or Craigslist®,
• publish or present papers or articles on the invention, or
• tell people about the invention without requiring confidentiality.

Any of the above could cause your client to forfeit valuable rights, so before exposing the invention to the public, the need for patent protection should be determined first.

Trademarks

A trademark is a signal to consumers as to the source of goods or services. For example, when you see a red can of soda with the distinctive white swirling letters—even in a foreign language—you recognize it as a can of Coca Cola®. If you preferred Coca Cola®, you would probably pay more for that can than you would a similar can of soda with an unknown brand. That is why the Coca Cola® trademark is estimated to be worth more than $70 billion.

Although registering a trademark with the USPTO is not a requirement, there are advantages to doing so. Registration costs about $325 for each class of goods or services and the process takes about 12 months. Once registered, your client can use the trademark symbol, ®. To maintain registration, your client must be using the mark in interstate commerce and renewing registration at certain intervals.

It is important to search the USPTO trademark registry and the Internet before choosing a mark in order to avoid paying for business cards, stationery and neon signs, only to find that someone else is already using the same or similar mark in the same or similar business.

Copyrights

Does your client’s business involve creative works? If so, the client needs to understand copyrights. Once an original work is fixed in a tangible medium (such as canvas, audio or video recording, paper, or fabric), the author or artist automatically enjoys the exclusive right to copy it. With some exceptions, no one but the copyright owner can copy or profit from the work until it goes into the public domain, which is 70 years after the death of the author. While the copyright is automatic, the timely registration of the work with the U.S. Copyright Office has benefits, including the right to sue for infringement and the potential for increased damages. Registering most copyrights costs $45 and takes about four months to process.

The copyright symbol, ©, is used to notify others of copyright ownership.

So what about Bodyworks?

Getting back to our imaginary client, Bodyworks, here are just a few of the IP issues that should occur to you after reading this issue of the NM Lawyer.

Should your client patent his new process or keep it a trade secret? Since opening a shop in Arizona means interstate commerce, he should apply for federal trademark protection, but is “Bodyworks” a strong enough mark? Or worse, has someone already registered it?

If your client has created a document that describes the new painting process such that an employee could quit and take the document to a competitor, how should your client protect that document? Perhaps registering copyright and amending employment agreements are in order.

Is your client using the Internet to advertise his business and, if so, is he making some of the mistakes common to business owners that put him at risk of committing copyright or trademark infringement?

Just like equipment, vehicles, and inventory, your client’s intellectual property is an asset; he needs to protect it. Referring him to an intellectual property attorney for an evaluation of his business’ particular needs may be one of the best pieces of advice you give!

About the Author
Gina Constant is a registered patent attorney at the Rodey Law Firm in Albuquerque. She has 20 years of business experience including two years as a process engineer at a nuclear-chemical processing plant, fourteen years as an engineer and manager at Intel, and five years in partnership with her husband running a small health care business.
Businesses today rely heavily on the Internet to advertise and sell their products and services. The early Internet represented the digitization of print and media. Access to information was limited to a few portals such as AOL. Users could not interact until technology evolved to allow social networking, and thus Web 2.0 was born. No key defining moment exists when businesses realized the value of the Internet, but as they have, related legal issues have increased. Four legal obstacles may affect some of your clients as they conduct business on the Internet.

Obstacle 1: Meta-tags
Believe it or not, you can be guilty of trademark infringement even if 90 percent of the population of this planet cannot view the infringing text and is completely unaware of its presence. How could this happen? Through meta-tags, the hidden text that allows search engines to classify Web pages. Here is an example from a well-known site, Tiffany & Co.:<

<meta name='keywords' content='Tiffany and Co., Tiffany, Company, TCO, Gift, Gift Card, Gift Certificate, Gift Registry, Wedding, Wedding Registry, Diamonds, Jewelry, Watches, Bridal Registry, Home, Home Accessories, Accessories, Dinnerware, Drinkware, Flatware, Sterling Silver Flatware, Table, Vase, Wine'/>

Another business that sells tableware and jewelry may use many of these same terms without infringement and may possibly even use “Tiffany” if it is a reseller of Tiffany products. However, if this fictional business is not selling Tiffany products but uses the keyword “Tiffany” in its meta-tags, it may be guilty of infringement.

In Oppedahl v. Advanced Concepts, a group including Advanced Concepts operated a Web site that had nothing to do with the plaintiff’s law firm but used the plaintiff’s name in the meta-tags of the site. While users of the site would not actually see “Oppedahl” or “Larson,” the plaintiff argued that a user searching for the law firm would type the name into a search engine, click on the defendant’s link, and assume that the Web site was owned by the plaintiff. This was a misuse of the trademark and diluted its value. Advanced Concepts was required to remove the law firm’s name from the meta-tags.

If the individual has a legitimate use for the terms, the court will not find trademark infringement. In Playboy v. Terri Welles, the defendant was sued by Playboy when she placed the terms “Playboy” and “Playmate” in the meta-tags and on her Web site. The court ruled that as she was a former Playmate, she was permitted to use the terms to describe herself and properly catalogue her site.

Obstacle 2: Web Page Design
A new business or even an established one may choose to hire an individual to design a Web site. In addition to the Web site text, copyrightable elements include the “look and feel” of the site, the scripts the site uses, the site’s graphics, etc. Lawyers with business clients should not overlook IP issues in this area.

Web Site Content
Infringement does not result just from copying another site’s text but also from copying a site’s graphics. Playboy Enterprises, Inc. v. Sanfilippo illustrates the danger of copying images without receiving permission from the copyright owner. The defendant scanned images from Playboy magazine onto his Web site and charged visitors for the right to view them. Playboy sued for copyright infringement and won, proving that it had a valid copyright which the defendant had violated.

Even if a client does not post the infringing material but merely allows third parties to publish it, the client may be liable for these postings. In Software Development and Investment of Nevada d/b/a Traffic Power.com v. Aaron Wall, d/b/a SEO Book.com, Traffic Power sued SEO Book for text written by commentators to Aaron Wall’s blog. The case was dismissed, but it shows the danger of allowing others to make use of a site. Attorneys should consider whether the client’s actions (i.e., attempt to moderate or not) make the client a common carrier or a publisher.

Linking
While the Internet by its nature consists of interlinked pages, the way a page is linked may result in a copyright or trademark infringement claim. Ticketmaster v. Microsoft offers an example of a trademark infringement suit involving “deeplinking” i.e., setting up a link to bypass a Web site’s homepage and connect to an internal page instead. Microsoft created a site called Sidewalk.com that contained links to various entertainment Web sites, linking also to Ticketmaster, to allow users to purchase tickets. Microsoft’s link did not, however, connect to the homepage of Ticketmaster but to an internal ticket purchasing page. Ticketmaster claimed that the link infringed on its trademark, diluted value, and violated state and federal unfair competition laws. A confidential settlement agreement makes it unclear how the matter might have developed, but Microsoft did replace the deeplink with a link to Ticketmaster’s homepage.

Obstacle 3: Web Game Design
Web game design presents a relatively new issue in IP—the idea that games created for use on Web 2.0 sites such as Facebook can cause the owners to confront “take down” notices and lawsuits. A case in the news of late, Hashro, Inc., v. RJ SOFTWARES, Rajat Agarwalla and Jayant Agarwalla, provides a good example. The brothers Agarwalla created a computer version of Scrabble for use on Facebook called Scrabulous. Hashro sued for trademark and copyright infringement of continued on page 10
Protecting Your Intellectual Property:  
**Trade Secret or Patent?**

Diane Albert and David Ferrance

Successful businesses maximize their intellectual property assets. When is it best to protect your valuable IP as a patent and when is it best to protect it as a trade secret? Generally, a protectable trade secret is information that:

- is not generally known to the public;
- confers some sort of economic benefit on its holder; and
- is the subject of reasonable efforts to maintain its secrecy.

Trade secret law protects against misappropriation of material that has been diligently kept secret. Patent law, on the other hand, conveys a 20-year right to exclude others from practicing the patented invention in return for full disclosure to the public. Famous examples of trade secrets include the formula for Coca-Cola, KFC’s secret blend of herbs and spices, WD-40’s contents, and Chanel #5’s ingredients. Because a trade secret must be kept secret and a patented invention must be fully disclosed to the public, clients and practitioners must choose one or the other.

Trade secret law protects against misappropriation of material that has been diligently kept secret. Patent law, on the other hand, conveys a 20-year right to exclude others from practicing the patented invention in return for full disclosure to the public. Famous examples of trade secrets include the formula for Coca-Cola, KFC’s secret blend of herbs and spices, WD-40’s contents, and Chanel #5’s ingredients. Because a trade secret must be kept secret and a patented invention must be fully disclosed to the public, clients and practitioners must choose one or the other.

Patents are appropriate for new inventions that cannot be exploited in secret. Patents also deter competitors who otherwise might be tempted to copy, especially inventions that can be reverse-engineered. Patents are valuable property. When patent infringement or other litigation is settled, the infringer may be offered the opportunity to license the technology covered by the patent. It is usually far easier to establish the value of patents than trade secrets. However, many inventions will not qualify for a patent because they are not new, useful, and non-obvious—the three basic requirements of obtaining a patent.

Because a trade secret derives its value from not being known or readily ascertainable, trade secret protection may be preferable for technology that can be exploited in secret, such as a method, customer list, or the source code for a computer program. Trade secrets do not need to be new, useful, or non-obvious; however, owners of trade secrets must be diligent in protecting the secrecy. Protection can exist indefinitely but once secrecy is compromised, the protection is gone. Maintaining trade secrets may be expensive because of the cost of designing reasonable secrecy measures such as non-disclosure agreements, physical security, and human resources policies.

It is important that clients be familiar with the pros and cons of trade secret and patent protection early in the inventive process in order to preserve their rights because actions taken at that time may limit later protection. Inventions that do not qualify for patent protection may be good candidates for trade secret protection and vice-versa. Choosing the best protection requires a careful analysis of the client’s technology, objectives, and budget.

**About the Authors**
Diane Albert practices with Peacock Myers PC in the area of intellectual property prosecution. David Ferrance is a second-year student at the UNM School of Law.

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Think Like Rick James!

In general, copyright law seeks to balance protecting the rights of copyright owners with protecting an individual’s right to free speech and expression. These rights collide when a musician engages in “sampling,” taking a portion of the sound recording of another and reusing it as an element of a new recording.

Sampling is risky business and has frequently been the subject of litigation. A few notable examples:

- Vanilla Ice’s unauthorized sampling of the most identifiable riffs from the David Bowie/Queen song *Under Pressure* for his one and only hit *Ice Ice Baby*. The parties settled after Bowie/Queen threatened to sue.
- Biz Markie’s album *I Need a Haircut* was withdrawn following a 1992 court ruling that his use of a sample from Gilbert O’Sullivan’s *Alone Again (Naturally)* was willful infringement.
- *U Can’t Touch* was MC Hammer’s biggest single, and it heavily sampled Rick James’ *Super Freak*. MC Hammer had more than James’ permission: Rick James insisted on being credited as a co-author and it is rumored that James made more money on MC Hammer’s single than he did on all of his previous recordings combined.
- The Verve sampled an orchestra recording of The Rolling Stones’ 1965 song, *The Last Time*, for their biggest hit, *Bittersweet Symphony*. They had entered into a licensing agreement for the sample but then the song became a huge hit in Britain and, you can guess the rest. All profits ended up going to the Stones!
As many people have already noticed, the film industry is growing in New Mexico. The 25 percent rebate incentive for production and post-production work has successfully lured many large-budget movies to our state. With this growing industry, big business opportunities have arisen for New Mexico lawyers. With the rebate also being applicable to production legal expenses, hiring New Mexico lawyers means big savings for film productions. Savvy production companies and film professionals are looking for New Mexico attorneys to represent them.

New Mexico has been a storehouse for entertainment law information for years. Sherri Burr, a law professor at the University of New Mexico School of Law, has been teaching and writing books about entertainment law for years. However, this is the wild, wild west. Entertainment attorneys in New Mexico have little actual law on which to hang their hats. There is little statutory law and essentially no on-point case law. This means that every legal question is completely and totally open to new argument and a potentially wild ride. Entertainment attorneys with clients in the film industry are educated in the primary concerns of their clients, which can be wide and varied, but keep the following ideas at the forefront.

The Law Surrounding the 25 Percent Tax Rebate
Entertainment lawyers know the 25 percent rebate act very well, especially since it is very short and to the point. The act divides film production into two parts: production and post-production. Expenses related to production qualify for the rebate, whether or not the actual work was done in New Mexico. The threshold question for whether production work qualifies for the credit is, Was the expense taxable as income by New Mexico? If the answer is "yes," then it most likely qualifies. Post-production work is different because it requires that the threshold question be "yes" and that the work was performed in New Mexico. However, no case law exists regarding this act; therefore, it is the New Mexico Film Board and the New Mexico Tax and Revenue Department’s unenviable job to put the policy into place that supports the act. These policies are constantly growing and evolving through administrative decisions within the Tax and Revenue Department. Entertainment attorneys maintain a close relationship with the Film Board to keep abreast of the latest information regarding the act and how it is being implemented.

LLCs for Filmmakers (Maybe?)
The film industry is fickle and volatile. Yesterday’s blockbuster is tomorrow’s flop. Entertainment lawyers make protecting their clients from the pitfalls of their own industry a primary concern. Fortunately, the activities that should protect filmmakers are the same activities that provide an avenue for handling a film’s assets and debts. Most film productions are formed as a limited liability company. However, some entertainment attorneys argue that a limited partnership is more appropriate for film productions. Entertainment attorneys are well versed in this realm of the law and properly counsel and advise clients about how to best protect their clients’ assets while meeting their other needs. A close relationship with an accountant is often a vital element of this type of counsel.

Client Management
Often, stereotyping is an activity to be avoided. That said, there is a certain stereotype about filmmakers that often does ring true. Filmmakers are often “artists.” As such, they are focused on their craft and don’t wish to be bothered by the annoyances of business. If the client falls into this stereotype, then client management occupies a large part of an entertainment attorney’s time. In general, contracts, negotiations and other business activities are handled with the attorney, who will need client authority and decision-making to complete “the deal.” However, the client, in the throes of creative endeavor, will not see the vital nature of signing contracts or even showing up for the negotiations. It falls on the shoulders of the attorney to figure out how to best manage clients to get the jobs done. In many respects, this is where the entertainment attorney begins to feel more like a manager or agent. In some instances, attorneys wind up being agents and managers, completely dropping the practice of law in favor of the practice of client manager/agent. In other states, such as California, there are carefully constructed laws that define the relationship and role of the agent/manager. Such laws do not yet exist in New Mexico; therefore, entertainment attorneys are careful to mind their ethics in relating to their clients.

About the Authors
Tamara and Tony Couture are a husband and wife team and partners at Couture Law. Tony practices law primarily in the area of film entertainment law.
A trademark is a symbol used by its owner to identify the owner as the source of the goods or services. The mark may be a word, phrase and/or a logo. Even a distinctive sound used in advertisements may be a protectable trademark. A trademark or service mark need not actually name the company (or individual) as the source of the goods. In fact, a mark often bears no resemblance to the name of its owner.

It is crucial to choose a mark that is protectable under trademark law principles. Under those principles, a mark falls into one of four categories (from strongest to weakest).

Arbitrary or Fanciful Marks
The strongest marks are “arbitrary or fanciful,” which are used as source of origin of goods or services in an arbitrary, non-descriptive manner. Arbitrary marks are words that have no relation to any characteristic or quality of the goods or services. Examples of arbitrary marks include “Apple” for computers and “Arrowhead” for water. Fanciful marks are words with no meaning that are created solely to serve as a mark. An example is “Kodak” for photography products.

Suggestive Marks
A suggestive mark requires some imagination to determine the product or service to which it refers. Examples include “Skinvisible” for transparent medical adhesive tape, “Coppertone” for suntan lotion, and “Greyhound” for transportation services. Suggestive marks make an impression on consumers when first adopted, before the public becomes familiar with the product.

Descriptive Marks
A descriptive mark directly conveys a function, characteristic or quality of the goods or services. Examples include “Fifteen Minute Oil Change” for a store providing oil change services in fifteen minutes and “Albuquerque Hearing Center” for a clinic providing hearing-related goods and services in Albuquerque.

Generic Marks
The weakest category of marks is “generic.” A generic mark states the products or services being sold, rather than the source of the products or services. Examples of generic marks include “Bran Flakes” for bran cereal, “Consumer Reports” for a magazine providing consumer reports and “Diet Soda” for low-calorie soda. A generic mark cannot be protected under trademark law.

Once your client chooses a mark, it is important to use it referring to the source of goods or services rather than naming or describing what is being sold. For example, if “Gatorade” is a trademark for sports drinks, your client should not say “Nothing quenches thirst better than a Gatorade.” Instead, it should say, “Nothing quenches thirst better than Gatorade™ brand sports drink” (or “Gatorade® brand sports drink” if the mark is federally registered).

Following those simple guidelines can help clients choose the strongest mark for their products or services.

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About the Authors
Alberto A. León, J.D., Ph.D. is a registered patent attorney and the managing partner of Bauman, Dow & León, where he assists clients in the protection of intellectual property assets and related litigation.

Simone M. Seiler, J.D., focuses on intellectual property law, including patent, trademark, copyright and licensing.
Even sophisticated clients occasionally have the misfortune of spending thousands of dollars to have a Web site, logo, design, or jingle created without obtaining full ownership. Copyright law deems the creator (author) to be its owner. But if the client hired this person for the purpose of creating the work, shouldn’t the client own the copyright? The key to avoiding an unfortunate outcome lies in having properly crafted agreements with those employees, in place from the outset and, more significantly, with independent contractors who are hired for their creative output.

The “Work for Hire” Doctrine

Authors are presumed to own the copyright in the works they create unless the work was one made for hire. Under the Copyright Act of 1976, a “work made for hire” is one that is created by either:

* an employee within the scope of his or her employment, or
* an independent contractor under the following explicit circumstances: the work must be “specifically ordered or commissioned;” must fall into one of nine statutorily defined categories of works; and the parties must expressly agree in writing that the product shall be considered a “work made for hire.”

Most “work for hire” ownership issues arise in connection with independent contractors; therefore, it is best to have a written agreement in place before work begins, clearly stating that the commissioned work shall be considered “work for hire.” It is also advisable to employ the “abracadabra” approach; i.e., to use the words “work for hire” or “work made for hire” in the agreement to avoid any ambiguity regarding the parties’ intent.

However, it is not always safe to assume that everything an employee creates belongs to the employer. Issues of ownership can arise where employees create works after hours and/or outside the scope of employment. Depending on the circumstances, work created after hours may or may not constitute “work for hire.” In light of this and to avoid ambiguity in any event, it may be advisable to include a statement in traditional employment contracts (particularly with respect to those employed in a creative capacity) that any work created in the scope of employment, whether during or after hours, constitutes “work for hire.”

The Alternatives—Assignments and Licensing

When dealing with an independent contractor situation, the work being commissioned often may not clearly fall within one of the nine statutorily defined classes of works for hire. For this reason, you may want to consider adding fallback language that assigns the contractor’s entire copyright if the contractor’s work (or any part of it) is found not to qualify as “work made for hire.”

Many Web sites are devoted to educating creative types about the evils of “work for hire” arrangements. Don’t be surprised if you come across a contractor who, recognizing the profit to be made from recycling his or her creativity, refuses to sign your airtight “work for hire” agreement with its equally airtight back-up assignment. In this case, your client essentially has two choices: go elsewhere or agree to a license. Under a license, the client will not obtain full ownership of the work but will obtain rights to its use defined by a number of parameters, such as exclusivity, duration and media.

Endnotes

2 See Playboy Enterprises, Inc. v. Dumas, 53 F.3d 549, 558–561 (2nd Cir. 1995) (discussing the “writing” requirement under the “work for hire” doctrine).

About the Author
Suzanne Odom is of counsel with Montgomery & Andrews, P.A. Her practice encompasses the areas of real estate, business and commercial law in transactional, general counsel and litigation matters.
Obstacles in Web 2.0 continued from page 5

that “venerable game.” Rather than continue the lawsuit, the brothers removed the game from North American servers and replaced it with a new version, Wordscraper, with features that they presumably hope will allow them to escape another lawsuit. Whether the suit might have succeeded or not, this issue affects businesses that hope to attract users to their Web site by offering re-creations of old games.

Obstacle 4: Cybersquatting

Cybersquatting refers to the practice of an individual who registers domain names similar to or the same as the owner’s trademarked name. In *Coca-Cola Co. v. Purdy*, the 8th Circuit decision was against Purdy, an anti-abortion activist who registered multiple domain names such as “drinkcoke.org,” “mymcdonalds.com,” and “mypepsi.org.” The Court held that the names were confusingly similar to the trademarked ones and thus violated the Anticybersquatting Consumer Protection Act, which requires the plaintiff to prove that:

- its mark is distinctive,
- the domain name owner registered, used, or trafficked in the mark with bad faith intent to profit from the mark, and
- the domain name and the trademark are identical or confusingly similar.

An infringer cannot get around the act by “typosquatting,” i.e., simply misspelling the trademark name. In *Lands’ End, Inc. v. Remy*, Lands’ End sued the owner of Thinkspin for the Web site www.landwend.com. Thinkspin, as an affiliate of Lands’ End, received a commission for all sales it generated for Lands’ End products. The court determined that Thinkspin profited through the typo Web site and that the three requirements of the act were met.

Conclusion

Many IP issues, in addition to the four discussed here, can affect how businesses operate on the World Wide Web. As the Internet changes and Web 3.0 approaches, new challenges may arise. Despite this, attorneys must be able to advise business clients and protect them from themselves as well as from unfair competition.

Endnotes

3 7 F. Supp. 2d 1098 (S.D. Cal. 1998).
7 No. 97-3055DPP (C.D. Cal. 1997); http://legal.web.aol.com/decisions/dlip/tick.html.
10 382 F.3d 774 (8th Cir. 2004).
11 Enacted on November 29, 1999, the Act amends the Lanham Act by adding the new Section 43(d).
13 82 U.S.P.Q.2d 1732 (W.D. Wis. 2006).

About the Author

Ian Bespalko, a sole practitioner in Albuquerque, works on matters involving non-patent IP cases, contracts, and other business transactions. He offers legal research and writing for attorneys in all practice areas.
The seeds of invention often require protection from the weather of today’s global competition. Carstens & Cahoon offers both the legal and technical insight needed for ideas to prosper. We are intellectual property attorneys dedicated to helping our clients with all of their intellectual property needs. To find out how we can provide the shelter ideas you need, contact us. Dedicated to protecting ideas.
IN THE MATTER OF THE ADOPTION OF NEW RULE 15-301.2 NMRA OF THE RULES GOVERNING ADMISSION TO THE BAR

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Board of Bar Examiners and the New Mexico Commission on Access to Justice to adopt new Rule 15-301.2 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that new Rule 15-301.2 NMRA of the Rules Governing Admission to the Bar hereby is ADOPTED;

IT IS FURTHER ORDERED that new Rule 15-301.2 NMRA of the Rules Governing Admission to the Bar shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the adoption of new Rule 15-301.2 NMRA of the Rules Governing Admission to the Bar by publishing the same in the Bar Bulletin and NMRA.

IT IS SO ORDERED.

Witness, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 29th day of August, 2008.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

15-301.2 Legal services provider limited law license for emeritus and non-admitted attorneys.

A. Definitions. As used in this rule:

(1) “applicant” means an emeritus attorney or non-admitted attorney who meets the eligibility requirements set forth in Paragraphs B or C of this rule and who completes the application process in Paragraph D of this rule;

(2) “emeritus attorney” means any person who is a member in good standing of any state bar, who has been admitted to practice before the highest court of any other state or territory of the United States of America or the District of Columbia for at least twenty (20) years, and who is an inactive member of the State Bar of New Mexico or is an inactive or active member of any other state bar;

(3) “non-admitted attorney” means any person who is not a member of the State Bar of New Mexico but who is admitted to practice before the highest court of any other state or territory of the United States or the District of Columbia and is in good standing in all states in which the person is admitted;

(4) “qualified legal services provider” means a not for profit legal services organization whose primary purpose is to provide legal services to low income clients or a legal department within a non-profit organization which employs at least one lawyer full-time to provide legal services to low income clients; and

(a) is an organization described in Section 501(c)(3) and exempt from federal income taxes under Section 501(a) of the Internal Revenue Code of 1986 or corresponding provisions of federal income tax laws from time to time in effect;

(b) is registered with the New Mexico Attorney General Registry of Charitable Organizations in compliance with the New Mexico Charitable Solicitations Act and;

(c) is recommended by the New Mexico Commission on Access to Justice.

B. Eligibility of emeritus attorneys. Upon application, the clerk of the Supreme Court may issue a legal services limited renewable three (3) year license, limited to one (1) renewal, to represent legal services clients through a qualified legal services provider to an emeritus attorney who:

(1) satisfies the legal services limited license requirements set forth in this rule; and

(2) supplies a sworn statement that the applicant has not been the subject of disciplinary action by the bar or courts of any jurisdiction in the five (5) years preceding the applicant’s retirement from the practice of law.

C. Eligibility of non-admitted attorneys. Upon application, the clerk of the Supreme Court may issue a legal services limited non-renewable three (3) year license to represent legal services clients through a qualified legal services provider to a non-admitted attorney who:

(1) has been an active member of the bar in another state, territory, or protectorate of the United States of America or the District of Columbia for three (3) years immediately preceding submission of an application under this rule;

(2) is in good standing to practice law in each jurisdiction in which the attorney is licensed;

(3) satisfies the legal services limited license requirements set forth in this rule; and

(4) supplies a sworn statement that the applicant has not been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five (5) years; provided, however, that complaints against the applicant shall not be considered disciplinary actions.

D. Application procedure. An applicant for a legal services limited license to represent legal services clients through a qualified legal services provider shall file with the clerk of the Supreme Court an application for a legal services limited license. The application shall be accompanied by:

(1) a certificate of admission to practice and good standing from each state in which the applicant is licensed to practice law or in the case of an emeritus attorney a certificate showing that attorney’s inactive status;
(2) a letter from the director of the qualified legal services provider that employs the applicant certifying the applicant’s employment;

(3) a certificate signed by the applicant stating that the applicant has read and is familiar with the New Mexico Rules of Professional Conduct, other New Mexico Supreme Court rules and New Mexico statutes relating to the conduct of attorneys and the Creed of Professionalism of the State Bar of New Mexico;

(4) a docket fee in the amount of one hundred twenty-five dollars ($125.00) payable to the New Mexico Supreme Court; and

(5) a disciplinary fee in the amount provided by Rule 17-203 NMRA payable to the Disciplinary Board.

All fees and costs associated with an application for a legal services limited license are not refundable.

E. License; issuance and revocation.

(1) If an applicant for a legal services limited license to represent legal services clients through a qualified legal services provider complies with the provisions of this rule, the clerk of the Supreme Court may issue a legal services limited non-renewable three (3) year license, except the limited license issued to an emeritus attorney shall be renewable for one (1) term as provided in paragraphs B and F.

(2) A legal services limited license issued pursuant to this rule permits the applicant to practice law in New Mexico only as an attorney representing legal services clients through a qualified legal services provider.

(3) The clerk of the Supreme Court shall revoke the legal services limited license of any person found in violation of this rule or any other rules approved by the Supreme Court regulating the licensing and conduct of attorneys. Upon revocation of a legal services limited license, the applicant shall not represent any legal services client nor appear before any court of the State of New Mexico representing any legal services client.

F. Expiration. A legal services limited license shall expire upon the occurrence of any of the following events:

(1) termination of employment with a qualified legal services provider;

(2) admission to the New Mexico Bar upon passing the bar examination;

(3) denial of admission to the New Mexico Bar;

(4) failure to maintain membership in good standing in at least one state bar in which the applicant is a member; or

(5) expiration of three (3) years from the date of issuance of the limited license by the Supreme Court, provided that the limited license issued to an emeritus attorney shall be renewable for one (1) term as provided in paragraphs B and E.

G. Legal services limited licensee status.

(1) An applicant granted a legal services limited license pursuant to this rule shall be a member of the state bar and shall be subject to the Rules of Professional Conduct and the Rules Governing Discipline.

(2) Licensees under this rule shall pay a reduced annual state bar membership fee of one hundred dollars ($100.00), consisting of a state bar services fee of fifty dollars ($50.00) and a disciplinary fee of fifty dollars ($50.00) in lieu of the fee required by Rule 17-203 NMRA.

(3) Licensees under this rule shall comply with the Rules for Minimum Continuing Legal Education.

[ Adopted by Supreme Court Order No. 08-8300-024, effective August 29, 2008. ]
NO. 08-8300-028

IN THE MATTER OF THE AMENDMENTS OF RULES 15-103 AND 15-104 NMRA OF THE RULES GOVERNING ADMISSION TO THE BAR

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Board of Bar Examiners to amend Rules 15-103 and 15-104 NMRA of the Rules Governing Admission to the Bar, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 15-103 and 15-104 NMRA of the Rules Governing Admission to the Bar hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 15-103 and 15-104 NMRA of the Rules Governing Admission to the Bar shall be effective for the February 2009 bar examination;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rules 15-103 and 15-104 NMRA of the Rules Governing Admission to the Bar by publishing the same in the Bar Bulletin and NMRA.

IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Edward L. Chávez of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of September, 2008.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

15-103. Qualifications.

A. Requirements mandatory. Licenses to practice law shall be granted only to applicants who fulfill all of the requirements of these rules.

B. Qualifications. Every person seeking admission to practice law in New Mexico shall file a formal application as prescribed by these rules and as required by the board. Submission of the application shall constitute submission by the applicant to the jurisdiction of the New Mexico Board of Bar Examiners until a final determination upon admission of the applicant may be completed. Every applicant shall have the burden of establishing to the satisfaction of the board that the applicant possesses all of the following qualifications:

1. is at least eighteen (18) years of age;
2. is a graduate with a juris doctor or bachelor of laws and letters degree (at the time of the bar examination for which application is made) of a law school formally accredited by the American Bar Association or is a graduate of any law school who has been engaged in the practice of law in another state or states for at least four (4) of the six (6) years immediately preceding the person’s application for admission to practice in New Mexico;
3. is a person of good moral character, physically and mentally fit to practice law;
4. is, if ever admitted to practice in any other state or states, in good standing in such state or states;
5. is professionally qualified for admission to the bar of New Mexico;
6. is in compliance with all child support and spousal support obligations imposed under a “judgment and order for support” as defined in the Parental Responsibility Act, Sections 40-5A-1 through 40-5A-13 NMSA 1978, or imposed under a child support or spousal support order entered by any other court of competent jurisdiction. If an applicant is not in compliance with a child support or spousal support obligation, the applicant will not be recommended for admission to the bar until the applicant provides the board with evidence that the applicant is in compliance with the judgment or order. If the applicant has appeared on the Human Services Department’s certified list of obligors, the applicant shall submit a certified statement from the Human Services Department that the applicant is in compliance with the judgment and order for support. In all other cases, the applicant shall provide evidence acceptable to the board of compliance with all applicable child and spousal support orders; and
7. is a citizen or national of the United States, an immigrant alien lawfully admitted for permanent residence in the United States, or an alien otherwise authorized to work lawfully in the United States.

C. Character and fitness standards and investigation.

1. The purpose of character and fitness investigation before admission to the bar is to assure the protection of the public and to safeguard the justice system.
2. The applicant bears the burden of proving good character in support of the application.
3. The revelation or discovery of any of the following may be treated as cause for further inquiry before the board determines whether the applicant possesses the character and fitness to practice law:
   a. unlawful conduct;
   b. academic misconduct;
   c. misconduct in employment;
   d. acts involving dishonesty, fraud, deceit or misrepresentation;
   e. acts which demonstrate disregard for the rights or welfare of others;
   f. abuse of legal process, including the filing of vexatious or frivolous lawsuits;
   g. neglect of financial responsibilities or professional obligations;
   h. violation of an order of a court, including child support orders;
   i. conduct that evidences current mental or emotional instability that may impair the ability to practice law;
   j. conduct that evidences current drug or alcohol dependence or abuse that may impair the ability to practice law;
   k. denial of admission to the bar in another jurisdiction on character and fitness grounds;
(l) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction;
(m) making of false statements, including omissions, on bar applications in this state or any other jurisdiction; or
(n) as otherwise determined by the board for just and good cause.

(4) The board shall determine whether the present character and fitness of an applicant qualifies the applicant for admission. In making this determination, the following factors should be considered in assigning weight and significance to prior conduct:

(a) the applicant’s age at the time of the conduct;
(b) the recency of the conduct;
(c) the reliability of the information concerning the conduct;
(d) the seriousness of the conduct;
(e) the factors underlying the conduct;
(f) the cumulative effect of the conduct or information;
(g) the evidence of rehabilitation;
(h) the applicant’s positive social contributions since the conduct;
(i) the applicant’s candor in the admissions process; and
(j) the materiality of any omissions or misrepresentations.

(5) The applicant has a continuing obligation to update the application with respect to all matters inquired of on the application. This obligation continues during the pendency of the application, including the period when the matter is on appeal to the board or the Court.

D. Conviction; rehabilitation. A person who has been convicted of a serious crime as defined under these rules shall prove good moral character by demonstrating by clear and convincing evidence that the applicant is rehabilitated and satisfies all other requirements for good moral character.

E. Examination. All applicants shall be required to take and pass the written examination except as otherwise provided with respect to law faculty at the University of New Mexico.

[As amended, effective November 14, 1988; July 24, 1996; as amended by Supreme Court Order 05-8300-10, effective September 1, 2005; as amended by Supreme Court Order No. 08-8300-28, “effective for the February 2009 bar examination.”]

15-104. Application.

A. Form of application. All applications shall be under oath on forms provided by the board, shall contain such information relating to the applicant’s qualifications and eligibility as may be required by the board, and shall include applicant’s age, residence, addresses for at least the five (5) years immediately preceding date of application, citizenship, occupations, general and legal background and information as to the applicant’s background and moral character. The Court may revoke the license of any attorney at any time upon satisfactory showing that the same was obtained by false representations, fraud or deceit.

B. Filing requirements. Applications for admission to the bar of New Mexico shall be submitted in duplicate on forms prescribed by the Board of Bar Examiners from time to time. Applications shall be filed with the board at its executive offices as follows:

(1) The filing deadline for the February examination is on September 10th immediately preceding the examination and the filing deadline for the July bar examination is on January 10th immediately preceding the examination.

(2) Applicants seeking a re-examination must file by January 10th for the February bar examination and June 10th for the July bar examination.

(3) No application will be accepted after the applicable filing date set forth in this rule except upon payment of such additional late fees as required by these rules.

C. Documents needed. The following documents shall be furnished with the application:

(1) a copy of the Federal Bureau of Investigation identification record of the applicant and a copy of the New Mexico Department of Public Safety identification record of the applicant;

(2) a properly authenticated transcript (sent from the law school) evidencing graduation with a juris doctor or bachelor of laws and letters degree from a law school formally accredited by the American Bar Association along with a completed law school certification on a form prescribed by the board; except that if the applicant is not a graduate of an accredited law school, the applicant shall transmit with the application:

(a) a certificate of admission in another state;
(b) three certificates vouching for the applicant’s good moral character by members of the bar of such other state;
(c) one or more certificates by a judge or judges of the highest court of original jurisdiction in such other state, or the clerk thereof, to the effect that the applicant has been actively engaged in the actual practice of law in that state for at least four (4) years prior to the date of the certificate, and further that applicant is in good standing in the bar of such state and has not been disbarred, been placed under disciplinary suspension or resigned from such bar while under disciplinary investigation, is not the subject of any pending disciplinary proceedings in such state, or if the applicant has been suspended or disbarred, that the applicant has been duly reinstated.

Certificates of admission from other states may be sent directly to the Board of Bar Examiners under separate cover. All such papers will be returned to the applicant in due course. Other documents submitted will be returned to the applicant, if requested, upon approval by the chair or vice chair of the Board of Bar Examiners; and

(3) character and fitness statements from three licensed attorneys in good standing in any jurisdiction in the United States, who are familiar with the applicant’s qualifications certifying that the applicant is a person of good moral character and physically and mentally qualified for admission to the bar of New Mexico.

[As amended, effective November 14, 1988; effective November 1, 1994; November 17, 1999 for bar examinations after January 1, 2001; April 9, 2002; as amended by Supreme Court Order No. 08-8300-28, “effective for the February 2009 bar examination.”]
PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS FOR CRIMINAL CASES

The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court’s consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s Web site at http://nmsupremecourt.nmcourts.gov/ or sending written comments to:

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

Comments must be received by the Clerk on or before Oct. 27, 2008, to be considered by the Court.

14-203. Act greatly dangerous to life; essential elements.
The defendant is charged with first degree murder by an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life. For you to find the defendant guilty [as charged in Count _______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant ________________________ (describe act of defendant);
2. The defendant's act caused the death of ____________________________ (name of victim);
3. The act of the defendant was greatly dangerous to the lives of others;
4. The defendant knew that his act was greatly dangerous to the lives of others;
5. This happened in New Mexico on or about the __________ day of __________, _______

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

USE NOTE
1. Insert the count number if more than one count is charged.
2. UJI 14-251 must also be used if causation is in issue.


Committee commentary. — See 30-2-1A(3) NMSA 1978. See LaFave & Scott, Criminal Law §29 (1972). This provision is used for a killing which resulted from extremely negligent conduct or “perpetrated by any act imminently dangerous to another, and evincing a depraved mind, regardless of human life, though without any premeditated design to effect the death of any particular individual.” Warren on Homicide 393 (2d ed. 1938).

— It is generally believed that this murder occurs when the accused does an act which is dangerous to more than one person. Some examples of conduct which have been held to come within the depraved mind murder category are: firing a bullet into a room occupied by several people; shooting into a passing train or a moving automobile; driving a car at very high speeds along a busy street. See generally, LaFave & Scott, Criminal Law 543 (1972) and Perkins, Criminal Law 37 (2d ed. 1969).

— This instruction sets forth a subjective test for “depraved mind murder.” Second degree murder provides an objective test for depraved mind murder.

— LaFave & Scott believe that most depraved heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue — where the defendant is more absent-minded, stupid or intoxicated than the reasonable man—LaFave & Scott, supra at 544.]


Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others—though unaccompanied by any intent to kill or do serious bodily injury—and which actually causes the death of another . . . . 2 Wayne R. LaFave, Substantive Criminal Law § 1.4.4., at 436-7 (2 ed. 2003).

“One way our courts have distinguished depraved mind murder is by the number of persons exposed to danger by a defendant’s extremely reckless behavior.” Reed, 2005-NMSC-031, ¶ 22. See State v. Brown, 1996-NMSC-073, ¶ 14, 122 N.M. 724, 931 P.2d 69. Generally, in New Mexico, “depraved mind murder convictions have been limited to acts that are dangerous to more than one person.” Reed, 2005-NMSC-031, ¶ 22. “Such condemned behavior is required to be extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions’ cage in the zoo.” State v. Johnson, 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct. App. 1985). Other types of conduct that have been held to involve a “very high degree of unjustifiable homicidal danger” include “starting a fire at the front door of an occupied dwelling, shooting into the caboose of a passing train or into a moving automobile necessarily occupied by human beings,” and “driving a car at very high speeds along a main street.” 2 LaFave, supra, § 1.4.4, at 440. LaFave cites additional examples imaginable, including “throwing stones from the roof of a tall building.
onto the busy street below” and “piloting a speedboat through a group of swimmers.” *Id.* at 441.

“In addition to the number of people endangered, [New Mexico] has construed depraved mind murder as requiring proof that the defendant had ‘subjective knowledge’ that his act was greatly dangerous to the lives of others.’ Reed, 2005-NMSC-031, ¶ 23. *See State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). “The required mens rea element of ‘subjective knowledge’ serves as proof that the accused acted with ‘a depraved mind’ or ‘wicked or malignant heart’ and with utter disregard for human life.” *Brown*, 1996-NMSC-073, ¶ 16. “[The legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent.” Reed, 2005-NMSC-031, ¶ 24 (quoting *Brown*, 1996-NMSC-073, ¶ 15). “[O]ne way to distinguish depraved mind murder from manslaughter when an underlying act involves extremely reckless conduct is by identifying an element of viciousness . . . .” Reed, 2005-NMSC-031, ¶ 24(citing Rollin M. Perkins & Ronald N. Boecke, *Criminal Law*, 60 (3d ed. 1982)). “Obviously, mere negligence or recklessness will not do.” Reed, 2005-NMSC-031, ¶ 23.

Therefore, this instruction sets forth a subjective test for depraved mind murder. “The defendant must know his act is greatly dangerous to the lives of others.” Johnson, 103 N.M. at 368, 707 P.2d at 1178. But, “[a] defendant does not have to actually know that his victim will be injured by his act.” *Ibn Omar-Muhammad*, 102 N.M. at 278, 694 P.2d at 926. *See also McCrary*, 100 N.M. at 673, 675 P.2d at 122. In *McCrary*, the defendant had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. He and a co-defendant claimed that they decided to get revenge by shooting the tires of the carnival trucks. They discharged about twenty-five shots into several tractor-trailers and cabs. Not a single tire was shot. The victim was in a sleeper cab of one of the trucks and was killed by one of these bullets. The Court stated, “Defendants did not have to actually know that [victim] was in the sleeper compartment. Rather, sufficient subjective knowledge exists if Defendants’ conduct was very risky, and under the circumstances known to Defendants they should have realized this very high degree of risk.” *Id.* The fact that no tires were shot and there were twenty-five bullet holes in the upper parts of the vehicles was substantial evidence of the defendants’ knowledge of the risk. The Court also pointed out the fact that the defendants contemplated slashing the tires but rejected it for fear of being caught, indicating that defendants had reason to know people were in the area. The Court held that in light of the surrounding circumstances known to defendants, there was substantial evidence for a jury to find that defendants had subjective knowledge of the risk.

The Supreme Court has held that “a fact finder may consider evidence of extreme intoxication when determining whether a defendant possessed the requisite mental state of ‘subjective knowledge’ for first-degree depraved mind murder.” *See Brown*, 1996-NMSC-073, ¶ 1.

Also note that the existence of an intent to kill a particular individual does not remove the act from this class of murder. *See State v. Sena*, 99 N.M. 272, 657 P.2d 128 (1983). In Sena, the defendant, a woman, and another man entered a bar through the front entrance. The woman was holding a drink and the doorman did not allow her to enter with the drink. A dispute arose and the defendant hit the doorman. The doorman then sprayed defendant with mace, hit him with a flashlight, and threw him out of the door. Within a few seconds the defendant returned with a gun. He then opened fire on the doorman, who immediately turned and ducked. The defendant fired four or five times. The first shot hit the doorman in the face, but the other shots missed. One of these shots struck and killed an innocent bystander. The Court held, “By firing at the doorman in a room containing other persons within the line of fire, [defendant] committed an act ‘greatly dangerous to the lives of others’ which falls within the deprived mind theory. It is irrelevant whether he intended only to kill the doorman . . . .” *Id.* at 274, 657 P.2d at 130.

As LaFave explains, “[I]t is what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances which he knows, which is important, rather than the amount of risk as an abstract proposition of the mathematics of chance.” *LaFave*, supra, § 14.4, at 439. Here is an example:

The risk is exactly the same when one fires his rifle into the window of what appears to be an abandoned cabin in a deserted mining town as when one shoots the same bullet into the window of a well-kept city home, when in fact in each case one person occupies the room into which the shot is fired. In the deserted cabin situation it may not be, while in the occupied home situation it may be, murder when the occupant is killed. *Id.*

Additionally, it must also be unjustifiable for the defendant to take the risk. Here is an example:

If [a defendant] speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct done solely for the purpose of experiencing the thrill of fast driving may be enough for murder. *Id.*

As said in a simpler way, “the extent of the defendant’s knowledge of the surrounding circumstances and the social utility of his conduct” are to be considered. *Id.*

In contrast, the second-degree murder instruction provides an objective test. *See NMSA 1978, § 30-2-1(B) (1994) and UJI 14-210 NMRA 2005. “[The sole difference between the two instructions] rests with the requirement in the depraved mind murder instruction that the jury find Defendant’s act indicated a depraved mind without regard for human life . . . .” Reed, 2005-NMSC-031, ¶ 21. *See also Brown*, 1996-NMSC-073, ¶ 17 (recognizing that “[t]he instruction for first-degree deprived murder sets forth a subjective test, whereas the instruction for second-degree murder requires only an objective test”).

14-2212. Aggravated battery on a peace officer with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer with a deadly weapon [as charged in Count ______], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully] touched or applied force to __________ (name of peace officer) by __________ with a [________________________] [deadly weapon. A __________________________ (name of object) is a deadly weapon only if you find that a __________________________ (name of object), when used as a weapon, could cause death or great bodily harm];

2. The defendant’s conduct [caused injury to __________________________ (name of peace officer)]; [or]’

[threatened the safety of __________________________ (name of peace officer)];
To Prospective Jurors:

Please answer each of the following questions as fully and accurately as possible. There are no right or wrong answers. You should simply answer the questions honestly and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will be given to the parties or their attorneys in the case for which you are being considered as a juror. If you do not understand a question or do not have enough room to give adequate explanation to your answer, please use the last page for additional information. This questionnaire is to be answered as though you were in court answering questions.

The case for which you are being questioned is entitled State of New Mexico v. John Jones in which the State alleges that Mr. Jones committed the crime of (1) driving while under the influence of intoxicating liquor and (2) vehicular homicide. This is a brief statement of the charges against Mr. Jones but this and the following statements are not evidence. Mr. Jones is presumed innocent and the truth, if any, of the charges against him must be proved by the prosecution beyond a reasonable doubt.

The incidents which are relevant to the case occurred on or about June 1, 1991 on the 100 block of Central Avenue in Albuquerque. At that time Wanda Smith, 25, from Albuquerque, was a passenger in Mr. Jones’ car and was killed as a result of a one vehicle accident. Also riding in the automobile were Sandra Johnson and Jose Garcia. All of the passengers in the car were students at the University of New Mexico.

Your candor in answering these questions is appreciated.

Thank you for your cooperation.

NAME:

1. The possible witnesses in this case include: (See attached list)
   - Do you know or have you heard of any of these prospective witnesses? Yes No
   - If yes, which witnesses do you know?
   - what is your relationship to the witness?
   - or what have you heard?

2. Have you heard of the incidents or persons

USE NOTE

1. Insert the count number if more than one count is charged.
2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. If the issue of “lawfulness” involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184.
3. Use ordinary language to describe the touching or application of force.
4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in UJI 14-128 NMSA 1978 and if the deadly weapon is specifically listed in UJI 14-128 NMSA 1978, Section 30-1-12(B) (1963).
5. UJI 14-131, the definition of “great bodily harm,” must also be given.
6. This alternative is given only if the object used is not specifically listed in UJI 14-128 NMSA 1978, Section 30-1-12(C) (1963). If there is an issue as to whether or not the victim was a peace officer, UJI 14-2216 must be given. If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.11 NMSA 1978; UJI 14-2212 SCRA; as amended, effective January 15, 1998; February 1, 2000; November 1, 2001; as amended by Supreme Court Order ______________, effective ______________, __________.]
involved in this case in any way, including through radio, television, newspapers, the internet, discussion with friends or otherwise? Yes No
If yes, what have you heard?

________________________
what is the source of your information?

3. Mr. Jones is represented by (attorneys for defendant). Do you know or have you heard of the attorneys in this case? Yes No
If yes, which do you know? ________________
how do you know? ________________
what have you heard? ________________
What is your feeling about sitting on a case in which these attorneys are involved?

4. The State of New Mexico is represented by ________________
(names of prosecuting attorneys). Do you know or have you heard of these attorneys? Yes No
If yes, which do you know? ________________
how do you know? ________________
what have you heard? ________________
What is your feeling about sitting on a case in which these attorneys are involved?

Have you had any contact whatsoever with the Bernalillo County District Attorney’s office? Yes No
If yes, explain _______________________

5. Have you had any contact whatsoever with the Albuquerque Police Department? Yes No
If yes, what has been your contact? ________________
what is your feeling about the members of the Albuquerque Police Department?

6. Do you, your relatives or close associates belong to any organizations which take an official position on the use of alcohol? Yes No
(MADD, SADD, certain churches, etc.)

7. Do you drink alcohol? Yes No
How often? ________________
What are your feelings about the use of alcohol?

8. Have you ever known anyone who was arrested for driving while intoxicated (DWI)? Yes No
Explain: _________________________

9. Have you, your relatives, or close associates become familiar, through work, training, or study, with the effects of alcohol? Yes No
If so, please explain:

10. Have you ever taken any courses which addressed the effects of alcohol? Yes No
Explain: _________________________

11. What is your knowledge, education, or training about blood alcohol levels as shown by a blood test or breath test? Please explain:

12. Do you drive an automobile regularly? Yes No
What kind of car(s) do you drive?

13. Have you ever been in an automobile accident? Yes No
Was anyone injured or killed? Please explain:

14. How well do you feel the court system deals with crime?

15. What are your favorite movies that you’ve seen within the last few years?

16. From what brief description you’ve been given, is this a case in which you would like to serve as a juror? Yes No
Why or why not?

17. Please list any other information you think would be important for the court to know. Also, list here any information which you did not have room to give earlier. If you do not understand particular questions, please list those questions.

________________________
________________________

I SWEAR OR AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF

Signature ____________________________
Date ________________________________

[Adopted, effective January 1, 1995; as amended by Supreme Court Order , effective _________.]

14-120. Voir dire of jurors by court.

LADIES AND GENTLEMEN:

This is a criminal case in which the defendant(s) __________________________ [is] [are] charged with ___ (offense charged). If chosen as jurors, you will decide whether ______________________ (name of defendant) is not guilty or guilty. (name of defendant) is presumed innocent. The burden is on the state to prove guilt beyond a reasonable doubt.

At this time you will be asked some questions. You should remember that there are no right or wrong answers to these questions. The best answer is the most honest answer. If you would prefer not to answer any question in front of other people, please tell us and we will address your concern privately.

You have previously given answers on a questionnaire given by the court clerk. You may also add to your answers to those questions if your memory is refreshed about those questions here in open court.4

[Though not required, before the attorneys ask questions, the court might ask preliminary questions. For example:

1. The state is represented by ______________________ (name of attorney). How many of you are familiar with
2. The defendant is represented by __________________________ (name of attorney). How many of you are familiar with __________________________ (name of attorney)? What is your attitude about sitting on the case in which __________________________ (name of attorney) is representing one of the parties?)

3. The defendant is __________________________ (name of defendant). How many of you are familiar with __________________________ (name of defendant)? What is your attitude about sitting on this case given your familiarity with __________________________ (name of defendant)?

4. Without saying what you have seen or heard, how many of you have seen or heard anything about this case from any source whatsoever, including news media, radio, television, internet, or from any other person? (Those jurors who have received information should be questioned privately.)

5. It is estimated that this case will last __________________________ (length of trial). Do any of you feel that you would be caused an undue hardship by sitting in this case for that time? What is your hardship? What would be your attitude if chosen to sit in the case?

6. Is there any other reason that any of you feel you should not sit on this case? The attorneys may question the jurors.

USE NOTE

1. For use before jury selection. The court may wish to address a group of prospective jurors about preliminary issues such as hardship excuses before the parties address the jurors. The parties might address the jurors in smaller groups or individually as to more sensitive issues. Sample questions have been provided above. This instruction does not go to the jury room.

2. Use only the applicable bracketed alternative.

3. Fill in the charge as stated on the charging document.

4. There are three basic sources of information used by the court in jury selection:
   a. [F] the standard jury questionnaires given to all prospective jurors which contain basic demographic information;
   b. [E] case specific supplemental questionnaires which are given to the prospective jurors in the case in question;
   c. [F] voir dire questioning. The questioning by the attorneys is generally used for inquiry concerning the jurors’ attitudes and opinions about case-related issues (for example, burden of proof, self defense, alcohol use, etc.) and as follow-up to specific information highlighted by the questionnaires (for example, a juror’s knowledge of a witness).

5. It will sometimes be necessary to ask follow-up questions outside the hearing of the other prospective jurors. This is to avoid giving factual information to other jurors that they would not otherwise know and which might affect their view of the case.

6. If the answer to the question is yes, the bracketed additional questions may be given.

7. This instruction is an example of voir dire introduction, but voir dire examination should be tailored to the particular needs of a specific case. The court should be sensitive to several factors about voir dire:
   a. the size of group questioned as to a particular topic;
   b. which party proceeds first;
   c. the types of questions asked;
   d. the length of time required for particular question areas.

These factors will depend on a number of considerations:
   a. the type of case tried;
   b. the sensitivity of issues. For example sexual matters, publicity, or knowledge of parties might give reason for individual voir dire;
   c. the age, experience, intelligence, education, ability to articulate, or timidity of a particular juror;
   d. the degree of seriousness of the case;
   e. the information gathered in juror questionnaires;
   f. the party seeking to exclude a juror.

[As amended, effective January 1, 1995; October 15, 2002, as amended by Supreme Court Order _______________, effective _______________.]

Committee commentary. — This instruction is based on the voir dire used in federal courts and is included for guidance in conducting the voir dire in criminal cases. These questions may be asked of the jurors as a group in order to save time.

14-2217. Aggravated fleeing a law enforcement officer.

[NEW MATERIAL]

For you to find the defendant guilty of aggravated fleeing a law enforcement officer [as charged in Count ________], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;
2. The defendant drove willfully and carelessly in a manner that endangered the life of another person;
3. The defendant had been given a visual or audible signal to stop by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle;
4. The defendant knew that a law enforcement officer had given him an audible or visual signal to stop;
5. This happened in New Mexico, on or about the ________

USE NOTE

1. Insert the count number if more than one count is charged.

[As approved by Supreme Court Order _______________, effective _______________.]


Committee commentary. — Although the statute requires that the pursuit be conducted “in accordance with” the Law Enforcement Safe Pursuit Act, NMSA 1978, Sections 29-20-1 to -4 (2003), this is not an essential element of the crime. State v. Padilla, 2008-NMCA-006, 143 N.M. 310, 176 P.3d 299, reversing State v. Padilla, 2006-NMCA-107, ¶ 19.
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-051

Topic Index:
- Appeal and Error: Appellate Review; Fundamental Error; and Preservation of Issues for Appeal
- Constitutional Law: Confrontation
- Criminal Law: Intent; Specific Intent; and Tampering with Evidence
- Criminal Procedure: Burden of Proof; Cross-Examination; Immunity; Right to Confrontation; and Substantial or Sufficient Evidence
- Evidence: Substantial or Sufficient Evidence; and Witness Immunity

STATE OF NEW MEXICO, Plaintiff-Petitioner, versus JUAN ANTONIO SILVA, Defendant-Respondent.
No. 30,555 (filed: August 20, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
MARK A. MACARON, District Judge

GARY K. KING
Attorney General
JOEL JACOBSEN
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

CAREN ILENE FRIEDMAN
Santa Fe, New Mexico
PAUL J. KENNEDY
KENNEDY & HAN, P.C.
Albuquerque, New Mexico
for Respondent

OPINION

PATRICIO M. Serna, Justice

1. INTRODUCTION

2. Defendant Juan Silva was convicted of second degree murder, conspiracy to commit second degree murder, and tampering with evidence. He appealed, and the Court of Appeals remanded for a new trial based on the grounds that the district court had violated his Sixth Amendment rights by not allowing defense counsel to inquire into whether a State witness had been promised immunity in exchange for his testimony. The Court also found insufficient evidence to support the tampering conviction and ordered the charge dismissed on remand. The State petitioned this Court to review the Court of Appeals’ order.

II. THE SIXTH AMENDMENT ISSUE

3. We begin with the facts related to Defendant’s Sixth Amendment claim. The State’s star witness, Bobby Salas (Salas), was the closest thing it had to an eyewitness. His testimony occurred over three days, filled approximately three volumes of transcript, and was rife with inconsistencies. One of those inconsistencies provides the fount for Defendant’s claim that he was unable to fully confront Salas on cross-examination.

4. Prior to trial, Salas testified under oath at a deposition about his acquisition of the photographs that he later used to identify the defendants. At trial, he told a different story about those photos. In response, the State asked Salas a series of questions during direct examination aimed at establishing which of those renditions was true. Anticipating that Salas was about to testify that he had previously lied under oath concerning the photos, defense counsel objected. The objection focused on Salas’s Fifth Amendment right against self-incrimination and asserted that, before Salas answered the State’s questions, he should be provided with a lawyer who could advise him whether he should testify to the truth or falsity of his prior sworn statements. The State responded, in open court and in front of Salas, that it did not plan to prosecute him for perjury and would not do so even if he testified to having previously lied under oath. The State then suggested, again in front of Salas, that the trial court could give him use immunity to insulate him from any future perjury prosecution. The trial court took a recess to consider the issue.

5. Upon its return, the trial court heard further argument on the issue. Each of the three defense lawyers joined in this discussion, variably asserting their reasons as to why Salas’s Fifth Amendment rights demanded that he consult with a lawyer before answering the State’s questions. The State, on the other hand, argued that Salas had not perjured himself, that the trial court could grant him use immunity, and that the State would not later prosecute him for perjury. Ultimately, the trial court decided against immunity and against requiring Salas to consult with an attorney. Instead, it admonished Salas that he was to testify truthfully and that he could be prosecuted for perjury if he failed to do so.

6. Salas’s testimony resumed. At the conclusion of his direct examination, the State asked him whether he had been promised anything in exchange for his testimony, to which Salas responded, “No.”
beginning cross-examination, defense counsel asked to approach and argued at the bench that the State had opened the door to cross-examining Salas on the State’s non-prosecution promise made earlier during the discussion of his Fifth Amendment rights. The State responded that such questions should not be allowed because the trial court had not given Salas immunity. At one point, defense counsel stated, “[W]e have to be able to vigorously cross-examine about untrue statements under oath,” to which the trial court responded, “I ruled that.” Asked to clarify its ruling, the trial court explained:

Well, I think that the key here is whether—I mean, he obviously came in without the promise to testify. I think that the key here is whether—if the State promised him something to come in, I think that’s a little different. I See a difference. I wouldn’t allow going into that particular area that the State offered him immunity to testify, and it wouldn’t be true. They may have offered it, but the Court didn’t grant it, so I think that area is still out of bounds. Any inconsistent statements are in bounds.

Nowhere during this exchange did defense counsel claim a Confrontation Clause problem or protest the trial court’s ruling on either general constitutional or Sixth Amendment grounds.

[7] Defendant Seemingly amalgamates those two exchanges between the court and the lawyers into a single colloquy and argues that, somewhere within that rather nebulous construction, defense counsel raised the Sixth Amendment issue. When questioned at oral argument as to where, precisely, that issue was raised, Defendant admitted that the initial issue was Salas’s Fifth Amendment rights but that it later “morph[ed] indirectly” into an issue of Silva’s Sixth Amendment rights. Defendant pointed to the trial court’s ruling that defense counsel could not ask about the promise of immunity. According to Defendant, the record shows that the trial court was aware of the Sixth Amendment issue and knew that it was ruling on the issue when it purposefully excluded defense counsel’s inquiry into the State’s promise not to prosecute Salas for perjury.

[8] The State, however, construes the events quite differently, parsing what Defendant interprets as a single conversation into two distinct colloquies and arguing that nowhere did defense counsel alert the mind of the trial court to an alleged Sixth Amendment violation. According to the State, the first colloquy was about Salas’s Fifth Amendment rights, while the second sought an evidentiary ruling on the scope of cross examination. Therefore, the State argues, Defendant did not preserve the Sixth Amendment argument for review.

A. Defendant Did Not Preserve the Sixth Amendment Issue

[9] We agree with the State that defense counsel did not alert the trial court to the Sixth Amendment issue that Defendant now claims. “To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . .” Rule 12-216(A) NMRA. We require that a party assert the basis for its objection “with sufficient specificity to alert the mind of the trial court to the claimed error or errors.” State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (quoted authority omitted). Where an objection is made without the specificity necessary to call the trial court’s attention to the matter complained of, the matter will be deemed unpreserved and ineligible for review. See Hill v. Burnworth, 85 N.M. 615, 616, 514 P.2d 1312, 1313 (Ct. App. 1973).

[10] Defense counsel’s objection during Salas’s direct examination addressed solely Salas’s Fifth Amendment rights; it did not raise, and thus did not preserve, the Sixth Amendment claim that Defendant now argues. Likewise, defense counsel’s inquiry into the scope of cross-examination did not preserve the issue. Defense counsel asked the trial court to rule whether the State had opened the door to questions about promises that may have been made to Salas in exchange for his testimony. Counsel did not argue that refusing the opportunity to ask questions about the non-prosecution promise would violate Defendant’s constitutional rights generally, nor did counsel take the more desirable approach and argue specifically that Defendant’s Sixth Amendment or Confrontation Clause rights would be infringed. The record shows that the trial court treated defense counsel’s inquiry as a request for clarification on the scope of cross-examination. See State v. Lucero, 104 N.M. 587, 591, 725 P.2d 266, 270 (Ct. App. 1986) (concluding that confrontation issue was not preserved because defendant’s objection asked merely for an evidentiary ruling and did not alert the trial court to a constitutional error). Thus, if defense counsel meant to characterize his objections as a Sixth Amendment issue at trial, it was not done with sufficient specificity to call the trial court’s attention to the matter complained of, and therefore was not preserved as such. See State v. Mora, 1997-NMSC-060, ¶ 47 n.1, 124 N.M. 346, 950 P.2d 789 (holding that defendant’s failure to object on confrontation grounds or general constitutional grounds resulted in abandonment of Confrontation Clause argument on appeal).

B. The Trial Court did not Commit Fundamental Error

[11] Defendant also argues that, even if his Sixth Amendment claim was not preserved, we should consider it under the fundamental error exception to the preservation rule because it involves his fundamental rights. See Rule 12-216(B)(2) (“This rule shall not preclude the appellate court from considering . . . questions involving . . . fundamental error or fundamental rights of a party.”). The first step in reviewing for fundamental error is to determine whether an error occurred. Campos v. Bravo, 2007-NMSC-021, ¶ 8, 141 N.M. 801, 161 P.3d 846. If that question is answered affirmatively, we then consider whether the error was fundamental.

[12] As to the existence of error, the Court of Appeals correctly held that the trial court erred in preventing defense counsel from inquiring into the possibility of an agreement between Salas and the State. Silva, 2007-NMCA-117, ¶ 20. “A defendant’s right to cross-examine witnesses concerning bias or motivation to fabricate favorable testimony does not hinge on whether in fact any such deals or understandings were effected.” State v. Martinez, 1996-NMCA-109, ¶ 17, 122 N.M. 476, 927 P.2d 31 (quoted authority omitted). Instead, as we have explained before, rather than the existence of an actual understanding, the “determinative factor in the Court’s analysis” is that “[a] jury . . . should be able to take into consideration whether a witness hoped to curry favor by cooperating with the prosecution.” State v. Gonzalez, 1999-NMSC-033, ¶ 24, 128 N.M. 44, 898 P.2d 419 (alteration in original) (quoting Martinez, 1996-NMCA-109, ¶17). Therefore, even in the absence of evidence that a deal had been made or could have been made exchanging Salas’s testimony for leniency, defense counsel was entitled to explore the potential that Salas had been offered immunity for his testimony so that the jury, when judging his credibility, could consider whether Salas was testifying with the hope of gaining the State’s favor. Martinez, 1996-NMCA-109, ¶ 17.

[13] Having identified an error in the
Upon reviewing the record in the instant case, we cannot say that Defendant is indisputably innocent. See, e.g., Garcia, 19 N.M. at 418, 422, 143 P. at 1013, 1015 (stating that the evidence conclusively established the defendant’s innocence because he was unconscious at the time of the murder for which he was charged). Thus, our inquiry turns to an analysis of whether the trial court’s limitation of cross-examination resulted in a fundamental unfairness that undermined the integrity of our judicial system. See State v. Barber, 2004-NMSC-019, ¶ 16, 135 N.M. 621, 92 P.3d 633. To resolve that question, we view the trial court’s ruling “in the context of the individual facts and circumstances of the case,” as determined from our review of the entire record. State v. Sutphin, 2007-NMSC-045, ¶ 19, 142 N.M. 191, 164 P.3d 72 (quoted authority omitted).

We start by recognizing that the loss of the fundamental right to cross-examine is not necessarily fundamental error. State v. Rogers, 80 N.M. 230, 232, 453 P.2d 593, 595 (Ct. App. 1969). Although the trial court in the instant case prevented defense counsel from asking Salas whether he had received immunity in exchange for his testimony, it allowed defense counsel wide latitude in cross-examining Defendant on his inconsistent statements and any prior untrue statements he made under oath. This is not a case in which the defendant’s right to cross-examine was entirely vitiated. See Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973) (holding that the defendant was denied a fair trial because, among other things, a procedural rule prevented him from cross-examining a witness who had earlier confessed to the underlying crime). On the contrary, defense counsel had ample opportunity to cross-examine Salas and did so effectively—practically decimating his credibility as a witness. Had the trial court’s ruling been a more complete restriction and denied defense counsel the breadth that it enjoyed on cross-examination, we would be more inclined to conclude that the ruling resulted in a fundamental unfairness. However, “[a] defendant’s right to confront and to cross-examine is not absolute.” State v. Stephen F., 2008-NMSC-037, ¶ 6, ___ N.M. ___, 188 P.3d 84 (quoted authority omitted). Viewing the trial court’s ruling among the facts and circumstances of this case, we cannot say that merely disallowing counsel the opportunity to inquire into the possibility of an agreement between Salas and the State worked such a fundamental unfairness in Defendant’s trial that it impugned the integrity of our judicial system. Thus, the trial court’s limitation of cross-examination did not rise to the level of fundamental error.

For those reasons, we reverse the Court of Appeals’ conclusion that the Sixth Amendment issue was eligible for review and the holding that it reached after considering the merits. Defendant is not entitled to a new trial.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TAMPERING CONVICTION

The State also challenges the Court of Appeals’ holding that there was insufficient evidence to support Defendant’s conviction for tampering with evidence, contrary to NMSA 1978, Section 30-22-5(A) (1963, prior to amendments through 2003). “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” State v. Duran, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (quoted authority omitted). The State argues that Defendant tampered with evidence because (1) Defendant had a gun at the scene of the crime; (2) a gun was used to murder Hernandez; (3) the murder weapon was removed from the scene; and (4) the murder weapon was never recovered. The jury was instructed that, to prove Defendant guilty of tampering with evidence, the State had to show that he “hid a handgun” and that he did so “intending to prevent the apprehension, prosecution or conviction of himself.” See UJI 14-2241 NMRA; accord § 30-22-5(A).

Tampering with evidence is a specific intent crime, requiring sufficient evidence from which the jury can infer that the defendant acted with an intent to prevent “apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.” Section 30-22-5(A); accord Duran, 2006-NMSC-035, ¶ 14. As we have previously explained, “[i]ntent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence.” State v. Motes, 118 N.M. 727, 729, 885 P.2d 648, 650 (1994) (quoted authority omitted). Thus, when direct evidence of an intent to disrupt the investigation is lacking, it is often inferred from an overt act of the defendant. Duran, 2006-NMSC-035, ¶ 14; See also State v. Roybal, 115 N.M. 27, 33-34, 846 P.2d 333, 339-40 (Ct. App. 1992). For example, in a case involving death by gunshot to the head, evidence that the defendant gave a gun to his brother shortly after the killing, instructed his brother to hold it, and then lied to the police about his knowledge of the gun’s whereabouts was sufficient evidence of an overt act from which the jury could infer his intent to tamper with evidence. State v. Arellano, 91 N.M. 195, 197, 572 P.2d 223, 225 (Ct. App. 1977). However, absent both direct evidence of a defendant’s specific intent to tamper and evidence of an overt act from which the jury may infer such intent, the evidence cannot support a tampering conviction. Duran, 2006-NMSC-035, ¶ 15.

Such is the case here. The State argues that Defendant’s possession of a gun and the police’s inability to find the gun used in the murder constitutes sufficient evidence of Defendant’s tampering. However, the State offered no direct evidence to show that Defendant intended to disrupt the police investigation, nor did it provide any evidence, circumstantial or otherwise, of an overt act on Defendant’s part from which the jury could infer such intent. Instead, the State effectively asked the jury to “speculate that an overt act of . . . hiding [the murder weapon] had taken place, based solely on the fact that such evidence was never found.” Id. Therefore, the State failed to meet its burden and the evidence is insufficient to support Defendant’s conviction for tampering with evidence.

The State alternatively argues that Defendant’s conviction should stand based on a theory of accessory liability. The jury was instructed that it could find Defendant “guilty of [tampering with evidence] even
though he himself did not do the acts constituting the crime, if . . . [t]he defendant intended that the crime be committed; . . . [t]he crime was committed; [and] . . . [t]he defendant helped, encouraged or caused the crime to be committed.” See UJI 14-2822 NMRA; accord NMSA 1978, § 30-1-13 (1972). To convict Defendant as an accessory, the State still had to prove that someone hid the gun intending to disrupt the investigation and that Defendant helped, encouraged, or caused that to occur. See State v. Johnson, 2004-NMSC-029, ¶¶ 52, 54, 136 N.M. 348, 98 P.3d 998. However, as with Defendant, the record lacks sufficient evidence to establish that someone else acted with such intent, let alone evidence to show that Defendant helped, encouraged, or caused them to so act. Because the State did not provide such evidence, Defendant could not have been found guilty as an accessory to tampering as a matter of law.

{21} Thus, we agree with the Court of Appeals that there was insufficient evidence to support the tampering conviction.

IV. CONCLUSION

{22} Based on the forgoing analysis, we reverse the Court of Appeals’ holding that Defendant’s Sixth Amendment rights were violated and uphold his convictions for second degree murder and conspiracy to commit second degree murder. However, we affirm the Court of Appeals’ conclusion that there was insufficient evidence to support the tampering conviction and remand to the trial court to vacate accordingly.

{23} IT IS SO ORDERED.

PATRICIO M. Serna, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
was arraigned. On June 9, 2005, the parties gerred on April 28, 2005, when Defendant and running a stop sign. Pursuant to Rule 5-604(B) NMRA. The purpose of these rules is to “assure the prompt trial and disposition of criminal cases.” State v. Guzman, 2004-NMCA-097, ¶ 9, 136 N.M. 253, 96 P.3d 1173 (quoting State v. Flores, 99 N.M. 44, 46, 653 P.2d 875, 877

BACKGROUND

[2] Defendant was charged in metropolitan court on April 14, 2005, with aggravated driving-while-intoxicated (DWI) and running a stop sign. Pursuant to Rule 7-506 NMRA, the 182-day rule was triggered on April 28, 2005, when Defendant was arraigned. On June 9, 2005, the parties appeared for trial, and defense counsel was granted a continuance because he had not spoken with Defendant. Even though they were far from the expiration of the 182-day rule, the State requested an extension of the rule so that it would be “covered” in the event that the deadline was missed. Defense counsel agreed, and the metropolitan court reset the case for trial.

[3] On July 20, 2005, the parties again appeared for trial, with the court granting a defense request for a continuance and agreeing to the State’s request for an extension of the 182-day rule. The case came up for trial again on August 5, 2005, but the State was not ready to proceed because the arresting officer was not available to testify. After two additional delays, trial was set for November 17, 2005. On that date, the State appeared with its witness, the arresting officer, and indicated that it was ready to proceed to trial. Defense counsel indicated that he, too, was ready for trial. However, he asked the court if it could delay calling the jury for trial so that the court could consider a motion challenging the validity of the stop. The judge informed defense counsel that Defendant was not entitled to a jury trial. Defense counsel responded by telling the court that, “instead of setting it for trial, judge, if you just want to have the motion—but since it is a judge trial I guess we could just do it.” The court indicated that it would address the suppression motion first, and held a hearing in which a defense witness and the arresting officer then testified about the circumstances of the stop. The court then heard testimony on the motion and took it under advisement after requesting briefing, with no formal commencement of trial on that date.

[4] The case came back for trial on February 15, 2006. Defense counsel then argued that they might be over the 182-day limit, unless the November hearing could be considered part of the trial. The State noted that, with the extensions that had been granted, the 182-day rule would have expired about a month prior to the February setting. The metropolitan court judge reviewed the record of the November hearing, noting that it had focused on the pre-trial motion. Nevertheless, after some discussion of whether double jeopardy had attached at the November hearing, the court referred the parties to the fact that the motion to dismiss had been denied on January 27, 2006. In effect, the court declined to change the ruling denying dismissal, and Defendant was found guilty after a bench trial. The district court affirmed the metropolitan court, and this appeal followed.

STANDARD OF REVIEW

[5] The district court sat in its appellate capacity and reviewed the case in a manner that we repeat herein. See State v. Trujillo, 1999-NMCA-003, ¶ 4, 126 N.M. 603, 973 P.2d 855 (“For on-record appeals the district court acts as a typical appellate court, with the district judge simply reviewing the record of the metropolitan court trial for legal error.”). We review de novo the issue of whether the metropolitan court properly applied the 182-day rule. See State v. Carreon, 2006-NMCA-145, ¶ 5, 140 N.M. 779, 149 P.3d 95, cert. quashed, 142 N.M. 436, 166 P.3d 1090.

DISCUSSION

[6] In metropolitan court, a “trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days [of a triggering event].” Rule 5-604(B). The rule is nearly identical to its district court counterpart, which refers to six months instead of 182 days. See Rule 5-604(B) NMRA. The purpose of these rules is to “assure the prompt trial and disposition of criminal cases.” State v. Guzman, 2004-NMCA-097, ¶ 9, 136 N.M. 253, 96 P.3d 1173 (quoting State v. Flores, 99 N.M. 44, 46, 653 P.2d 875, 877
that we rejected in
pears to us to rely on a technical reading of
the triggering moment is when the jury is
test used for double jeopardy analysis—that
by that date. 2000-NMCA-027, ¶ 2. The
although the petit jury had been selected
rule had been violated because the jury had
the defendant claimed that the six-month
timely manner.”
¶ 28.
Id.

defendant acquiesces in the delay or fails
to the benefit of the defendant or (2) the
will prevail over a technical violation of
where common sense and equity prevail
and the policy against technical dismissals;
Id. approach advise against a dismissal.
where the equities and a common sense
right to a timely trial.”

fendant to trial under these rules are not
doubt, double jeopardy attaches when the
P.3d 1155 (stating that, in a criminal bench
double jeopardy, which make the reception of evi-
ding to give it further consideration. Given
the State’s preparedness and the court’s
the State had not received prior notice of
the motion. The court also observed that
Defendant’s motion involved a particularly
complicated legal issue, and deferred a rul-
ing to give it further consideration. Given
the State’s preparedness and the court’s
efforts to rule on Defendant’s motion, and
in the absence of any attempt to circumvent
the rule, id. ¶ 7, we believe that dismissal
would only result from an overly technical
reading of the rule. Cf. State v. Mendoza,
108 N.M. 446, 449, 774 P.2d 440, 443
(1989) (cautioning that the six-month rule
should not be used to effectuate technical
dismissals). This is the same conclusion
reached by the district court.

Defense claim of the trial court to not persuade us that the
district court got it wrong. Defendant’s
primary argument is based on the charac-
terization of the November hearing—was it
a pre-trial hearing or was it part of the trial?
Defendant claims that, even if a bench trial
commences with opening arguments, as the
district court determined, the November
hearing could not be characterized as a trial
because no opening statements were made.
As we stated above, we are not bound by
the more stringent rules that govern double
jeopardy, which make the reception of evi-
dence the triggering event in a bench trial.
Instead, we must balance the bright-line
purpose of the rule with a common-sense
application. See State v. Lucero, 2007-
NMCA-096, ¶ 9, 142 N.M. 315, 164 P.3d
1014 (observing that the bright-line ap-
plication of the six-month rule is tempered by
a common-sense application). Here, the
State appeared on the November trial date
with its witness prepared to commence
trial, and Defendant was prepared as well.
In the absence of further delay caused by
the State or the court for reasons unrelated
to Defendant’s actions, we believe that the

purpose of the rule was satisfied on that
date, and the issue would only remerge if there is “[p]rolonged, unjustified delay
or conduct suggestive of an attempt to
circumvent [the rule].” Rackley, 2000-
NMCA-027, ¶ 7

Defendant claims that dismissal is
appropriate because the State conceded
on appeal to the district court that the
trial commenced outside the time limit and
agreed that dismissal was the appropriate
remedy. As the district court observed,
appellate courts are not bound by this
type of concession. See State v. Martinez,
1999-NMSC-018, ¶ 26, 127 N.M. 207,
979 P.2d 718 (“[A]ppellate courts in New
Mexico are not bound by the [a]ttorney [g]
eneral’s concession of an issue in a criminal
appeal.”). Defendant also argues that it was
not her fault that the court did not rule on
the motion at the November hearing, nor
that the State failed to try her prior to the
rule’s deadline at the end of January 2006.
Cf. County of Los Alamos v. Beckman,
120 N.M. 596, 599, 904 P.2d 45, 48 (Ct. App.
1995) (noting that an accused has no duty
to bring on his or her own trial). Defendant
argues that, like the situation in Beckman,
where this Court affirmed dismissal based
on a six-month rule violation, Defendant
had informed the metropolitan court at the
November hearing of the amount of time
that had run on the rule. Id. Although we
note that in Beckman, the court had been
informed of the specific expiration date, id.,
we do not believe that Beckman helps De-
fendant here. Unlike the facts in Beckman,
the State, Defendant, and the court in the
present case were prepared to commence
trial at the November proceedings. While
we have some concern that Defendant’s
new trial setting was pushed beyond the
182-day deadline, we do not believe that
the record bears out any attempt to cir-
cumvent the rule, and dismissal would be
an overly technical response to the unique
circumstances of this case.

CONCLUSION

For the reasons set forth above,
we conclude that the metropolitan court
properly denied Defendant’s motion to dis-
miss. Accordingly, we affirm Defendant’s
conviction.

IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge
OPINION

MICHAEL E. VIGIL, JUDGE

[1] The metropolitan court dismissed the case against Defendant after two mistrials were caused by the State’s witnesses and after a police officer, who was a key witness for both the State and Defendant, failed to appear for the third scheduled trial when the State failed to subpoena him after representing that it would do so. The State appealed to the district court, which reversed. Defendant then appealed to this Court. We reverse and remand for reinstatement of the metropolitan court order of dismissal.

BACKGROUND

[2] Officer Picchione of the Albuquerque Police Department filed a complaint in the metropolitan court on June 23, 2005, charging Defendant with battery of a household member (his father-in-law) following an incident that occurred when Defendant, who was separated from his wife, was in the process of removing some property from the former marital home. Officer Picchione wrote a report and filed the complaint after speaking with Defendant’s wife and father-in-law.

[3] A jury trial was set for November 1, 2005. The State filed a “Notice of Intent to Call Witnesses” stating it intended to call Defendant’s wife, Defendant’s father-in-law, and Officer Picchione as witnesses at the trial. The State was prepared to proceed with the trial, but Defendant moved for a continuance because a defense witness, who was not subpoenaed, was not present. The continuance was granted, and the trial was rescheduled.

[4] At the next trial setting on December 13, 2005, the State moved for a continuance because Officer Picchione was not present. Stating that he also required Officer Picchione’s presence, Defendant did not oppose the State’s motion. Upon inquiry from the metropolitan court as to whether the parties required subpoenas, Defendant said he would subpoena the defense witnesses and asked the prosecutor if he was going to have to subpoena Officer Picchione as well. The prosecutor stated, “We’ll go ahead and subpoena the officer.” The State never subpoenaed Officer Picchione.

[5] The first trial commenced on January 4, 2006. However, a mistrial was declared after the State’s first witness (Defendant’s father-in-law) violated a pretrial ruling on a motion in limine. The metropolitan court had cautioned the State to instruct its witnesses about its ruling and that a violation of the ruling would be grounds for a mistrial. The second trial commenced on January 25, 2006, and another mistrial was declared on the same basis when the State’s second witness (this time Defendant’s wife) violated the same pretrial ruling. Trial was re-set to commence on March 10, 2006, with the metropolitan court stating this would be the last such setting.

[6] On March 7, 2006, Defendant filed a motion to dismiss based on double jeopardy, prosecutorial misconduct, and speedy trial grounds. At the March 10, 2006, setting, the State requested a continuance, stating that Officer Picchione was not present due to a lung and throat infection and because it wanted additional time to respond to Defendant’s motion to dismiss. The metropolitan court granted the State’s request over Defendant’s objection and set a motion hearing for March 29, 2006.

[7] During the motion hearing on March 29, 2006, the metropolitan court expressed concern about the protracted course of the proceedings. There was also discussion about Officer Picchione’s illness that necessitated a continuance of the March 10, 2006 setting. The metropolitan court specifically asked, “Is he able to come to court now? Is this stale information?” In response, the prosecutor answered, “I believe that’s stale information. He couldn’t come to court on that day.” The metropolitan court said, “Alright, so this whole business of Officer Picchione—Everybody’s available for trial now?” The prosecutor represented, “Everyone’s available for trial, your honor. I’ve kept in regular contact with them and let them know, kept them informed of what’s going on.” The metropolitan court denied Defendant’s motion to dismiss. However, the court also warned, “I’m going to reset the case for trial, and we’ll get to try it once and for all. If the State has another problem with its witnesses testifying to things they are directed not to, then I’ll dismiss it with prejudice and impose sanctions if necessary.”

[8] The case was called for trial a third time on May 3, 2006. Officer Picchione was not present. Defense counsel asserted that Officer Picchione’s absence was damaging to the defense and made an offer of proof that aspects of his report had exculpatory value and that his testimony was required to impeach the State’s other witnesses. Defense counsel further stated that she had not subpoenaed Officer Picchione because the State had previously represented that it was going to insure his presence at the trial. Upon inquiry by the metropolitan court, the prosecutor acknowledged both the potential exculpatory value of Officer Picchione’s testimony and his prior assurances that he would procure Officer Picchione’s presence at the trial. The prosecutor then explained that he did not know until the morning of trial that Officer Picchione was at a doctor’s appointment.
and that efforts to contact Officer Picchione had been unsuccessful. The State asserted, nevertheless, that it was prepared to proceed to trial without Officer Picchione’s testimony. [9] In light of Officer Picchione’s absence, Defendant moved to either suppress all evidence that might have been impeached by Officer Picchione’s testimony or to dismiss. After hearing the arguments of counsel, the metropolitan court granted Defendant’s motion and dismissed. In its final judgment, the court stated that the two prior mistrials combined with Officer Picchione’s failure to appear at the third scheduled trial, supplied the grounds for the dismissal of the proceedings. [10] The State appealed the dismissal to the district court. See NMSA 1978, § 34-8A-6(C) (1993) (providing that in criminal actions involving “domestic violence” as defined, the metropolitan court is a court of record and that a party aggrieved by a judgment of the metropolitan court in such an action may appeal to the district court). Sitting as an appellate court, the district court concluded that the metropolitan court abused its discretion when it dismissed the State’s case and reversed. The district court gave three reasons for its conclusion: (1) it was Defendant’s duty to make sure Officer Picchione had been subpoenaed if his testimony was critical to his defense, (2) the proper remedy was to continue the trial to allow Defendant to subpoena Officer Picchione, and (3) Defendant would not have been prejudiced had the case proceeded to trial in Officer Picchione’s absence. [11] Defendant appeals from the order of the district court. See Rule 7-703(R) NMRA (“An aggrieved party may appeal from a judgment of the district court to the New Mexico Supreme Court or New Mexico Court of Appeals, as authorized by law, in accordance with the Rules of Appellate Procedure.”). The State argues that we should arrive at the same conclusion as the district court for the same three reasons expressed by that court. We decline to do so. Accordingly, we reverse the order of the district court and reinstate the final judgment of the metropolitan court. STANDARD OF REVIEW [12] The district court was sitting as an appellate court in this case. See State v. Foster, 2003-NMCA-099, ¶ 9, 134 N.M. 224, 75 P.3d 824 (stating that if an appeal from the magistrate court in the district court is on the record, the district court acts as a typical appellate court). The issue decided by the district court was whether the dismissal was properly ordered by the metropolitan court. A metropolitan court is vested with the inherent authority to sanction parties in furtherance of controlling its docket and the proceedings that come before it. See In re Jade G., 2001-NMCA-058, ¶¶ 27-28, 130 N.M. 687, 30 P.3d 376. An appellate court reviews dismissal of a criminal case based on this inherent power for an abuse of discretion. See State v. Espanza, 2003-NMCA-075, ¶ 41, 133 N.M. 772, 70 P.3d 762 (observing that dismissal pursuant to inherent authority is reviewed for abuse of discretion); State v. Lopez, 99 N.M. 385, 388, 658 P.2d 460, 463 (Ct. App. 1983) (“We hold that the trial court exercised its inherent power to dismiss, and that its ruling was not against logic or effect of the State’s representations at the time the motion to dismiss was granted.”), cert. denied, 464 U.S. 831 (1983). The district court’s review of the metropolitan court’s discretion does not turn on whether the district court would have arrived at the same result, see State v. Ferguson, 111 N.M. 191, 195, 803 P.2d 676, 680 (Ct. App. 1990), and the district court could only conclude that the metropolitan court abused its discretion if it could characterize its ruling as “clearly untenable or not justified by reason.” State v. Rojo, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). In performing its review, the district court is required to view the evidence, and its inferences, in the light most favorable to the metropolitan court’s decision. See State v. Rael, 2008-NMCA-067, ¶ 6, 144 N.M. 170, 184 P.3d 1064. [13] Our standard of review is identical—did the metropolitan court abuse its discretion in accordance with the foregoing standards when it ordered a dismissal of the criminal charge under its inherent authority to control the orderly and expeditious disposition of its cases? DISCUSSION [14] “Inherent judicial power is the power necessary to exercise the authority of the court.” In re Jade G., 2001-NMCA-058, ¶ 27. “This authority embraces the ability of a court to control its docket and the proceedings before it.” Id. The authority of the court to control its docket encompasses the power to “supervise and control the movement of all cases on its docket from the time of filing through final disposition, and to apply sanctions when reasonable efforts to manage the court’s caseload have failed.” State v. Ahasteen, 1998-NMCA-158, ¶ 28, 126 N.M. 238, 968 P.2d 328 (internal quotation marks and citations omitted). Furthermore, when the State is not ready to proceed because of a missing witness it did not subpoena, this inherent power allows a trial court to dismiss a prosecution. See Lopez, 99 N.M. at 387-88, 658 P.2d at 462-63 (recognizing that trial courts have an inherent power in the orderly and expeditious disposition of their cases to dismiss where the prosecution is not ready to proceed because of a missing witness). [15] As described at greater length in the background section of this opinion, the metropolitan court struggled to control the course of the proceedings in this case and to ensure the expeditious resolution of the pending charges. Only after the State repeatedly failed to control its witnesses, causing multiple mistrials and re-settings, did the metropolitan court conclude that sanctions were in order. This basic determination was not an abuse of discretion. The State also failed to abide by its representations to the metropolitan court and Defendant on December 13, 2005, that it would subpoena Officer Picchione for trial. As discussed at greater length below, when Officer Picchione was not subpoenaed and he did not appear, the State’s inaction effectively prevented the third-scheduled trial from proceeding. Thus, the metropolitan court acted reasonably in faulting the State, rather than the defense, for the officer’s absence from the trial five months later on May 3, 2006. See State v. Torres, 1999-NMSC-010, ¶ 11, 127 N.M. 20, 976 P.2d 20 (declining to fault the defense for failing to subpoena a witness where the record indicated that the fault lay with the sheriff’s department). When the State decided not to subpoena Officer Picchione for trial, it should, at the very least, informed Defendant in time so he could subpoena Officer Picchione. See State v. Bartlett, 96 N.M. 415, 418, 631 P.2d 321, 324 (Ct. App. 1981) (“As an officer of the court a prosecutor carries a heavy responsibility to both the court and the accused to conduct a fair trial. . . . he should not take unfair advantage of the defendant.”) (internal quotation marks and citation omitted)). Perceiving a lack of due diligence, a dereliction of responsibility, and a disregard for the integrity of the process, the metropolitan court did not abuse its discretion in determining that harsh sanctions were in order. See In re Jade G., 2001-NMCA-058, ¶ 28 (explaining that a court may use its inherent authority to “sanction parties and attorneys to ensure compliance with the proceedings of the court”). [16] The type of sanction to be imposed in any given case is essentially discretionary with the court. See United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 239, 629 P.2d 231, 315 (1980) (“[T]he choice of sanctions . . . lies within the sound discretion of the trial court.”). However, this inherent power is not unfettered particularly where dismissal is ordered. State v. Hicks, 105 N.M. 286, 287, 731 P.2d 982, 983 (Ct. App. 1986). “A party must receive notice and an opportunity to be heard before a case can be involuntarily dismissed...
on the merits.” Esparza, 2003-NMCA-075, ¶ 42; see also State v. Wilson, 116 N.M. 802, 806, 867 P.2d 1184, 1188 (Ct. App. 1993) (“[B]efore the court can dismiss a criminal prosecution with prejudice, it must give the State advance notice.”). In this case, the State received two warnings from the metropolitan court that it would not re-set the trial if the State’s witnesses presented further problems. This satisfied the notice requirement. Additionally, the metropolitan court allowed the parties to present their arguments prior to dismissing the case. As a result, the State had the opportunity to be heard. We are therefore satisfied by the essential “integrity and fairness of the process.” Esparza, 2003-NMCA-075, ¶ 44.

Alternative Sanctions

{17} In the course of its argument to the metropolitan court, the State suggested either that a continuance be granted or that the trial proceed on the merits. “We conclude by addressing the State’s argument that “it was not the State’s duty to secure for the defense an apparently indispensable defense witness.” The State’s argument continues, “If Officer Picchione was a necessary defense witness, it was defense counsel’s duty to subpoena Officer Picchione regardless of the prosecutor’s assurances that Officer Picchione would be available on the date of trial.” These assertions are without merit. At the December 13, 2005 trial setting, the State moved for a continuance because Officer Picchione was not present, and Defendant did not oppose the motion because he also required Officer Picchione’s presence. The metropolitan court specifically inquired whether subpoenas were required, whereupon defense counsel stated that all witnesses required by the defense, including Officer Picchione, would be subpoenaed. However, the prosecutor specifically assured Defendant that the State would subpoena Officer Picchione, but it never did, and it apparently never told defense counsel that it did not. At the trial five months later on May 3, 2006, Officer Picchione was not present. The question is whether Defendant reasonably relied on the State’s representation. Well-settled, existing precedent provides the obvious answer.

{18} In 1953, our Supreme Court adopted the following general rule concerning stipulations:

The courts look upon stipulations with favor, and, as a rule, will enforce all stipulations of parties or their attorneys for the government of their conduct or the control of their rights in the trial of a cause or the conduct of litigation, if such stipulations are not unreasonable, not against good morals or sound public policy, are within the general scope of the case made by the pleadings, and are in such form as may be required by rule of court or statutory enactment.

It is generally considered that stipulations which tend to expedite the trial should be enforced unless good cause is shown to the contrary.

S. Union Gas Co. v. Cantrell, 57 N.M. 612, 616, 261 P.2d 645, 647 (1953) (internal quotation marks and citation omitted). Peya v. Ortega, 101 N.M. 564, 565, 686 P.2d 254, 255 (1984) added, “Courts generally honor stipulations between the parties and uphold such agreements concerning trial of a cause or conduct of litigation if the stipulations are not unreasonable, not against good moral standards or sound public policy, and are within the general sense of the pleadings.” We reiterated this standard for upholding stipulations in Olguin v. Manning, 104 N.M. 791, 792, 727 P.2d 556, 557 (Ct. App. 1986). There was no basis for not enforcing the stipulation of the parties that the State would subpoena Officer Picchione.

CONCLUSION

{20} The State’s actions and inactions resulted in protracted, unnecessary delay. The State’s actions also resulted in the unavailability of a material witness, and trial in his absence may have resulted in a denial of due process. With these concerns, the metropolitan court invoked its inherent authority to control its docket to insure that cases before it proceeded in a timely and orderly manner, and dismissed the prosecution. We conclude that the ruling of the metropolitan court was a reasonable course of action that was supported by the circumstances before it. Stated another way, the metropolitan court did not abuse its discretion. We further conclude that the district court did not correctly apply the standards to determine whether the metropolitan court abused its discretion, and it therefore erred in reversing the order of the metropolitan court. As a result of our conclusions, we need not address the remaining constitutional arguments that Defendant makes on appeal. The ruling of the district court is therefore reversed, and the case is remanded for reinstatement of the metropolitan court order of dismissal.

{21} It is so ordered.

MICHAEL E. VIGIL, Judge

WE CONCUR:

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