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www.nmbar.org
A MESSAGE FROM STATE BAR PRESIDENT HENRY ALANIZ

Dear Members of the State Bar of New Mexico:

I was sworn-in as the 113th president of the State Bar of New Mexico on December 10. To serve as your president is an honor I will carry with me for a lifetime. It is a responsibility I take quite seriously, and I am thankful that my fellow members of the State Bar of New Mexico and the Board of Bar Commissioners have given me this privilege. I will do my very best to carry out the important duties of this office.

As do all incoming presidents, I begin the year with challenges and ideas to leave the organization a better place for having served. I am fortunate to assume this office at a time when the State Bar is stable and not facing any serious issues. I would like to thank the leaders who came before me and the group of outstanding individuals who volunteer to serve on the BBC and in leadership roles. These fine men and women are elected from within our ranks to be your voice in the New Mexico legal profession, and they are to be commended for their hard work and dedication. Without the fine leadership of our Immediate Past President Craig Orraj and the vision of our incoming officers, this job would be even more challenging than it promises to be. I’d like to mention some of the highlights of the coming year as I see them and invite your thoughts, guidance and counsel.

On December 18, the Supreme Court convened a summit of the Court entities it regulates—the State Bar, Disciplinary Board, Minimum Continuing Legal Education, Board of Bar Examiners and the Center for Civic Values (IOTLA). This was an historic event as it was the first ever of its kind in New Mexico. It gave all groups the opportunity to begin a healthy, spirited dialogue about the profession and each of our roles in the administration of justice. I intend to keep this dialogue going in 2009 with meetings and open communication that will better serve our profession.

The State Bar’s public service efforts are extraordinary. I intend to continue to strengthen our service to the public with referral programs, client-attorney assistance, workshops and other outreach efforts. I believe that public service is also member service in that it promotes the good and positive contributions lawyers make to our communities.

I also plan to continue the excellent tradition of outreach to our members. Being a solo practitioner, time will be a challenge for me, but I hope to make it to as many parts of the state as possible. In addition, I am pleased to have the Hispanic National Bar Association coming to Albuquerque, and the Chief Judges Council to Santa Fe, in 2009. I will work with these groups to offer our support and help as they plan their events.

While the State Bar of New Mexico is generally quite stable and sound, the Board of Bar Commissioners is always addressing the future growth of the State Bar, the addition of new programs, continued funding of successful programs, and the normal rising costs associated with the daily operations of the State Bar. Let me start by telling you that member dues, the major source of our income, have not been increased in 16 years. That said, the State Bar has continued to offer programs and services to members that are too numerous to list here in their entirety. Just consider that for the $215 you pay in dues, you receive the weekly Bar Bulletin, an annual membership directory, and many proactive risk management services, sections and committees. The list goes on and on. The Board has been able to hold dues steady by operating a very lean and efficient organization. The reality, however, is that we need to look at the possibility of an increase and have formed a committee of the BBC to study this in 2009.

I also want to extend a heartfelt invitation for you to attend our Annual Meeting in July. The event will be held at the newly opened Buffalo Thunder Resort in Pojoaque, July 9–12. We have negotiated terrific room rates and are working on an agenda that will offer superb CLE and social programs. I hope you’ll also consider joining us on the CLE-at-Sea trip this year, a New England color tour aboard Holland America from Montreal to Boston, September 26–October 3. These events are a terrific opportunity to earn your CLE credits and interact with a great group of people.

In closing, I want to express my humble appreciation for the opportunity to serve as your president for 2009. I look forward to a year that will continue to move our organization ahead for the betterment of our profession and the public. I believe we are off to a good start and will have a tremendous year. If I can be of service to you this year, please contact me at (505) 232-9384 or henryaacalaniz@msn.com.

Sincerely,

Henry A. Alaniz, President
State Bar of New Mexico
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### Professionalism Tip •

With respect to parties, lawyers, jurors and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

## Meetings

### January

5  Attorney Support Group, 5:30 p.m., First United Methodist Church

6  Appellate Practice Section Board of Directors, noon, Rodey Law Firm

7  Children’s Law Section Board of Directors, 11:30 a.m., Hotel Albuquerque

7  Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court

7  Employment and Labor Section Board of Directors, noon, State Bar Center

8  Board of Editors 8:30 a.m., State Bar Center

## State Bar Workshops

### January

14  Lawyer Referral for the Elderly Workshop 10 a.m., Presentation 1–4 p.m., Clinics Deming-Luna County Senior Center, Deming

15  Lawyer Referral for the Elderly Workshop 9:30 a.m., Presentation 1:30–4:30 p.m., Clinics Truth or Consequences Senior Center, Truth or Consequences

### Cover Artist

The media of Helen Gwinn's expressive images are acrylics on wooden panels and water media on paper with collage. She often embellishes with handmade paper packets—stuffed, folded, tied, painted and incorporated into each composition (www.HGWWINN.com). Her works are also represented at the Artist Gallery and Old Pecos Gallery in Calsbad. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
NOTICES

COURT NEWS
N.M. Supreme Court

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of any changes in address or telephone number.

Supreme Court
E-mail: supvm@nmcourts.gov; or
Fax: (505) 827-4837; or
Mail to: PO Box 848
Santa Fe, NM 87504-0848

State Bar
E-mail: address@nmbar.org; or
Fax: (505) 828-3755; or
Mail to: PO Box 92860,
Albuquerque, NM 87199; or
Visit www.nmbar.org

Board of Legal Specialization

Board governing the Recording of Judicial Proceedings

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.

Board of Legal Specialization Comments Solicited

The following attorneys are applying for certification as specialists in the areas of law identified. Application is made under the New Mexico Board of Legal Specialization Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicants' qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Caren I. Friedman
Recertification in Appellate Practice
Richard L. Kraft
Recertification in Family Law

Proposed Revisions to the Code of Judicial Conduct

The Code of Judicial Conduct Committee is considering whether to recommend proposed amendments to the Code of Judicial Conduct for the Supreme Court's consideration. To facilitate the work of the committee, interested parties are invited to comment on the proposed amendments before they are submitted to the Court for final consideration. Either submit comments electronically through the Supreme Court's Web site at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

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

Comments must be received on or before Jan. 19 to be considered by the Court. Note that any submitted comments may be posted on the Court's Web site for public viewing. For reference, see the Dec. 22, 2008 (Vol. 47, No. 52) Bar Bulletin.

First Judicial District Court

Judicial Vacancy

A vacancy on the 1st Judicial District Court will exist in Rio Arriba County as of Jan. 1 upon the appointment of the Honorable Timothy Garcia to the New Mexico Court of Appeals. The chair of the 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

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.

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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., Jan. 5. Applications received after that date will not be considered. The Judicial Nominating Commission will meet at 9 a.m., Jan. 15, at the Judge Steve Herrera Judicial Complex, 100 Catron Street, Santa Fe, to evaluate all applicants for this position. The meeting is open to the public.

Judicial Nominating Commission information is available at http:// lawschool.unm.edu/judsel/commissions/index.php. The links will only be viable when a vacancy exists and a commission meeting is pending in the respective court. Information is updated on the Web site as it becomes available.

Second Judicial District Court Clerk’s Office Hours

Pursuant to Supreme Court Order 08-8500 due to budget reduction in FY09 and possibly FY10, effective Jan. 5, the hours of the 2nd Judicial District Court Clerk’s Office will be:
- Closed 8–10 a.m.
- Open 10 a.m.–5 p.m.

Third Judicial District Court Judicial Nominees

The District Court Judicial Nominating Commission convened on Dec. 18, 2008, in Las Cruces and completed its evaluation of the twelve applicants for the vacancy on the 3rd Judicial District Court. The commission recommends the following four applicants (in alphabetical order) to Governor Bill Richardson:
- Manuel I. Arrieta
- Marci E. Beyer
- Beverly J. Singleton
- John A. Trujillo

Fourth Judicial District Court Judicial Assignments

Effective Jan. 1, all cases previously assigned to the Honorable Gerald E. Baca, Division III, 4th Judicial District, will be reassigned to the Honorable Matthew J. Sandoval. Pursuant to Rule 1-088.1 (2008) and 5-106 (2008), parties who wish to exercise their right to excuse Judge Sandoval must do so within ten days of Jan. 12.

Tenth Judicial District Court Temporary Court Hours

Due to the retirement of the district court clerk in De Baca County, beginning Jan. 5 the hours of the court shall temporarily change to:
- Tuesday through Thursday, 9:30 a.m.–3 p.m.
- Closed Monday and Fridays

Hours are subject to change due to inclement weather. For information required on Mondays and Fridays, call Diane Ulibarri, court administrator, (575) 461-2764, Tucumcari.

Bernalillo County Metropolitan Court Judicial Appointment

Governor Bill Richardson appointed Briana H. Zamora to serve on the Bernalillo County Metropolitan Court. Zamora has worked as a sole practitioner, an associate attorney with Butt, Thornton & Bahr, an assistant attorney general, an assistant public defender, and an assistant district attorney. She is a graduate of Cibola High School and holds a bachelor’s degree from New Mexico State University. She is a 2000 graduate of the University of New Mexico School of Law. She is a member of the Young Lawyers Division, the New Mexico Hispanic Bar Association and the Lawyers Leadership Institute. Zamora will fill a seat on the bench vacated by retiring Judge Theresa Gomez.

Judicial Assignment

Bernalillo County Metropolitan Court Chief Judge Judith Nakamura has announced that the Honorable Sandra Engel was appointed the presiding judge for the Domestic Violence Early Intervention Program (DVEIP). Judge Engel succeeds the retiring Judge Theresa Gomez. The appointment is effective immediately. DVEIP is open to first-time domestic violence offenders. It includes probation supervision, drug testing, counseling and group sessions with the presiding judge. If defendants successfully complete the six-month to one-year program, charges may be dismissed by the prosecutor. Managing the DVEIP is a voluntary position. Judge Engel will continue hearing her regular docket in addition to the new responsibilities.

U.S. District Court, District of New Mexico Free CLE Seminar

The Federal Bar Association and the U.S. District Court, District of New Mexico, will host Criminal Psychopathy: Assessment, Recidivism, Treatment and Neuroscience from 9 a.m. to noon, Jan. 16, in the Jury Assembly Room, 2nd Floor, Pete V. Domenici Federal Courthouse, 333 Lomas Blvd NW, Albuquerque. Register at http://www.nmcourt. fed.us/web/DCDCOCS/dcindex.html. CLE credits are pending.

STATE BAR NEWS

Attorney Support Group
- Afternoon groups meet regularly on the first Monday of the month:
  - Jan. 5, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month:
  - Jan. 19, 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.

2009 Grant Application and Guidelines Pro Hac Vice Fund

The State Bar of New Mexico, through the New Mexico Bar Foundation, seeks grant applications from nonprofit organizations that provide civil legal services to low-income New Mexicans within the scope of the “State Plan for Providing Civil Legal Aid to Low Income New Mexicans.” Pursuant to Rule 24-106 NMRA, the State Bar of New Mexico collects a registration fee of $250 from non-admitted attorneys intending to appear in civil actions before New Mexico courts. The State Bar holds these fees in the State Bar Pro Hac Vice Fund which is distributed annually to nonprofit organizations providing or supporting the provision of civil legal services to the poor.

The 2009 Grant Application and Guidelines are now available online at www.nmbar.org. The deadline for submission is 4 p.m., Feb. 3, at the State Bar offices, 5121 Masthead NE, Albuquerque, NM 87199.
Connections

Participation in sections, committees, and divisions provides members the opportunity to explore best practices and new ideas, share knowledge, and discover solutions to shared challenges.

Bill Kitts Network Program
How do I land a state government job? What if I’m thinking about making a change to my practice? How can I find answers to questions in other areas of the law?

Find the answers through the Bill Kitts Network Program:
• Sign up for the listserve.
• View the online network directory and contact a specific attorney.

Visit www.nmbar.org.
Click on Attorneys Members/Member Services.

Delivery of Legal Services to People with Disabilities Committee
Donations Requested
The Delivery of Legal Services to People with Disabilities Committee is requesting that all New Mexico attorneys consider making a tax deductible contribution to the Pro Bono Interpreter Fund at the time the State Bar dues form is submitted. This fund helps attorneys pay for interpreters for pro bono clients who are deaf. More information about this fund can be found on the State Bar’s Web site under “Membership Services.”

Employment and Labor Law Section
Board Meetings Open to Section Members
The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, Jan. 7, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar Web site, www.nmbar.org, or contact Danny Jarrett, section chair, (505) 878-0515 or jarrettd@jacksonlewis.com.

Equal Access to Justice
Help Equal Access to Justice for just six months. Legal professionals are needed to begin work on the EAJ Silent Auction to be held in July at the State Bar of New Mexico annual meeting at Buffalo Thunder. Call Kate Mulqueen at (505) 797-6064 or e-mail kmulqueen@nmbar.org before Jan. 15.

Young Lawyers Division
UNM Law Mock Interview Program
The Young Lawyers Division is seeking volunteer attorneys to serve as interviewers at the 19th Annual Young Lawyers Division/UNM Law Mock Interview Program, from 9 a.m. to 12:30 p.m., Feb. 21. The mock interviews and subsequent critiques assist UNM law students with their preparation for job interviews. Attorneys from all practice areas, as well as the public and private sectors, are needed. We also seek judges to conduct the mock interviews. A brief training session will be held preceding the interviews at 8:15 a.m. at the UNM School of Law. Those interested in volunteering should contact Martha Chicoski, mary.martha.chicoski@farmers.com, or Nasha Torrez, Nasha.Torrez@state.nm.us, by Jan. 30.

UNM School of Law
Winter Intersession Library

Hours
Building and Circulation
Monday—Friday 8 a.m.—6 p.m.
Saturday 9 a.m.—6 p.m.
Sunday Noon—6 p.m.
Reference
Jan. 5–9 10 a.m.—Noon, 1–5 p.m.
Jan. 12–13 9 a.m.—6 p.m.

Other News
Center for Civic Values
Coaches Needed
High schools in Animas need an attorney to provide legal expertise and coaching for the New Mexico High School Mock Trial Program. The amount of time invested will be decided by the attorney and the teacher advisor, but teams usually meet at least once each week. Regionals are Feb. 20–21, state finals are March 20–21, and nationals are May 7–10. Each team is provided a subscription for eight students and one teacher to the National Mock Trial Practicum, an online resource that will help teams learn the basics and beyond. Your mission, should you decide to accept it, will be to help students learn the finer points of presenting their cases before panels of judges and jurors. Contact Michelle Giger, (505) 764-9417, ext. 11.

2009 Dues and Licensing
• The 2009 license and dues forms were mailed Dec. 8, 2008.
• License and dues fees were payable on Jan. 1 and are late after Feb. 2.
• Members who have not received the form should notify the State Bar office, (505) 797-6035.
• Fees may also be paid online through secured eCommerce at www.nmbar.org.
• License and disciplinary fees are mandatory and must be paid to maintain license status.
• Without exception, fees are due, whether or not you received your form.

Late fees may be assessed if payment is not postmarked by Feb. 2, 2009.

Changes in Publication of Member Addresses
Pursuant to Rule 17-202 (A) NMRA, the State Bar will no longer exclude the address of record from publication in the annual Bench and Bar Directory or on www.nmbar.org under “Find an Attorney.” The address of record is a public record.

The street address will also be published unless a clerk certificate has designated that a street address is confidential. Members are advised that this change will go into effect as dues payments are received.

www.nmbar.org
HEMANOS Y CONCUÑADOS: THE RISE AND FALL OF THE BROTHERS LEAHY

By Mark Thompson

Most of us have some familiarity with the themes of triumph and tragedy in the Irish-American community, a favorite topic of novelists and playwrights. It should be no surprise to learn that two lawyers of Irish descent experienced a life in territorial and early statehood New Mexico that included elements of both triumph and tragedy.

Jeremiah Leahy was born Sept. 15, 1861, in LaSalle County, Illinois, and his brother David J. Leahy joined the family on June 26, 1867. Their parents, John B. and Ellen (Stack) Leahy, had emigrated from Listowel in County Kerry, a place on the road from Limerick to Tralee, one of the truly scenic areas of Ireland. The family eventually moved their farming operation to Livingston County, Illinois, and the boys, as usual in those days, helped out with the farming while attending public schools. They were the lucky ones; by 1900, only eight of Ellen’s thirteen children were still living.¹

Jerry Leahy took a common path of 19th century lawyers—reading the law while teaching school. He was admitted to the Illinois Bar in June 1888, but later that year he ended up in the irrigation business in Springer, New Mexico. He was admitted to practice by New Mexico Judge James O’Brien in 1891² and was, for almost forty years, the model of a small-town lawyer and public servant in Raton. He served three years as Raton city attorney, appointed district attorney by Governor Otero in 1897 and reappointed every two years thereafter, resigning the post in March 1907. He was the councilor (territorial senator) for Colfax, Mora, and Union counties, 1904-05, and was a State Bar delegate to the American Bar Association in 1904. To complete this storybook picture, he married Judge O’Brien’s daughter Mary on Nov. 29, 1894.³

David Leahy followed his older brother to New Mexico about 1891 and spent his first years in the territory in education, eventually serving as the Colfax County superintendent of schools, a political position. He probably read for the law in his brother’s office and may have been admitted by the district judge as early as 1897.⁴ When he was given a second lieutenant’s commission to serve in

2009 BBC Officers Sworn In

On Dec. 10, Chief Justice Edward L. Chávez administered the oaths of office to the 2009 officers of the Board of Bar Commissioners. The ceremony took place in Santa Fe at the Supreme Court. The leadership team for the coming year took the oath with family and friends at their sides. Each also signed the oath of office. The ceremony has become an annual tradition for the BBC.
the Rough Riders in the Spanish-American War in 1898, another political appointment, he was still serving as superintendent of schools. He probably saw this as a political opportunity and sent letters “From Our Own Soldier Boys” for publication in the Raton Range while serving in Cuba. He was wounded at San Juan and mustered out in September on the sick list. Following the lead of Col. Theodore Roosevelt, Leahy attempted to improve his political standing in 1898 but, unlike Roosevelt who was a successful candidate for governor of New York, Leahy lost his race for Colfax County treasurer.

For the next five years David Leahy appears to have lived and worked in the shadow of his older brother, but in July 1904, Edward A. Mann, the new judge with headquarters in Alamogordo, made David his first clerk. Perhaps this new full-time job made him a better marriage prospect, and on June 21, 1905, he married Lucille O’Brien at her parents’ home in Minnesota. Lucille, of course, was the sister of his brother’s wife, Mary, and both David and Lucille had lived in the Jeremiah/Mary home in Raton. In October of 1905, David’s immediate superior at San Juan Hill, W.H.H. Llewellyn of Las Cruces was appointed U.S. attorney and Leahy became his assistant with headquarters in Las Vegas. Two years later Llewellyn was “fired” and David Leahy became U.S. attorney, a position he retained in the next administration and until almost the end of territorial days.

In the special election of 1911, David Leahy was elected district judge, a position he held for what became a rough and controversial thirteen years. A telling of his association with the A.B. Fall wing of the Republican Party and the unseemly fight with the newspapers cannot be done in this short article but fortunately others have done the job. At the election of 1924, he lost his judgeship to district attorney Luis E. Armijo by a little over 300 out of a total of almost 8,800 votes. The victory by Democrat Armijo was “fired” and David Leahy became U.S. attorney, a position he retained in the next administration and until almost the end of territorial days.

Unfortunately for Leahy, the election loss was only another ledge on his fall from grace. In today’s vernacular, he “lost it” after being thwarted in his effort to silence the Albuquerque Tribune’s Carl Magee by dubious legal means. On August 21, 1925, Leahy entered the lobby of the Meadows Hotel in Las Vegas after learning of the presence of Magee. Leahy hit Magee and began kicking him after Magee fell to the floor. Magee pulled out a pistol and fired, wounding Leahy but also killing a bystander who had tried to break up the fight. Both Leahy and Magee were arrested but only Magee was charged with the killing of the bystander. After Leahy’s testimony at Magee’s trial in June 1926, District Attorney Chester Hunker and Judge Armijo arrived at the same conclusion, and the judge directed a verdict of acquittal for Magee. Leahy escaped prosecution but was certainly finished as a major public figure.

Jeremiah Leahy continued as a prominent member of the Raton Bar after his last term as district attorney in 1907. For example, he is listed as counsel of record on some thirty appellate decisions between 1908 and 1930. If David’s fall was metaphorical, Jerry’s, sadly, was literal. He died from a cranial fracture after a fall on a sidewalk in Raton in April, 1933. The official death certificate states that a contributory cause was alcoholism and kidney failure. David J. Leahy died in Las Vegas on Feb. 6, 1935. The O’Brien girls, hermanas y concunadas, outlived their husbands. Mary died Jan. 3, 1942 and Lucille died on Christmas Eve, 1947.

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

Endnotes
1 This paragraph contained many facts from multiple sources but, trying to keep on the good side of our editor, I will only say for this and many other assertions of details, “citations available upon request.”
2 I have previously treated admission by a district judge as “admission to practice law in New Mexico” for territorial lawyers. Until the legislature (N.M. Laws 1909, ch. 53) reduced the authority of the district judge, such admission was apparently sufficient for all purposes. Even representing a client before the territorial district court judges, sitting en banc as the Supreme Court, may not have always required further “admission.” J. Leahy is a good example; he is co-counsel of record with Miquel Salazar of Las Vegas in 1892, Faulkner v. Territory, 6 N.M. 464, but in signing the Roll of Attorneys and Counselors at Law Practicing in the Supreme Court of the Territory of New Mexico. @ 1897, he writes his admission date as Aug. 3, 1893.
3 James O’Brien, chief justice and Fourth Judicial District judge, 1889-93, emigrated from County Cork, Ireland, in 1849. His wife Catherine (Lyons) O’Brien was born in Kentucky, the daughter of Irish immigrants. The O’Brien family returned to Minnesota following his term as territorial judge in New Mexico.
4 His date of admission to practice before the Supreme Court according to the Roll of Attorneys, etc., is Oct. 1, 1901.
8 This election gave the Albuquerque Journal its “Dewey Beats Truman” moment. The paper ran a three-column, nine inch, front page photo of Republican Manuel B. Otero with the caption “Our Next Governor.” The Morning Journal, Thursday Nov. 6, 1924. Otero was the son of the man killed by (the acquitted) James Whitman. See Bar Bulletin, Sept. 10, 2007, p. 11.
10 Leahy, having started the affair, could have been charged under New Mexico law as a principal. United States v. Densmore, 12 N.M. 99, 106 (1904).
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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 January 5, 2009**

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CLERK’S CERTIFICATE OF
### Clerk Certificates

<table>
<thead>
<tr>
<th>Name, Address, and/or Telephone Changes</th>
<th>Clerk’s Certificate of Admission</th>
<th>Clerk’s Certificate of Reinstatement to Inactive Status</th>
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</thead>
</table>
| I, KATHLEEN JO GIBSON, Clerk of the Supreme Court of the State of New Mexico, hereby certify that effective August 18, 2008, the following attorneys have a new firm name and are at the address and telephone number immediately following: | **Douglas J. Antoon**  
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PROPOSED REVISIONS TO THE LOCAL RULES OF CRIMINAL PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

The active Article III District Judges and the Local Criminal Rules Committee of the United States District Court for the District of New Mexico are considering the following proposed amendments to the Rules of Criminal Procedure. The proposed revisions incorporate changes to the Local Criminal Rules in their entirety to implement Case Management/Electronic Case Filing (CM/ECF). A “redlined” version (with proposed additions double underlined and proposed deletions stricken out) and a clean version are posted on the Court’s website at http://www.nmcourt.fed.us. If you would like to comment on the proposed amendments set forth below before they are adopted by the Court, you may do so by either submitting a comment electronically via e-mail to localrules@nmcourt.fed.us or sending your written comments to:

Matthew J. Dykman, Clerk of Court  
United States District Court  
Pete V. Domenici U. S. Courthouse  
333 Lomas Blvd. NW, Suite 270  
Albuquerque, NM 87102  
Attn: LCrimR

Your comments must be received by the Clerk on or before February 5, 2009.

LOCAL CRIMINAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

I. SCOPE OF RULES

RULE 1. Scope; Application

1.1 Title and Citation. These are the Local Rules for criminal proceedings in the United States District Court for the District of New Mexico. They are cited as “D.N.M.LR-Cr. ______.”

1.2 Effective Date. These Rules take effect on November 1, 2009.

1.3 Application of Rules. These Rules apply in all criminal proceedings in the District of New Mexico.

1.4 Electronic Filing. All petitions, motions and other pleadings or documents required to be filed with the Court must be electronically filed unless excepted as defined in the CM/ECF Administrative Procedures Manual.

1.5 Charging Documents. The electronically filed or electronically submitted charging documents, including the complaint, information, indictment and superseding information or indictment, must include the image of any legally required signature.

II. INITIAL APPEARANCE AND PRELIMINARY HEARING

RULE 5. Initial Appearance Before Magistrate Judge

5.A Initial Interview of Defendants by Pretrial Services Officers.

a. Opportunity to Consult with Counsel. A defendant will be given an opportunity to consult with counsel before his or her initial interview with the Pretrial Services Officers. The Federal Public Defender, as directed by the Court, will provide advice of rights to defendants before their interview by Pretrial Services.

b. Notification of Counsel. It is the responsibility of Pretrial Services to notify the defendant’s retained counsel or the Federal Public Defender before the initial interview.

c. Determination of Eligibility. If the Court determines the defendant is eligible for appointed counsel, the Court will appoint counsel under the Criminal Justice Act. The Clerk will notify defendant’s counsel of the custodial status of the defendant and the time of the Initial Appearance or the next scheduled hearing.

d. Summons Cases. If a summons is issued to a defendant, the Clerk will attach a notice to the summons advising the defendant to contact Pretrial Services. Pretrial Services will:

• advise the defendant of his or her rights;
• advise the defendant to consult with counsel before the initial interview with the Pretrial Services Officers; and
• advise the defendant that his or her counsel may be present during the initial interview.

5.B Handling and Dispositions of Undocumented Alien Material Witnesses.

a. Affidavit. If an undocumented alien is to be a material witness in a criminal case, the United States Attorney will immediately file an affidavit stating reasonable grounds to secure the presence of the undocumented alien under 18 U.S.C. §3144.

b. Eligible for Appointed Counsel. If the Court determines the detained material witness is eligible for appointed counsel, the Court will appoint counsel under the Criminal Justice Act, 18 U.S.C. §3006A(a)(1)(G).

c. Release of Material Witness. If the Court determines release to be appropriate, the material witness may be released to the supervision of Pretrial Services under 18 U.S.C. §3142.

d. Return to Custody of the Bureau of Citizenship and Immigration. When a material witness is no longer needed for a criminal proceeding, the United States Attorney will submit a written motion and submit a proposed order to the Court so a material witness may be returned to the custody of the Bureau of Citizenship and Immigration Services for further processing. The proposed order must be submitted as explained in the CM/ECF Administrative Procedures Manual.


RULE 5.1 Preliminary Hearing

Rules 5.1 Locations Where Preliminary Hearings may be Held. The preliminary hearing required under Rule 5.1 of the Federal Rules of Criminal Procedure will be held in a location where a District Judge or a full-time Magistrate Judge normally presides.
III. PREPARATION FOR TRIAL
RULE 11: Plea Agreements.

11.1 Advising Court of a Plea Agreement. The Court must be advised of a plea agreement sufficiently in advance of trial to avoid assembling a jury panel unnecessarily.

11.2 Deferring Acceptance or Rejection of Plea Agreements. The Court will defer a decision on the acceptance or rejection of the plea agreement until the Court has reviewed the presentence report, even in instances where the Court has accepted the guilty plea.

RULE 16: Discovery and Evidence.
16.1 Disclosure of Evidence. The Parties will comply with the Standard Discovery Order. A copy of the Order is attached to these Rules.

16.2 Complex or Capital Punishment Cases. If a case is complex or is a capital punishment case, the Court will enter a Scheduling Order after meeting with counsel.

IV. POST-CONVICTION PROCEEDINGS
RULE 32: Sentencing and Judgment.

32.A Notice and Opportunity for Defendant’s Attorney to Attend Presentence Interview. Defendant’s attorney is deemed to have requested notice and a reasonable opportunity to attend the presentence report interview. If a defendant’s attorney receives a request to schedule a presentence report interview, the attorney must respond within five (5) days. If the attorney does not respond, the presentence report disclosure time limits of Rule 32(e)(2) of the Federal Rules of Criminal Procedure are waived.

32.B Confidential Nature of Report. The presentence report is a confidential record of the United States District Court. It must not be disclosed to anyone other than the Court, the defendant, the defendant’s attorney, and the attorney for the government unless required by law or ordered by the Court. Copies of the report must not be made except when necessary to carry out this rule.

32.C Sentencing Pleadings. An unresolved objection regarding sentencing or motion for departure must be filed with the Court before sentencing. These pleadings must be filed within twenty-one (21) calendar days of the date of disclosure of the presentence report. A responsive pleading must be filed as soon as possible but not more than seven (7) calendar days after service of the pleading regarding sentencing. Copies of all sentencing pleadings must be served on opposing counsel and the Probation Office. The Court may alter these time limits for good cause shown.

32.D Disclosure of Report to Counsel. The presentence report is disclosed:
(1) when a report is faxed or e-mailed to counsel;
(2) when an electronic copy of the report is released to counsel;
(3) when a copy of the report is physically delivered to counsel;
4(4) one (1) business day after counsel is told orally that the report is available for inspection; or
(5) three days after either a copy of the report or notice of its availability for inspection is mailed to counsel.

32.E Disclosure of Recommendation. Except as ordered by the Court, the Probation Office must not disclose a final recommendation concerning sentencing.

32.F Confidential Records. Confidential records of the Court maintained by the Probation Office, as custodian of the Court record, including presentence and probation supervision records, may be disclosed only upon a written petition to the Court which establishes a need for the specific information. The procedures approved by the Judicial Conference, available on the website of the United States District Court for the District of New Mexico, http://www.nmjudges.org, must be followed when requesting disclosure of confidential records.

32.G Requesting Presentence Reports before Guilty Pleas. A motion for a Presentence Report before a plea agreement has been entered will be granted only for exceptional circumstances.

a. Form of Motion. If a presentence report is requested before a plea agreement has been entered, the motion must state the position of the government and must contain the following:
(1) a waiver of the defendant’s right to a speedy trial;
(2) an explanation of the issues that would justify the preparation of a pre-plea presentence report; and
(3) a copy of the proposed plea agreement, if any.

b. Review by the Probation Office. The Court may ask the Probation Office to review the request and make recommendations to the Court regarding the merits of a pre-plea presentence report.

V. GENERAL PROVISIONS
RULE 44: Right to and Appointment of Counsel.

44.1 Entry of Appearance.

a. Written Entry of Appearance. An attorney who is not appointed by the court must file a written entry of appearance which includes the attorney’s name, firm name, address, telephone number, facsimile number, and electronic-mail address.

b. Appointed Counsel. Counsel appointed by the Court need not file an entry of appearance.

c. Eligibility of Counsel. To be eligible to appear in criminal actions, the attorney must be a member in good standing of the Federal Bar of the District of New Mexico.

d. Counsel Must be Registered Participants. All attorneys appearing in the District of New Mexico must be Registered Participants in the CM/ECF system.

e. Out of State Counsel. Out of state counsel must associate with eligible counsel of the Federal Bar of the District of New Mexico. Local counsel need not appear at court hearings with associated out of state counsel unless directed by the Court. Out of state counsel must become Registered Participants in the District’s CM/ECF system before entering their appearance.

Withdrawal or Substitution of Counsel. Withdrawal or substitution of counsel must be by motion and order.

f. Representation of Corporation or Partnership. A corporation or partnership charged with an offense must be represented by an attorney eligible to practice before this Court.

Limited Entry of Appearance. An attorney may not appear in a limited manner except by Court order.

Bar Bulletin - January 5, 2009 - Volume 48, No. 1
RULE 46. Approval of Bonds
46.1 Hearings for Release from Custody. Any hearing held under the Bail Reform Act, 18 U.S.C. §3141, et seq., will be held in a location where a District Judge or a full-time Magistrate Judge normally presides.
46.2 Approval of Bonds by the Clerk of the District Court of New Mexico. Unless the statute requires or the Court has issued an order requiring prior Court approval, the Clerk may approve bonds when:
- the Court has fixed the amount of bail; and
- the bond is secured by the deposit of cash or obligations of the United States or an approved corporate surety bond.

RULE 47. Motions
47.1 Unopposed Motions. An unopposed motion must be accompanied by a proposed order approved by each party.
47.2 Opposed Motions. Movant must determine whether a motion is opposed. Movant must recite in the motion whether concurrence was refused or explain why concurrence could not be obtained.
- Service of Papers:
  1. Movant must file and serve on all parties a copy of the motion, any brief in support of the motion, affidavits, and other papers related to the motion.
  2. A copy of a response or reply must be served on the appropriate parties.
- Certificate of Service. A motion, response or reply must include a certificate of service on each party.
47.3 Unopposed Motions. An unopposed motion must state that it is unopposed and be filed like any other motion. A motion that fails to recite concurrence of each party may be summarily denied. A proposed order must accompany the motion as explained in the CM/ECF Administrative Procedures Manual.
47.4 Motions Regarding the Transport of or Visitation with a Defendant. A motion regarding the transport of a defendant or a visitation with a defendant in the custody of the United States Marshals Service must state the position of the United States Marshals Service. Service must also be made on the United States Marshals Service. All transport orders will be sealed.
47.5 Motions and Proposed Orders to Continue Trial. A motion, motions and proposed orders for a continuance of trial must address with particularity 18 U.S.C. §3161(h). A proposed order must accompany the motion.
47.6 Joiner of Co-Defendant’s Motion. A co-defendant who seeks to join a specific motion previously filed by a co-defendant must file a motion. A proposed order must accompany the motion.
47.7 Citation of Authority. A motion, response or reply must cite authority in support of legal positions advanced.
47.8 Timing and Restrictions on Responses and Replies.
- Timing. A response must be served within fourteen (14) calendar days after service of the motion. A reply must be served within fourteen (14) calendar days after service of the response. These time periods are computed in accordance with Rule 45(a) and (b) of the Federal Rules of Criminal Procedure and may be extended by the Court.
- Surreply. The filing of a surreply requires leave of the Court.
- Expedited Briefing. When the Court orders an expedited briefing schedule, briefs and any supporting papers must be served on each party by the most expeditious reasonable method of service.
47.9 Length of Motion and Brief. The length of a motion, or if a separate brief is filed in support of a motion, the combined length of a motion and supporting brief, must not exceed twenty-seven (27) double-spaced pages.
- A response brief must not exceed twenty-four (24) double-spaced pages.
- A reply brief must not exceed twelve (12) double-spaced pages.
47.10 Evidentiary Hearings. Parties will state in their pleadings whether and why an evidentiary hearing is needed.

RULE 49. Service and Filing Papers
49.1 Electronic Filing and Official Record.
- Filing of document. Electronic transmission of a document to the Court’s CM/ECF system constitutes filing of the document under the Federal Rules of Criminal Procedure and entry of the document on the docket kept by the Clerk of the Court.
- Official Record. When a document is electronically submitted or filed, the official record is the electronic recording of the document as stored by the Court.
- Time of Filing.
  1. Filed Electronically. The official date and time of filing is indicated on the Notice of Electronic Filing (NEF).
2. Filed in Paper Form. If a document is filed in paper form and subsequently converted to an electronic document, the time of filing is the date and time of the original filing.

3. Deadlines for Filing. Electronic filing must be completed before midnight local time where the Court is located in order to be considered timely filed that day.

d. Technical Failure. A Registered Participant whose filing is made untimely as a result of a technical failure may seek appropriate relief from the Court.

49.4 Sealed Documents.

a. Sealed Documents to be Filed Electronically. A motion to file documents under seal is filed electronically, unless prohibited by law. If the motion is granted, the sealed documents are also filed electronically. Sealed filings are explained in the CM/ECF Administrative Procedures Manual.

b. Sealed filings do not Produce Notice of Electronic Filing (NEF). When a pleading is electronically filed under seal, the CM/ECF system does not produce a Notice of Electronic Filing (NEF). The filer must serve the pleading by an alternate method.

49.5 Signatures.

a. Registered Participant Signature. The user log-in and password required to submit documents to the CM/ECF system serve as the Registered Participant’s signature on all electronic documents filed with the Court.

b. Signature of a Criminal Defendant. A document containing the signature of a criminal defendant must be scanned in a format that contains an image of the signature.

c. Signatures of Non-Registered Participants. A document containing the signature of a Non-Registered Participant is filed electronically. The signature is represented by a “s/” and the name typed in the space where a signature would otherwise appear or as a scanned image.

d. Documents Requiring Multiple Signatures. Documents requiring signatures of more than one party are electronically filed by either:
   1. Submitting a scanned document containing all the necessary signatures; or
   2. Representing the consent of the other parties on the document.

49.6 Retention of Documents Requiring Original Signatures. Documents that are electronically filed and require original signatures other than that of the Registered Participant must be maintained in paper form by the Registered Participant until one year after all time periods for appeals and post conviction relief expire. On request of the Court, the Registered Participant must produce the original documents for review.

RULE 53 Courtroom Photographing and Broadcasting Prohibited.

53.1 Courtroom and Courthouse Decorum.

a. Prohibition Against Cameras, Cellular Telephones with Cameras, Transmitters, Receivers, and Recording Equipment. No cameras, cell phones, cellular telephones with cameras, transmitters, receivers or recording equipment may be brought into or used in any courtroom or court environs. Environs include:
   • the entire floor where a courtroom is located;
   • the entire floor where the grand jury meets; and
   • the entire floor where a chambers of any Magistrate Judge or District Judge is located.

b. Authority to Impound Equipment. The United States Marshals Service may impound the above-described equipment brought into the courtroom or its environs.

c. Exemptions from Prohibition. The prohibitions of this rule do not apply to:
   1. a stenographic or recording device used by an official court reporter or other authorized court personnel;
RULE 55 Records.

55.1 Return of Exhibits in Criminal Cases. In criminal cases, the Clerk will return all exhibits in the custody of the Clerk to the party who introduced the exhibits in evidence to be retained until case disposition is final. The parties will be responsible for producing the exhibits if required for an appeal record.

RULE 57 Miscellaneous Rules.

57.1 Waiver of Rules. The Court may waive any of the Rules when necessary to meet unusual circumstances or to avoid injustice.

57.2 Compliance with the Rules of Professional Conduct and A Creed of Professionalism of the New Mexico Bench and Bar. In all criminal proceedings, attorneys will comply with the Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico, unless modified by local rule or Court order. Attorneys appearing in this District must comply with “A Creed of Professionalism of the New Mexico Bench and Bar.”

57.3 Release of Information by Courthouse Personnel in Criminal Cases. All Court personnel, including employees and subcontractors retained by the Court appointed official reporters, must not release any information pertaining to a criminal case that is not part of the public records of the Court or divulge any information concerning proceedings held outside the presence of the public.

57.4 Clinical Law Student Practice. A law student participating in the clinical program at the University of New Mexico School of Law may, under the control and direction of the dean of the law school, or the dean’s designee, represent a defendant. A member of the New Mexico Federal Bar, designated by the dean, must actively supervise the student and sign any pleading or other paper prepared by the student. An order authorizing the student’s participation must be filed entered before the student participates in a case.

57.5 Redaction of Personal Identifiers for Certain Persons. In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers for juveniles and victims from all pleadings filed with the Court, including attached exhibits, whether filed electronically or in paper, unless otherwise ordered by the Court.

a. Social Security Numbers. If an individual’s social security number must be included in a pleading, only the last four digits of that number should be used.

b. Names of Minor Children. If the involvement of a minor child must be mentioned and a pseudonym is not appropriate, only the first name and first initials of that child’s last name should be used.

c. Dates of Birth. If an individual’s date of birth must be included in a pleading, only the year should be used, except in the case of juveniles.

d. Addresses. The home address of any victim or material witness will not be used.

e. Financial Account Numbers. If financial account numbers must be included, only the last four digits of these numbers should be used.

57.6 Filing Documents Containing Personal Identifiers. In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above and who believes that the personal data identifiers are necessary and relevant to the case may either:

• file an unredacted version of the document under seal,
• or

file a reference list under seal. The reference list will contain the complete personal data identifier(s) and the redacted identifier(s) used in their place in the filing. The unredacted version of the document or reference list under seal will be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file record.

57.7 Counsel and Parties Responsible for Redactions. The responsibility for redacting the personal identifiers rests solely with the party filing the document. The Clerk will not review each pleading for compliance with this rule.

RULE 58: Petty Offenses and Other Misdemeanors.

58.1 Forfeiture of Collateral in Lieu of Appearance. If the Court so orders, the person charged with a petty offense may pay a fixed sum payment to the Clerk before his or her scheduled appearance. If the offender pays the fixed sum payment, the payment will be forfeited to the United States. The forfeiture will signify that the offender does not contest the charge and does not request a hearing before the Court.

58.2 Appeal Procedures for Decisions of the Magistrate Judge on Misdemeanors and Petty Offenses.

a. Appellant’s Brief. Appellant’s brief must be filed and served within fifteen (15) days after the filing of the Notice of Appeal. The original will be filed with the Clerk and a copy served on opposing parties.

b. Appellee’s Brief. Appellee’s brief must be filed and served within fifteen (15) days of the filing and service of appellant’s brief. The original will be filed with the Clerk and a copy served on opposing parties.

c. Reply Brief. Appellant may file and serve a reply brief within five (5) days after the filing and service of appellee’s brief.
d. **Length of Briefs and Exhibits.** The appellant’s brief must not exceed twenty (20) double-spaced pages. The appellee’s brief must not exceed fifteen (15) double-spaced pages. A reply brief must not exceed ten (10) double-spaced pages. Exhibits must not exceed twenty (20) pages.

e. **Notice of Electronic Filing (NEF) Sent by CM/ECF is Service.** When a pleading is electronically filed, a Notice of Electronic Filing (NEF) will be sent by the CM/ECF system to all Registered Participants. The NEF is valid service to Registered Participants. It is the responsibility of the filer to determine if all parties entitled to service are Registered Participants.

f. **Party not a Registered Participant.** If a party entitled to service is not a Registered Participant, the filer must serve the pleading by an alternate method.

g. **Certificate of Service.** Every pleading must have a certificate of service stating how the party was served. Certificates of service and the Notices of Electronic Filing are explained in the CM/ECF Administrative Procedures Manual.

h. **Appeals.** All appeals from Magistrate Judge decisions will be decided by the District Court without a hearing, unless otherwise ordered by the District Court.
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-063

Topic Index:
Appeal and Error: Standard of Review; and Substantial or Sufficient Evidence
Evidence: Admissibility of Evidence; Hearsay Evidence; and Substantial or Sufficient Evidence
Government: Elections

HARRIET RUIZ, ROSEMARIE SANCHEZ and WHITNEY C. BUCHANAN, Appellants,
versus
REBECCA D. VIGIL-GIRON, Appellee,
and
MARY HERRERA, in her capacity as New Mexico Secretary of State, Real Party in Interest.

No. 31,080 (filed: November 7, 2008)

ORIGINAL PROCEEDING
DANIEL A. SANCHEZ, District Judge

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for Appellants

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JONATHAN RICHARD ADAMS
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for Appellee

OPINION
PER CURIAM

This case highlights the problems faced in challenges to the validity of signatures on nominating petitions when the time allowed for such challenges is remarkably brief and when there is no clear guidance on which database of registered voters is to be used to verify the signatures. Harriet Ruiz, Rosemarie Sanchez, and Whitney C. Buchanan (Plaintiffs) filed a complaint, pursuant to Rule 1-096 NMRA, challenging the signatures on the nominating petitions of Rebecca D. Vigil-Giron (Defendant), who sought to be the Democratic Party’s candidate for the United States House of Representatives from the First Congressional District, and Mary Herrera, in her capacity as New Mexico Secretary of State (Real Party in Interest). The district court dismissed the challenge on two grounds: (1) that the evidence showed Defendant had collected the required number of valid signatures, and (2) that the complaint did not satisfy the specific pleading requirements of Rule 1-096. Because we conclude there was sufficient evidence to support the district court’s ruling that Defendant had collected enough signatures to be placed on the primary election ballot, we affirm the dismissal of the challenge.

I. BACKGROUND

(2) At the Democratic Party’s pre-primary convention on March 15, 2008, Defendant failed to obtain the Democratic Party’s designation to be placed on the primary election ballot. Subsequently, pursuant to NMSA 1978, Section 1-8-33(D) (2008), Defendant collected additional signatures to those submitted before the pre-primary convention as an alternative method of being placed on the ballot. Under Section 1-8-33(D), she was required to file a total of at least 1,214 valid signatures (at least four percent of the total vote for the party’s candidates for governor in the most recent gubernatorial election), a number that includes those signatures filed both before and after the pre-primary convention. In accordance with the expedited process outlined in the Election Code, Defendant filed a new declaration of candidacy and additional signatures on March 25, 2008, within ten days of the pre-primary convention. See § 1-8-33(D).

(3) Plaintiffs then filed a complaint challenging a number of the signatures on April 4, 2008, within ten days of the date Defendant filed her declaration of candidacy, as required by NMSA 1978, Section 1-8-35(A) (1993). Plaintiffs prepared a summary of signatures they argued were invalid, contending that Defendant was 85 signatures short of the number of signatures required. Of specific relevance to this appeal are 347 signatures that Plaintiffs alleged did not belong to registered Democratic voters. Defendant countered by presenting her own evidence that 103 of the challenged signatures did, in fact, belong to registered Democratic voters. In addition, Defendant argued that Plaintiffs’ complaint did not comply with the pleading requirements of Rule 1-096 because the complaint did not make clear whether the group of 347 signatures on the petitions was being challenged because no corresponding name was found on voter registration lists or because the addresses in the petitions did not match the addresses on the registration lists.
[4] At the evidentiary hearing in district court, Plaintiffs and Defendant argued that each other’s evidence was inadmissible. However, the district court admitted the evidence of both parties. After reviewing the evidence, the district court dismissed the complaint on two grounds: (1) that Plaintiffs had not shown that Defendant had not collected enough signatures to be placed on the ballot, and (2) that the complaint did not specifically state the grounds for each challenged signature as required by Rule 1-096. Plaintiffs then filed a certificate of counsel with this Court, pursuant to Rule 12-603(D) NMRA, appealing the district court’s decision.

II. DISCUSSION

[5] New Mexico law mandates that every signature on a nominating petition is to be counted unless evidence is presented that the person signing

(1) was not a registered member of the candidate’s political party ten days prior to the filing of the nominating petition;

(2) failed to provide information required by the nominating petition sufficient to determine that the person is a qualified voter of the state, district, county or area to be represented by the office for which the person seeking the nomination is a candidate;

(3) has signed more than one petition for the same office, except as provided in Subsection A of this section, or has signed one petition more than once;

(4) is not of the same political party as the candidate named in the nominating petition as shown by the signer’s certificate of registration; or

(5) is not the person whose name appears on the nominating petition.

NMSA 1978, § 1-8-31(C) (1999). Therefore, the burden is on the challenger to demonstrate that specific signatures should not be counted, and we are “committed to examine ‘most carefully, and rather unsympathetically’ any challenge to a voter’s right to participate in an election, and will not deny that right ‘absent bad faith, fraud or reasonable opportunity for fraud.’” Simmons v. McDaniel, 101 N.M. 260, 263, 680 P.2d 977, 980 (1984) (quoting Valdez v. Herrera, 48 N.M. 45, 53, 145 P.2d 864, 869 (1944)).

[6] Plaintiffs argue that the district court erroneously dismissed their challenge to Defendant’s nominating petitions, and they frame the issues as follows: that the district court erred (1) in admitting an exhibit introduced by Defendant’s campaign manager showing that several of the challenged signatures were valid, and (2) in dismissing Plaintiffs’ complaint for failure to plead the challenges to signatures with sufficient particularity. We first address the admissibility of Defendant’s exhibit.

A. THE ADMISSION OF DEFENDANT’S EXHIBIT

[7] Plaintiffs argue on appeal that the district court should not have admitted Defendant’s exhibit showing that a number of the challenged signatures were valid. Plaintiffs objected to the exhibit’s admission on the grounds that it was hearsay and not a proper summary under Rule 11-1006 NMRA. Plaintiffs argue that if this evidence had been excluded, there would have been insufficient evidence to support the ruling that Defendant had collected the required number of signatures. The admission or exclusion of evidence is reviewed for an abuse of discretion. Coates v. Walmart Stores, Inc., 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it 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 citations omitted).

[8] Both parties presented their evidence in the form of summaries compiled from voter registration records under Rule 11-1006. Rule 11-1006 provides:

The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

The summary, of course, must be of admissible evidence. See United States v. Samaniego, 187 F.3d 1222, 1223 (10th Cir. 1999) (“Admission of summaries, however, is conditioned on the requirement that the evidence upon which they are based, if not admitted, must be admissible.”); see also Benavidez v. Benavidez, 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (explaining that it is appropriate to look to judicial interpretations of corresponding federal rules when our rules are the same). Plaintiffs do not dispute that the Bernalillo County Clerk’s database of voter registration records and the nominating petitions are public records, which are admissible under Rule 11-803(H) NMRA. Indeed, Plaintiffs themselves used the Bernalillo County Clerk’s database, among others, to develop their own summary and did not argue that the underlying record was unreliable. We note, moreover, that a foundation is usually unnecessary when introducing a public record into evidence because a public official is presumed to properly perform his or her duty and because it is therefore more likely that the public record will be accurate. State v. Ramirez, 89 N.M. 635, 644-45, 556 P.2d 43, 52-53 ( Ct. App. 1976), overruled on other grounds, Sells v. State, 98 N.M. 786, 788, 653 P.2d 162, 164 (1982).

[9] Plaintiffs, however, argued that Defendant’s exhibit was not a proper summary under Rule 11-1006. Although Plaintiffs argue that Defendant did not make the basis for the summary available to Plaintiffs as required by the rule, Plaintiffs’ witness relied on the same voter registration list in conducting her own research, and Plaintiffs’ witness testified that she had access to the same list.

[10] In this case, the witness through whom Defendant’s exhibit was introduced testified that she compiled the summary of valid signatures from information she received from the Bernalillo County Clerk’s Office. She testified that she sat with a clerk at the County Clerk’s Office and read to the clerk names from Defendant’s petitions. If the clerk verified that the names on the petitions appeared on the voter registration list, the witness noted that information on her copy of the petitions. The witness testified that she then prepared Defendant’s exhibit, which was a list of the signatures that the County Clerk’s Office had verified belonged to registered Democratic voters, from the notes she made on the petitions. Based on this testimony, the district court ruled that Defendant’s witness had personal knowledge about the compilation of the summary, she had worked on it at the Bernalillo County Clerk’s Office, and she had authenticated the summary. Under these circumstances, we find no clear abuse of discretion in the district court’s ruling admitting Defendant’s exhibit.

B. SUBSTANTIAL EVIDENCE

[11] Because Defendant’s exhibit was
admitted, the district court then weighed the evidence presented by both parties addressing the validity of the signatures. In doing so, the district court commented on the number of databases Plaintiffs had used to compile their challenges. Plaintiffs’ witness testified that she supervised a group of researchers who searched four different databases: (1) Bernalillo County voter registration files from March 9, 2008; (2) a database named “Caucus ’08” from the Secretary of State’s Office; (3) a database named “Vote Builder,” which is a web-based database maintained by the Democratic Party; and (4) the April 1, 2008 version of the voter registration files from the Bernalillo County Clerk’s Office.

Plaintiffs’ witness testified that the March 9, 2008 Bernalillo County voter registration files were provided by the Democratic Party and had been “filtered” to make them easier to search. The witness acknowledged that she only had the word of a Democratic Party official, who did not testify, to authenticate the Bernalillo County files. In a somewhat confusing statement, she testified that these files were not used to challenge any voter, but simply to find voters, although the files were used to identify duplicate voter signatures. The second database Plaintiffs used was Caucus ’08, which was obtained from the same Democratic Party official, who represented that this database was obtained from the Secretary of State’s Office and was dated January 21, 2008. Plaintiffs’ witness acknowledged that this database was used to identify voters outside of Bernalillo County. She also testified that the third database, Vote Builder, was a web-based database maintained by the Democratic Party, but she testified that it was not used to challenge any signatures. Finally, Plaintiffs’ witness testified that the challenges in Bernalillo County were based on the fourth database, the April 1, 2008 version of the Bernalillo County voter registration files, which was purchased from the Bernalillo County Clerk’s Office by Plaintiffs’ counsel and then uploaded into a searchable database by the Democratic Party official who gave her the databases.

After reviewing the evidence presented by both parties, the district court found that 102 of the signatures listed in Defendant’s exhibit were valid. Because Plaintiffs alleged that Defendant was 85 signatures short of the number required, the court’s acceptance of an additional 102 valid signatures resulted in the district court’s finding that Defendant had collected a sufficient number of signatures to have her name placed on the primary election ballot. This finding will only be reversed if we determine it is not based upon substantial evidence. See Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, ¶ 12, 17, 140 N.M. 478, 143 P.3d 717. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” Landavazo v. Sanchez, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). Under this standard, we resolve all factual disputes and indulge all reasonable inferences in favor of the party who prevailed in the trial court. See Coates, 1999-NMSC-013, ¶ 46. “[W]e will not reweigh the evidence nor substitute our judgment for that of the fact finder.” Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177.

III. CONCLUSION

Because we resolve all factual disputes and indulge all reasonable inferences in favor of Defendant, we conclude that the district court’s finding that Defendant submitted a sufficient number of signatures to have her name placed on the primary ballot was based upon substantial evidence. In so concluding, we emphasize that the purpose of placing the burden on Plaintiffs (the challengers) is to ensure that “absent bad faith, fraud or reasonable opportunity for fraud,” the right of voters to participate in an election will be protected. See Valdez, 48 N.M. at 53, 145 P.2d at 869. Accordingly, we affirm the dismissal of the challenge on that basis. In light of this holding, we do not address whether the complaint was pled with sufficient specificity.

In deciding that Defendant’s evidence of valid signatures was persuasive, the district court noted problems with the multiple databases used by Plaintiffs, observing that the person who obtained some of them was affiliated with the Democratic Party and was not present to testify. The use of multiple databases highlights the absence of clear guidance from the Legislature about which voter registration list is reliable and should be used to challenge nominating petitions. Such guidance would be helpful in light of the expedited process for such challenges. Under the circumstances of this case, a review of the exhibits and the databases forming the bases of those exhibits was extremely difficult in the time allowed, as the district court noted. If both parties to a challenge were required to rely on one list of registered voters to identify valid and invalid signatures, litigation would be more efficient and reliable, both for the parties and the courts.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Chief Justice

PETRAC M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-064

Topic Index:
Wills, Trusts and Probate: Constructive Trust; and Revocation

IN THE MATTER OF THE ESTATE OF
GEORGE GUSHWA, deceased.

ZANE GUSHWA,
Petitioner-Petitioner,
versus
WANDA HUNT,
Respondent-Respondent.
No. 30,592 (filed: November 13, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
TEDDY L. HARTLEY, District Judge

RANDY J. KNUDSON
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for Petitioner

MICHAEL T. GARRETT
GARRETT LAW FIRM, P.A.
Clovis, New Mexico
for Respondent

OPINION

RICHARD C. BOSSON, JUSTICE

The New Mexico Probate Code specifies the means by which a testator may revoke a prior will. See NMSA 1978, § 45-2-507(A) (1993) (stating that a will may be revoked by either executing a subsequent will or by performing a revocatory act on the will). The district court, concluding that the purported revocation in this case was legally ineffective, granted summary judgment.

BACKGROUND

In June 2000, Decedent George Gushwa executed his Last Will and Testament (the Will) while his wife, Zane Gushwa, the Petitioner in this appeal, was in the hospital. Decedent was assisted in preparing the Will by his niece, Betty Dale, and her husband, Ted Dale (Ted). The Will provided that Decedent’s separate property be held in trust for the support of Wife, during her life, and upon her death it was to be distributed to Decedent’s nieces and nephews. Wife received no permanent distribution under the Will. Decedent named Ted as the trustee, and gave the original Will to him for safekeeping. The Dales were not beneficiaries under the Will.

Shortly thereafter, it appears that Decedent decided he wanted to revoke the Will. According to Wife, Decedent called Ted to regain possession of the original Will, but Ted refused to send it. Ted denies receiving such a request from Decedent. Instead, Ted submitted an affidavit stating that Wife called him and requested that he send her the original Will. Ted then notified Decedent’s attorney and asked whether he should send Wife the original Will, because Ted knew that Decedent did not want her to see it. Decedent’s attorney told Ted to contact Decedent, which Ted did. According to Ted, Decedent asked him to discuss the Will only in general terms with Wife, and told Ted which pages of the Will to send to Decedent. Ted then sent photocopies of those pages to Decedent.

In January 2001, Decedent contacted another lawyer to help him revoke the Will. In February 2001, his new lawyer assisted him in drafting a document entitled “Revocation of Missing Will(s),” in which Decedent repeatedly stated that he wanted to revoke his previous Will. At the same time, on the advice of counsel Decedent wrote “Revoked” on the copy of three pages of the Will, presumably the same three pages that he received from Ted, and attached those pages to the Revocation of Missing Will(s) document. That document was signed by Decedent and two witnesses and was notarized. In April 2001, Decedent received a photocopy of the entire Will from his previous attorney and wrote “Revoked” on each page of that copy of the Will.

Decedent died in 2005. After his death, Wife filed an application for informal appointment of a personal representative. Wife asserted that her husband died intestate and that she was not aware of any unrevoked testamentary instruments. In her application, Wife listed the names of several interested parties, including Wanda Hunt (Wanda), Decedent’s niece, the Respondent in this appeal. Wanda objected to Wife’s application, arguing that the June 2000 Will had not been revoked and was still in force, because Decedent had failed to follow the statutory formalities for revocation set forth in the Probate Code.

In response to Wanda’s objections, Wife argued that the June 2000 Will had been revoked by the Revocation of Missing Will(s) document, and also by Decedent’s act of writing “Revoked” on the photocopied pages of the Will. She further contended that Ted’s behavior prevented Decedent from obtaining possession of the original Will so that he could write “Revoked” on the original instead of just a copy. Wife asked the district court to impose a constructive trust upon Decedent’s estate if the court found that the Will had not been successfully revoked under the statute. In July 2006, the district court agreed with Wanda that Decedent’s will had not been revoked in a manner consistent with the requirements of the Probate Code and granted summary judgment in her favor and against Wife.

The Court of Appeals affirmed the district court, concluding that the Revocation of Missing Will(s) document was not testamentary in nature; it was not a subsequent will as required by statute, and therefore it did not revoke Decedent’s prior Will. In re Estate of Gushwa, 2007-NMCA-121, ¶ 16, 142 N.M. 575, 168 P.3d 147. The Court of Appeals also agreed that the act of writing “Revoked” on the photocopied will was not a legally effective revocatory act because such an act must be done on an original or a duplicate original and not a photocopy. Id. ¶ 29. Finally, the Court of Appeals concluded that Ted’s refusal to surrender the original will did not preclude summary judgment. Id. With the exception of the last point, we agree with much of the Court of Appeals’ analysis.
DISCUSSION

[8] This appeal raises two questions under the Probate Code and one question of equity. First, we consider whether Decedent’s execution of the Revocation of Missing Will(s) document satisfies the requirements of Section 45-2-507(A)(1), dealing with revocation by writing. Second, we determine whether Decedent’s act of writing “Revoked” on a photocopy is a revocatory act within the meaning of Section 45-2-507(A)(2). Finally, we examine whether the allegations of fraud against Ted create a genuine issue of material fact that, if proven, might justify relief and preclude summary judgment.

[9] We review a district court’s grant of summary judgment de novo. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Id.

Our Probate Code provides that a will or any part thereof may be revoked in one of two ways. See § 45-2-507. A testator may revoke a previous will “by executing a subsequent will that revokes the previous will or part expressly or by inconsistency.” Section 45-2-507(A)(1).

A revocatory act on the will includes “burning, tearing, canceling, obliterating or destroying the will or any part of it.” Id. For purposes of this appeal, we concentrate on the word “canceling,” but we turn first to the requirement in Section 45-2-507(A)(1) for revocation by a “subsequent will.”

Revocation by Writing

[11] In this case, the district court specifically found that “[n]either party proposes the revocation document satisfies the requirements of § 45-2-507(A)(1).” Nevertheless, the court conducted its own analysis of the Revocation of Missing Will(s) document and concluded that the document was not a “subsequent will” as set forth in Subsection -507(A)(1). The court specifically noted that the document “act[ed] instanter and not upon [Decedent’s] death[,]” and therefore could not be a testamentary disposition.

[12] Relying on In re Estate of Martinez, 1999-NMCA-093, 127 N.M. 650, 985 P.2d 1230, the Court of Appeals agreed that the Revocation of Missing Will(s) document was not a subsequent will within the meaning of the Code. Gushwa, 2007-NMCA-121, ¶¶ 12-16. The Court noted that “although some portions of the document may arguably contain testamentary language, the document itself was not intended to be a subsequent will.” Id. ¶ 16.

[13] At the outset, we note that our Probate Code, unlike that of other states, does not allow for revocation of a will by any “other writing.” Compare § 45-2-507(A)(1) (“A will or any part thereof is revoked . . . by executing a subsequent will that revokes the previous will or part expressly or by inconsistency . . . .” with Fla. Stat. § 732.505(2) (2002) (“A will or codicil, or any part of either, is revoked . . . by a subsequent will, codicil, or other writing executed with the same formalities required for the execution of wills declaring the revocation.” (Emphasis added.)). As our Court of Appeals has previously explained:

Generally, the question whether a will can be revoked by a writing not testamentary in character depends upon the provisions of the governing statute. . . . Where the statute omits the clause “some other writing” or its equivalent, and simply states that no will shall be revoked except by some other “will, testament or codicil in writing, declaring the same,” it has been held that a will may not be revoked by a writing not testamentary in character. Martinez, 1999-NMCA-093, ¶ 11 (quoting E.T. Tsai, Annotation, Revocation of Will By Nontestamentary Writing, 22 A.L.R.3d § 2(a), at 1351 (1968)).

[14] Wife argues that the Revocation of Missing Will(s) document should be given the effect of a subsequent will because of its language expressly revoking Decedent’s prior will. Wife relies on the definition of “will” contained in the definitions section of the Probate Code. See NMSA 1978, § 45-1-201(A)(53) (1995) (defining a will as “any testamentary instrument that . . . revokes or revises another will”).

[15] Wife’s position, however, is at odds with the Code’s specific language describing the only legally effective methods of revocation. If a will could be revoked by any writing that simply revoked another will, without the necessary testamentary language—or that it be in fact a “subsequent will”—then a will could be revoked by “any other writing,” contrary to the Code’s specific language and the legislative intent to limit the available means of revocation. Because our Probate Code requires revocation by a subsequent will, we are guided by this more specific statement rather than a generic definition. Accordingly, we reject Wife’s argument that the Revocation of Missing Will(s) document satisfies the requirements of Section 45-2-507(A)(1). It clearly does not, regardless of Decedent’s intent. Our Probate Code requires an exacting attention to form as well as intent to validate a revocation. See Martinez, 1999-NMCA-093, ¶ 11.

[16] Similarly, Wife’s argument that other language in the Revocation of Missing Will(s) document gives it the effect of a subsequent will does not persuade us. Instead, the language chosen by Decedent clearly shows that he was not drafting a subsequent will.

[17] First, in the Revocation of Missing Will(s) document, Decedent explained in writing his correct understanding of the two methods by which a testator can revoke a will—drafting a subsequent will or performing a revocatory act on the will. Decedent then listed acceptable revocatory acts, including burning or canceling. After establishing that he knew how to revoke a will, and what acts constitute a revocatory act on a will, Decedent then “attest[ed] that [he] canceled the first three (3) pages of the will executed . . . on or about June 6, 2000, with the express intent to revoke the same.” Thus, it is clear from the Revocation of Missing Will(s) document that if Decedent intended to revoke the Will, it was not by drafting a subsequent will, but by performing a revocatory act on the photocopy of the Will.

[18] Additionally, Decedent used conditional language in the Revocation of Missing Will(s) document which strongly suggests that he did not intend the Revocation document to act as a subsequent will. Decedent wrote that he retained the option of drafting a subsequent will. Decedent stated that he knew that his property would pass through intestate succession “if [he] did not make a subsequent will.” (Emphasis added.) In other words, the Revocation of Missing Will(s) document, though an expression of intent, was not a subsequent will in Decedent’s mind. In addition, while
Decedent excluded Ted and Betty from inheriting any of his property, he explained that they were not to inherit "whether by will or by intestate succession," leaving open the possibility of a subsequent will.

{19} Our review of the statutory requirements for revocation by a subsequent will, along with our analysis of the language Decedent selected for use in the Revocation of Missing Will(s) document, persuades us that the Revocation of Missing Will(s) document was never intended to be a subsequent will and should not be given the effect of a subsequent will by this Court. Therefore, as a matter of law consistent with the clear language of the Probate Code, this document did not revoke Decedent’s prior will.

The Effect of a Revocatory Act on a Photocopy of the Will

{20} In addition to revoking a will by executing a subsequent will, the Probate Code provides that a will may be revoked by performing a revocatory act on the will. Section 45-2-507(A)(2). ("A will . . . is revoked . . . by performing a revocatory act on the will if the testator performed the act with the intent and for the purpose of revoking the will . . . .") The district court concluded that Decedent’s act of writing "Revoked" on a photocopy was insufficient to revoke the Will because a photocopy of a will does not have the same legal status as an executed copy of a will. The Court of Appeals agreed. Gushwa, 2007-NMCA-121, ¶ 29.

{21} The Court of Appeals first noted that an executed copy differs from a photocopy because an executed copy, or duplicate original, is executed with the same formalities as the original; the executed copy is signed, witnessed, and notarized at the same time as the original. Id. ¶ 20. Because each copy is signed and witnessed, the executed or duplicate copy has the legal effect of the original. Id. After reviewing these differences, the Court of Appeals concluded that Decedent’s act of writing "Revoked" on a photocopy of the Will was not a revocatory act within the meaning of Subsection -507(A)(2). Gushwa, 2007-NMCA-121, ¶ 29.

{22} Wife argues that a majority of modern courts hold that a testator’s revocation of a copy of will is a legally effective revocation of the original will. In support of her argument, Wife relies on an annotation that contains only six cases, all decided prior to 1952. See 79 Am. Jur. 2d Wills § 516 (2002). These cases do not support Wife’s position because the courts were considering the legal efficacy of fully executed duplicate copies, not photocopies of an original will. See In re Holmberg’s Estate, 81 N.E.2d 188, 189 (Ill. 1948) (explaining that a duplicate original is a carbon copy that is itself executed and attested); Robert v. Fisher, 105 N.E.2d 595, 597 (Ind. 1952) (same); Menzi v. White, 228 S.W.2d 700, 701 (Mo. 1950) (same); In re Will’s Will, 27 S.E.2d 728, 729 (N.C. 1943) (same); In re Bates’ Estate, 134 A. 513, 513 (Pa. 1926) (same); Blalock v. Riddick, 42 S.E.2d 292, 295 (Va. 1947) (same).

{23} Wife acknowledges that these cases address duplicate originals, but she contends that under our rules of evidence the distinction between a duplicate original and a photocopy “is a distinction without a difference.” Relying on Rule 11-1003 NMRA, “Admissibility of Duplicates,” Wife argues that a photocopy of a will should have the same evidentiary value as a duplicate original will.

{24} We disagree. Our rules of evidence require admission of an original “[t]o prove the content of a writing, recording or photograph.” Rule 11-1002 NMRA. Our rules also provide that a duplicate, which includes a photocopy, may be admitted in lieu of an original to prove the contents of a document unless there is a genuine question about the authenticity of the original or unless it would be unfair to admit the duplicate. Rule 11-1003. Based on this evidentiary principle, courts have admitted a photocopy of a will in lieu of an original as evidence to prove the contents of a lost will.

{25} For example, in In re Estate of Christoff, the Michigan Court of Appeals, relying on its rule of evidence describing the admissibility of duplicates, held that a photocopy of a lost will should be admitted to prove the contents of the original. 484 N.W.2d 743, 745 (Mich. Ct. App. 1992) (citing Mich. R. Evid. 1003). When, however, the proponent seeks to admit the photocopy for a purpose other than as evidence of the contents of a lost will, courts are more resistant to admitting the photocopy. See In re Estate of Goodwin, 18 P.3d 373, 376 (Okl. Civ. App. 2000) (holding that a photocopy of the original will that was not itself signed by the testator could not be admitted to probate).

{26} In making her argument that a photocopy of a will and an executed original will should be given the same evidentiary weight, Wife fails to appreciate that under our rules of evidence a duplicate is only admissible to the same extent as the original: to prove the contents of the original. Instead, Wife is attempting to give the photocopy the same legal significance as an executed original, which our Probate Code does not permit.

{27} Instead, our Probate Code mandates that a revocatory act be performed “on the will.” Section 45-2-507(A)(2). While the Code does not explicitly require that the act be performed on the original or on an executed original, such a requirement is implicit in the statutory term “will.” The Probate Code sets forth specific testamentary requirements for executing a will. See NMSA 1978, § 45-2-502 (1995) (“[A] will must be: A. in writing; B. signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction; and C. signed by at least two individuals . . . .”). Requiring that the revocatory act be performed on an original, or on a fully executed copy, simply comports with the statutory requirements for executing a will. See In re Estate of Tolin, 622 So. 2d 988, 990 (Fla. 1993) (“[T]he probate code] prescribes the manner used to properly execute a will or codicil. The use of the terms ‘will or codicil,’ which have specific statutory definitions, shows a legislative intent that in order to effectively revoke a will or codicil by a physical act, the document destroyed must be the original document.”).

{28} There is a real and valuable distinction between a photocopy admitted only to prove the contents of a will and a photocopy admitted as a legally effective original. See Lauenmann v. Superior Court, 26 Cal. Rptr. 3d 258, 261 (Cal. App. 2005) (“It is one thing to say that when a party is entitled

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1 In considering the thoughtful dissent authored by Chief Justice Chávez, we emphasize that under Section 45-2-507(A) of our Probate Code only a subsequent will may serve to revoke an existing will. As noted earlier, the district court found, without objection on appeal, that neither party put forth the Revocation of Missing Will(s) document as a subsequent will. Wife did not submit the document to probate, instead claiming that Decedent died without a will, intestate. Given these and other circumstances, the district court correctly concluded as a matter of law that Decedent did not comply with Section 45-2-507(A)(1) despite Decedent’s indications that he may have wanted to revoke by this or some other means.
to a document for informational purposes, a photocopy is sufficient as a ‘duplicate original.’ It is quite another to assert that a photocopy may be effective as an original in a context where the law requires that a physical document, to be legally operative, must be personally signed and witnessed in a particular manner.”).

{29} Further, we agree with our Court of Appeals that treating photocopies differently from originals is important as a matter of policy. As that Court explained, the requirement of an original can protect against fraudulent reproduction of unauthorized wills. See Gushwa, 2007-NMCA-121, ¶ 21. Photocopies can be readily produced and the existence of multiple copies of a will can engender confusion, especially when the issue is whether the will has been validly revoked. Id.

{30} We are also informed by case law from other jurisdictions where courts have held that a revocatory act performed on a mere photocopy is legally ineffective. See Tolin, 622 So. 2d at 990 (holding that the decedent’s attempted revocation was ineffective, even though the decedent “destroyed a document which ‘was an exact copy of the fully executed original . . . and was in all respects identical to the original except for the original signatures’”); In re Krieger, 595 N.Y.S.2d 272, 272 (App. Div. 1993) (holding “that a will cannot be revoked by the physical destruction of an unexecuted conformed copy”); Estate of Chariatou, 595 N.Y.S.2d 308, 311 (Sur. Ct. 1993) (holding that revocatory acts must be performed on the original will, not on a photocopy of the original); In re Estate of Stanton, 472 N.W.2d 741, 747 (N.D. 1991) (“In this case, the physical act of destruction . . . was not made of the original will, but rather of a copy of the will. While the destruction of an executed, duplicate will may operate to revoke the original will, the destruction of an unexecuted or conformed copy is ineffectual as an act of revocation regardless of the testator’s intent.” (citations omitted)). Accordingly, we hold that Decedent’s revocatory acts performed on a mere photocopy of his original Will do not comport with the statutory requirements of Section 45-2-507(A)(2).

**Imposition of a Constructive Trust**

{31} Because we conclude that Decedent’s attempt to revoke the Will was legally ineffective, we decline to remand for a trial on that issue. We are, however, mindful of the inequity that this holding may work under the circumstances of this particular case if, as alleged, Decedent was fraudently prevented from regaining possession of his original Will.

{32} Anticipating that the district court might find Decedent’s revocatory attempts inadequate, Wife asked the district court to impose a constructive trust on the estate to prevent an inequitable result. While Wife did not specifically argue to the Court of Appeals that the district court erred by not imposing a constructive trust, she has consistently argued that disputed issues of fact exist which preclude summary judgment. Specifically, Wife argued that Ted’s refusal to return the original created a disputed issue of fact that should have been resolved at trial. To this Court, Wife again asks that we remand for a trial to remedy what she perceives as an unjust result arising from a formalistic interpretation of the Probate Code.

{33} Our courts have correctly held that “statutes providing for revocation of wills are mandatory and that generally a will may be revoked only in the manner prescribed by statute.” Martinez, 1999-NMCA-093, ¶ 9 (citing Albuquerque Nat’l Bank v. Johnson, 74 N.M. 69, 71, 390 P.2d 657, 658 (1964)). To ameliorate the occasional inequities that such a formal approach may unintentionally produce, courts have resorted to equitable remedies such as the imposition of a constructive trust. See Tolin, 622 So. 2d at 990-91.

{34} A court will impose a constructive trust “to prevent the unjust enrichment that would result if the person having the property were permitted to retain it.” In re Estate of Duran, 2003-NMSC-008, ¶ 34, 133 N.M. 553, 66 P.3d 326. Courts have held that certain conduct, “such as fraud, constructive fraud, duress, undue influence, breach of a fiduciary duty, or similar wrongful conduct[,]” may warrant the imposition of a constructive trust. Id. (quoted authority omitted). “If a court imposes a constructive trust, the person holding legal title is subjected to an equitable duty to convey the property to a person to whom the court has determined that duty is owed.” Id.

{35} Wife maintains that Ted wrongfully prevented Decedent from regaining possession of his original Will. Decedent’s niece, Wanda, disputes these allegations with an affidavit from Ted. In response to Wife’s allegation that he refused to send Decedent the original Will, Ted denies ever receiving a call from Decedent requesting the original Will. Instead, he explains that it was Wife, not Decedent, who called him asking for the original Will. Ted also states that Decedent instructed him not to send Wife the original and to send Decedent a copy of only certain pages of the Will.

{36} Viewing this evidence in the light most favorable to Wife, as the party opposing summary judgment, and drawing all inferences in favor of a trial on the merits, we conclude that summary judgment was not appropriate with respect to this issue. See Handmaker, 1999-NMSC-043, ¶ 18. A disputed issue of material fact remains unresolved, namely whether Ted wrongfully prevented Decedent from obtaining the original Will, thereby making it virtually impossible for Decedent to comply with the statutory requirements for revocation. Thus, we remand to the district court to adjudicate that issue and decide whether, as a consequence, a constructive trust should be imposed under the facts of this case.

**CONCLUSION**

{37} We affirm in part and reverse in part and remand to the district court for further proceedings consistent with this Opinion.

{38} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

**WE CONCUR:**

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

EDWARD L. CHÁVEZ, Chief Justice (dissenting)

**CHÁVEZ, Chief Justice (dissenting).**

{39} Decedent George Gushwa executed a document (the Revocation of Missing Will(s) document) explaining that he wanted his prior will to be revoked and describing how he wished his property to be distributed upon his death. He was careful to follow all of the formalities required of a testator under the New Mexico Probate Code. After his death, the district court, without any specific fact-finding, refused to give effect to Decedent’s clearly expressed desires. The majority gives this decision its seal of approval, relying on the formalities of the Probate Code, which were designed to capture the intent of testators, not to frustrate it.

{40} I recognize that the Revocation of Missing Will(s) document is not an ideal will, and indeed that Decedent apparently believed that it did not constitute a will under New Mexico law. Decedent used language suggesting that he did not consider the document a will and that he intended to revoke his prior will by the ineffective means of performing a revocatory act on a partial photocopy of his
prior will. Because of this confusion, the majority concludes as a matter of law that Decedent’s document was not a will, and as such failed to satisfy New Mexico’s statutory requirements for the revocation of a prior will. I respectfully disagree. The document met all of the formalities necessary to create a will, and the district court’s responsibility was simply to determine the testator’s intent. *In re Estate of Deupree*, 2002-NMCA-097, ¶ 10, 132 N.M. 701, 54 P.3d 542 (“In construing the provisions of wills and trust instruments, ‘the court must attempt to ascertain and give effect to the testator’s intent.’”) (quoting *In re Estate of Russell*, 119 N.M. 43, 45, 888 P.2d 489, 491 (Ct. App. 1994)). Given the document’s ambiguity, we should remand to the district court to determine, on the basis of extrinsic evidence of the testator’s intent, whether the Revocation of Missing Will(s) document should be considered a will for the purposes of NMSA 1978, Section 45-2-507(A)(1) (1993) (providing that a prior will can be revoked “by executing a subsequent will that revokes the previous will or part expressly or by inconsistency”). Only if the document is found not to be a will would I raise the issue of constructive trust. Accordingly, I respectfully dissent.

{41} I agree that the Probate Code’s formalities must be punctiliously observed, even when at times this may undermine the deponent’s intent. See, e.g., *In re Estate of Martinez*, 1999-NMCA-093, ¶ 9, 127 N.M. 650, 985 P.2d 1230 (implying that even if the proper formalities were observed, a document purporting to do nothing more than revoke a prior will would not be effective to do so). For this reason, I agree with the majority’s holding that a revocatory act on a partial photocopy is insufficient to revoke the prior will. Under the New Mexico Probate Code, revocation may be achieved only in the two methods provided under the Code. *Perschbacher v. Moseley*, 75 N.M. 522, 256, 403 P.2d 693, 695 (1965) (decided under former law) (holding that without following the Code’s explicit provisions, “mere intention alone, no matter how unequivocal, is not sufficient to effect the revocation of such a solemn instrument.”). The first method is by a subsequent testamentary instrument, where “testamentary” is defined as taking effect upon the testator’s death. Section 45-2-507(A)(1), *In re Estate of Martinez*, 1999-NMCA-093, ¶ 11 (holding that a document purporting to do nothing more than revoke a prior will was ineffective to do so, since it took effect immediately and was therefore not testamentary in nature). The second, as the majority thoroughly explains, is by a revocatory act on the original will or an executed duplicate. Section 45-2-507(A)(2). While the second prong of the revocation statute has not been met, it is not clear to me that the first prong—revocation by subsequent will—has not been satisfied.

{42} Had Decedent executed, in accordance with the statutory formalities, a document purporting to be a will requesting that his property be disposed of through the intestacy laws, but specifying that nothing from his estate would be given to certain relatives, I see no reason why our courts should refuse to give effect to his desires. See NMSA 1978, § 45-1-201(A) (53) (1993) (“‘will’ includes codicil and any testamentary instrument that merely . . . expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.”); NMSA 1978, § 45-2-101(B) (1993) (“A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession.”). See also Unif. Probate Code art. II, pt. 1, general cmt., 8 U.L.A. 79 (1990) (explaining that the provision now adopted in New Mexico as Section 45-2-101(B) provides that “[s]o-called negative wills are authorized, under which the decedent who dies intestate, in whole or in part, can by will disinherit a particular heir.”); Unif. Probate Code § 2-101, cmt., 8 U.L.A. 80 (1990) (“A clear case would be one in which the decedent’s will expressly states that an individual is to receive none of the decedent’s estate. Examples would be testamentary language such as ‘my brother, Hector, is not to receive any of my property’ or ‘Brother Hector is disinherit ed.’”). In other words, such a document would be a valid will. Furthermore, if Decedent executed such a subsequent will, it seems clear that the New Mexico Probate Code would obligate us to conclude that the previous will had been revoked, even if the new will did not explicitly recite language revoking the previous will. Section 45-2-507(C) (“The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator’s estate.”); *Albuquerque National Bank v. Johnson*, 74 N.M. 69, 72, 390 P.2d 657, 659 (1964) (decided under former law) (holding that an implied revocation may be worked “either by express language, or by implication by a later testamentary instrument disposing of the property in a manner inconsistent with its disposition by the former will.”) (citations omitted). Unfortunately, our decision is not so simple, since the disputed Revocation of Missing Will(s) document contains additional language suggesting that Decedent did not perceive it to be a will.

{43} Because of this additional language, the majority has concluded that the Revocation of Missing Will(s) document “was not a subsequent will in Decedent’s mind.” (Emphasis added.) I agree with the majority that this language supports such an inference. However, since Decedent is unavailable to explain his understanding of what constitutes a “will,” I find it impossible to conclude as a matter of law that his understanding coincides with the definition of “will” under the New Mexico Probate Code. Although it may appear to be a stretch to ask whether both Decedent and New Mexico law intended the same interpretation of “will,” there is evidence on the face of the Revocation of Missing Will(s) document that Decedent’s understanding was imperfect. Specifically, Decedent sought to use this document to distribute his property after his death outside of New Mexico’s exact intestacy scheme, even if only by a few details. We are not in a position to determine the importance of these details to Decedent. In New Mexico, this goal can only be achieved with a will. Section 45-2-101(A) (“Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs”). Can we be so confident, then, that Decedent did not intend to create what our law recognizes as a will? I prefer to simply acknowledge that the Revocation of Missing Will(s) document is ambiguous in this respect.

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2Consider the following analogous situation that could arise under our probate law: The testator wrote and properly executed a will giving his real property to A and the residuum of the estate to B. Later, the testator executed a codicil providing that A was to receive nothing and that C was to receive the real property. Concerned that there might be some confusion over what was supposed to happen to the residuum, which he still intended to go to B under the original will, testator entitled the codicil “Codicil—Not a Will!”
In the context of such uncertainty, our case law reasonably counsels us to give way to the fact-finder in determining the nature of the disputed document. In our limited capacity as an appellate court, we should not be in the position of divining Decedent’s intent from his conflicting statements. Generally speaking, when a document is not ambiguous, questions of testamentary intent are decided by the trial judge as a matter of law. In re Estate of Kerouac, 1998-NMCA-159, ¶ 10, 126 N.M. 24, 966 P.2d 191. In the vast majority of cases, it poses no problem for a trial judge to make this determination; I have no quarrel with a trial judge who refuses to probate a document that gives no indication that it disposes of property upon death. However, when clear intent cannot be discerned from a document’s face, extrinsic evidence must be admitted. In re Estate of Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983). In Kelly, the Court of Appeals examined a document granting property to a decedent’s family and friends that failed to indicate “whether decedent intended the property referred to therein to pass immediately or only in the event of his death.” Id. at 488, 660 P.2d at 130. As such, the issue was whether the trial court had properly granted summary judgment to the will’s opponents. The Court of Appeals held that summary judgment had been improperly granted because “[w]here a doubt exists as to whether an instrument was intended to be a will, the issue of testamentary intent is generally a question of fact for the trier of fact.” Id. at 489, 660 P.2d at 131; see also In re Estate of Martinez, 99 N.M. 809, 813, 664 P.2d 1007, 1011 (Ct. App. 1983) (holding that there was substantial evidence to support the trial court’s findings, based on the witnesses’ testimony, that a document challenged as lacking testamentary intent was a will). In addition, the Kelly Court stressed that for a will to be valid, “it is not essential that the document expressly recite that the instrument shall take effect only at the death of the testator, if the instrument and circumstances under which it was written reasonably indicate that the document was intended to be testamentary in character.” Kelly, 99 N.M. at 489, 660 P.2d at 131; see also In re Estate of Kimble, 117 N.M. 258, 261, 871 P.2d 22, 25 (Ct. App. 1994) (testamentary intent “does not depend upon the testator’s understanding of the legal effect of the document”).

Although Kelly can be distinguished from the case at bar insofar as the document in Kelly did not involve any language directly suggesting that it was not a will, its essential holding applies. Where there is ambiguity involving the existence of testamentary intent—or, as the Court of Appeals put it, over the “testamentary character” of the document—summary judgment is not appropriate.

I would reverse the district court because it should not have decided the issue of the will’s testamentary nature as a matter of law. The document appears to satisfy the statutory requirements for a will. The real issue is Decedent’s intent, which the evidence strongly suggests was to dispose of his property and revoke the prior will. Due to the ambiguity of the Revocation of Missing Will(s) document, there still exists a genuine issue of material fact on this subject.

I recognize the majority’s concern that the issue I find compelling in this case was not preserved. However, because the district court specifically addressed the issue, as did the Court of Appeals and Wife in her brief to this Court, I conclude that the argument was preserved. Under Rule 12-216(A) NMRA, with the exception of issues of public interest or fundamental error, “[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review.” In the case at bar, there is no argument that either of the exceptions applies, so the Court should only consider whether the normal preservation requirements have been satisfied. State v. Joanna V., 2003-NMCA-100, ¶ 10, 134 N.M. 232, 75 P.3d 832, aff’d, 2004-NMSC-024, 136 N.M. 40, 94 P.3d 783. The Court of Appeals has explained that the preservation rule serves the purposes of (1) allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and (2) creating a record from which the appellate court can make informed decisions. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332. Preservation requirements assure that parties “alert the mind of the trial judge to the claimed error.” Madrid v. Roybal, 112 N.M. 354, 356, 815 P.2d 650, 652 (Ct. App. 1991).

In this case, it is unclear whether Wife raised Section 45-2-507(A)(1)’s applicability or failed to do so in district court. Moreover, in its order granting summary judgment, the district court stated that “[t]he purported revocatory document dated February 28, 2001, does not satisfy the requirements of §45-2-507A(1)” because it “is not testamentary in character, in that it purports to act instanter and not upon the death of George Gushwa.” Similarly, Wife does not seem to have raised the issue of Section 45-2-507(A)(1) in her briefs before the Court of Appeals, but that Court quite clearly considered it in reaching its decision. In re Estate of Gushwa, 2007-NMCA-121, ¶ 12-16, 142 N.M. 575, 168 P.3d 147. In her briefs before this Court, Wife has clearly argued the issue. Since both the district court and the Court of Appeals considered and ruled on this issue, and since it has been briefed before this Court, the policies behind the preservation requirement are not offended by this Court’s review of the issue.

For the foregoing reasons, I respectfully dissent.

EDWARD L. CHÁVEZ, Chief Justice

Under New Mexico law, as the majority and I agree, revocation can only be achieved by subsequent will or revocatory act. See Albuquerque National Bank, 74 N.M. 69, 72-73, 390 P.2d 657, 659-60 (1964) (decided under former law) (applying statutory revocation requirements to the question of whether a codicil could have revoked part or all of a prior will). There was no revocatory act in this scenario, so the question becomes whether the codicil could be considered a will under New Mexico statute. There is no doubt that except for the “Not a Will!” language, the revocation would be effective, since under Section 45-1-201(A)(53), a codicil is a “will.” Would we really come to the contrary conclusion, as the majority seems to have done in this case, just because of the testator’s confusion over our statutory definition of “will”?
**Certiorari Not Applied For**

From the New Mexico Court of Appeals

**Opinion Number:** 2008-NMCA-157

**Topic Index:**
- Criminal Law: Assault; Child Abuse or Neglect; and Homicide
- Statutes: Interpretation

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**STATE OF NEW MEXICO,** Plaintiff-Appellee, versus JEREMY MONDRAGON, Defendant-Appellant.

No. 26,346 (filed: October 27, 2008)

**APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY**

PEGGY J. NELSON, District Judge

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**OPINION**

**CELIA FOY CASTILLO, JUDGE**

{1} The question before us is whether injuries inflicted on a fetus, which result in the death of a child born alive, support a charge for child abuse resulting in death under NMSA 1978, § 30-6-1(E) (2004) (amended 2005). Based on the language of the statute, we conclude that the trial court erred by denying Defendant’s motion to dismiss the charges, and we reverse.

**I. BACKGROUND**

{2} The parties stipulated to the following facts for the purposes of the motion to dismiss. At the time of the incident, Defendant and Mother lived together, and Mother was 24 weeks pregnant. On September 4, 2002, Mother called the police for assistance in order to get to the hospital. She reported that someone had entered her home on the previous evening and raped her. After sheriff’s deputies arrived, Mother was transported to the hospital.

{3} At the hospital, the deputies took statements from Mother and Defendant. After questioning, Defendant admitted that he had hit Mother “on top of her head with his knuckles, on the side, leg or butt with nunchucks, and that he slapped her on the side of her face with a backhand.” He further admitted to “kicking or pushing her on the side near her left hip and that she may have hit her stomach when she fell against a table.” Hospital staff documented injuries to Mother’s head and bruising on her left flank. The next day, Mother’s water broke during a pelvic exam, and on September 10, Mother gave birth to a baby boy. He died on September 12. The Office of the Medical Examiner ruled the manner of death to be prematurity and infection due to maternal abdominal blunt trauma.

{4} The State indicted Defendant on three counts: abuse of a child resulting in death, aggravated battery with a deadly weapon of a household member, and aggravated assault against a household member with a deadly weapon. Defendant filed a motion to dismiss the child abuse charge, contending that the child abuse statute could not be read to punish for injury to a fetus. Defendant also filed a motion to suppress his oral statements to the deputies and argued that he was not advised of his constitutional rights and that his statements were involuntary and the result of coercion.

{5} On July 28, 2005, the trial court issued a letter decision denying Defendant’s motion to dismiss. The trial court summarized the State’s allegations to be that Defendant injured Mother, which resulted in the death of a child. The trial court also denied Defendant’s motion to suppress his statements. Defendant pled guilty to voluntary manslaughter and reserved the right to appeal “the legal rulings in this case.”

**II. DISCUSSION**

{6} Defendant raises two issues on appeal. First, he argues that the trial court improperly denied his motion to dismiss the child abuse charge. Second, Defendant contends that the trial court should have suppressed his statements to the deputies at the hospital. Because we agree with Defendant that the child abuse charge should have been dismissed, we do not reach the suppression issue. The facts are undisputed, and Defendant maintains that the trial court erred as a matter of law. Accordingly, we review de novo the denial of the motion to dismiss. State v. Shirley, 2007-NMCERT-010, 143 N.M. 73, 172 P.3d 1285.

{7} Defendant argues that the charge of child abuse resulting in death must be dismissed because it stems from injuries that Defendant allegedly inflicted on a fetus, and not on a child. This result is compelled, Defendant contends, by this Court’s decision in State v. Martinez, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195, which held that “the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute.” Id. ¶ 13.

{8} The State distinguishes Martinez and focuses instead on the fact that Defendant’s actions allegedly caused the death of a child, and not a fetus, because the baby was born alive. For this reason, the State urges us to apply the common law born alive rule to the facts of this case. The born alive rule allows a homicide prosecution in the event that injuries are inflicted on a fetus, the child is born alive, and the child subsequently dies as a result of the in utero injuries. See State v. Willis, 98 N.M. 771, 771-72, 652 P.2d 1222, 1222-23 (Ct. App. 1982). The trial court agreed with the State, explaining that “the State alleges that the injuries to [M]other caused a sequence of events that injured the child, ultimately resulting in the child’s death. Because the
child was born alive, [D]efendant’s motion, as a matter of law, must fail.” We consider the parties’ arguments in turn, beginning with the language of the charging statute. See State v. Lopez, 2000-NMCA-001, ¶ 6, 128 N.M. 450, 993 P.2d 767 (looking first to the language of the statute).

A. Section 30-6-1

9. “We look first to the plain language of the statute.” State v. Bennett, 2003-NMCA-147, ¶ 6, 134 N.M. 705, 82 P.3d 72. Child abuse is defined as “a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be . . . placed in a situation that may endanger the child’s life or health.” Section 30-6-1(D)(1). Section 30-6-1(E) explains that “[i]f the abuse results in great bodily harm or death to the child, he is guilty of a first degree felony.” Based on the plain language of Section 30-6-1(D)(1), in order for a person to be charged with child abuse, a child must have been placed in a dangerous situation. Section 30-6-1(E) attaches heightened punishment when the abuse of a child results in the death of that child. The language of the recently amended version of the statute makes clear that the abuse of a child must result in the death of that child: “Whoever commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child.” Section 30-6-1(H) (2005). Thus, from the language of the charging statute, we conclude that in order to charge a person with child abuse resulting in death, the State must have evidence (1) that a child was abused and (2) that the child died as a result of that abuse. We now consider whether a fetus is a child for the purposes of Section 30-6-1.

B. Martinez

[10] In Martinez, a mother gave birth to a child who showed signs of cocaine withdrawal. 2006-NMCA-068, ¶ 2. The mother was charged with felony child abuse. Id. ¶ 4. This Court held that the mother’s motion to dismiss the charges should have been granted. Id. ¶ 13. The Martinez Court explained that the Legislature had consistently addressed the killing of fetuses and the killing of persons separately. Id. ¶ 7. Further, the Court acknowledged that it could not “expand the meaning of ‘human being’ to include an unborn viable fetus because the power to define crimes and to establish criminal penalties is exclusively a legislative function.” Id. ¶ 9. As we stated earlier, in Martinez, this Court concluded that “the Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute.” Id. ¶ 13.

[11] Defendant contends that the holding in Martinez requires us to reverse the trial court. Based on our earlier discussion of the statutory language, we agree. Section 30-6-1(E) requires the State to establish that a child was abused and the child’s death resulted from the abuse. In the present case, the State has alleged that a child’s death resulted from Defendant’s abuse, because the child was born alive and subsequently died. Based on the holding in Martinez, however, the State cannot establish that a child was abused by Defendant. At the time that Defendant’s alleged acts occurred, on September 4, there was no child—because according to Martinez, a fetus is not a child for the purposes of the child abuse statute. Consequently, Defendant cannot be charged with child abuse resulting in death under Section 30-6-1.

[12] The State attempts to distinguish Martinez by providing auxiliary rationales for the holding. For example, the State suggests that the Martinez Court did not believe that the state had proven the elements of child endangerment in that case. In the alternative, the State argues that the crime of endangerment was complete when the mother in Martinez completed the act of ingesting a controlled substance, whereas in the present case, Defendant’s alleged acts were not completed until the child died. The State also contends that we should evaluate the crime of child abuse resulting in death differently from the crime of child endangerment. These distinctions disregard the analysis that was actually undertaken by the Martinez Court: to interpret the language of the child abuse statute. See 2006-NMCA-068, ¶ 5. The Martinez Court did not consider whether there was substantial evidence to support the charge or whether the crime was complete. The State does not explain how the Legislature could have intended the word “child” to include a fetus under Section 30-6-1(E), but not under Section 30-6-1(D)(1).

[13] Accordingly, we hold that the trial court should have granted Defendant’s motion to dismiss because, although the State alleged that Defendant’s actions resulted in the death of a child, the alleged injuries were inflicted on a fetus, which is not a child under Section 30-6-1.

C. Born Alive Rule

[14] The State contends that the trial court correctly applied the common law born alive rule. According to the State, the common law is a supplement to the criminal code, the common law acknowledges that a fetus born alive is a person, and the Legislature has not indicated that it has repealed the common law rule. With this as background, the State argues that the common law rule applies “to allow criminal prosecution for conduct causing injury to a fetus that results in injury or death to the child after birth.” We are not persuaded.

[15] The common law rule historically applies to allow homicide prosecutions. See Willis, 98 N.M. at 771, 652 P.2d at 1222 (“The killing of a fetus, under the common law, was not homicide unless the fetus had been born alive; until born alive there was no human being.”). Defendant was not charged with homicide, but with child abuse resulting in death under Section 30-6-1. Homicide, at its most basic, is “the killing of one human being.” NMSA 1978, § 30-2-1(A) (1994); see also 2 Wayne R. LaFave, Substantive Criminal Law § 14.1(c), at 419 (2d ed. 2003) (“It is a general requirement of the law of homicide that the victim be a living human being.”). Child abuse resulting in death, however, as we have explained, requires more—that a defendant inflict abuse on a child and that the abuse cause the death of that child. Section 30-6-1. The State’s application of the born alive rule to the present action would have us disregard the dual requirements of Section 30-6-1, in favor of the single requirement of a homicide prosecution. There is no dispute in the present case that Mother gave birth to a live child and that the child tragically died. We cannot ignore, however, the language of the charging statute, which requires that the initial abuse be inflicted on a child, and the construction of that statute by the Martinez Court, which held that a fetus is not a child for the purposes of the child abuse statute. Thus, the born alive rule—permitting homicide actions when a child dies of prenatally inflicted injuries—does not change the outcome because, in the case before us, Defendant was not charged with homicide, but under Section 36-6-1.

[16] The State, citing cases from other jurisdictions, argues that the born alive rule allows Defendant to be prosecuted for child abuse without running afoul of Martinez. In the cases cited by the State, the courts refused to prosecute pregnant women for prenatal ingestion of illegal drugs, as in Martinez, but allowed third parties to be charged with homicide where prenatal injuries resulted in the death of a live child. See State v. Cotton, 5 P.3d 918,
922-23 (Ariz. Ct. App. 2000) (holding that a defendant could be charged with homicide for injuries inflicted in utero that resulted in the death of a child born alive); Reinesto v. Super. Ct., 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (concluding that the plain meaning of the child abuse statute “refers to conduct that directly endangers a child, not to activity that affects a fetus and thereby ultimately harms the resulting child”); State v. Deborah J.Z., 596 N.W.2d 490, 493 (Wis. Ct. App. 1999) (determining that the legislature intended to limit the definitions of “human being” in the homicide and reckless injury statutes to “one who has been born alive”); State v. Cornelius, 448 N.W.2d 434, 436-47 (Wis. Ct. App. 1989) (holding that a defendant could be charged with homicide if the injured fetus was born alive).

{17} These cases do not advance the State’s argument because Defendant was not charged with homicide, but, rather, with child abuse resulting in death. As we have explained, homicide is only concerned with the victim’s status at the time of death, while child abuse resulting in death requires the victim to have a certain status both at the time of the abuse and at the time of death. The construction of the word “child” to exclude a fetus under Section 30-6-1 has no bearing on homicide charges against a person who inflicts fatal prenatal injuries on a fetus who is born alive. See Cotton, 5 P.3d at 923 (“Because the infant here was undeniably a ‘person’ at the time of her death a day after the shooting, it is irrelevant that the injuries that led to her death were inflicted while she was still in utero.” (emphasis omitted)). The construction of the word “child” to exclude a fetus under Section 30-6-1 is determinative in the present case because Defendant was charged under that statute and that statute requires the victim to be a child both at the time of abuse and at the time of death. The State’s reading of these cases provides a rationale for a policy differentiation between the punishment of pregnant women and the punishment of third parties. Nevertheless, the State’s policy approach fails to address the requirements of our child abuse statute and the construction of that statute in Martinez.

{18} In addition, the cases cited by the State construe the statutes of other states, and their holdings are not based on the distinction between injuries inflicted by a third party and actions taken by a woman during pregnancy. See Cotton, 5 P.3d at 920 (defining the issue on appeal as “whether a newborn child who dies from injuries inflicted while the child was in utero is a ‘person’ within the meaning of Arizona’s homicide statutes” (emphasis omitted)); Reinesto, 894 P.2d at 735 (“The plain language of [the statute] indicates that the legislature intended to proscribe conduct by any person that causes physical harm to a child.”); Deborah J.Z., 596 N.W.2d at 492 (“The question presented by this appeal—whether an unborn child is a ‘human being’ within the statutes for attempted first-degree homicide and first-degree reckless injury—is an issue of statutory construction.”); Cornelius, 448 N.W.2d at 437 (“After reviewing the applicable statutes, we find that they unambiguously allow for the charges[].”). Only Reinesto includes a discussion of the policy reasons behind refraining from charging pregnant women for child abuse based on actions taken during gestation. 894 P.2d at 736 (“Were we to extend the statute to prenatal conduct that affects a fetus in a manner apparent after birth—conduct that would be defined solely in terms of its impact on the victim—the boundaries of proscribed conduct would become impermissibly broad and ill-defined.”).

Accordingly, we consider these out of state cases to be unhelpful in construing the language of Section 30-6-1.

III. CONCLUSION

{19} Section 30-6-1 controls this appeal, and Martinez construed that statute to exclude “fetus” from the definition of “child.” As a result, Defendant’s alleged infliction of injuries to a fetus, which resulted in the death of a child, is insufficient to support a charge of child abuse resulting in death under Section 30-6-1. Accordingly, we reverse the trial court.

{20} IT IS SO ORDERED.

CELIB FOY CASTILLO, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge
defendant was convicted of involuntary manslaughter. On appeal, he argues that his conviction should be reversed because the trial court failed to properly instruct the jury on his claim of self-defense. We agree with defendant and therefore reverse and remand this case for a new trial with proper jury instructions.

I. BACKGROUND

[2] Defendant and his girlfriend were watching movies at the home of defendant’s mother when a car pulled into the driveway at two thirty in the morning. Loud music played from the car stereo, and the car’s driver revved the engine and spun the tires. Defendant and his girlfriend did not recognize the car. Defendant watched from a window while the driver backed the car into the driveway, narrowly missing a propane tank. Defendant stepped outside, and the driver continued to maneuver—driving repeatedly backward and forward. Defendant loudly questioned the car’s occupants, but he received no answer. Defendant was not able to see into the car. [3] Defendant went back inside, dressed, and retrieved a .25 caliber pistol from his dresser. After unlocking the trigger lock, he put the gun in his pants pocket and kept his hand on the gun as he went back outside. At this point, the music was quieter, and defendant could see that there were two people in the front seats of the car, but he still could not see into the back seat. The car started to pull away, but it stopped at the edge of the driveway. Victim got out of the car, walked rapidly toward defendant, and punched him in the face. Defendant testified that as he stumbled backward, he put his hands up to his face, and the gun, still in his hand, went off. Victim got back in the car, drove away, and died a short time later. [4] Defendant was charged with second degree murder, contrary to NMSA 1978, §§ 30-2-1(B) (1994). At trial, the jury was instructed to consider second degree murder, involuntary manslaughter, and involuntary manslaughter. In addition, the trial court instructed the jury on self-defense. After deliberations, the jury was unable to reach a verdict, and the trial court declared a mistrial. The State re-tried defendant and amended the criminal complaint to charge only voluntary and involuntary manslaughter. The facts described above were those presented during the second trial. Defendant again proffered a self-defense jury instruction, which the trial court denied. The jury convicted defendant of involuntary manslaughter, and defendant appeals.

II. DISCUSSION

[5] “The question of proper denial of a jury instruction is a mixed question of law and fact, which we review de novo.” State v. Neatherlin, 2007-NMCA-035, ¶ 9, 141 N.M. 328, 154 P.3d 703. “For a defendant to be entitled to a self-defense instruction . . . there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense. If any reasonable minds could differ, the instruction should be given.” State v. Rudolfo, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 (citation omitted). Defendant argues that there was sufficient evidence at the second trial to support an instruction on self-defense and that the trial court improperly refused to give the instruction. The State responds with three arguments: (1) that deadly force is never a reasonable response to a simple battery, (2) that defendant was the first aggressor, and (3) that defendant presented insufficient evidence at trial to support his proffered jury instruction. The trial court, in agreeing with the State that defendant presented insufficient evidence to support a self-defense instruction, made the following comments:

All right, and for the record the court wishes to state that with respect to the self-defense instruction or the issue of self-defense, the court is of the opinion that the evidence has failed to support such an instruction. Defendant testified that the shooting of victim was an accident. Defendant never testified nor was there any other evidence that he was in reasonable—that there was an appearance of immediate danger of death or great bodily harm to defendant as a result of victim striking him with—in the face with a fist or any of the other attendant circumstances. There is no indication that defendant was, in fact, put in fear by the apparent danger of immediate death or great bodily harm and that he killed victim because of that fear. The evidence is that he killed victim.
by accident. . . . The evidence is absent with respect to any self-defense by [Defendant].

As a result, the case was sent to the jury without any mention of self-defense. With this as a background, we now turn to the State’s arguments, which we will address in reverse order.

A. Sufficient Evidence

[6] As a preliminary matter, we will begin with a review of the law of self-defense as it relates to the law of involuntary manslaughter because this case involves both theories. To receive a self-defense instruction, there must have been evidence to show that Defendant “was put in fear by an apparent danger of immediate bodily harm, that his [actions] resulted from that fear, and that [he] acted as a reasonable person would act under those circumstances.” State v. Denzel B., ___-NMCA-A, __, ¶ 6, ___ N.M., __ P.3d __ [No. 27, 684 (May 7, 2008)] (first alteration in original) (internal quotation marks and citation omitted). This Court has held that “a defendant is entitled to a self-defense instruction if he or she introduces evidence from which the jury could reasonably find that the killing resulted from the threats or provocation that preceded it, even if the ultimate injury occurred accidentally.” State v. Gallegos, 2001-NMCA-021, ¶ 13, 130 N.M. 221, 22 P.3d 689. In Gallegos, an altercation began after a group of friends had been drinking. Id. ¶ 2. The defendant’s husband was stabbed, and the defendant retrieved her pistol, intending to fire a warning shot into the air. Id. ¶ 3. Instead, the gun fired, and the shot hit the victim in the head. Id. The trial court refused to instruct the jury on self-defense, in part because the defendant’s “testimony that the shooting was accidental was inconsistent with the theory of defense of another which presupposes an intentional act.” Id. ¶¶ 5, 7 (noting “case law and commentary treat ‘defense of another’ and ‘self-defense’ as virtually identical for purposes of analysis”). This Court reversed the trial court, noting that a “jury given a self-defense instruction can resolve any anomalies in the circumstances surrounding the homicide, including the question of whether the defendant accidentally killed the victim while defending himself or another.” Id. ¶ 14.

[7] When evidence supports a defendant’s theory that he was acting in self-defense, but that the resulting death was an accident, the trial court should instruct the jury using UJI 14-5181 NMRA, the non-deadly force self-defense instruction. State v. Romero, 2005-NMCA-060, ¶ 12, 137 N.M. 456, 112 P.3d 1113 (“[W]hen a defendant, asserting self-defense, claims that the resulting death was unintentional, [the deadly force self-[-] defense instruction] is inappropriate and that [the nondeadly force self[-]defense instruction] is likely to better fit the facts of the case.” (some alterations in original) (internal quotation marks and citation omitted)). In the present case, Defendant instead tendered UJI 14-5171 NMRA, which is the jury instruction relating to justifiable homicide and the use of deadly force. He modified it as follows:

The killing is in self-defense if:

1. There was an appearance of immediate danger of death or great bodily harm . . . to [Defendant].

2. [Defendant] was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed [Victim] because of that fear; and

3. A reasonable person in the same circumstances as [Defendant] would have acted as [Defendant] did.

The trial court rejected this instruction, specifically because “[t]he evidence is that [Defendant] killed [Victim] by accident. . . . The evidence is absent with respect to any self-defense by [Defendant].” Despite Defendant’s failure to proffer UJI 14-5181 instead of UJI 14-5171, he did offer evidence to support a self-defense theory. Defendant testified that he was afraid when he went outside carrying a loaded gun: “I felt threatened. I didn’t know who was out there, and I didn’t know what they were going to do or what they were planning on because they were not answering me at all, so that’s why I went inside and grabbed my gun because I was concerned on who they were and I didn’t know what they had.” There was also testimony that Defendant was afraid when he saw the defendant and the victim, in order to reach the conclusion that the defendant’s self-defense theory was supported by the evidence. Id. at 502, 684 P.2d at 1167. In the present case, the events of the entire evening, together with Defendant’s testimony, could raise a reasonable doubt about whether Victim’s actions put Defendant in fear of great bodily harm resulting in Defendant’s arming himself. See Rudolfo, 2008-NMSC-036, ¶ 27.

[9] In addition, there was also testimony to support the theory that the gun went off by accident. Defendant testified that after the punch, “[w]e both went like opposite ways, and right when I stumbled just like out of a reaction, I put my hands up and the gun was still in my hand at that time, and I shot off one round.” Defendant explained the gunshot as “a reaction,” and he testified that he “was not aiming at all.” Although immediately after being arrested, Defendant told the investigating officer a different story— that the shot was intended to incapacitate and not kill—it is for the jury to weigh and resolve conflicting evidence and testimony. See Gallegos, 2001-NMCA-021, ¶ 14 (“A jury given a self-defense instruction can resolve any anomalies in the circumstances surrounding the homicide.[]”).

[10] On appeal, Defendant summarizes his self-defense theory as follows:

At 2:30 in the morning, for no apparent reason, his yard was invaded by persons unknown to him who made a display of wild driving around his house. Music was blaring from the car, and the driver spun the tires wildly, several different times. The occupants made no attempt to explain why they were in [Defendant’s] yard creating a disturbance, even when given a chance to do so. Nor did they leave after [Defendant] confronted them.
Whether [Defendant’s] decision to initiate contact with the occupants of the car, given their persistent and menacing conduct, was brave or foolish is a matter of opinion; there can be no dispute that he was within his rights to do so.

This statement was supported by the evidence at trial. Based on this, we conclude that Defendant offered sufficient evidence to support a self-defense theory and an accidental shooting theory. See id. ¶ 13.

The difficulty remaining is that Defendant presented an incorrect jury instruction to communicate his theory to the jury. See Romero, 2005-NMCA-060, ¶ 12. We note, however, that “Defendant’s tender of a proper, written instruction . . . would have not alerted the trial court to its error . . . and would not have resulted in avoidance of the error because the error was based on incorrect rationales having nothing to do with the tender of written instructions.” State v. Diaz, 121 N.M. 28, 34, 908 P.2d 258, 264 (Ct. App. 1995). The reasoning provided by the trial court supports the conclusion that had Defendant offered a jury instruction based on UJI 14-5181, the trial court would still have rejected the self-defense theory based on its belief that there was insufficient evidence to support “any self-defense by Defendant.” In addition, the correct jury instruction would not have affected the trial court’s second line of reasoning—that an accidental shooting theory is incompatible with a self-defense instruction. These conclusions were “incorrect rationales” having nothing to do with the tender of correct instructions. Diaz, 121 N.M. at 34, 908 P.2d at 264.

Defendant raised and presented evidence to support a correct theory of self-defense. As a result, the trial court had an independent duty to instruct the jury on Defendant’s theory of self-defense. See State v. Lucero, 1998-NMCA-075, ¶ 21, 122 N.M. 696, 930 P.2d 1148 (“[T]he jury should have been allowed to determine whether [the defendant’s actions were reasonable under the circumstances[].”).

III. CONCLUSION

Because we conclude that reasonable minds could differ about whether Defendant acted in self-defense and that the State’s remaining arguments are unavailing, we vacate the conviction and remand for a new trial in accordance with this opinion.

IT IS SO ORDERED.

Celia Foy Castillo, Judge

We Concur:

James J. Wechsler, Judge

Michael E. Vigil, Judge
DPMS


certiorari not applied for

from the new mexico court of appeals

opinion number: 2008-nmca-159

topic index:

appeal and error: pro se representation on appeal
civil procedure: sanctions; and summary judgment
taxation: income tax


No. 27,312 (filed: October 29, 2008)

appeal from the district court of dona ana county

Jerald A. Valentine, District Judge

David Landess
Paula Landess
Santa Teresa, New Mexico
Pro Se Appellants

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opinion

Jonathan B. Sutin, Chief Judge

[1] Pro se Appellants, David and Paula Landess (Taxpayers), appeal from the district court’s grant of summary judgment in favor of Appellee, Gardner Turf Grass, Inc. (Gardner), dismissing their complaint and imposing sanctions under Rule 1-011 NMRA for bringing a frivolous action. Taxpayers argue that summary judgment and sanctions were improperly granted. Concluding that Taxpayers’ arguments are without merit, we affirm.

background

[2] David Landess is an at-will employee of Gardner. Directed by the Internal Revenue Service (IRS), Gardner withheld federal income taxes from Mr. Landess’s wages in accordance with federal tax law. On May 17, 2005, Taxpayers filed an action in district court for debt and money due and conversion. By way of answer and motion to dismiss, Gardner explained that the money allegedly due was withheld federal income tax in an amount that Mr. Landess contends is greater than he owes.

[3] In early 2001, Mr. Landess submitted to Gardner an Employee’s Withholding Allowance Certificate, Form W-4, on which he claimed he was exempt from withholding. In early 2004, Mr. Landess submitted another W-4 to Gardner, again claiming to be exempt from withholding. Gardner submitted both of these forms to the IRS, but continued to withhold taxes from Mr. Landess’s wages and to forward them to the IRS.

[4] In December 2004, a letter was sent to Gardner by the Questionable W-4 Program of the IRS. The letter directed Gardner to disregard the W-4 submitted by Mr. Landess and to withhold taxes as if he were claiming to be single with no allowances. The letter informed Gardner that employers are liable for the taxes they are required to deduct and that employers who fail to withhold taxes are subject to civil and criminal penalties. See I.R.C. § 6672 (West 1998) (providing for imposition upon employers of a civil penalty “equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over”); I.R.C. § 7202 (West 1954) (providing criminal penalties of a fine up to $10,000 or imprisonment for up to five years, or both). The letter also stated that employees have no cause of action against employers to recover wages withheld and paid to the United States. See I.R.C. § 3403 (West 1983) (providing that employers “shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment”).

[5] The district court granted summary judgment in favor of Gardner, dismissing Taxpayers’ complaint and imposing sanctions under Rule 1-011 for bringing a frivolous action. This appeal followed. Although the amount of attorney fees was not determined, the judgment was sufficiently final for appeal. See San Juan 1990-A, L.P. v. El Paso Prod. Co., 2002-NMCA-041, ¶ 16, 19, 132 N.M. 73, 43 P.3d 1083.

discussion

I.R.C. § 3403 (West 1983) creates a statutory bar to taxpayers’ suit

[6] A de novo standard of review applies to the construction and legal effect of § 3403. See State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (stating that “[i]nterpretation of a statute is an issue of law” that is reviewed de novo). The district court’s determination that § 3403 bars the action is implicit in its dismissal of the action and in its conclusion that the Taxpayers’ complaint was frivolous.

[7] “Taxpayers’ arguments are typical of the many taxpayer protester arguments summarily rejected by courts throughout the country.” Stockton v. N.M. Taxation & Revenue Dep’t, 2007-NMCA-071, ¶ 9, 141 N.M. 860, 161 P.3d 905; see generally Christopher S. Jackson, The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands, 32 Gonz. L. Rev. 291 (1996-97) (discussing common tax protest arguments). As our Stockton decision points out, relying on the Supreme Court’s decision in Holt v. N.M. Dep’t of Taxation & Revenue, 2002-NMSC-034, ¶ 3, 133 N.M. 11, 59 P.3d 491, these taxpayer protest cases are frequently frivolous and effect “unnecessary expenditure[s] of public resources.” Stockton, 2007-NMCA-071, ¶ 9 (internal quotation marks omitted). In this case, we hold Taxpayers’ lawsuit frivolous and a misuse of public resources as well.

[8] The federal income tax paid by a wage earner is collected at the source; the Inter-
nal Revenue Code requires employers to deduct and withhold income tax from the wages of their employees. I.R.C. § 3402(a) (1) (West 2006). The employer withholds the taxes as “a special fund in trust for the United States.” I.R.C. § 7501(a) (West 1954). Withheld taxes “are credited to the government in satisfaction of federal income tax liability.” Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1984); Howard v. United States, 711 F.2d 729, 733 (5th Cir. 1983). The employee is not liable for any additional payment. Purdy v. United States, 814 F.2d 1183, 1186 (7th Cir. 1986); Wise v. Comm’r of I.R.S., 624 F. Supp. 50, 54 (E.D. Wis. 1985).

§ 3403 immunizes the employer and employees to the government in satisfaction of federal income tax liability.” Edgar v. Inland Steel Co., 744 F.2d at 1276, 1278 (7th Cir. 1984); see Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 770 (9th Cir. 1986); Wise v. Comm’r of I.R.S., 624 F. Supp. 1124, 1128 (D. Mont. 1986); Peth v. Breitmann, 611 F. Supp. 50, 54 (E.D. Wis. 1985).

State courts lack subject matter jurisdiction to adjudicate cases such as this, because “[c]laims by employees against employers to recover federal or state withholding are statutorily barred.” Malan v. Dalmer, 722 N.E.2d 1274, 1276-77 (Ind. Ct. App. 2000) (citing § 3403 and stating that “the employer is liable for those sums only to the government and ‘shall not be liable to any person for the amount of any such payment’”). Section 3403 is part of a comprehensive statutory scheme that occupies the field with regard to the collection and payment of federal taxes and preempts the operation of state law within that field. See Srader v. Verant, 1998-NMSC-025, ¶ 7, 125 N.M. 521, 964 P.2d 82 (stating that preemption occurs when “federal law so occupies the field that state courts are prevented from asserting jurisdiction” (internal quotation marks and citation omitted)). Taxpayers have asserted state causes of action that are intended to frustrate the operation of federal law. The doctrine of federal preemption bars states from legislatively or judicially frustrating uniform federal policy. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 7, 126 N.M. 396, 970 P.2d 582.

The case at hand is factually similar to King v. Gilman Paper Co., 351 S.E.2d 710, 710 (Ga. Ct. App. 1986), in which the court held that § 3403 of the Internal Revenue Code “affords employers complete immunity from liability to employees for federal income taxes withheld from their pay.” The employer in King complied with a directive from the IRS to withhold federal income taxes from the employee as if he were single and claimed one allowance after the employee claimed no federal income tax from the previous year. King, 351 S.E.2d at 710. The same result as in King should obtain here.

Taxpayers’ claims against Gardner are based entirely on Gardner’s withholding of federal income tax from Mr. Landess’s wages as required by federal law. That being the case, Taxpayers are barred by § 3403 from pursuing any cause of action against Gardner in connection with Gardner’s withholding from Mr. Landess’s wages.

Taxpayers contend that this case is not necessarily about withheld taxes, that the documents in the record so showing were improperly considered, and that the district court did not properly consider the effect of Taxpayers’ argument concerning community property. We disagree. Gardner submitted an affidavit authenticating the IRS letter that was also submitted to the district court. Thus, there was a sufficient showing of the factual basis for the district court to have granted summary judgment. Taxpayers’ arguments concerning community property were properly ruled to be irrelevant. As the IRS documents in the record demonstrate, taxpayers pay taxes, and taxes are withheld, based on filing status and type of return filed. State marital property laws simply do not apply. See Srader, 1998-NMSC-025, ¶ 7 (stating the rule of preemption).

The district court’s grant of summary judgment is affirmed.

BECAUSE TAXPAYERS’ COMPLAINT WAS FRIVOLOUS, THE DISTRICT COURT PROPERLY AWARDED ATTORNEY FEES AS A SANCTION

“A court may award attorney[] fees in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.” State ex rel. N.M. State Highway & Transp. Dep’t v. Baca, 120 N.M. 1, 5, 896 P.2d 1148, 1152 (1995). “It has long been recognized that a court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions. Such powers inhere in judicial authority and exist independent of statute[,]” Id. at 4, 896 P.2d at 1151. The district court awarded Gardner attorney fees as a sanction against Taxpayers for subjecting Gardner and the court to the burdens of frivolous litigation, based upon Rule 1-011.

Under Rule 1-011, a pleader’s signature “constitutes a certificate by the signer . . . that to the best of the signer’s knowledge, information and belief there is good ground to support [the complaint].” The rule further provides that “[f]or a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action.” Id.

The “good ground” requirement of the rule “is appropriate only in those rare cases in which [a party] deliberately presses an unfounded claim or defense.” Rangel v. Save Mart, Inc., 2006-NMCA-120, ¶ 11, 140 N.M. 395, 142 P.3d 983 (internal quotation marks and citation omitted). In contrast to the standard in federal courts, the New Mexico test for the propriety of Rule 1-011 sanctions is subjective.

Any violation depends on what the attorney or litigant knew and believed at the relevant time and involves the question of whether the litigant or attorney was aware that a particular pleading should not have been brought. Sanctions should be entered against an attorney rather than a party only when a pleading or other paper is unsupported by existing law rather than unsupported by facts.

Rivera v. Brazos Lodge Corp., 111 N.M. 670, 675, 808 P.2d 955, 960 (1991). In the case of a pro se litigant, therefore, the sanctions for pleadings unsupported by law may be against the party. The district court’s imposition of sanctions is reviewed for abuse of discretion. Id. This is because:

The trial judge is in the best position to view the factual circumstances surrounding an alleged violation and must exercise sound judgment concerning the imposition of sanctions. Because Rule 11 gives courts discretion to fashion sanctions to fit specific cases, no mechanical rules can be stated.

Id. Similarly, an award of attorney fees
under the court’s inherent powers is reviewed for abuse of discretion. *Baca*, 120 N.M. at 8, 896 P.2d at 1155.

{17} We hold that the district court acted within its discretion in awarding attorney fees as a sanction for Taxpayers’ filing of a frivolous lawsuit. Taxpayers’ lawsuit belongs to a vexing class of suits attacking the validity of well-established federal tax laws. These patently meritless actions abuse the judicial process and impose enormous burdens on the courts and the parties who must defend such claims. Courts have no hesitation in treating such claims as “plainly frivolous, brought in bad faith, and for the purposes of harassment.” *Bright*, 780 F.2d at 772; see *Edgar*, 744 F.2d at 1278 (characterizing as “patently frivolous” a similar “appeal filed by abusers of the tax system merely to delay and harass the collection of public revenues”). As the Tenth Circuit stated in *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990):

We are confronted here with taxpayers who simply refuse to accept the judgments of the courts. . . . [T]he courts are not powerless in these circumstances and are not required to expend judicial resources endlessly entertaining repetitive arguments. Nor are opposing parties required to bear the burden of meritless litigation.

{18} These observations apply to Taxpayers’ action against Gardner. Taxpayers sought to camouflage their tax protest as a contract action against Gardner for its acting in compliance with federal law. Taxpayers’ willful subjection of Gardner to the defense of this frivolous action is precisely the kind of activity Rule 1-011 is designed to deter and in which a court may impose sanctions in the exercise of its inherent powers.

{19} The district court determined, based on properly authenticated documents, that Taxpayers were seeking reimbursement for money withheld for taxes and paid to the IRS by Gardner as required by law. The court’s finding that the claim was frivolous necessarily followed. Under the circumstances of this case, we conclude these findings were sufficiently particularized to justify an award of attorney fees to Gardner for its having to defend frivolous and vexatious litigation and to vindicate the court’s interest in deterring frivolous lawsuits. See *Baca*, 120 N.M. at 8, 896 P.2d at 1155 (approving the Court’s prior holding in *Rivera* that an award of attorney fees under Rule 1-011 requires “particularized findings of misconduct”). Courts have the inherent power, independent of statute or rule, to award attorney fees “to vindicate [their] judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.” *Baca*, 120 N.M. at 5, 896 P.2d at 1152.

{20} Taxpayers’ lawsuit was frivolous from inception, burdening both Gardner and the court with a senseless attempt to impose liability upon Gardner for its compliance with federal tax laws. The district court properly awarded attorney fees as a sanction.

ATTORNEY FEES SHOULD LIKEWISE BE AWARDED FOR THE APPEAL

{21} Gardner requests an award of attorney fees for work done on appeal. We may award attorney fees where permitted by law. Rule 12-403(B)(3) NMRA. Taxpayers’ continuation of their frivolous contentions on appeal imposed on this Court and Gardner the same burden as they did in the district court. An appellate court should have the same authority as a district court to exercise inherent authority to sanction frivolous litigation. See *Baca*, 120 N.M. at 4-5, 896 P.2d at 1151-52. Although permitted by statute, federal courts routinely award appellate fees for frivolous litigation in the identical situation as that presented in this case. See *Edgar*, 744 F.2d at 1278-79; *Bright*, 780 F.2d at 772-73; cf. *King*, 351 S.E.2d at 711 ( awarding a penalty pursuant to court rule for a frivolous appeal on similar facts). In addition to setting the amount of attorney fees for the district court proceedings, we direct the district court to award an appropriate fee for work performed in connection with this appeal.

CONCLUSION

{22} The judgment of the district court granting summary judgment and the sanction are affirmed. We remand for determination of the amount of attorney fees to be awarded.

{23} IT IS SO ORDERED.

JONATHAN B. SUTIN,
Chief Judge

WE CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge
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