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Special Insert:
CLE At-A-Glance

www.nmbar.org
It is more important than ever to understand your 401(k) fees.

401(k) fees can be assessed as explicit out-of-pocket expenses or charged as a percentage of assets. These expenses can be charged to either the sponsoring law firm or the plan’s participants. Often they are assessed both ways, in some combination to the firm and its participants.

**HOW IS THE ABA RETIREMENT FUNDS PROGRAM DIFFERENT FROM OTHER PROVIDERS? TWO REASONS:**

1. The ABA Retirement Funds program was created by a not-for-profit organization within the ABA to provide a member benefit, not generate revenue for the ABA.

2. The ABA Retirement Funds program achieves the necessary economies of scale with over $2.5 billion invested to eliminate all explicit fees for firms, and provide investments for participants with low assets based fees.

Let the **ABA Retirement Funds** program provide you with a cost comparison so you can better understand your direct 401(k) fees, and see how we can help you to provide an affordable 401(k), without sacrificing service, to your firm.

For more details contact us by phone **(877) 947-2272**, by email **abaretirement@us.ing.com** or on the web at **www.abaretirement.com**

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You should consider the investment objectives, risks, charges and expenses of the investment options carefully before investing. For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call 1-877-947-2272, or visit www.abaretirement.com or write ABA Retirement Funds P.O. Box 5142, Boston, MA 02206-5142 - abaretirement@us.ing.com. Please read the information carefully before investing. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program. 03/09
The National Employment Lawyers Association ("NELA") advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA’s vision is to see that workers are paid at least a living wage in an environment free of discrimination, harassment, retaliation and capricious employment decisions; that employers fulfill their promises to provide retirement, health, and other benefits; that workers’ safety and livelihood will not be compromised for the sake of corporate profit and interests; and that individuals have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to trial by jury.

NELA is the country’s largest professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment related matters. NELA and its 67 state and local affiliates have more than 3000 members. Visit the NELA website at http://www.nela.org Please note, membership to NELA requires 51% of your practice be related to plaintiff employment law.

### Registration & Information

| Registration Fee | $140.00 per person
| Registration postmarked before April 24th, take $20 off |
|------------------|--------------------------------------------------------------------------------------------------|
| Includes box lunch: | $120.00 for NELA members |

### Schedule

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8:30 am</td>
<td>Registration / Continental Breakfast</td>
</tr>
<tr>
<td>9:00-10:30</td>
<td>The ADA Amendments Act of 2008: Major Changes, Expanded Coverage, and Meaningful Protections</td>
</tr>
<tr>
<td></td>
<td>Brian East</td>
</tr>
<tr>
<td>10:45-11:45</td>
<td>Carpenter v. Sandia Corp. - The Trial of a Wrongful Discharge Case</td>
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<td>Philip B. Davis</td>
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<tr>
<td>11:45-1:00</td>
<td>Lunch (provided)</td>
</tr>
<tr>
<td>1:00-1:45</td>
<td>Recent Proposed Changes in New Mexico Uniform Jury Instructions on Employment Law</td>
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<td></td>
<td>Gregory P. Williams</td>
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<tr>
<td>2:00-2:45</td>
<td>Alternative Dispute Resolutions 2009: Reflections and Visions</td>
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<tr>
<td></td>
<td>Kathleen Davison Lebeck</td>
</tr>
<tr>
<td>3:00-4:00</td>
<td>Professionalism: Making Sure Your Level of Professionalism is Established by You and Not by Anyone Else</td>
</tr>
<tr>
<td></td>
<td>Justice Charles W. Daniels</td>
</tr>
<tr>
<td></td>
<td>Happy Hour social at the Marriott Pyramid Hotel immediately following the seminar.</td>
</tr>
</tbody>
</table>

**CLE CREDITS:** Professionalism - 1.0; General - 4.0

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**Justice Charles W. Daniels - New Mexico Supreme Court**

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**New Mexico Employment Lawyers Association**
Dialogue in the Schools
Engage students in a meaningful discussion of this year’s Law Day theme, “A Legacy of Liberty—Celebrating Lincoln’s Bicentennial.” American Bar Association materials will be provided. Attorneys and judges are needed to visit schools on a selection of days April 27 through May 8.

Ask-a-Lawyer Call In
Assist callers with legal questions by offering information and referrals from 9 a.m. to 1 p.m., Saturday, May 2. Attorneys are needed in:

- Albuquerque
- Las Cruces
- Farmington
- Roswell

Pro bono credit for both events. Contact Marilyn Kelley mkelley@nmbar.org or (505) 797-6048, or fax the form below to (505) 797-6074.

I would like to assist with:

- Dialogue in the Schools
- Ask-a-Lawyer Call in

Contact information:

<table>
<thead>
<tr>
<th>Name</th>
<th>Bar ID</th>
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<tbody>
<tr>
<td>Address</td>
<td></td>
</tr>
<tr>
<td>City</td>
<td>State</td>
</tr>
<tr>
<td>Phone</td>
<td>Fax</td>
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**Opinions**

From the New Mexico Supreme Court

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### Professionalism Tip

**Lawyer’s Preamble**

As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

### Meetings

#### April

- **13**
  - Taxation Section Board of Directors, noon, via teleconference
- **14**
  - Appellate Practice Section Board of Directors, noon, Rodey Law Firm
- **15**
  - Health Law Section Board of Directors, noon, State Bar Center
- **20**
  - Attorney Support Group, 7:30 a.m., First United Methodist Church
- **21**
  - Solo and Small Firm Practitioners Section Board Meeting, 11:30 a.m., Section meeting, noon, State Bar Center

### State Bar Workshops

#### April

- **16**
  - Lawyer Referral for the Elderly Workshop 1 p.m., Presentation/2:30–3:30 p.m., Clinics Estancia Senior Center
- **22**
  - Lawyer Referral for the Elderly Workshop 10 a.m., Presentation/1–3:30 p.m., Clinics Agnes Kastner Head Senior Center, Hobbs
- **22**
  - Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
- **23**
  - Lawyer Referral for the Elderly Workshop 10 a.m., Presentation/1–4 p.m., Clinics Roswell Joy Center, Roswell
- **23**
  - Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
NOTICES

COURT NEWS

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

The Rules of Civil Procedure Committee is considering whether to recommend proposed amendments to the Rules of Civil Procedure for the District Courts for the Supreme Court’s consideration.

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 April 27 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s Web site for public viewing. For reference, see the April 6 (Vol. 48, No. 14) Bar Bulletin.

First Judicial District Court Brown-Bag Lunch Meeting

A brown-bag lunch meeting will be held at noon, April 14, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally or Kim in the Criminal Division.

Judicial Appointment

Governor Bill Richardson has appointed Sheri Raphaelson to fill the vacancy in Division V (Tierra Amarilla) of the 1st Judicial District Court effective March 23. Judge Raphaelson will be assigned all case types previously assigned to Judge Tim Garcia. Parties who have not previously exercised their right to challenge or excuse will have ten days from April 27 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Judge Raphaelson will be formally invested at 4:30 p.m., April 17, at the Steve Herrera Judicial Complex lobby, 100 Catron, Santa Fe. The Honorable Alex M. Naranjo will administer the oath of office. A reception with light refreshments will follow at Charlotte Jackson Fine Art, 201 Marcy Street, Santa Fe.

Third Judicial District Court Reassignment of Judges

Because the Legislature did not fund additional requested judgeships, the 3rd Judicial District Court will make the following changes to utilize limited judicial resources:

Judge Jim T. Martin will continue with one of the civil divisions.
Judge Manuel I. Arrieta will take one civil division.
Judge Jerald A. Valentine will continue with part of the civil divisions which will include the Lower Rio Grande Stream Adjudication.
Judge Stephen Bridgforth will continue with one of the criminal divisions.
Judge Lisa Schultz will take one of the criminal divisions.
Judge Fernando Macias: The Children’s Court will be consolidated into one division. Judge Macias will continue as the Children’s Court judge and will also take a part of the criminal divisions’ cases.
Judge Douglas R. Driggers will take over one of the domestic relations divisions.
Judge Michael Murphy will continue with one of the domestic relations divisions.

For some judges, there will have to be a transition period as the changes are made. Pursuant to the applicable Civil and Criminal Rules, the Clerk’s Office will notify counsel and pro se parties when specific cases are reassigned.

Zamora Joins Metro Court

One hundred guests assembled March 27 at Bernalillo County Metropolitan Court for the investiture of Briana H. Zamora. Judge Zamora was a sole practitioner; an associate attorney with Butt, Thornton & Baehr; an assistant attorney general; an assistant public defender; and an assistant district attorney. She is a 2000 graduate of the UNM School of Law. Judge Zamora will fill a seat on the bench vacated by retiring Judge Theresa Gomez.

(left) Chief Judge Judith K. Nakamura administers the oath to Briana H. Zamora. Justice Patricio M. Serna (seated) spoke on behalf of the Supreme Court.

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in Children’s Court, Criminal, Civil, and Domestic Relations</td>
<td>1978–1992</td>
<td>April 17</td>
</tr>
</tbody>
</table>
U.S. Bankruptcy Court
Invitation to Comment on
Proposed Revised Local Rules

The United States Bankruptcy Court for the District of New Mexico proposes to revise the local rules in their entirety. In accordance with 28 U.S.C. §2071(b), the Court invites public comment. A copy of the proposed revised local rules (and related forms) is available at the Clerk’s Office or on the Court’s Web site at http://www.nmcourt.fed.us/usbc/local-rules-proposed where comments can be made. The Court prefers to receive comments via the online survey. For those unable to use the survey, e-mail comments to usbcproposedrules@nmcourt.fed.us, or mail written comments to Norman H. Meyer, Jr., Clerk, United States Bankruptcy Court, District of New Mexico, PO Box 546, Albuquerque NM 87103-0546. The deadline for submitting comments is May 16.

Retirement Ceremony

A retirement ceremony for Chief Bankruptcy Judge Mark B. McFeeley will be held at 4 p.m., May 1, in the Ceremonial Courtroom, 6th Floor, Federal Building and United States Courthouse, 421 Gold Avenue SW, Albuquerque. A reception will follow at the Albuquerque Country Club, 601 Laguna Boulevard SW.

State Bar News

Attorney Support Group

• Afternoon groups meet regularly on the first Monday of the month:
  May 4, 5:30 p.m.
• Morning groups meet regularly on the third Monday of the month:
  April 20, 7:30 a.m.

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

Board of Bar Commissioners

Board Appointment

The Board of Bar Commissioners will make two appointments to the DNA-People’s Legal Services, Inc. board for two-year terms. Members wishing to serve on the board should send a letter of interest and brief resume by April 24 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Elder Law Section
Annual Meeting and CLE

The Elder Law Section is holding its annual meeting at 11 a.m., May 8, at the State Bar Center. Lunch will be served. R.S.V.P. to Tony Horvat, thorvat@nmbar.org or (505) 797-6033, so that he can order sufficient lunches. Submit agenda items to Chair Barbara Ann Michael, bmichaelaw@junoo.com, no later than April 15 to allow time to prepare and distribute an agenda ahead of time to section members.

The 6th Annual Elder Law Seminar (2.9 general and 1.0 professionalism CLE credits) will follow the annual meeting. Registration begins at 12:30 p.m. The fee is $129 for section members and paralegals and $149 for non-members. See the agenda in the CLE-at-Glance insert in this issue.

Equal Access to Justice
Auction Items Needed

Equal Access to Justice will host its famous silent auction at the State Bar’s annual meeting in July 2009 to raise money for civil legal services for needy New Mexicans. Auction items are needed (gift certificates, handmade crafts, jewelry, art, vacation home rentals, hotel packages, air tickets, vintage wine or creative gift packages, etc.). Contact Kate Mulqueen, (505) 797-6064 or kmulqueen@nmbar.org, by June 1.

New Mexico Needs You

New Mexico legal aid providers are facing a dire situation. Demand for civil legal services is increasing while funding for those services, from all sources, is stagnant or decreasing. The New Mexico legislative appropriation for civil legal services is down by 2.5 percent. Federal interest in IOLTA accounts is minimal at best—0 percent to .005 percent. Equal Access to Justice is down by $40,000 compared to this time in 2008. So how can you help? This is your community. Help your neighbors access the New Mexico justice system by donating to Equal Access to Justice.

• If you have already donated this year, please make another small donation.
• If you have not donated yet, go to www.eaj-nm.org and do your part.
• Call (505) 797-6064 to see how you can help.

Equal Access to Justice helps to fund the state’s largest legal aid providers: New Mexico Legal Aid, Law Access New Mexico, Executive Assistance Program, and DNA-People’s Legal Services, Inc.

Lawyers Assistance Program

Depression, alcohol or drug problems?
Help is as close as your phone.
Free confidential 24-hour hotline.
Albuquerque (505) 228-1948
1-800-860-4914

New Mexico Center on Law and Poverty, and DNA-People’s Legal Services, Inc.

Public Law Section
Public Lawyer of the Year Award

The Public Law Section is pleased to announce that the Public Lawyer of the Year Award for 2009 will be presented to Gerald McBride, who is being honored for his many years of dedicated service to the state’s most vulnerable adults through his work at the Adult Protective Services Division of the New Mexico Aging and Long-Term Services and its predecessors. The award ceremony will be held at 4 p.m., May 1, in Apodaca Hall, PERA building, Santa Fe. A reception will follow. Speakers include Justice Petra Jimenez Maes, Chief Deputy Attorney General Al Lama and State Bar Vice President Jessica Perez. For further information contact Public Law Section Chair Stephen Ross, (505) 986-6279, or e-mail stross@co.santa-fe.nm.us.

Solo and Small Firm Section

War Stories from Kabul

The Solo and Small Firm Section is happy to present Assistant U.S. Attorney Tara Neda at their noon meeting, April 21, at the State Bar Center. Neda will detail her experiences as a Department of Justice senior legal advisor at the U.S. Embassy in Kabul, Afghanistan. She was part of the internationally created Criminal Justice Task Force which investigates and prosecutes higher-level drug traffickers in Afghanistan. The work was extraordinarily challenging due to the danger, lack of resources, language and culture barriers, and the newness of the concept of the rule of law. Neda traveled to many provinces (via old Russian helicopters) to meet and train provincial judges, prosecutors and investigators. She learned...
the language, wore a gun and flak jacket, drove an armored SUV through some tight situations, and experienced a lifetime in the one-and-one-half years she was in country. Neda will discuss her work introducing the rule of law of Afghanistan, the people, and the war. Lunch will be provided to section members who R.S.V.P. by April 20 to Tony Horvat, horvat@nmbar.org or 797-6033.

**Young Lawyers Division Junior Judges, a Community Service Program–New Date**

The Young Lawyers Division is seeking volunteer attorneys for its fourth annual Junior Judges program. Volunteer attorneys will lead discussions with 3rd, 4th and 5th grade students about the potential consequences of bad behavior and making decisions in difficult peer situations. Topics include stealing, bullying, cheating, drugs and alcohol, and gangs and weapons. The program, presented in one-hour units, will take place in APS elementary schools on May 8. After showing a brief video to students, volunteers will engage classes in a discussion about the difficult situations. A teaching curriculum and video will be provided. For more information or to volunteer, contact William Gilchrist, wgg@NMcounselor.com, or Martha Chicoski, mary.martha.chicoski@farmers.com by April 17.

**Law Day Ask-a-Lawyer Call-In**

The Young Lawyers Division is seeking attorney volunteers to answer phones for the annual Ask-A-Lawyer Call-In Program from 9 a.m. to 1 p.m., May 2, at sites around the state. The program provides legal information and referrals to callers with various legal issues. Contact the following for more information or to volunteer:

- Albuquerque: Martha Chicoski, mary.martha.chicoski@farmers.com
- Farmington: Reagyn Germer, germerlaw@yahoo.com
- Las Cruces: David Lutz, dplutz@osogrande.com
- Roswell: Dustin Hunter, dhunter@kraftandhunter.com

**American Bar Association 2009 Midyear Meeting**

The American Bar Association convened for its midyear meeting Feb. 14–16 in Boston beginning with a tribute to Justice Daniel Sosa, a former member of the New Mexico Supreme Court. Justice Sosa was nominated by the State Bar for a Spirit of Excellence Award which was presented by the ABA Commission on Racial and Ethnic Diversity during its annual luncheon. Justice Sosa’s acceptance speech can be viewed at: http://www.abavideonews.org/ABA548/av.php?id=317&type=v.

The deliberations of the House of Delegates meetings were “televised” live on the Internet. The recorded Web cast can be seen at http://www.totalwebcasting.com/live/aba/.

The most rigorous debate on two separate resolutions dealt with lateral hiring by law firms and the imputation of conflicts to all other lawyers in the new law firm, an issue that takes on particular importance in these recessionary times of layoffs and lateral transfers. The debate focused on changing the current status of firm-to-firm lateral hires that prevents lawyers from representing clients who might have a potential conflict of interest without a written waiver from the client. Ultimately, by a close vote, the House agreed to ease the prohibitions on such client representation provided the lawyer undergoes prior screening to resolve any conflicts. The new language changed Model Rule of Professional Conduct 1.10 and now provides a procedure for allowing lateral hires despite a conflict, provided three conditions are met: (i) if the new attorney is screened from participating in the matter of the former client’s adversary and receives none of the fees derived therefrom; (ii) the former client is given notice of and is informed of its right to have the matter reviewed by a judge; and (iii) the new attorney provides his former client with a copy of the Model Rule and a description of the screen procedures being employed by his new firm. A conflict waiver from the client is not necessary under the amended Model Rule of Professional Conduct 1.10. Note that the New Mexico Rules of Professional Conduct do allow screening.

Significant debate also ensued on the issue of the Guantanamo Bay detainees with the House agreeing to urge the Obama administration to ensure that any detainees who are expected to be charged with crimes be prosecuted in federal district courts. The resolution also recommended that if the attorney general certifies that the detainees cannot be prosecuted in such courts that they will be prosecuted in other regularly constituted courts consistent with due process, the laws of war, the Geneva Convention and the Uniform Code of Military Justice. The House also urged that any detainees who are no longer considered to be enemy combatants should be released or resettled, and any currently detained enemy combatants be granted prompt habeas corpus hearings with full due process rights. Visit http://www.abanet.org/leadership/2009/midyear/daily_journal/Adopted10A.doc to view the adopted resolution and accompanying comments.

To learn more about House proceedings that day, visit: http://www.abavideonews.org/ABA548/hodr.php.

Furthermore, a summary of all proceedings of the House can be reviewed at: http://www.abanet.org/leadership/2009/midyear/docs/select_committee_report.doc.
Call for Nominations
State Bar of New Mexico

2009 Annual Awards

The State Bar of New Mexico’s Annual Awards recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2008 or 2009. The awards will be presented July 10 during the 2009 Annual Meeting at Buffalo Thunder Resort, Pojoaque, New Mexico.

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

Deadline for nominations is May 15

First Judicial District Bar Association
CLE Program

The 1st Judicial District Bar Association will host a special CLE event April 20 at The Hilton Santa Fe Historic Plaza Hotel, 100 Sandoval Street, Santa Fe. Lunch will be from noon–12:30 p.m. at a cost of $15. A program about Casemaker, the State Bar’s free online legal research program, (1.0 general CLE credit) will be held from 12:30–1:30 p.m. E-mail kgilbert@rodey.com to R.S.V.P. no later than noon, April 17.

Members are also encouraged to renew their 1st Judicial District Bar Association membership if they have not already done so. Membership dues are $25 for lawyers who have been in practice fewer than three years and $40 for lawyers who have been in practice three years or more. Membership is free for clerks and members of the judiciary. Make checks payable to “First Judicial District Bar Association” and mail to First Judicial District Bar Association, PO Box 2825, Santa Fe, NM 87504-2825. Direct questions, suggestions for improving the organization, or interest in speaking at one of this year’s meetings to Patrick J. Dolan, pdolan@catchlaw.com or (505) 820-7741.

N.M. Defense Lawyers Association
Basic Skills Seminar

The New Mexico Defense Lawyers Association presents Defense Practice Academy: Basic Skills (9.0 general CLE credits) April 24–25 at the State Bar Center. Designed for attorneys with zero to three years of experience, the seminar will feature a faculty of experienced attorneys from local firms providing insight into opening a file, pleadings and motions, discovery, depositions, medical records/experts, and evidence/trial preparation. Attendance is limited so register early. For more information, e-mail DLA at nmdefense@nmdla.org.

Women Litigators Seminar

The New Mexico Defense Lawyers Association presents Women in the Courtroom II: Sharing Success (4.0 general and 1.0 professionalism CLE credits) May 8 at the Jewish Community Center, 5520 Wyoming Blvd., Albuquerque. Part II of Power Lessons for the Female Litigator is a unique seminar designed for New Mexico trial lawyers. This seminar is designed for women litigators who want to refine their trial skills and gain practical, diverse perspectives on balance, ambition and success. Law firm managers and other attorneys who want to recruit and retain talented female attorneys are also encouraged to attend. For more information, e-mail DLA at nmdefense@nmdla.org.

N.M. Lesbian and Gay Lawyers Association

LGBT Social Gathering

The lesbian and gay lawyers, doctors and therapists groups will hold a joint social gathering from 5 to 8 p.m., April 16, at Inn the Village–A Corrales Bed and Breakfast, 58 Perea Rd., Corrales. All are welcome to attend to get acquainted and network. Snacks, soft drinks, and beer and wine will be provided. Guests are asked to bring additional beverages and an appetizer to share. R.S.V.P. to info@innthevillagecorrales.com.

UNM School of Law
Spring Library Hours

Building and Circulation
Monday–Thursday 8 a.m.–11 p.m.
Friday 8 a.m.–6 p.m.
Saturday 9 a.m.–6 p.m.
Sunday Noon–11 p.m.
Reference
Monday–Friday 9 a.m.–6 p.m.
Saturday Closed
Sunday Noon–4 p.m.

Other News
N.M. Christian Legal Aid
Volunteers Needed

New Mexico Christian Legal Aid is hosting a new volunteer training session from 11 to 5 p.m., May 1, at the State Bar Center. Lunch will be provided. CLE credit has been requested and the training will likely offer 2.5–3.0 CLE credits. Contact Jim Roach, (505) 243-4419 or nmcla.coordinator@yahoo.com, for more information.
By Mark B. Thompson

The casual observer might justifiably assume that the 19th century New Mexico law business was almost the exclusive province of those who came to the territory after 1846. The first published list of persons admitted to the Bar of the Supreme Court of the Territory of New Mexico appears to include only two lawyers born before 1846 in that part of Mexico which became the U.S. Territory of New Mexico.1 Those two men, José Francisco Cháves and José Doroteo Sena, were destined to play important roles in territorial law and politics.2

J. Francisco Cháves, for whom the county is named, had the larger political presence and met a violent end in 1904, possibly instigated by his political opponents.3 José D. Sena, had a significant military, political and legal career, but to modern lawyers he may not emerge from the shadow of his son, José, who served thirty years as clerk of the N.M. Supreme Court. The careers of Cháves and Sena intertwined as we shall see, but Sena died peacefully at his Santa Fe home on July 11, 1892.4

Sena was born about 1836 in Santa Fe and was recognized as an academic prodigy. His parents sent him to school in Albuquerque at age nine and, from 1853 to 1855, he continued his formal education while serving as a private secretary and interpreter for the New Mexico delegate to the U.S. Congress, José Manuel Gallegos, a/k/a Padre Gallegos. Ralph Twitchell, our first lawyer/historian, says that part of Sena’s education included the study of law in Alexandria, Virginia.5

Sena moved back to New Mexico after the U.S. House of Representatives decided that M.A. Otero (the 1st) had prevailed over Gallegos in the 1855 election for Congressional Delegate. Sena became a merchant in Taos and married Isabel C. de Baca of Peña Blanca. On Aug. 1, 1861, he enlisted in the Union Army and was commissioned a captain in the 1st New Mexico Cavalry. Historian Marc Simmons finds him at Ft. Fauntleroy, later Ft. Wingate, in September of 1861, before moving south to defend Ft. Craig with Col. Canby’s troops. Ralph Twitchell reports that Sena received the praise of Canby for his efforts at the Battle of Valverde in 1862, won by the Confederates under General Sibley. Sena’s last cavalry job involved the reconstruction of Ft. Marcy in Santa Fe and he mustered out with the rank of major on May 13, 1864.6

Following his military service, Major Sena was elected sheriff of Santa Fe County in 1865. In 1871 he apparently decided he had acquired sufficient political standing to challenge the incumbent, J. Francisco Cháves, for the Republican Party nomination for delegate to Congress. At the Territorial Republican Convention on April 29, 1871, Major Sena received the support of 23 convention delegates but Cháves prevailed with 44 votes.7

After Sena declared as an independent candidate, Republicans branded him a renegade and complained that he had “openly pledged himself”8 to support Chávez over the Democrat, José Manuel Gallegos. Was the Major’s independent candidacy based upon his desire to see Padre Gallegos return to Congress? Did he merely think that he, Sena, was the better man for the job? Whatever Sena’s motivation, his candidacy arguably cost Chávez the delegate seat. If Chávez had received all of Sena’s 2,534 votes, a matter of speculation, he would have defeated Gallegos by 149 votes and retained the delegate seat.9

In 1873, Major Sena was admitted to the Bar and practiced law in Santa Fe until his death in 1892. He served four more years as Sheriff of Santa Fe County and also spent considerable time as a court interpreter. In 1886, he served as clerk of the territorial Council (Senate) under President, J. Francisco Chávez. In 1888, he held the same position in the House of Representatives, led by the Republican Speaker of the House, Albert J. Fountain of Doña Ana County. Perhaps the prior political sins had been forgiven. The next time you have lunch at Sena Plaza on East Palace Avenue in Santa Fe, you can toast the early residents, Major Sena and his family. Or perhaps, after a meal at the Padre Gallegos House on Washington Avenue, you should raise a glass to the political career of its former owner, rescued by the cavalry riding on a “stalking horse.”10

About the Author:
Mark Thompson is a member of the State Bar Historical Committee.

(Endnotes)
1 New Mexico did not become a territory of the U.S. until 1851, but the legal system started with the military occupation of 1846. The first list of lawyers includes Supreme Court admissions from 1846 and was published in the preface to 1 N.M. (1881). I believe that there were territorial lawyers admitted to the practice of law by a district judge but who were never listed as admitted by the Supreme Court. I have found at least one lawyer, Stephen B. Elkins, listed as counsel of record in reported cases but who never appears in a printed list of persons admitted to the Bar.
2 Antonio José Otero of Peralta, (DOB March 13, 1809), was appointed by General Kearny to the first N.M. Supreme Court in 1846, but I have found no evidence that he was a lawyer. Miguel Antonio Otero, primero, of Valencia County (DOB June 21, 1829), apparently studied law in New York and Missouri and was admitted to the Missouri Bar in 1851. His U.S. Congressional biography says that he was appointed New Mexico attorney general in 1854, an assertion not supported by the New Mexico Blue Book. I have not found any evidence of his practicing law in New Mexico. His son, the governor and for whom Otero County is named, was not a lawyer. His grandson, Miquel Antonio Otero, tercero, was the first M.A. Otero on any New Mexico Supreme Court list. He served as attorney general and as a district judge.
4 “Death of Major Sena,” The Daily New Mexican (Santa Fe: July 11, 1892), p. 3.
10 From the third definition in the Webster’s Encyclopedic Unabridged Dictionary of the English Language: “Politics. a candidate used to conceal the candidacy of a more important candidate or to draw votes from a rival and hence cause his defeat.”
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LEGAL EDUCATION

29 2008 Estate Planning Symposium
VR–State Bar Center
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29 2009 Professionalism: An Attorney’s Guide to Good Lawyering for People With Disabilities
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29 Fifth Annual Elder Law Seminar
VR–State Bar Center
Center for Legal Education of NMSBF
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www.nmbarcle.org

29 Medicaid and Elder Law
Albuquerque
Lorman Education Services
6.6 G
1-866-352-9539
www.lorman.com

30 Oil and Gas Agreements
Santa Fe
Rocky Mountain Mineral Law Foundation
11.1 G, 1.0 E
(303) 321-8100
www.rmmlf.org

MAY

5 An Attorney’s Guide to Good Lawyering for People with Disabilities
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1.0 P
(505) 797-6020
www.nmbarcle.org

5 How to Keep Tax Exempt Organizations in Compliance
Albuquerque
NBI, Inc.
6.5 G
1-800-930-6182
www.nbi-sems.com

5 I Was From Venus and My Lawyers Were From Mars
State Bar Center
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6 Renewable Energy Development in New Mexico
State Bar Center
Center for Legal Education of NMSBF
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(505) 797-6020
www.nmbarcle.org

6 When a Prosecutor Withholds Exculpatory Evidence
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8 Women in the Courtroom II: Sharing Success
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(505) 797-6021
nmdefense@nmdla.org

VR–Las Cruces
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11 Evidentiary Issues for the Civil Trial Practitioner in State and Federal Courts
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(505) 222-9356

12 Ethics in Bankruptcy Practice
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NO. 30,174 | State v. Williamson                | (COA 27,193)    | 2/11/09        |
NO. 30,015 | State v. Demongey                  | (COA 26,543)    | 2/25/09        |
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PETITION FOR WRIT OF CERTIORARI DENIED:

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<td>Roland v. Hickson</td>
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WRIT OF CERTIORARI QUASHED:

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Civil Procedure: Effective April 3, 2009

PUBLISHED OPINIONS

No. 28220 1st Jud Dist Santa Fe CV-06-558, T WILLIAMS v FARMERS INS. CO. (affirm) 3/30/2009
No. 27553 2nd Jud Dist Bernalillo CV-04-2618, L ZARR v WASHINGTON TRU (affirm in part, reverse in part and remand) 4/1/2009

UNPUBLISHED OPINIONS

No. 29006 5th Jud Dist Lea JQ-06-27, CYFD v LISA O (affirm) 3/30/2009
No. 29073 3rd Jud Dist Dona Ana DM-07-1541, A BERGMAN v S BERGMAN (affirm) 3/30/2009
No. 29102 12th Jud Dist Lincoln CV-07-342, GOLF COURSE ESTATES v V JONES (affirm) 3/30/2009
No. 29209 2nd Jud Dist Bernalillo PB-07-279, ESTATE OF D JARAMILLO (dismiss) 3/30/2009
No. 28828 6th Jud Dist Grant CR-02-145, STATE v R KIRBY (affirm) 3/31/2009
No. 28245 5th Jud Dist Lea CR-06-151, STATE v B MACKEY (affirm) 4/1/2009
No. 29176 11th Jud Dist San Juan JR-08-96, STATE v CLARYN C (reverse) 4/1/2009
No. 28767 3rd Jud Dist Dona Ana CV-07-2673, STONE MOUNTAIN v G SANCHEZ (affirm) 4/2/2009
No. 28972 12th Jud Dist Lincoln CV-08-269, S SEDERWALL v R VIRDEN (affirm) 4/2/2009

Slip Opinions for Published Opinions may be read on the Court’s Web site:
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<tr>
<td>645 Don Gaspar Avenue</td>
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<tr>
<td>555 S. Telshor, Ste. 300</td>
<td>Sarah B. Morgan</td>
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<tr>
<td>Las Cruces, NM 88011</td>
<td>Office of the U.S. Attorney</td>
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<tr>
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<tr>
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Clerk’s Certificates

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Santa Fe, NM 87505

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John J. Britt
5 Camino Conejo
Placitas, NM 87043

As of March 13, 2009:
Dean F. Carris
7200 Toulon Drive, NE
Albuquerque, NM 87122

As of March 13, 2009:
Deborah R. Jenkin
Chemin Sous Voie 14C
1295 Mies
Switzerland

Clerk’s Certificate of Change to Inactive Status

Effective February 18, 2009:
Eric J. Heimann
U.S. Department of Justice
PO Box 23985
Washington, DC 20026-3985

Effective March 6, 2009:
Denise P. Tomlinson
Denise P. Tomlinson, P.L.L.C.
911 W. FM 1626, Ste. 105
Austin, TX 78748

Effective February 14, 2009:
Ruth Tamara Yodaiken
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580-0002

Clerk’s Certificate of Reinstatement to Active Status

Effective March 2, 2009:
Thomas N. Crowther
901 West Baxter Drive
South Jordan, UT 84095

Effective February 26, 2009:
Kara L. Kellogg
714 Montclaire Drive, NE
Albuquerque, NM 87110

Clerk’s Certificate of Admission

On March 9, 2009:
Jose Francisco Perez
Department of State
U.S. Government Foreign Service
2201 C Street, NW
Washington, DC 20520
813-817-1564
perezfp@state.gov
PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE FOR THE DISTRICT COURTS

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

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

Your comments must be received on or before May 4, 2009, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

12-502. Certiorari to the Court of Appeals.

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

B. Time. The petition for writ of certiorari shall be filed with the Supreme Court clerk within twenty (20) days after final action by the Court of Appeals and served immediately on respondent. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the petition shall be accompanied by the docket fee [or a free process order]. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the Court of Appeals shall be the filing of its decision with the Court of Appeals clerk unless timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing that was timely filed.

C. Petition.

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

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

(a) the date of entry of the decision and any order on motion for rehearing thereon;

(b) the questions presented for review (the Court will consider only the questions set forth in the petition);

(c) the facts material to the questions presented;

(d) the basis for granting the writ, specifying where applicable:

(i) any decision of the Supreme Court with which it is asserted the decision of the Court of Appeals is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from the part of the Supreme Court decision showing the alleged conflict;

(ii) any decision of the Court of Appeals with which it is asserted the decision from which certiorari is sought is in conflict, and showing of such conflict, including a quotation from that part of the Court of Appeals decision, if any, and a quotation from that part of the prior Court of Appeals decision showing the alleged conflict;

(iii) what significant question of law under the Constitution of New Mexico or the United States is involved; or

(iv) the issue of substantial public interest that should be determined by the Supreme Court;

(e) a direct and concise argument amplifying the reasons relied upon for granting the writ, including specific references to the briefs filed in the Court of Appeals showing where the questions were presented to the Court of Appeals; and

(f) a prayer for relief, including whether the case should be remanded to the Court of Appeals for consideration of issues not raised in the petition if the relief requested is granted.

(3) Attachments. The petition shall have attached a copy of the decision of the Court of Appeals and, if decided on the summary calendar, a copy of any calendaring notices; and, if decided by the Court of Appeals pursuant to Rule 12-505 NMRA, a copy of the final order or judgment of the district court and any district court findings or decision leading thereto, as well as a copy of the administrative decision under review by the district court. If a motion for rehearing was filed, the motion and the order of the Court of Appeals on the motion shall be attached.

D. Length limitations. Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) Body of the petition defined. The body of the petition consists of headings, footnotes, quotations and all other text except any cover page, table of contents, table of authorities, signature blocks and certificate of service.

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

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

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

F. **Conditional cross-petition.** Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition for writ of certiorari, to be considered only if the Court grants the petition. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the conditional cross-petition shall be accompanied by the docket fee. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by [all] the other provisions of this rule, except as provided in [this paragraph] Paragraph B.

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

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

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

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

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

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

[As amended, effective July 1, 1990; August 1, 1992; October 1, 1995; January 1, 2000; November 1, 2003, as amended by Supreme Court Order No. 07-8300-24, effective November 1, 2007; as amended by Supreme Court Order No. __________________, effective ______________.]

**Commentary for 2007 Amendments.**

In an effort to provide additional options for producing more readable documents, the 2007 amendments to this rule allow practitioners to exceed the traditional page limitations for a petition, conditional cross-petition or response if the pleading complies with the type-volume limitations set forth in the new Subparagraph (3) of Paragraph D of the rule. Specifically, petitions, conditional cross-petitions and responses that exceed the traditional ten (10) page limit may not contain more than three thousand one hundred fifty (3,150) words or three hundred forty-two (342) lines in the body of the petition, depending on whether a proportionally-spaced or monospaced type style or typeface is used. See Subparagraph (1) of Paragraph D for a definition of the body of the petition. If a proportionally-spaced type style or typeface is used, the word-count limit applies. If a monospaced type style or typeface is used, the line-count limit applies. In either case, a statement of compliance must be included as provided by Paragraph E of the rule to show that the pleading complies with the applicable type-volume limitation.
From the New Mexico Supreme Court

Opinion Number: 2009-NMSC-007

Topic Index:
- Appeal and Error: Exhibits; and Record on Appeal
- Civil Procedure: Abuse of Process; Arbitration; Dismissal; Motion to Dismiss; and Record
- Remedies: Arbitration
- Torts: Abuse of Process; Malicious Abuse of Process; and Malicious Prosecution

JAMIE DURHAM and TRAVIS DURHAM, Plaintiffs-Petitioners,
versus
SUZANNE GUEST, Defendant-Respondent.
No. 30,656 (filed: February 20, 2009)

ORIGINAL PROCEEDING ON CERTIORARI
MICHAEL EUGENE VIGIL, District Judge

OPINION
EDWARD L. CHÁVEZ, CHIEF JUSTICE

{1} Plaintiffs Jamie Durham (Jamie) and Travis Durham (Travis) (together, the Durhams) sued Suzanne Guest (Guest) for malicious abuse of process, alleging that she issued subpoenas for an illegitimate purpose in an arbitration proceeding. Guest contends that the Durhams failed to state a malicious abuse of process claim of process, and (2) arbitration proceedings are judicial proceedings for the purpose of the tort of malicious abuse of process.

1. BACKGROUND

{2} Because this case is before us to review the district court's dismissal of the Durhams' malicious abuse of process claim pursuant to Rule 1-012(B)(6) NMRA, we accept as true all well-pled factual allegations. See Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, ¶ 2, 131 N.M. 272, 34 P.3d 1148. In addition, we do not consider factual allegations raised for the first time by either party on appeal to determine whether the Durhams stated an actionable malicious abuse of process claim. We therefore refer only to the well-pled facts in the Durhams’ complaint and attached exhibits in recounting the facts pertinent to our review.

{3} In March of 1997, the Durhams were traveling in Jamie’s car when they were injured in an accident with an uninsured motorist who was driving while intoxicated. At the time of the accident, Jamie’s car was insured with Allstate Insurance Company (Allstate) under a policy containing uninsured motorist coverage. Both Jamie and Travis suffered personal injuries and other damages as a result of the accident.

{4} Two days after the accident, the Durhams' counsel advised Allstate that the Durhams would be making uninsured motorist claims for their injuries. A dispute arose regarding the amount of damages owed to the Durhams under the policy. Nearly one year after the accident, Allstate retained Guest to represent it in the arbitration of the Durhams’ claims. The arbitrators awarded the Durhams $45,000 plus all arbitration costs, an award that exceeded Allstate’s last offer to settle by over $31,000. No corresponding court proceeding was filed by either party with respect to the Durhams' uninsured motorist claims.

{5} In January of 2002, the Durhams brought a bad faith action against Allstate, Guest, and Allstate’s sales agent for Jamie’s policy, alleging over a dozen common law and statutory violations against them. Only the Durhams’ malicious abuse of process claim is the subject of our review. In that claim, the Durhams alleged that, during discovery in the arbitration proceedings, Guest maliciously issued one or more subpoenas for an illegitimate purpose when she sought the Durhams’ employment and

under DeVaney v. Thriftway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277 (filed 1997), because she did not initiate the underlying arbitration and because arbitration proceedings are not judicial proceedings for the purpose of stating a malicious abuse of process claim. The district court and the Court of Appeals agreed. We reverse and hold that (1) it is not necessary for the defendant to have initiated judicial proceedings against the plaintiff in order to state a claim for malicious abuse
medical records in violation of a protective order issued by the arbitrators. According to the Durhams’ complaint, Guest’s purpose for issuing the subpoenas was to ruin the Durhams’ reputations, cause them to lose their employment, inflict humiliation and emotional distress upon them, invade their privacy, retaliate against them for refusing to accept Allstate’s previous settlement offer, and coerce them into giving up their lawful right to benefits under Jamie’s uninsured motorist policy. Upon Guest’s motion, the district court dismissed all of the claims against Guest for failure to state a claim upon which relief can be granted. The Durhams appealed.

[6] The Court of Appeals affirmed the district court’s dismissal and concluded that DeVaney requires that Guest must have initiated judicial proceedings against the Durhams in order for their malicious abuse of process claim to proceed. Durham v. Guest, 2007-NMCA-144, ¶ 42, 142 N.M. 817, 171 P.3d 756. The Court held that an arbitration proceeding is not a judicial proceeding for the purpose of malicious abuse of process and that, in any case, Guest did not initiate the arbitration. Id. ¶¶ 41-42. Citing this Court’s directive that the malicious abuse of process tort should be improvidently granted with respect to the five issues presented in their petition. ¶ 44.

II. PRELIMINARY ISSUES
A. REFERENCE TO FACTS NOT IN THE RECORD
[8] The parties’ counsel, David J. Berardinelli (Berardinelli) for the Durhams and Guest representing herself, have inundated this Court with paper. We will not endeavor to count the number of pages of motions, responses, replies, and exhibits put before us while we considered this matter on review. Suffice it to say that the maxim “less is more” is lost on both counsel in all respects. We are compelled to comment on several specific abuses in counsels’ filings, each related to the propriety of asking this Court to consider and resolve factual disputes with this appeal.

[9] Both Berardinelli and Guest attempt to argue the factual basis of the malicious abuse of process claim on appeal. They initially do so by improperly referring in their briefs to documents that were not presented to the district court judge for his consideration when he ruled on Guest’s motion to dismiss. Reference to exhibits not in the record proper and not presented to the district court for consideration is improper and a violation of the Rules of Appellate Procedure. Kassel v. Anderson, 84 N.M. 697, 700, 507 P.2d 444, 447 (Ct. App. 1973), overruled on other grounds by Fidelity Nat’l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 108-09, 583 P.2d 470, 472-73 (1978). Therefore, we will not consider these exhibits on appeal. See State v. Wood, 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct. App. 1994) (exhibits to briefs that are not part of the record proper will not be considered on appeal); State v. Lucero, 90 N.M. 342, 345, 563 P.2d 605, 608 (Ct. App. 1977) (“Exhibits to briefs neither identified nor tendered as exhibits to the trial court will not be considered [on appeal].”).

[10] In addition to referring the Court to exhibits not before the district court, Berardinelli and Guest also make assertions of facts in their briefs that were not alleged in the complaint or otherwise before the district court. As if the reference on appeal to facts not in the record were not audacious enough, in many cases both Berardinelli and Guest cite no authority in support of their new contentions. Also, in many instances where Berardinelli does cite to the complaint in support of his new assertions, the complaint provides no support for the allegation. We are not sure which is worse: failing to provide a citation to support a fact not in the record or providing a misleading one. Regardless, we are certain that “[o]ur review on appeal is limited to a consideration of the transcript of the record properly certified by the clerk of the trial court[,]” Fed. Nat’l Mortgage Ass’n v. Rose Realty, Inc., 79 N.M. 281, 281-82, 442 P.2d 593, 593-94 (1968). We reiterate that counsels’ reference to facts not before the district court and not in the record is inappropriate and a violation of our Rules of Appellate Procedure. See Rule 12-213(A)(3) NMRA (stating that the brief in chief shall include a summary of the facts relevant to the issues presented for review with citations to the record proper, transcript of proceedings, or exhibits supporting each factual representation); Rule 12-213(B) (same for answer brief). We therefore do not consider any of Berardinelli’s or Guest’s new factual assertions on appeal, and review only the complaint and exhibits attached thereto to determine if the Durhams stated a claim for relief. Both Berardinelli and Guest are admonished to adhere strictly to the Rules of Appellate Procedure in the future.

B. EXHIBITS TO THE COMPLAINT
[11] The Durhams attached five exhibits to their complaint. On appeal, they argue that the Court of Appeals erred in considering these exhibits in ruling on their malicious abuse of process claim, relying on Dellaira v: Farmers Ins. Exch., 2004-NMCA-132, ¶ 8, 136 N.M. 552, 102 P.3d 111. However, Guest contends that the Court’s consideration of the exhibits was proper.

[12] We agree with Guest that the Durhams’ reliance on Dellaira is misplaced. The issue before the Court of Appeals in Dellaira was whether it was proper to consider exhibits that were submitted in opposition to the plaintiffs’ motion to dismiss, when nothing in the record indicated that the district court relied on the disputed exhibits when ruling on that motion. Id. ¶ 7. The Court held that under those circumstances, it would not consider the exhibits and would review the district court’s decision under the standard applicable to Rule 1-012(B)(6) dismissals. Id. In this case, the exhibits in question were attached to the Durhams’ complaint and were not submitted in response to Guest’s motion to dismiss. Thus, Dellaira is inapposite, and our rules governing the attachment of exhibits to pleadings control. “A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” Rule 1-010(C) NMRA. Therefore, the Court of Appeals was correct when it considered the exhibits attached to the complaint and we may also consider the exhibits in determining the basis for the Durhams’ malicious abuse of process claim.

C. GUEST’S MOTION FOR SANCTIONS
[13] Guest filed a motion in this Court requesting us to impose sanctions against the Durhams and Berardinelli for knowingly making false factual representations to this Court in their certiorari briefs regarding their allegations that Guest misused the subpoena process in the underlying arbitration. In her motion, Guest contends that such misrepresentations violate Rule 16-303 NMRA (candor toward the tribunal) such that Rule 12-312(D) NMRA
allows this Court to impose sanctions for failure to comply with the Rules of Appellate Procedure. Guest also contends that Berardinelli’s factual misrepresentations to this Court directly violated the Court of Appeals’ order requiring him to refrain from overzealous advocacy and to adhere to the Rules of Appellate Procedure. We denied the motion without prejudice.

To resolve Guest’s motion for sanctions, we would need to resolve factual disputes that are inextricably linked to the merits of the Durhams’ claim. For example, Guest asserts that the Durhams or Berardinelli knew at the time of filing their complaint that she did not issue the subpoena that forms the basis of their malicious abuse of process claim. She argues that the Durhams or Berardinelli knowingly misrepresented this fact to the Court in their briefs. The Durhams’ complaint, however, alleges that Guest misused a judicial process when she issued subpoenas for an improper purpose. It does not list specific subpoenas. Therefore, we cannot tell from the complaint what subpoenas form the basis of the Durhams’ complaint and whether Guest actually issued them. Furthermore, we cannot tell from the record when the Durhams or Berardinelli actually knew which subpoena(s) were issued by Guest, to whom, and for what purpose. Without the benefit of a developed record that clearly resolves the allegations in Guest’s motion for sanctions, we declined to rule on its merits.

Our denial of Guest’s motion without prejudice will not prevent Guest from raising these issues again in the district court, nor is it meant to preclude the district court from considering and ruling on any of the issues raised in Guest’s motion for sanctions, should Guest file such a motion in the district court on remand. Specifically, our denial of Guest’s motion will not preclude the district court from determining whether the Durhams or Berardinelli violated the Rules of Appellate Procedure by knowingly making false representations in any of its filings in either the Court of Appeals or this Court.

III. DISCUSSION

We review de novo the district court’s dismissal of the Durhams’ malicious abuse of process claim for failure to state a claim pursuant to Rule 1-012(B) (6). See Valdez v. State, 2002-NMSC-028, ¶4, 132 N.M. 667, 54 P.3d 71. The specific issue we must resolve is whether Guest’s alleged issuance of a subpoena during an arbitration proceeding for the purpose of extortion is sufficient to state a malicious abuse of process claim when she did not initiate the arbitration proceeding against the Durhams. To resolve this dispute, we must address two separate issues: (1) whether the malicious abuse of process tort requires that the defendant have initiated the underlying judicial proceeding against the plaintiff, and (2) whether arbitration proceedings may be considered judicial proceedings for the purpose of malicious abuse of process.

The Court of Appeals affirmed the district court’s dismissal, holding that an arbitration proceeding is not a judicial proceeding for the purpose of malicious abuse of process, and that, in any event, Guest did not initiate the arbitration. Durant, 2007-NMCA-144, ¶¶ 41, 44. We reverse the district court, and hold that the defendant’s initiation of judicial proceedings against the plaintiff is no longer a required malicious abuse of process element and arbitration proceedings are judicial proceedings for the purpose of the malicious abuse of process tort.

In Devaney v. Thriftyway Marketing Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277 (filed 1997), abrogated on other grounds by Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶¶ 19-21, 142 N.M. 150, 164 P.3d 31, we combined the torts of abuse of process and malicious prosecution and restated them as a single cause of action known as malicious abuse of process. 1998-NMSC-001, ¶¶ 1, 17. We held that the elements of the tort of malicious abuse of process are as follows:

1. the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages.

Id. ¶ 17. The focus of the parties’ arguments is the first malicious abuse of process element.

The parties dispute whether this Court intended to limit claims for abuse of process in Devaney to only those where the defendant had first brought a judicial action against the plaintiff. Guest argues that the plain language of the first malicious abuse of process element is unambiguous and that the Durhams’ malicious abuse of process claim was properly dismissed because (1) she did not initiate the arbitration proceeding against them, and (2) an arbitration is not a “judicial” proceeding for the purposes of stating a malicious abuse of process claim. The Durhams argue that, despite our inclusion of the first malicious abuse of process element in Devaney, this Court did not intend to eliminate malicious abuse of process claims when legal processes were abused by either party to a proceeding. Alternatively, the Durhams argue that the issuance of a subpoena may be considered “the initiation of a judicial proceeding” for the purposes of stating a malicious abuse of process claim. We understand the Durhams’ second argument to be a response to Guest’s claim that an arbitration proceeding may not be treated as a judicial proceeding for the purpose of malicious abuse of process. We address the following issues in turn: (1) whether the initiation of proceedings by the defendant is an element of malicious abuse of process, and (2) whether arbitration is a judicial proceeding for the purpose of stating a malicious abuse of process claim.

A. THE DURHAMS’ ARGUMENT WAS PRESERVED

Guest argues that because the Durhams rely on facts not presented to the district court, many of their arguments are not preserved for review. We disagree. Although the Durhams presented facts in their brief that we will not consider in our review, they have consistently argued to the district court, the Court of Appeals, and this Court that the Devaney Court did not intend to limit claims for malicious abuse of process to situations when the defendant initiated the judicial proceeding, and that an arbitration for legitimate purposes is sufficient to state a malicious abuse of process claim. Therefore, these arguments were preserved and we will properly consider them.

B. THE INITIATION OF JUDICIAL PROCEEDINGS BY THE DEFENDANT AGAINST THE PLAINFIGHT IS NO LONGER AN ELEMENT OF MALICIOUS ABUSE OF PROCESS

The thrust of the Durhams’ Devaney argument is that this Court did not intend to eliminate claims for abuse of process when the individual accused of abusing process was not the party who initiated the judicial proceeding. They contend that the Devaney Court intended to combine both claims based on their similarities, and claims that would have been allowable under the former tort of abuse of process should be allowed after
DeVaney, despite the plain language of the first malicious abuse of process element. Essentially, the Durhams argue that DeVaney’s requirement that the defendants must have initiated the judicial proceedings in which they allegedly abused process is unfair because it allows defendants to abuse process within those proceedings simply because the defendants did not commence them. We agree. For basic reasons of equality and fairness, this cannot have been the DeVaney Court’s desired result.

Prior to DeVaney, we stated that “[t]he initial use of process itself [i.e., the initiation of litigation] may constitute the required overt act under the facts [necessary to state a claim for abuse of process].” Richardson v. Rutherford, 109 N.M. 495, 502, 787 P.2d 414, 421 (1990). We also stated that, “[w]hile a subsequent act may suffice to prove an abuse of process which was appropriate when issued, it is not an essential element [to stating an abuse of process claim].” Id. The New Mexico Court of Appeals subsequently noted this language and stated that Richardson “arguably might be read as blurring the line between malicious prosecution and abuse of process because it held that the improper act required for an abuse of process claim could be the filing of the complaint itself and that an improper subsequent act was not required.” Westland Dev. Co. v. Romero, 117 N.M. 292, 294, 871 P.2d 388, 390 (Ct. App. 1994). Similarly, in DeVaney, the Court of Appeals “construed Richardson and Westland as allowing for the possibility that under certain, very limited and special circumstances[,] the filing of [a] suit could be enough [to state a claim for abuse of process].” 1998-NMSC-001, ¶ 8 (internal quotation marks and citation omitted).

Thus, our charge in DeVaney was to clarify these two torts and determine whether a plaintiff could state a claim for abuse of process when the only alleged abusive act was the improper filing of a complaint. See id. ¶ 1 (“We granted certiorari to revisit and clarify the elements required for the two torts on which [the plaintiff] relies.”). We held that while [a]n improper act, or misuse of process, need not occur subsequent to the filing of a complaint and might, in fact, be found in the complaint itself, . . . the filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability for malicious abuse of process, even if it is the result of a malicious motive.

Id. ¶ 20 (citations omitted). As a result, the DeVaney Court held that maliciously filing a complaint was insufficient to state a malicious abuse of process claim unless it was done without probable cause or was accompanied by some subsequent abuse of process. Id. ¶¶ 22, 28.

Had we not gone further and clarified the elements of the two former misuse of process torts, this holding would have led to confusion regarding which cause of action—abuse of process or malicious prosecution—was the correct claim to make in such situations, because the act of filing a complaint without probable cause arguably satisfied the elements of both torts. See id. ¶ 11 (listing the elements of the former tort of malicious institution of civil proceedings). To minimize this confusion, we combined the two torts, recognizing that they shared common purposes and elements. Id. ¶¶ 14, 15. Importantly, in so doing we did not overrule our prior case law with respect to abuse of process. See id. ¶ 18 (recognizing that many of the traditional elements of the abuse of process tort continue to serve important purposes). Thus, we believe that this Court’s intention was to allow claims that would have been viable under the former tort of abuse of process to have continued validity under the restated malicious abuse of process tort.

Prior to DeVaney, the tort of abuse of process did not require that the defendant have initiated judicial proceedings against the plaintiff. Instead, to state such a claim, one had only to allege “(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.” Richardson, 109 N.M. at 501, 787 P.2d at 420 (internal quotation marks and citation omitted). Before DeVaney, this Court said that “[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.” Id. (quoting Restatement (Second) of Torts § 682 (1976)). We also said that [a]n abuse of process arises only when there has been a perversion of court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to do some collateral thing which he could not legally and regularly be compelled to do.

Farmers Gin Co. v. Ward, 73 N.M. 405, 406, 389 P.2d 9, 11 (1964). In other words, the only prerequisites to bringing an abuse of process claim were that the defendant have misused a process within a judicial proceeding for some purpose that it was not intended. See Restatement (Second) of Torts, § 682 cmt. a (1977) (“The gravamen of the misconduct for which the liability stated in this Section [of abuse of process] is imposed . . . is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.”). The initiation of judicial proceedings by the process abuser was not an element of this claim.

Our restatement of the malicious abuse of process cause of action in DeVaney overlooked the fact that our law allowed some abuse of process claims to proceed when a defendant had not initiated the action against the plaintiff. In fact, in DeVaney we recognized that the abuse of process tort was broader than malicious prosecution, 1998-NMSC-001, ¶ 13, and we acknowledged that typical abuses of process involve the misuse of procedures, such as discovery abuses or the improper issuance of subpoenas. Id. ¶ 28. Instead of limiting claims for abuse of process, it was the Court’s intention to preserve both torts, restating them only for the sake of simplicity and to avoid confusion. See, e.g., id. ¶ 38 (recognizing “that malicious prosecution and abuse of process should be restated as a single cause of action in order to achieve the ultimate, common purposes for which they were created”).

Furthermore, the result of applying the first malicious abuse of process element to typical abuse of process claims would create an inequity that the DeVaney Court could not have intended. If the initiation of judicial proceedings by the defendant
process abuser against the plaintiff remains a malicious abuse of process requirement, then a defendant that did not initiate the judicial proceeding may abuse process within that proceeding without risking malicious abuse of process liability. However, an abuse of process by the plaintiff could result in a valid malicious abuse of process claim. Such an inequitable cause of action cannot be what the Court intended, and we are compelled to correct that oversight.

{29} For these reasons, we overrule DeVaney with respect to its holding that all malicious abuse of process claims require the defendant to have initiated a judicial proceeding against the plaintiff. We leave in place the combined tort of malicious abuse of process, but restate its elements as follows: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages. An improper use of process may be shown by (1) filing a complaint without probable cause, or (2) “an irregularity or impropriety suggesting extortion, delay, or harassment[,]” or other conduct formerly actionable under the tort of abuse of process. {31} In any malicious abuse of process claim, the use of process for an illegitimate purpose forms the basis of the tort. See Richardson, 109 N.M. at 502, 787 P.2d at 421 (“Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required[,]” (emphasis added) quoting W.P. Keeton, D.B. Dobbs, R.E. Keeton, & D.G. Owen, Prosser and Keeton on the Law of Torts § 121, 898 (5th ed. 1984)). When the judicial process is used for an illegitimate purpose such as harassment, extortion, or delay, the party that is subject to the abuse suffers harm, as does the judicial system in general. Thus, the malicious abuse of process tort makes the process abuser liable to the other party for the harm caused by the abuse of process. See id. at 501, 787 P.2d at 420 (quoting the Restatement (Second) of Torts § 682 (1976)).

{32} Abuse of process torts have traditionally been limited to abuses in judicial proceedings. See, e.g., DeVaney, 1998-NMSC-001, ¶ 17 (holding that, to state a malicious abuse of process claim, “there must be both a misuse of the power of the judiciary by a litigant and a malicious motive.”). However, New Mexico has a strong public policy in favor of arbitration as a form of dispute resolution, as expressed in the Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 through -32 (2001). See Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 625, 857 P.2d 22, 25 (1993). New Mexico has specifically determined that arbitration is an acceptable form of dispute resolution when the parties have agreed to resolve their dispute without accessing the judicial system. See § 44-7A-7(a) (stating that agreements to arbitrate are “valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract”). We see no reason why we should have any less interest in protecting citizens against misuses of process in an arbitration when the State has ratified, if not encouraged, arbitration as a form of dispute resolution.

{33} Furthermore, the processes that are susceptible to abuse in both the civil judicial system and arbitration proceedings are governed by similar rules such that abuses in either forum should subject the abuser to liability. For example, with respect to arbitrators, the arbitrator “may issue a subpoena for the attendance of a witness and for the production of records and other evidence” so long as it is “served in the manner for service of subpoenas in a civil action” Section 44-7A-18(a). In addition, a subpoena issued in an arbitration may be “enforced in the manner for enforcement of subpoenas in a civil action.” Id. The arbitrator may also issue discovery-related orders, compel the attendance of a witness or the production of evidence, and may “take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state.” Section 44-7A-18(d). An arbitrator may also issue a protective order to the same extent allowed to the district court, § 44-7A-18(e), and “[a]ll laws compelling a person under subpoena to testify . . . apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state.” Section 44-7A-18(f). Therefore, the similarity of these rules of procedure suggest that we should treat abuses of the processes in an arbitration proceeding just as we would in a judicial forum.

{34} Finally, we note that arbitration awards are subject to confirmation by the district court, § 44-7A-23, and those awards are final, subject to a very limited scope of judicial review. Fernandez, 115 N.M. at 625, 857 P.2d at 25 (holding that the Uniform Arbitration Act does not allow a district court to review an arbitration award on the merits of the controversy). Magnifying the effect of this limited review, the doctrine of collateral estoppel is applicable to issues decided in arbitration proceedings. Rex, Inc. v. Manufactured Hous. Comm., 119 N.M. 500, 505, 892 P.2d 947, 952 (1995). Just as the rules governing legal processes that may be subjected to abuse are similar in both civil actions and arbitrations, the outcomes of arbitration proceedings are similarly binding on the parties. These similarities compel us to treat abuses of process in either forum identically.

{35} We believe that the use of process in either a judicial or an arbitration proceeding to harass, extort, delay, or for any other
illegitimate end should subject a person to the same civil liability for the resulting harm. Our interest in seeing that justice and fairness predominate in the resolution of parties’ disputes is not confined within courthouse walls. Given this State’s strong public policy in favor of arbitration, the similarities between the two types of proceedings, and the similarity of the harms that could be inflicted by abuses of process in either forum, we see no principled reason to distinguish malicious abuse of process claims on this basis. Therefore, we hold that for the purpose of the tort of malicious abuse of process, arbitration proceedings are judicial proceedings, and the improper use of process in an arbitration proceeding to accomplish an illegitimate end may form the basis of a malicious abuse of process claim.

IV. CONCLUSION

{36} For the reasons stated above, we overrule DeVaney with respect to its requirement that the defendant have initiated judicial proceedings against the plaintiff in order to state a claim for malicious abuse of process. We restate the malicious abuse of process tort to require: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages. We further hold that an arbitration proceeding is a judicial proceeding for the purpose of stating a malicious abuse of process claim.

{37} We therefore reverse the district court’s dismissal of the Durhams’ malicious abuse of process claim for failure to state a claim for which relief can be granted, and we likewise reverse the Court of Appeals’ affirmance of that dismissal. We remand this claim to the district court with instructions to reinstate this matter on its docket.

{38} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice
TED BACA, District Judge
(sitting by designation)
HEALTHCARE 2009: CURRENT ISSUES OF CONCERN

Thursday, April 16, 2009 • State Bar Center, Albuquerque
5.6 General and 1.0 Ethics CLE Credits

Standard Fee $209 • Health Law Section Member, Government, Legal Services Provider, Paralegal $179

8:30 a.m. Registration
9:00 a.m. Healthcare Financing – Money Makes The World Go Round
Larry Heyeck
10:00 a.m. The RAC Is Coming! Providers Take Heed
David H. Johnson
10:50 a.m. Break
11:00 a.m. Conflicts of Interest in Physician-Industry Relationships
Robyn Shapiro, Drinker Biddle, Milwaukee, WI
Noon Lunch (provided at the State Bar Center)
1:00 p.m. Stark Reality: Winding Our Way Through the Healthcare Regulatory Jungle
Joel Wakefield, Coppersmith Gordon, Phoenix, AZ
2:30 p.m. Break
2:40 p.m. Healthcare 2009: State and Federal Legislative Updates
Jeff Dye and Angela Martinez
4:10 p.m. Big Labor’s Big Agenda for 2009: The Employee Free Choice Act and other Labor Law Changes
Danny W. Jarrett
5:00 p.m. Adjourn

STATE BAR VIDEO REPLAYS - State Bar Center, Albuquerque

APRIL 21, 2009
2009 Professionalism: An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
9:00 a.m. – 10:00 a.m.
$49

Avoiding Oops! Uh-Oh! & Yikes
1.0 Ethics CLE Credit
10:15 a.m. – 11:15 a.m.
$49

Judge May I Borrow Your Gavel?
2.0 General CLE Credits
1:00 p.m. – 3:00 p.m.
$69

2008 Civil Procedures Update
6.7 General CLE Credits
9:00 a.m. – 4:15 p.m.
$219

APRIL 22, 2009
2009 Professionalism: An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
1:00 p.m. – 2:00 p.m.
$49

The Joint Conference for Criminal Defense Attorneys & Prosecutors
4.2 General & 1.0 Ethics CLE Credits
9:00 a.m. – 2:30 p.m.
$189

APRIL 29, 2009
2008 Estate Planning Symposium
6.0 General & 1.0 Ethics CLE Credits
8:30 a.m. – 3:30 p.m.
$219

2009 Professionalism: An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
9:00 a.m. – 10:00 a.m.
$49

Fifth Annual Elder Law Seminar
3.7 General CLE Credits
12:30 p.m. – 4:15 p.m.
$149

May 5
Renewable Energy Development in New Mexico
5.0 General, 1.0 Ethics and 1.0 Professionalism CLE Credits
8:30 a.m.
$219

An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
9 a.m.
$49

Law Office Technology in Economically Challenging Times
1.0 General CLE Credit
10:30 a.m.
$49

I Was From Venus and My Lawyers Were From Mars
2.0 Ethics and 1.0 Professionalism CLE Credits
1:00 p.m.
$129

May 19
24th Annual Bankruptcy Year in Review (2009)
6.0 General and 1.0 Professionalism CLE Credits
8:30 a.m.
$219

What’s Next? How to Refresh, Refocus & Recharge Your Legal Career
3.0 General CLE Credits
9 a.m.
$129

An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
1:00 p.m.
$49
### 2009 NEW MEXICO COLLABORATIVE LAW SYMPOSIUM

Friday-Saturday, April 17-18, 2009 • State Bar Center, Albuquerque  
**Basic/Intermediate Track:** 6.5 General Credits • **Advanced Track:** 6.7 General Credits

**Basic/Intermediate Track:**  
Standard Fee $295.00 • NMCPG Member $265.00  
**Advanced Track with Sherri Goren Slovin:**  
Standard Fee $345.00 • NMCPG Member $315.00

**FRIDAY, APRIL 17 - BASIC/INTERMEDIATE TRACK**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>9:00 a.m.</td>
<td>Presenting the Collaborative Option to Clients</td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>Break</td>
</tr>
<tr>
<td>10:15 a.m.</td>
<td>Case/Team Selection</td>
</tr>
<tr>
<td>11:15 a.m.</td>
<td>First Four Way</td>
</tr>
<tr>
<td>12:15 p.m.</td>
<td>Lunch</td>
</tr>
<tr>
<td>1:15 p.m.</td>
<td>Maintaining Strong Teams and Avoiding Alignment</td>
</tr>
<tr>
<td>2:30 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>2:45 p.m.</td>
<td>Advocacy in the Collaborative Model</td>
</tr>
<tr>
<td>3:50 p.m.</td>
<td>Role of the Law</td>
</tr>
<tr>
<td>5:00 p.m.</td>
<td>Adjourn</td>
</tr>
</tbody>
</table>

**SATURDAY, APRIL 18 - ADVANCED TRACK**

**A DAY WITH SHERRI GOREN SLOVIN**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 a.m.</td>
<td>Introduction/Challenges/Goals of Collaborative Work</td>
</tr>
<tr>
<td>9:20 a.m.</td>
<td>What’s it all about</td>
</tr>
<tr>
<td>11:40 a.m.</td>
<td>The challenges we face</td>
</tr>
<tr>
<td>1:30 p.m.</td>
<td>Meet the Clients (Sue and Will)</td>
</tr>
<tr>
<td>2:30 p.m.</td>
<td>Brainstorming to resolution</td>
</tr>
<tr>
<td>4:00 p.m.</td>
<td>When Things Fall Apart</td>
</tr>
</tbody>
</table>

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### IMPROVING THE HR PROFESSIONAL/ATTORNEY RELATIONSHIP (2009)

Friday, April 24, 2009 • State Bar Center, Albuquerque  
5.0 General CLE Credits

**Standard Fee $179 • Employment and Labor Law Section Member, Government, Legal Services Attorney, Paralegal $149**  
**Co-Sponsors:** SBNM Employment & Labor Law Section and Human Resource Management Association of New Mexico

**Registration**

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8:30 a.m.</td>
<td>Registration</td>
</tr>
<tr>
<td>9:00 a.m.</td>
<td>The Top 7 Things You Need to Know</td>
</tr>
<tr>
<td>10:30 a.m.</td>
<td>Beyond Discrimination Claims: What Else Can You Be Sued For?</td>
</tr>
<tr>
<td>Noon</td>
<td>Lunch (provided at the State Bar Center)</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>The High Cost of Getting Even: Preventing Retaliation Claims</td>
</tr>
<tr>
<td>2:15 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>2:30 p.m.</td>
<td>2009 Federal and State Legislative Update</td>
</tr>
<tr>
<td>3:30 p.m.</td>
<td>Adjourn</td>
</tr>
</tbody>
</table>
6TH ANNUAL ELDER LAW SEMINAR

Friday, May 8, 2009 • State Bar Center, Albuquerque
2.9 General and 1.0 Professionalism CLE Credits

Standard Fee $149 • Elder Law Section Member, Government, Legal Services Attorney, Paralegal $129

Co-Sponsor: Elder Law Section

12:30 p.m. Registration
1:00 p.m. Introductory Remarks
Barbara A. Michael, Attorney at Law, Santa Fe
Chair, Elder Law Section
1:05 p.m. Special Needs Trusts: Planning for Disability
Robert E. Fleming, Esq., Fleming & Curti, PLC, Tucson, AZ
Mary A. Green, Attorney at Law, Albuquerque
1:55 p.m. Practical Considerations in Representing the Elder Client
Robert E. Fleming, Esq.
2:40 p.m. Break
2:50 p.m. Presentation TBA (1.0 P)
Robert L. Schwartz, Esq., Professor, UNM School of Law
Richard D. Stoops, Attorney at Law, Albuquerque
3:50 p.m. Overview of the 2009 Legislative Session
Angelica Anaya-Allen, Esq., Executive Director, Senior Citizens Law Office
4:20 p.m. Bench View of Cases Involving the Elderly
Hon. Beatrice J. Brickhouse, Esq., 2nd Judicial District, Albuquerque
5:05 p.m. Adjourn and Reception (State Bar Lobby)

KINSHIP GUARDIANSHIP

ONE CLE PROGRAM, TWO MORE DATES:

TUESDAY, MAY 12, 2009
3rd Judicial District Courthouse, Las Cruces

TUESDAY, MAY 19, 2009
Alcove Room, Campus Union Building, 48 University Blvd, NMSU, Roswell

Standard Fee $199 • Government, Legal Services Attorney, Paralegal $169

Co-Sponsor: Pegasus Legal Services for Children

8:00 a.m. Registration
8:30 a.m. Introductory Remarks
Lawrence B. Kronen, Esq., Pegasus Legal Services for Children
Elizabeth V. McGrath, Esq., Pegasus Legal Services for Children
8:45 a.m. Foundations of the Kinship Guardianship Act
Lawrence B. Kronen, Esq. and Elizabeth V. McGrath, Esq.
9:15 a.m. Handling a Case Under the Kinship Guardianship Act
Lawrence B. Kronen, Esq.
10:45 a.m. Break
11:00 a.m. Ethical Issues in Cases Involving Children (1.0 E)
Lawrence B. Kronen, Esq. and Elizabeth V. McGrath, Esq.
Noon Lunch (provided at the State Bar Center)
1:00 p.m. Social and Emotional Aspects of Kinship Care Giving for Children and Care Givers
Cindy Anderson, Outcomes, Inc.
1:15 p.m. Benefits and Services for Kinship Families
Lawrence B. Kronen, Esq. and Elizabeth V. McGrath, Esq.
2:00 p.m. Break
2:45 p.m. New Pro Bono Rules and Representing Low Income Clients in Kinship Guardianship cases (1.0 P)
Rosalie Fragoso, Esq., 2nd Judicial District Volunteer Attorney Project
Carol Garner, Esq., Law Access New Mexico
Lawrence B. Kronen, Esq., Pegasus Legal Services for Children
3:00 p.m. Adjourn

LAS CRUCES VIDEO REPLAYS

Third Judicial District Courthouse
Jury Assembly Room #1 (go left at security entrance)
201 West Picacho Ave., Las Cruces, NM

MAY 11
2009 Professionalism: An Attorney’s Guide to Good Lawyering for People with Disabilities
1.0 Professionalism CLE Credit
11:00 a.m. – Noon • $49

Evidentiary Issues for the Civil Trial Practitioner in State and Federal Courts
2.7 General CLE Credits
1:15 p.m. – 4:00 p.m. • $109

MAY 12
Kinship Guardianship
Live Program, see above
# Medicare Set Asides in Personal Injury Cases

**Wednesday, May 20, 2009 • State Bar Center, Albuquerque**

2.7 General CLE Credits

Standard Fee $109 • Government, Legal Services Attorney, Paralegal $ 95

*Presenters:* Erin Wideman, Esq., Marcy Baysinger, Esq., and Ruth Pregenzer, Esq., Pregenzer Baysinger Wideman & Sale, P.C.

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
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</thead>
<tbody>
<tr>
<td>8:30 a.m.</td>
<td>Registration</td>
</tr>
</tbody>
</table>
| 9:00 a.m.| **Medicare Set Asides and Impact on Personal Injury Settlements and Awards**  
- History and Recent developments in the Medicare Secondary Payer Act  
- Post Settlement Factors Attorneys must Consider  
- Options for Set Medicare Aside |
| 10:15 a.m.| Break                                            |
| 10:30 a.m.| **Calculating the Medicare Set Aside**  
- Reporting Requirements  
- CMS Policy  
- CMS Enforcement |
| Noon     | Lunch (provided at the State Bar Center)  
with Discussion Session (non-credit) |

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# Second Annual New Mexico Legal Service Provider Conference

**Thursday, June 18 and Friday, June 19, 2009 • State Bar Center, Albuquerque**

13.4 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

*Co-Sponsors:* Public and Legal Services Department and The Center for Legal Education, New Mexico State Bar Foundation

## Day One - Thursday, June 18

### All Tracks

- **8:00 a.m.** Registration
- **8:20 a.m.** Introductory Remarks  
  Kasey Daniel, Director, Public and Legal Services Department, New Mexico State Bar Foundation
- **8:30 a.m.** How Do All of the Legal Service Providers Work Together?  
  Richard Spinello, Esq., General Counsel, State Bar of New Mexico
- **9:30 a.m.** Legal Service Provider Round Robin  
  DNA Peoples’ Legal Services
- **9:40 a.m.** Break

#### TRACK A

- **9:50 a.m.** LSP Round Robin  
  Enlace Comunitario
- **10:00 a.m.** Consumer Law  
  Andoe Arathoon and Philip Armour, Law Access  
  Presenter TBA, New Mexico Legal Aid
- **Noon** LSP Round Robin  
  Legal FACS
- **12:10 p.m.** Lunch (provided at the State Bar Center)
- **12:55 p.m.** LSP Round Robin  
  NM Center on Law and Poverty
- **1:05 p.m.** Crossing the Line: What is Legal Advice? What is the Unauthorized Practice of Law?  
  (1.0 E)  
  Leigh Ann Chavez, Esq., Central New Mexico Community College
- **2:05 p.m.** LSP Round Robin  
  Senior Citizens Law Office
- **2:15 p.m.** UCCJEA, the Family Violence Protection Act and the DV Counselor Confidentiality Act  
  Beth Rourke, Enlace Comunitario
- **3:15 p.m.** Break
- **3:25 p.m.** Immigration Law – Overview of the Immigration System & 2009 Update of Policy Changes under Obama Administration  
  Jennifer Landau, Diocesan Migrant & Refugee Services, Inc.

#### TRACK B

- **9:50 a.m.** LSP Round Robin  
  Enlace Comunitario
- **10:00 a.m.** The Elements of a Professional Letter  
  Presenter TBA
- **11:00 a.m.** Basic Legal Writing – Complaint Drafting and Basic Motions  
  Leigh Ann Chavez, Esq., Central New Mexico Community College
- **12:10 p.m.** Lunch (provided at the State Bar Center)
- **12:55 p.m.** LSP Round Robin  
  Legal FACS
- **1:05 p.m.** Crossing the Line: What is Legal Advice? What is the Unauthorized Practice of Law?  
  (1.0 E)  
  Leigh Ann Chavez, Esq., Central New Mexico Community College
- **2:05 p.m.** LSP Round Robin  
  Senior Citizens Law Office
- **2:15 p.m.** Interviewing Skills – Funneling Down to Get the Information You Need  
  David Godfrey, ABA Commission on Law and Aging
- **3:15 p.m.** Break
- **3:25 p.m.** Diffusing Difficult Client Situations  
  David Godfrey, ABA Commission on Law and Aging
- **4:25 p.m.** Statewide Resources for Pro Se Litigants – What to Tell Someone When Your Agency Can’t Help Them  
  Presenter TBA
- **5:25 p.m.** Adjourn

*continued on next page*
### TRACK C

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Presenter/Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>2:15 p.m.</td>
<td>Civil Rights Litigation</td>
<td>Presenter TBA</td>
</tr>
<tr>
<td>3:15 p.m.</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>3:25 p.m.</td>
<td>How to Represent Organizations</td>
<td>Presenter TBA</td>
</tr>
</tbody>
</table>

**DAY TWO - FRIDAY, JUNE 19**

#### BOTH TRACKS A and B

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Registration</td>
<td></td>
</tr>
<tr>
<td>8:30 a.m.</td>
<td>Introductory Remarks</td>
<td>Kasey Daniel, Director, Public and Legal Services Department, New Mexico State Bar Foundation</td>
</tr>
<tr>
<td>8:40 a.m.</td>
<td>Legal Service Provider Round Robin</td>
<td>Law Access New Mexico</td>
</tr>
</tbody>
</table>

### TRACK A

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Presenter/Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:50 a.m.</td>
<td>LSP Round Robin</td>
<td>Lawyer Referral for the Elderly and Bridge To Justice, New Mexico State Bar Foundation</td>
</tr>
<tr>
<td>11:00 a.m.</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>11:15 a.m.</td>
<td>LSP Round Robin</td>
<td>New Mexico Legal Aid</td>
</tr>
<tr>
<td>11:30 a.m.</td>
<td>General Litigation and Common Mistakes Made</td>
<td>Presenter TBA</td>
</tr>
<tr>
<td>12:30 p.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
<td></td>
</tr>
<tr>
<td>1:15 p.m.</td>
<td>LSP Round Robin</td>
<td>Pegasus Legal Services for Children</td>
</tr>
<tr>
<td>3:25 p.m.</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>3:35 p.m.</td>
<td>LSP Round Robin</td>
<td>United South Broadway</td>
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### TRACK B

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Details</th>
</tr>
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<tbody>
<tr>
<td>8:50 a.m.</td>
<td>Using Technology to Better Manage Your Projects: Word, Excel, Meeting Wizard and Basecamp</td>
<td>Kathleen Brockel, Executive Director, Legal Services National Technology Assistance Project</td>
</tr>
<tr>
<td>10:50 a.m.</td>
<td>LSP Round Robin</td>
<td>Lawyer Referral for the Elderly and Bridge To Justice, New Mexico State Bar Foundation</td>
</tr>
<tr>
<td>11:00 a.m.</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>11:15 a.m.</td>
<td>LSP Round Robin</td>
<td>New Mexico Legal Aid</td>
</tr>
<tr>
<td>11:30 a.m.</td>
<td>Casemaker Research</td>
<td>Joe Conte, Executive Director, State Bar of New Mexico</td>
</tr>
<tr>
<td>12:30 p.m.</td>
<td>Lunch (provided at the State Bar Center)</td>
<td></td>
</tr>
<tr>
<td>1:15 p.m.</td>
<td>LSP Round Robin</td>
<td>Pegasus Legal Services for Children</td>
</tr>
<tr>
<td>1:25 p.m.</td>
<td>Training the Gatekeeper: Legal Issue Spotting for Intake and Referral Staff</td>
<td>David Godfrey, ABA Commission on Law and Aging</td>
</tr>
<tr>
<td>3:25 p.m.</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>3:35 p.m.</td>
<td>LSP Round Robin</td>
<td>United South Broadway</td>
</tr>
<tr>
<td>3:45 p.m.</td>
<td>2009 Professionalism: An Attorney’s Guide to Good Lawyering for People with Disabilities</td>
<td>(pre-taped session) (1.0 P)</td>
</tr>
<tr>
<td>4:45 p.m.</td>
<td>LSP Round Robin</td>
<td>Protection and Advocacy, SW Women's Law Center, and Native Disability Law Center</td>
</tr>
<tr>
<td>5:05 p.m.</td>
<td>Adjourn</td>
<td></td>
</tr>
</tbody>
</table>
21 Estate Planning for Retirement Benefits
Retirement assets such as IRAs, 401(k)s, annuities and defined benefit plans are the biggest asset class of most individuals. In dollar value, they are often larger than an individual’s personal residence and generally more liquid. Understanding these benefits, each with its own rules and logic, is an essential component to integrating them into a client’s larger estate plan. This program will discuss practical techniques for estate and trust planning with retirement benefits.
1.0 General CLE Credit $67

23 Asset-Backed Financing in a Tight Credit Environment
Borrowing against the value of assets is probably the most common form of business finance. Although common, the structure of the market, and thus basic borrowing terms, have changed substantially amid the economic turbulence and credit crunch. This program will extensively discuss the process and documentation of an asset-based finance deal in a new lending environment.
1.0 General CLE Credit $67

28-29 Buying and Selling Family Businesses, Parts 1 & 2
Family businesses dominate the American financial landscape. Many of the even the most successful and extensive businesses are either exclusively or predominantly family owned, and often operated, too, by the founding. Buying a family is unlike buying a business owned by third parties. There are a host of ownership and managerial issues that need to be discovered in diligence and untangled in the structure of the deal. In the same way, selling a family business often requires the owners to engage in a reorganization of the business in order to make it saleable to third parties. This program will discuss the unique issues and special challenges of buying and selling family businesses.
2.0 General CLE Credits $129

30 Fundamentals in Gift Taxation
Gift taxation is fundamentally different from the estate tax and income taxation. Gift taxes apply more broadly than widely believed and presents many traps for the unwary. This program will provide an introduction to fundamental principles and reporting requirements of gift taxation. The program will focus on how gift tax liability arises in many common planning and transactional contexts.
1.0 General CLE Credit $67

15 Ethics in Real Estate Practice
Among other topics, the program will focus on negotiations over price and terms, confidentiality and conflicts of interest.
1.0 Ethics CLE Credit $67

19 Series LLCs: New Developments
“Series” LLCs are a string of LLCs used to segregate and thus protect assets from claims against other assets. There have been a host of recent statutory and case law developments, including those affecting the rights of creditors. This program will review those developments and discuss planning opportunities and limitations with Series LLCs.
1.0 General CLE Credit $67

21 Successor Liability in Business Transactions
There are several theories of liability that tag buyers of assets with the liabilities of the seller’s business. This problem will become more frequent as buyers seek to acquire distressed assets from failing businesses. This program will examine the common law and statutory theories of liability and discuss planning techniques for indentifying and protecting against those liabilities.
1.0 General CLE Credit $67

22 Timesheets and Traps: Ethics in Billing and Collecting Fees
This program will review how several attorney ethics rules apply in the context of billing fees and collecting them from clients. The program will emphasize common ethical pitfalls of tracking and billing time and practical tips on how to foresee and avoid disputes with clients.
1.0 Ethics CLE Credit $67
26 Estate Planning in a Low Interest Rate Environment
With interest rates at historically low levels certain estate plans become more attractive and others less viable. This program will examine the practical uses and benefits of these plans in a low-interest rate environment.
1.0 General CLE Credit $67

28 Avoiding Fraudulent Transfers in Asset Protection Planning
One of the central challenges of asset protection planning is avoiding any civil or criminal claim of fraudulent transfers. This program will extensively discuss those transactions and transfers that are a legitimate part of asset protection planning and those that step over the line and are illegitimate.
1.0 General CLE Credit $67

JUNE
2-3 2009 Ethics Update, Parts 1 & 2
This two part annual ethics update will provide you a wide ranging review of developments affecting attorney ethics. Among other topics, the program will cover conflicts, waivers, the attorney client privilege, wireless and digital communications, multi-jurisdictional practice.
2.0 Ethics CLE Credits $129

4 LIVE REPLAY: Religious Accommodation in the Workplace
The First Amendment guarantees the free expression of religious faith. Accommodating that expression, which is required under federal statutory law, in an increasingly diverse workplace is a challenge for employers. This program will examine the mandates of law and discuss best practices for employers as they seek to satisfy the tandem challenges of religious accommodation and establishing a harmonious work environment.
1.0 General CLE Credit $67

5 LIVE REPLAY: Entity Conversions: LLCs, Corporations, and S Corps, From One Thing to Another
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From the New Mexico Supreme Court

Opinion Number: 2009-NMSC-008

Topic Index:
Contracts: Ambiguous Contracts; Forfeiture; and Interpretation
Domestic Relations: Marital Settlement Agreement
Property: Redemption of Property
Remedies: Equity

DIANA CORTEZ,
Petitioner-Petitioner,
versus
SERGIO RENE CORTEZ,
Respondent-Respondent.
No. 30,717 (filed: February 20, 2009)

ORIGINAL PROCEEDING ON CERTIORARI
JAMES T. MARTIN, District Judge

MARY W. ROSNER
ROSNER & CHAVEZ, L.L.C.
Las Cruces, New Mexico
for Petitioner

SHANE A. ENGLISH
ROSNER & CHAVEZ, L.L.C.
Anthony, New Mexico
for Respondent

OPINION
RICHTHARD C. BOSSON, JUSTICE

[1] Marital settlement agreements are contracts executed by divorcing spouses setting forth the present and future obligations of the parties. They are to be interpreted and enforced according to their terms, when clear, including even the extreme case of enforcing a forfeiture of one spouse’s property interest to the other. But when clarity is lacking or important terms are absent, and the parties have substantially complied with their obligations to each other, then equity must intervene to avoid a forfeiture when not to do so would be unfair. Our Court of Appeals having ruled differently, we reverse and uphold the ruling of the district court.

BACKGROUND
[2] Husband and Wife were married for fourteen years and had two children together before Wife filed for divorce. The divorce action proceeded over a nine-month period, and in that time Husband and Wife, aided by legal counsel, engaged in a series of negotiations regarding alimony, custody, assets, and debts. Before a final agreement had been reached, Wife obtained Husband’s consent to relocate with the children to Las Vegas, Nevada, on a trial basis.

[3] Almost immediately following the effective date of the divorce on September 5, 2006, Wife fell sixty days past due on the first mortgage. Husband elected to cure the delinquency by paying the entire past-due amount of $1,454.45. On November 28, 2006, Husband notified Wife that he intended to take over her entire interest in the property unless she exercised her right of redemption and reimbursed the delinquent amount to him within thirty days.

[4] On December 28, 2006, the final day of the redemption period, Wife mailed a check to Husband for the full past-due amount via overnight express mail from Las Vegas, Nevada. Delivery was first attempted on the following day, December 29, but the check was not actually received by Husband until January 4, 2007. The next day, Husband notified Wife that he rejected the redemption check because he had not received it within the thirty-day period. Thereafter, he claimed her interest in the marital residence as his own under the terms of the marital settlement agreement.

[5] Husband filed a motion in the district court to obtain complete title to the

[6] The forfeiture clause states in part that “if [Wife] becomes more than sixty (60) days delinquent on either or both of the mortgage obligations, then [Husband] may, but shall not be obligated to, cure all or part of the delinquency and in that event he shall have a lien on the property for all sums he elects to pay. If [Husband] elects to pay the entire amount of the mortgage delinquency, then he shall also have the right and option of assuming and succeeding to all of [Wife’s] right, title and interest in the property, and in that event [Wife] shall have the right to redeem the property from [Husband] by paying [Husband] all sums paid by him to cure the delinquency within thirty (30) days after he exercises the option to assume and succeed to [Wife’s] interest.”

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as to the absence of additional limiting language, any silence should be interpreted to avoid forfeiture.

Mailbox Rule

[9] As a general rule, a check must be both mailed and received to constitute payment. See, e.g., Werne v. Brown, 955 P.2d 1053, 1055 (Colo. Ct. App. 1998) (“Generally, payment by mail is not effective until receipt by the creditor . . . .”). However, the “mailbox rule” provides a limited exception and states that a check, properly addressed with postage prepaid, constitutes payment at the moment it is deposited into the mail, provided the parties either have a custom of payment by mail or have expressly authorized payment by mail. See 60 Am. Jur. 2d Payment §§ 11, 17 (2007) (“A debtor does not make a payment of a debt merely by placing a check in the mail, unless the obligee has expressly or by implication directed or consented that payment may be made in such manner.”). Other jurisdictions recognize instances where the act of mailing a check constitutes delivery of payment. See Werne, 955 P.2d at 1055 (holding that the timely mailing of a check before the expiration of a thirty-day period cured a default); Wiers v. White, 196 So. 206, 209 (Fla. 1940) (“It has been held in well-reasoned cases that by depositing a note in the mail with the intent that it should be transmitted to the payee or assignee in the usual way, the maker or assignor parts with his control and over it, and it and the delivery is in legal contemplation complete.”); Neuman v. Ferris, 432 So. 2d 641, 643 (Fla. Dist. Ct. App. 1983) (finding that the mailing of a check on the final day of a grace period constituted delivery upon deposit); Finn v. Nat’l City Bank, 36 N.Y.S.2d 545, 546 (City Ct. 1942) (mailing of check by bank constitutes delivery to prevent attachment of debt): see also Bingo v. Comm’r of Internal Revenue, 61 T.C.M. (CCH) 2782 (1991) (“The mailing of properly addressed checks may constitute delivery to the addressees.”).

[10] The mailbox rule in this form has never been expressly adopted in New Mexico. Our courts have adopted the common law “mailbox rule,” which provides an evidentiary presumption that items properly mailed will be received by the recipient in ordinary course. See Schneider Nat’l, Inc. v. State ex rel. Taxation & Revenue Dep’t, 2006-NMCA-128, ¶ 13, 140 N.M. 561, 144 P.3d 120. This evidentiary rule differs from the “mailbox rule” used in matters of contract construction, as set forth above, and therefore does not apply to the present dispute. Nevertheless, our Court of Appeals was compelled to evaluate the forfeiture clause in light of the mailbox rule because of the lower court’s decision. Applying the rule, the Court determined that Wife’s check could constitute payment at the time of mailing, only if (1) the marital settlement agreement expressly authorized payment by mail, or (2) the parties had established a pattern of mailing payments. Cortez, 2007-NMCA-154, ¶ 9. The Court found no basis for either exception.

Id. [11] We acknowledge there are situations where the mailbox rule might apply to render a payment timely on the date of mailing. However, we agree that neither exception applies in this case. The contract was silent with regard to mailing, and the parties had no established pattern of mailing as this was the first time a payment had been attempted under the forfeiture clause. Therefore, we are not comfortable relying on the mailbox rule in this particular instance.

[12] This does not end our inquiry however. We turn to our well-established principle that an appellate court “will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant.” Maralex Res. Inc. v. Gilbreath, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626 (internal quotation marks and citation omitted). “Unless clearly erroneous or deficient, findings of the trial court will be construed so as to uphold a judgment rather than to reverse it.” Herrera v. Roman Catholic Church, 112 N.M. 717, 721, 819 P.2d 264, 268 (Ct. App. 1991). We look to the facts of this case and the arguments raised by the parties to determine whether we can affirm the district court on an alternative legal basis which would not be unfair or unjust to the parties.

Equity, Forfeiture, and Contract Law Governing Omitted Terms

[13] Wife argues that equity should serve to prevent a forfeiture in this case. The Court of Appeals correctly noted that forfeitures are not favored in equity. Cortez, 2007-NMCA-154, ¶ 12. However, the Court indicated that the marital settlement agreement must contain an ambiguity before equity may assist Wife. Id. In this case, without overtly addressing the issue of ambiguity, both parties recognize that their marital settlement agreement is a contract and have offered competing and conflicting interpretations of the term “paying” in the forfeiture clause. See Herrera v. Herrera, 1999-NMCA-034, ¶ 9, 126 N.M. 705, 974 P.2d 675 (holding that marital settlement agreements are contracts, subject to contract law). Although the plain language of the contract unambiguously states what must be paid, it fails to specify whether “paying” can be accomplished by depositing a check into the mail within the thirty-day period (as Wife proposes), or whether “paying” should be construed strictly to require actual delivery of the check within thirty days (as Husband proposes). We are asked to determine which interpretation controls under the circumstances.

[14] When faced with competing interpretations of a contractual term, our equity jurisprudence directs us that “‘the construction which avoids forfeiture must be made if it is at all possible.’” Davies v.
condition which involves forfeiture must
at 90, 385 P.2d at 953 (Moise, J., specially
enforce the forfeiture.

contractual language narrowly and construe
all inferences against the party seeking to
interpret the forfeiture clause in a contract, courts interpret the
clause in this case, we look to the express
language of the contract for the condition
that triggers forfeiture; we also look to the
parties' intent and the circumstances sur-
rounding the transaction. See Thomas, 112
N.M. at 461, 816 P.2d at 530.

Although the contractual language
itself is significant, we begin our analysis by examining the nature of the parties' bargain
as a means to provide context for their
language. The forfeiture clause is part of the
larger bargain incorporated in the marital
settlement agreement. A significant part of
the bargain occurred early in the divorce
proceedings, when Wife offered to waive
her right to present and future alimony in
exchange for a clear title to the marital
residence. Husband agreed and surrendered
his interest in the property. The marital
residence represents the major portion of
Wife's share of the marital assets.

As part of this arrangement, the marital settlement agreement states that
"the intention of the parties and a material
part of their settlement agreement [is] that
[Husband] be released from the mortgage
loan obligation [on the marital residence]
within two (2) years." However, until Wife
could have Husband released, he remained
liable on the mortgage loan and his credit
remained vulnerable. Accordingly, the par-
ties, through the forfeiture clause, created a
mechanism to induce timely payments by
Wife on the first mortgage. In addition, the
forfeiture clause allowed Husband to cure
any delinquent payments in exchange for a
security interest in the property equal to the
amount of his payment, thereby, one would
reasonably infer, protecting Husband's
credit. Once Wife removed Husband from
the first mortgage, the forfeiture clause
would become a nullity.

Under the circumstances, the
forfeiture clause acts as a penalty provision
in the event Husband was prejudiced by
Wife's delinquency on the first mortgage.
In such instances, rather than require strict
compliance, courts have held that if the de-
defaulting party substantially performed with
reasonable diligence and in good faith, and
"the other party has suffered no damage by
the delay, and particularly if the property
has not materially enhanced in value during
the time of the delay, a Court of Equity will
not enforce the forfeiture." Steele v. Branch,
40 Cal. 3, 11 (1870). We took a similar
view when applying equitable principles
to the forfeiture of a real estate contract.
Yu v. Paperchase P'ship, 114 N.M. 635,
contractual rights should not be surrendered
or forfeitures suffered by a slight delay in
performance unless such intention clearly
appears from the contract or where specific
enforcement [upon the seller] will work
injustice after a delayed tender." (internal
quotation marks and citation omitted)).

Nevertheless, if the contractual
language is clear and unequivocal, we will
enforce a forfeiture, even where the terms
result in a hard bargain. United Props. Ltd.
v. Walgreen Props., Inc., 2003-NMCA-140,
¶¶ 10, 12, 134 N.M. 725, 82 P.3d 535.
Therefore, we turn to a textual analysis of
the forfeiture clause.

As an initial matter, although both
parties have offered equally plausible
interpretations, we observe that the for-
feiture clause does not expressly require
actual receipt of payment by the thirtieth
day, nor does it prohibit payment by mail.
Therefore, to construe the forfeiture clause
as Husband suggests, we would have to
read language into the contract that is not
there. In this case, the absence of additional,
clarifying language is significant, particu-
larly when compared to other provisions in
the marital settlement agreement.

Elsewhere in the contract, the par-
ties chose to include more specific payment
terms regarding Husband's child support
obligations. The child support clause re-
quires Husband or his employer to mail
the monthly obligation and mandates that
"payments" are "due and payable on or be-
fore the first (1st) day of each month." The
language chosen by the parties in the child
support clause illustrates that they under-
stood how to designate that payment must
be actually received by a stipulated date.
See Werne, 955 P.2d at 1055 ("Certainly,
that party can avoid such consequences by
clearly specifying that, even if use of
the mail is permissible, only the actual
receipt of payment will be effective.").

Accordingly, the absence of similarly
explicit language in the forfeiture clause
indicates either that actual receipt was not
required, or at the very least that it was not
contemplated by the parties at the time of
formation.

These parties had the necessary
resources to aid them in understanding
subtle differences in language and the con-
sequences of lack of clarity. Both Husband
and Wife were represented by able counsel
experienced in family law, and the marital
settlement agreement appears to have been
negotiated at arms' length. If Husband had
wanted to specify the method of tender, he
could have done so. If Husband had insisted
upon actual receipt of payment within the
designated redemption period, he was free
to negotiate for it. But he did not do so.
Smith v. Price's Creameries, 98 N.M. 541,
the parties are otherwise competent and
free to make a choice as to the provisions
of their contract, it is fundamental that the
terms of contract made by the parties must
govern their rights and duties.").

We also consider the parties' intent,
and we agree with Wife that mailing must
have been contemplated by the parties
because, when they finalized the marital
settlement agreement, Husband knew of
Wife's relocation to Nevada and the result-
ing distance between them. That distance
is a significant factor in interpreting this
contract because, if not for Wife's reloca-
tion from Santa Teresa where both parties
lived, the parties would have had no reason
to anticipate the need for mailing the
payment, and could therefore have reasonably
expected actual delivery by the end of the
thirtieth day. However, the element of dis-
tance alters what is reasonable under the
circumstances, and language which, at first
blush, does not appear overtly ambiguous
now raises a question of interpretation.

Wife alleged that she had found a buyer for the marital residence and closing was scheduled for January 30, 2007. However, Wife claimed that Husband declined to sign a special warranty deed, which clouded the title, and the sale could not be completed.
Because the parties could have specified how payment should be handled in light of the physical distance between them, but failed to do so, we are left with an element of uncertainty as to what was required to achieve a timely redemption under these circumstances. Accordingly, we look to our equity jurisprudence for guidance.

{23} Our courts have previously applied equitable principles to interpret silence in contracts. See Martinez v. Martinez, 101 N.M. 88, 91-93, 678 P.2d 1163, 1167-68 (1984); cf. Stamm v. Buchanan, 55 N.M. 127, 135, 227 P.2d 633, 638 (1951); Thomas, 112 N.M. at 461, 816 P.2d at 530. In Martinez, where the parties’ real estate contract failed to provide for either notice or time to cure in the event of default, we construed the contract’s silence to avoid forfeiture and held that the purchaser was entitled to both notice and a reasonable time to cure the default before the forfeiture would be enforced. 101 N.M. at 92-93, 678 P.2d at 1167-68.

{24} Similarly, in Stamm, the parties’ commercial lease failed to address whether a forfeiture provision could be enforced based on the actions of an original tenant, after that tenant had validly assigned the lease to a third party. 55 N.M. at 128, 227 P.2d at 634. We concluded that it would “violate fundamental equitable principles” to permit a forfeiture under such circumstances and construed the forfeiture clause as applying only to the tenant in possession after the assignment. Id. at 135, 227 P.2d at 638; see also Thomas, 112 N.M. at 460-61, 816 P.2d at 529-30 (denying partial reversion under equitable preference for avoiding forfeitures because the deed did not contain explicit language permitting divisibility or partial forfeiture).

{25} These cases indicate that contractual silence is problematic when forfeitures are sought because the contracts necessarily lack the specificity required to be confident that a forfeiture is enforceable. As we stated in Stamm, “where a provision so full of financial hazard and danger . . . is intended, it must rest on language so plain and unmistakable that the courts are left no alternative but to enforce it according to the letter.” 55 N.M. at 135, 227 P.2d at 638. Indeed, our evolving equity jurisprudence demonstrates an appreciation for a more modern view that “[a] forfeiture declaration is essentially an equitable remedy” that must take into consideration both the clarity of the contractual language and fundamental principles of fairness. Yu, 114 N.M. at 643, 845 P.2d at 166.

{26} Applying these principles to the present case, we conclude that this contract does not exhibit the clarity of language typically required before a forfeiture will be upheld. See Bishop v. Beecher, 67 N.M. 339, 343, 355 P.2d 277, 279-80 (1960) (enforcing forfeiture under clear language of real estate contract). We continue to recognize that forfeiture provisions are enforceable “absent unfairness which shocks the conscience of the court.” Martinez v. Logsdon, 104 N.M. 479, 482, 723 P.2d 248, 251 (1986) (internal quotation marks and citation omitted) (refusing to apply forfeiture clause against subpurchasers without notice because a forfeiture under these circumstances would “shock the conscience”); cf. Bishop, 67 N.M. at 343, 355 P.2d at 280 (stating that forfeiture provisions in real estate contracts will be enforced if they are clear, “absent unfairness which shocks the conscience of the court”); United Props. Ltd., 2003-NMCA-140, ¶¶ 31-32 (denying equitable relief where renewal provision in a commercial lease was clear and unambiguous, and where lessee did not allege that lease was unconscionable). In such cases, we indicated that contractual agreements contemplating forfeitures must be clear and unequivocal before a forfeiture would be enforced. That is not the case here.

{27} Had the parties used clear language in the forfeiture clause and specified their preference for actual receipt, we would have no choice but to enforce the bargain they created. Without such language, we rely on the principle adopted by Justice Moise in Davies, 73 N.M. at 90, 385 P.2d at 953, and choose that construction which avoids a forfeiture. Accordingly, we hold that mailing a check on the thirtieth day, after that tenant had validly assigned the lease to a third party, 55 N.M. at 128, 227 P.2d at 634. Further, using the date plaintiff actually receives the check . . . will require defendant[s] to estimate the number of days it will take for the check to reach the plaintiff after mailing it to assure plaintiff receives the check within the . . . time period. By taking this estimation into consideration, defendant’s [sic] period of time to make payment is shortened. . . . Further, using the date plaintiff receives the check to determine when payment is made may cause confusion and create an opportunity for self-interest especially since defendant[s] do[] not have control over when plaintiff receives the check.

Id. at 63 (alterations in original).

{28} The facts in this case, where the check was mailed on the thirtieth day, delivery was first attempted on the thirty-first day, but Husband did not accept delivery of the check for an additional six days, exemplify these concerns. In light of these considerations, we will not place upon Wife the entire risk of unavoidable delay absent unequivocal language. We think it more reasonable to divide the risk between the
parties such that mailing at any time within the thirty day redemption period constitutes a timely payment in this case.

Statutory Redemption

[31] In support of Husband’s position that the redemption period should be strictly construed in his favor, Husband cites, by way of analogy, to a number of cases addressing statutory redemption under our mortgage foreclosure law. However, for the reasons that follow, we are not persuaded that our mortgage foreclosure jurisprudence is helpful to this dispute.

[32] In the mortgage context, statutory redemption is a narrow right that affords a debtor, having already lost in formal judicial proceedings, one last opportunity to reclaim his property. NMSA 1978, § 39-5-18 (1957, as amended through 2007). It is a form of legislative grace. Under these circumstances, New Mexico courts routinely require debtors to comply strictly with the terms set forth by statute as a condition to redemption. See Brown v. Trujillo, 2004-NMCA-040, 135 N.M. 365, 88 P.3d 881 (holding that debtors, by placing funds in an escrow account, did not meet the statutory requirements for redemption because they neither deposited funds with the district court nor placed cash in the hand of the purchaser); Dalton v. Franken Const. Cos., 1996-NMCA-041, 121 N.M. 539, 914 P.2d 1036 (holding that an unendorsed cashier’s check tendered to the district court on the last day of the redemption period was not a timely redemption because the funds were not transferred into the court account and actually available until after the redemption period had expired).

[33] Although we strictly enforce statutory redemption periods, in our view New Mexico’s mortgage foreclosure statutes offer a poor analogy to the present case. First, this is not a standard commercial transaction that might compel a strict interpretation of the redemption period. Importantly, Husband did not loan money to Wife to purchase the property based on the value of the property, the two hallmarks of commercial lending governed by our mortgage foreclosure laws. Instead, Husband made two payments totaling a mere $1,454.55 on an existing mortgage debt, essentially making a temporary loan in that amount. Moreover, unlike mortgage foreclosure statutes, Wife did not have the benefit of prior judicial proceedings, either on this debt or the forfeiture. Thus, the policy and contextual considerations that animate our case law in regard to mortgage foreclosures simply do not exist, or if they are present at all, it is to a much lesser degree. We reject Husband’s reliance upon this body of case law.

CONCLUSION

[34] We reverse the Court of Appeals and affirm the district court for the reasons stated in this Opinion.

[35] IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMÉNEZ MAES, Justice
CHARLES W. DANIELS, Justice
OPINION

PETRA JIMENEZ MAES, JUSTICE

{1} Defendant, Charlie Trujillo, appealed the denial of his claim for a homestead exemption in a foreclosure action. Plaintiff, Tasheena Grygorwicz, initiated the foreclosure action in partial satisfaction of a civil judgment she received for personal injuries resulting from sexual abuse. See Grygorwicz v. Trujillo, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550, cert. denied, 2006-NMCERT-007, 140 N.M. 280, 142 P.3d 361. The Court of Appeals held that Defendant had waived his right to the homestead exemption because he had failed to appeal within thirty days from the district court’s decree of foreclosure. Grygorwicz v. Trujillo, 2008-NMCA-040, ¶ 20, 143 N.M. 704, 181 P.3d 696. We hold that Defendant’s appeal was timely under Rule 12-201(D) NMRA because Defendant’s motion for claim of exemptions on execution, filed subsequent to the final foreclosure decree, tolled the time for filing a notice of appeal, and Defendant properly appealed within thirty days of the express denial of that motion. We further hold that there is no basis in the record to support the district court’s denial of Defendant’s homestead exemption and, therefore, remand this case to the district court with instruction to grant Defendant’s claim for a homestead exemption.

FACTS

{2} Following a bench trial, the district court found in Plaintiff’s favor on her sexual abuse claim and awarded her $1.3 million in damages. See Grygorwicz, 2008-NMCA-040, ¶ 2. On August 7, 2006, Plaintiff filed a motion to foreclose on Defendant’s home in partial satisfaction of the judgment debt. Id. ¶ 3. In response, Defendant asserted his right to a homestead exemption under NMSA 1978, Section 39-4-15 (1933) and NMSA 1978, Section 42-10-9 (1993, prior to the 2007 amendment).

{3} The district court’s foreclosure decree, entered on November 30, 2006, granted Plaintiff the property to either keep or sell in partial satisfaction of the judgment debt. Grygorwicz, 2008-NMCA-040, ¶ 3. To protect the property from neglect or wear during the pendency of the foreclosure, the district court also issued a writ of assistance to put Plaintiff in possession of the property immediately. Id. ¶¶ 3-4. The decree of foreclosure omitted an allowance for Defendant’s homestead exemption. Id. ¶ 4.

{4} The Taos County Sheriff executed the writ of assistance by locking Defendant and his wife out of the house and putting Plaintiff in possession of the property. Id. On December 4, 2006, Defendant filed a claim of exemptions on execution in the district court pursuant to Rule 1-065.1 NMRA. Id. Defendant claimed that both he and his wife were entitled to homestead exemptions. Id. Plaintiff argued that Defendant could not claim a homestead exemption under Rule 1-065.1, which applies to writs of execution, when the property had been seized under a writ of assistance. Id. The district court agreed and entered an order dismissing Defendant’s claim of exemptions on execution with prejudice on January 9, 2007. Id. Defendant filed a notice of appeal on January 19, 2007. Id.

{5} The Court of Appeals affirmed the district court’s order of dismissal. Id. ¶ 20. The Court noted that Defendant properly had raised his homestead exemption in response to Plaintiff’s motion for foreclosure, as required by Section 39-4-15. Id. ¶ 6. The Court further concluded that the district court’s November 30 foreclosure decree was a final appealable judgment, however, and that Defendant’s failure to appeal from this judgment within thirty days, as prescribed by Rule 12-201(A)(2), constituted a waiver of his right to contest the district court’s denial of the homestead exemption. Id. ¶ 15.

{6} Defendant argued that his subsequent claim for exemptions on execution under Rule 1-065.1 preserved his right to a homestead exemption. The Court of Appeals rejected this argument, noting that Rule 1-065.1 is applicable only to writs of execution, not writs of assistance. Grygorwicz, 2008-NMCA-040, ¶ 16. The Court concluded that the district court properly denied Defendant’s request for a homestead exemption under Rule 1-065.1 because “foreclosure, not execution, was the operative procedure, and Defendant did not timely appeal from the district court’s foreclosure decree.” Id.

1 The Court of Appeals did not consider whether the district court properly had denied Mrs. Trujillo’s request for a homestead exemption, noting that “Mrs. Trujillo has not sought to assert any claim in this appeal” and, therefore, her “rights are not before us.” Grygorwicz, 2008-NMCA-040, ¶ 19. Neither Defendant nor Mrs. Trujillo petitioned for certiorari to review the Court’s resolution of Mrs. Trujillo’s rights and, therefore, the issue is not before this Court.
DISCUSSION

{7} The issue before us is whether the Court of Appeals erred by holding that Defendant had “waived his homestead exemption claim by failing to pursue an appeal of the foreclosure decree within the time frame required by Rule 12-201(A)(2) NMRA.” Id. ¶ 1. The New Mexico Constitution, Article VI, Section 2, mandates that “an aggrieved party shall have an absolute right to one appeal.” We have held that this constitutional provision “evidences the strong policy in this state that courts should facilitate, rather than hinder, the right to one appeal.” Govich v. N. Am. Sys., Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Determining whether Defendant’s appeal was timely involves the interpretation of court rules, which we review de novo. See Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co., 2007-NMSC-051, ¶ 6, 142 N.M. 527, 168 P.3d 99.

{8} We have held that the district court’s decree of foreclosure is both final and interlocutory in its operation. The decree serves two functions: first, it determines the rights of the parties in the property; and, second, it fixes the manner and terms of the foreclosure sale. Speckner v. Riebold, 86 N.M. 275, 277, 523 P.2d 10, 12 (1974). Whereas, the court’s judgment with respect to the manner and terms of sale is interlocutory, the declaration of the parties’ rights may be construed as a final judgment unless modified under the provisions of NMSA 1978, Section 39-1-1 (1917). Speckner, 86 N.M. at 277, 523 P.2d at 12 (discussing Section 21-9-1 in the 1953 statutory compilation, recompiled as NMSA 1978, Section 39-1-1). Similarly, Rule 12-201(D) provides that if a party makes a post-judgment motion directed at the final judgment pursuant to Section 39-1-1, the time for filing an appeal does not begin to run until the district court enters an express disposition on that motion. See Albuquerque Redi-Mix, Inc., 2007-NMSC-051, ¶ 15 (holding that our rules eliminated Section 39-1-1’s automatic denial provision). Therefore, when a party makes a motion challenging the district court’s determination of the rights of the parties contained in the foreclosure decree, the decree is not final, and the time for filing an appeal does not begin to run until the district court disposes of the motion.

{9} Defendant properly asserted his homestead exemption in his answer to the foreclosure action. Section 39-4-15 (“The defendant, if he desires to claim such real estate or any part thereof as an exemption allowed by law, shall set up his claim of exemption by answer in such foreclosure suit.”). We view Defendant’s claim of exemptions on execution as Defendant’s best attempt to challenge the denial of his homestead exemption in the foreclosure decree. This attempt was imperfect as it was presented as a claim of exemptions on execution, rather than as a post-judgment motion challenging the foreclosure decree. However, Section 39-1-1 retained jurisdiction in the court to hear and dispose of any motions challenging the court’s determination on the rights of the parties in the decree. Defendant’s continued and prompt assertion of his claim for homestead exemption shows an intention to challenge the foreclosure decree in which the court excluded Defendant’s homestead claim. Accordingly, we construe Defendant’s claim of exemptions on execution as a motion challenging the foreclosure decree pursuant to Section 39-1-1. Because Defendant filed his notice of appeal within ten days of the district court’s denial of his motion, Defendant’s appeal was timely. See Rule 12-201(D).

The District Court Erred by Denying Defendant’s Claim for Homestead Exemption

{10} Having determined that Defendant’s appeal was timely, we next address the district court’s denial of Defendant’s claimed exemption, which the Court of Appeals did not reach.

{11} The homestead exemption, Section 42-10-9 provides:

“Each person shall have exempt a homestead in a dwelling house and land occupied by him or in a dwelling house occupied by him although the dwelling is on land owned by another, provided that the dwelling is owned, leased or being purchased by the person claiming the exemption. Such a person has a homestead of thirty thousand dollars ($30,000) exempt from attachment, execution or foreclosure by a judgment creditor and from any proceeding of receivers or trustees in insolvency proceedings and from executors or administrators in probate. If the homestead is owned jointly by two persons, each joint owner is entitled to an exemption of thirty thousand dollars ($30,000).”

We have held that the legislative purposes of the exemption is to benefit the debtor and to “prevent families from becoming destitute as the result of misfortune through common debts which generally are unforeseen.” Coppler & Mannick, P.C. v. Wakeland, 2005-NMSC-022, ¶ 9, 138 N.M. 108, 117 P.3d 914 (internal quotation marks and citation omitted). The statute provides a homestead exemption as a matter of right and a court may not frustrate this purpose by denying a properly asserted exemption for a qualifying homestead.

{12} In the present case, the district court’s denial of Defendant’s requested homestead exemption is unsupported by the record. Plaintiff argued to the district court that the homestead exemption should be denied due to the punitive nature of the underlying judgment. However, we have held that a court may not deny the exemption on the basis of tortious or malicious conduct. Id. ¶ 12 (holding that courts may only impose an equitable lien against the homestead exemption under limited circumstances where malicious, fraudulent, or intentional tortious conduct involves the homestead itself). Though an allegation of waste may affect a debtor’s right to a homestead exemption, id. (“[T]he judgment in the waste action . . . is not the type of debt the Legislature intended to shield.”), the district court issued a writ of assistance putting Plaintiff in immediate possession of the property in order to prevent the possibility of waste. The court’s issuance of the writ prior to any allegation of waste, and Plaintiff’s failure to raise any such allegation, precludes any argument on appeal that could challenge Defendant’s homestead exemption. Defendant properly asserted his claim in answer to the foreclosure action, and there is no basis in the record on which the district court could have properly denied Defendant’s assertion of his homestead exemption. Therefore, we hold that Defendant is entitled to the homestead exemption.

CONCLUSION

{13} Defendant’s appeal from the decree of foreclosure was timely. On the merits of the appeal, we hold that the district court erred by denying Defendant’s right to a homestead exemption. Therefore, we remand this case to the district court with instruction to grant Defendant’s request for a homestead exemption.

{14} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. Serna, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice
OPINION

MICHAEL E. VIGIL, JUDGE

[1] The State entered into a plea and disposition agreement with Defendant and agreed not to bring habitual offender proceedings “if and only if” Defendant completed at least one year of inpatient alcohol treatment and successfully completed probation without a violation. Defendant violated his probation one month after beginning to serve his probation, and he admitted to the violation. The State did not bring habitual offender proceedings based on the violation, and the district court gave Defendant a second chance at probation. The State subsequently filed a motion to revoke probation, asserting that Defendant violated his probation a second time. The State also initiated habitual offender proceedings because Defendant had already admitted to the first probation violation, and it occurred within one year of the plea and disposition agreement. Without a finding that Defendant committed a second probation violation, the district court held a trial on the State’s supplemental habitual offender information and enhanced Defendant’s original sentence. Defendant appeals. We affirm.

BACKGROUND

[2] In June 2004, a four-count information charged Defendant with the felony offenses of burglary, attempted burglary of a dwelling house, battery upon a peace officer, and possession of burglary tools. The case was resolved when Defendant entered into a plea and disposition agreement with the State, which the district court approved in July 2004. Defendant agreed to plead guilty to battery upon a peace officer, and the State agreed to dismiss the remaining three charges and not bring habitual offender proceedings for the three prior convictions “IF AND ONLY IF [Defendant] completes at least one year of inpatient alcohol treatment, and successfully completes probation without violation.” Defendant signed the plea and disposition agreement acknowledging that he read and understood its terms.

[3] In its July 2004 judgment and suspended sentence, the district court adjudged Defendant guilty of battery upon a peace officer, sentenced Defendant to the Department of Corrections for eighteen months, and suspended execution of the sentence subject to standard and special supervised conditions of probation. Pertinent to this case, one of the special conditions of probation was that “[D]efendant shall enroll in, enter and successfully complete an inpatient alcohol and/or drug treatment facility of at least twelve months’ duration, immediately upon his release from jail following the plea and sentencing in this matter. Defendant shall abide by all rules and regulations of said program as a condition of his probation.” Defendant also signed the order of probation dated July 14, 2004, and placed his initials beside each condition, stating that he read and understood the terms of the probation order and agreed to abide by its terms. Defendant specifically acknowledged that as a special condition of his probation, “I will enter, participate, and complete the Opportunity House, inpatient program located at Hobbs, NM for a period of at least twelve (12) [months] in duration, immediately upon my release from jail following the plea and sentencing in this matter. I [shall] abide by all rules and regulations of said program as a condition of my probation.”

[4] Defendant violated his probation the following month. The State filed a motion to revoke probation alleging that Defendant violated the aforementioned special condition, “in that on or about August 12, 2004, [Defendant] was terminated from [the Opportunity House P]rogram for program violations.” In October 2004, the district court held a hearing, and after consulting with his attorney, Defendant admitted in a probation violation agreement that he violated his probation as alleged. At the hearing, the district court first determined that Defendant was aware of his constitutional rights and agreed to waive them and then determined that Defendant knowingly, voluntarily, and intelligently agreed to admit that he violated his probation. The district court then formally accepted Defendant’s admission that he violated his probation.

[5] In its October 2004 order, the district court revoked Defendant’s probation. However, instead of ordering Defendant to serve the balance of his sentence in prison, the district court reinstated Defendant’s original eighteen-month suspended sentence. Probation was reinstated for eighteen months, commencing on the date that the July 2004 judgment and suspended sentence was imposed, with the requirement that Defendant “abide by all conditions imposed herein,” with credit for the time already served on probation. The district court wanted Defendant to have another
opportunity to receive counseling and treatment. Again, a special condition of probation in this order was that “Defendant shall enter and successfully complete an in-patient alcohol/substance abuse program (of at least one year duration–currently planned as Recovery House or Sept House), immediately upon acceptance into the program and a bed being found for [Defendant].”

On January 6, 2005, the State filed a second motion to revoke probation, alleging that in November 2004, Defendant had violated four different conditions of his probation in that he was discharged from the Recovery House in Albuquerque for noncompliance with the program rules or directives; that he failed to comply with his Albuquerque probation officer’s order to report to his Raton probation officer; that his whereabouts were unknown to probation authorities; and that he tested positive through urinalysis for marijuana and cocaine, and he admitted to using controlled substances.

Contemporaneous with the motion to revoke probation, the State also filed a supplemental information on January 6, 2005, alleging that Defendant was previously convicted of three other felonies, and that his sentence for the battery on a peace officer conviction should be enhanced pursuant to the Habitual Offender Act. See NMSA 1978, § 31-18-17(C) (2003) (providing that the basic sentence of a person convicted of a noncapital felony who has incurred three or more prior felony convictions shall be increased by eight years, which shall not be suspended or deferred).

Trial on the merits of the habitual offender supplemental information was scheduled prior to the hearing on the outstanding motion to revoke probation.

Trial on the habitual offender supplemental information commenced on April 5, 2005. Defendant objected to having the habitual offender trial before the hearing on the second probation revocation. Defendant argued that because he was reinstated to probation at the first revocation hearing without a habitual offender supplemental information being filed by the State at that time, the State waived its right to initiate habitual offender proceedings based on the first probation violation. The State argued that it could proceed on the supplemental information based on Defendant’s first probation violation, even though the second probation revocation hearing was not scheduled.

The district court agreed with the State. The district court stated, “I think even though the State did file a second motion to revoke probation, the first probation violation admission triggered the language of the original plea and disposition agreement. And so the State can proceed with its supplemental information.” After hearing the State’s evidence on Defendant’s prior offenses, the district court found that Defendant had two prior felonies. The district court subsequently filed a judgment, sentence and commitment on April 20, 2005, in which Defendant’s original sentence was enhanced by four years, to be served concurrently with the original sentence of eighteen months in the Department of Corrections. See Section 31-18-17(B) (providing that the basic sentence of a person convicted of a noncapital felony who has incurred two prior felony convictions shall be increased by four years, which shall not be suspended or deferred). The scheduled hearing on the outstanding motion to revoke probation was never held.

No direct appeal was filed, but Defendant was subsequently allowed to pursue an appeal to this Court in 2007, after receiving habeas corpus relief based on the failure of trial counsel to file a direct appeal.

**DISCUSSION**

**I. Habitual Offender Enhancement**

Defendant claims that the district court denied him due process by enhancing his sentence based on his admission that he violated his probation in the October 2004 probation violation agreement. The general rule is that a prosecutor may seek habitual felony offender enhancement at any time following conviction and prior to the expiration of the period of incarceration and any parole or probation that follows that period. See State v. Freed, 1996-NMCA-044, ¶ 8, 121 N.M. 569, 915 P.2d 325. This discretion to seek habitual offender enhancement rests with the prosecutor and is not restricted even where the prosecutor knows of prior felonies but chooses to delay seeking the enhancement. Id.

The issue before us is whether the prosecutor was otherwise restricted from exercising her discretion to file the habitual offender supplemental information in April 2005. Defendant makes three alternative arguments to support such a restriction. First, Defendant argues that the State failed to prove that Defendant willfully violated the terms of the initial probation agreement. We construe his argument as a contention that the October 2004 probation violation agreement was invalid, with the result that the restriction in the original plea agreement on any habitual offender enhancement remained intact. Second, Defendant argues that, even if the probation violation agreement was valid, it should be interpreted to prohibit the State from filing the supplemental information. Finally, Defendant claims that, even if the terms of the agreement permitted the State to file the supplemental information, the State’s delay in doing so amounted to a waiver of this right. We discuss each of these arguments in turn.

**A. Enforceability of the Probation Violation Agreement**

As we interpret his argument, Defendant contends that the October 2004 probation violation agreement was invalid and therefore, could not be used to trigger the language in the original July 2004 plea agreement that would authorize the filing of the habitual offender supplemental information. The October 2004 probation violation agreement contains no express limitation on the State’s authority to bring the habitual offender charges. Defendant’s arguments are based on his interpretation of comments made at the revocation hearing. Defendant maintains that his strategy at the revocation hearing was to admit to a technical violation of probation, but not one that would be sufficient, in and of itself, to support a determination that a violation had occurred. Defendant characterizes the district court’s acceptance of his admission at the beginning of the revocation hearing as a “conditional acceptance,” subject to reconsideration, and he claims that the court ultimately agreed with the argument he now makes on appeal that there was an insufficient showing of willfulness or that the violation was otherwise insufficient to support revocation.

The State responds to Defendant’s arguments by correctly observing that Defendant has never previously sought to set aside the October 2004 probation violation agreement. As such, the State argues that Defendant has failed to preserve the issue. See State v. Hodge, 118 N.M. 410, 414, 882 P.2d 1, 5 (1994) (observing that “a plea of guilty or nolo contedere, when voluntarily made after advice of counsel and with full understanding of the consequences, waives objections to prior defects in the proceedings and also operates as a waiver of statutory or constitutional rights, including the right to appeal”). Not only did Defendant fail to attack the October 2004 probation violation agreement prior to the hearing on the habitual offender supplemental information, but even at that hearing, defense
counsel conceded to the district court that Defendant had admitted to the probation violation; defense counsel’s sole argument was that the State had waived by inaction its right to seek the enhancement.

{15} Notwithstanding Defendant’s failure to preserve the alleged invalidity of the probation violation, we disagree with his characterization of those proceedings. At the probation revocation hearing the court asked Defendant whether he was willing to make an admission, to which Defendant answered: “I admit that I–I didn’t complete the program, that’s why I got thrown out. So I’m admitting, yes, today, that I didn’t complete the Opportunity House, the program.” In response to the district court, Defendant also stated that he was knowingly waiving applicable constitutional protections and rights.

{16} For her part, defense counsel stated that Defendant was willing to admit to the violation, and she agreed with the court that the only issue concerned sentencing. Defendant claims that this merely amounts to argument of counsel. See State v. Cochran, 112 N.M. 190, 192, 812 P.2d 1338, 1340 (Ct. App. 1991) (“Argument of counsel is not evidence.”). However, this claim overlooks Defendant’s own statement to the court that he was admitting to the State’s allegation that he was terminated from the Opportunity House program.

{17} Defendant’s primary contention is that there was no showing that his conduct to support the violation was willful. See State v. Martinez, 108 N.M. 604, 606-07, 775 P.2d 1321, 1323-24 (Ct. App. 1989) (explaining that probation should not be revoked where the violation is not willful, in that it resulted from factors beyond a probationer’s control). As we have already stated, the record supports the conclusion that Defendant knowingly and voluntarily admitted to the probation violation, and we are not inclined to address any additional alleged defect because Defendant never reserved the right to make this challenge by entering a conditional plea. See Hodge, 118 N.M. at 415-17, 882 P.2d at 6-8. This is not a situation where evidence used to support a plea compels us to set aside the plea agreement notwithstanding our limited review. See State v. Nash, 2007-NMCA-141, ¶¶ 10-19, 142 N.M. 754, 170 P.3d 533 (permitting successful collateral attack of a prior plea-based conviction where there was clear and convincing evidence of innocence). To the contrary, in the present case Defendant repeatedly stated that he was admitting to the violation. The defense strategy at the probation revocation hearing was, in effect, to admit to a willful violation of probation, but to minimize the seriousness of the violation for purposes of advocating for continued probation and treatment in another facility. Defendant’s own witness, a social worker, testified that Defendant had otherwise been an exemplary participant in the Opportunity House program, and had left after being upset with the amount of money he was being paid. The witness quoted Defendant as saying, “this isn’t working for me,” which buttressed Defendant’s own admission with respect to willfulness. In fact, this evidence of willfulness was used to support Defendant’s request to be placed back on probation, because another facility might be better suited to his personality. Defendant’s strategy succeeded, and he was placed back on probation.

{18} Finally, Defendant argues that the district court implicitly determined that, while there was a technical violation, there was no actual violation. We believe that Defendant misconstrues the court’s comments. At the end of the revocation hearing, after it had already accepted Defendant’s admission of a probation violation, the district court simply articulated the reasons why it was agreeing to place Defendant back on probation. Moreover, the court’s comment on Defendant’s need for anger management treatment was an implicit reference to the reason for Defendant’s violation, and additional comments support the view that the district court agreed with Defendant’s own position that the violation was not so serious that another attempt at treatment should be foreclosed. Defendant’s claim that the district court implicitly found that no violation occurred is also contradicted by the fact that the district court entered the order revoking Defendant’s probation. B. Interpretation of Probation Violation Agreement

{19} Defendant claims that, even if the October 2004 probation violation agreement is valid, it should be interpreted to prohibit the State from filing the supplemental information in this case. As we observed above, Defendant’s argument at the hearing on the supplemental information was limited to waiver. Nevertheless, we consider Defendant’s arguments with respect to the terms of the agreement, because if they did not authorize enhancement, then Defendant was subject to an illegal sentence. See State v. Shay, 2004-NMCA-077, ¶ 6, 136 N.M. 8, 94 P.3d 8 (stating the rule that an illegal sentence challenge does not have to be preserved); cf. State v. Trujillo, 2007-NMSC-017, ¶ 7-13, 141 N.M. 451, 157 P.3d 16 (rejecting illegal sentence preservation argument where—unlike the present case—there was no claim that the terms of the underlying plea prohibited habitual offender charges).

{20} Plea agreements are binding upon the parties in the absence of a constitutional or statutory invalidity. See State v. Montaño, 2004-NMCA-094, ¶ 7, 136 N.M. 144, 95 P.3d 1059. Upon review, an appellate court “construe[s] the terms of the plea agreement according to what [the d]efendant reasonably understood when he entered the plea.” State v. Fairbanks, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954. Defendants do not get to choose which part of a plea bargain to follow; plea agreements are generally viewed and enforced in their entirety. See State v. Gibson, 96 N.M. 742, 743, 634 P.2d 1294, 1295 (Ct. App. 1981). With respect to ambiguities:

[I]f the ambiguities are not addressed by the district court and there is no other relevant extrinsic evidence to resolve the ambiguity, the reviewing court may rely on the rules of construction, construing any ambiguity in favor of the defendant. Under these circumstances, contract interpretation is a legal issue that this Court reviews de novo.

State v. Fairbanks, 2004-NMCA-005, ¶ 15 (citation omitted).

{21} In this case, the October 2004 probation violation agreement has the title, “Repeat Offender and Probation Violation Agreement.” The document itself states that Defendant agrees he was convicted of three prior felonies, but this provision and the information identifying the felonies were crossed out and initialed by the prosecutor. Defendant suggests this action constituted an agreement that no habitual offender sentence would be sought because of these three prior felony convictions. We disagree. The fact that Defendant did not admit to being a habitual offender at that time does not control whether the State had authority to seek a habitual offender enhancement based on the previously admitted probation violation under the terms of the original July 2004 plea and disposition agreement. Defendant’s argument is also undermined by the fact that there is no express language in the October 2004 probation violation agreement binding the State from subsequently seeking an enhanced sentence. Given the terms of the
original plea and disposition agreement, coupled with the State’s broad discretion to seek habitual offender enhancement, the absence of any express language limiting this discretion demonstrates that no such agreement between the State and Defendant was reached. {22} To the extent that any ambiguity can be inferred by the crossed-out language in the October 2004 probation violation agreement, a full review of the transcript of the October 2004 hearing demonstrates that there was no dispute with respect to the probation violation, that the focus was on whether Defendant would be incarcerated or given another chance at probation and in-patient treatment, and that the State was willing to give Defendant this second chance. The State’s willingness to provide Defendant another opportunity would have been meaningless if it would have sought habitual enhancement at that time, since “enhancement is mandatory if the prosecutor exercises discretion to pursue the enhancement.” Freed, 1996-NMCA-044, ¶ 8; see § 31-18-17(C). Again, we emphasize that a prosecutor is not required to seek an enhancement simply because it has the authority to do so. See Freed, 1996-NMCA-044, ¶ 8. This explains why the prosecutor in this case specifically informed the district court that “today will not be the day for resolution of the supplemental information.” It is clear from this and other similar statements by the prosecutor that the State was willing to see what treatment options were available, and revisit Defendant’s prior felonies at another time, if necessary. Finally, Defendant may not rely on the absence of any resolution of the prior felonies in the October 2004 probation violation agreement to the subsequent filing of the habitual offender supplemental information. See Trujillo, 2007-NMSC-017, ¶ 12 (stating that a “plea agreement’s silence on the subject of habitual-offender charges cannot inure to [a defendant’s] benefit”). 

C. Waiver

{23} We now consider the only argument that was actually made by Defendant at the hearing on the supplemental information: that the State’s failure to resolve the habitual offender issue at the probation violation hearing in October 2004 constituted a waiver of its right to subsequently file the supplemental habitual offender information. {24} Defendant’s waiver argument is made in two respects. First, Defendant argues that the prosecutor’s comments at the probation violation hearing, together with crossing out the language referencing prior convictions on the face of the written agreement amounted to a waiver of the express terms of the original plea. We have considered and resolved this argument above. Defendant’s other waiver argument, which we now address, is his contention that the State waived its right to seek enhancement by failing to timely file the habitual offender supplemental information. However, that case addressed the reasonable time requirement between an alleged probation violation and the filing of a petition to revoke based on that conduct. Id. at 281, 694 P.2d at 929. Defendant’s waiver argument has been specifically rejected by the Legislature because a prosecutor may bring habitual-offender charges at any time prior to limits that are not at issue here. See Freed, 1996-NMCA-044, ¶ 8 (noting that the Legislature has given its express approval of the initiation of habitual-offender proceedings after the imposition of the basic sentence).

{25} Having determined that the probation violation was valid, that its terms supported the filing of the habitual offender supplemental information, and that waiver is inapplicable, we conclude that the district court was authorized to enhance Defendant’s sentence.

II. Allocation

{26} Defendant claims that the district court filed the judgment, sentence and commitment following the trial on the habitual offender supplemental information in violation of his right to allocution. In State v. Setser, 1997-NMSC-004, ¶ 20, 122 N.M. 794, 932 P.2d 484 our Supreme Court stated:

Allocation is defined as the formal inquiry or demand made by the court or clerk to accused at the time for pronouncing sentence as to whether accused has anything to say why sentence should not be pronounced on him. In New Mexico, this common-law doctrine has been extended to noncapital felonies. This means that, at least in cases involving felony convictions, the trial judge must give the defendant an opportunity to speak before he pronounces sentence. Failure to do so renders the sentence invalid.

(internal quotation marks and citations omitted). In this case, Defendant was denied his right of allocution because further proceedings were anticipated on the second motion to revoke probation, but none took place. Instead, the district court filed the judgment, sentence and commitment approximately two weeks after the trial on the habitual offender supplemental information was held. {27} The State maintains that the right of allocution does not apply to habitual offender sentencing. The State’s argument is based on the lack of the district court’s sentencing discretion, because where the prior felonies are established, “the court shall sentence [the defendant] to the punishment as prescribed in Section 31-18-17.” NMSA 1978, § 31-18-20(C) (1983). We believe that the State’s outcome-based argument overlooks the fundamental due process underpinnings of this right. As our Supreme Court has observed, “[i]n the right developed at a time when the criminal defendant had no right to counsel and no right to testify. Allocution was created so that a defendant would be aware of the single situation in which he could address the court. Although this is no longer the case, the right of allocution has remained a part of the common law.” Setser, 1997-NMSC-004, ¶ 20 n.1 (citation omitted). We disagree with State’s claim that allocution under these circumstances is essentially meaningless, because “the opportunity to personally address the sentencer retains both symbolic and practical significance. It may increase for some defendants the perceived equity of the process.” 6 Wayne R. LaFave et al., Criminal Procedure § 26.4(g), at 780 (3d ed. 2007). Accordingly, we must remand for re-sentencing.

CONCLUSION

{28} For the reasons set forth above, we conclude that the State was authorized to bring habitual offender charges against Defendant and affirm, but we remand for re-sentencing with Defendant present in open court where he is accorded his right to allocution.

{29} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
CELVIA FOY CASTILLO, Judge
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Ms. Sanchez is from New Mexico. She received her Juris Doctorate from the University of New Mexico in 2002 and was admitted to the New Mexico Bar in 2002.

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Official Publication of the State Bar of New Mexico

SUBMISSION DEADLINES
All advertising must be submitted by e-mail by 5 p.m. Wednesday,
two weeks prior to publication (Bulletin publishes every Monday).
Advertising will be accepted for publication in the Bar Bulletin in
accordance with standards and ad rates set by the publisher and subject
to the availability of space. No guarantees can be given as to advertising
publication dates or placement although every effort will be made to
comply with publication request. The publisher reserves the right to
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For more advertising information, contact:
Marcia C. Ulibarri at 505.797.6058
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**Classified**

**Positions**

**Fifth Judicial District Court Request For Proposals**

In accordance with the appropriate sections of the State of New Mexico Procurement Code, the Fifth Judicial District Court, Counties of Chaves, Eddy and Lea, is accepting proposals from licensed New Mexico attorneys or firms to furnish professional services for indigent persons in each county by serving as a (1) guardian ad litem, or (2) attorney for the primary respondent(s), or (3) attorney for conflict custodian(s) for the FY2010, beginning July 1, 2009 and ending June 30, 2010. Proposals are to be sealed and marked "CAAFF SEALED PROPOSAL" on the envelope. Proposals are due in the Court Administrator's Office by 5:00 P.M., on Friday, May 1, 2009. For further information on case statistics, costs, contract requirements and resume information requested, contact the Court Administrator's Office, P. O. Box 1776, Roswell, NM 88202-1776, or 575-622-2565, Ext. 120.

**Senior Trial Attorney – Cibola County**

The 13th Judicial District Attorney's Office is accepting resumes for an experienced Prosecutor to fill the position of Senior Trial Attorney in the Cibola County Office, Grants, NM. This position requires substantial knowledge in areas of criminal prosecution and complex felony work. Salary will be based upon experience and the District Attorney Personnel & Compensation Plan. Send resumes to Carmen Gonzales, HR Administrator, 333 Rio Rancho Blvd., Ste. 201, Rio Rancho, and NM 87124 or via E-Mail: CGonzales@da.state.nm.us. Deadline for submission: Open until filled.

**Litigation Attorney**

Walsh, Anderson, Brown, Schulze & Aldridge, P.C., a law firm with offices in Texas and New Mexico is seeking a litigation attorney for our Albuquerque, New Mexico Office. Candidates should possess 3-5 years of litigation experience. Position involves representing public entities with areas of practice to include employment, business transaction, and general civil litigation. A pre-legal career in Education, Governmental representation experience and additional licensing in Texas is also a plus. Both State and Federal Court experience required. Candidates shall possess a valid New Mexico Law License. Please email your cover letter, writing sample and salary requirements to jobs@wabsa.com or to Legal Administrator, Walsh Anderson, P. O. Box 2156, Austin, Texas 78768-2156. To apply online, email resume to jobs@wabsa.com

**Request For Proposals (RFP)**

**Fourth Judicial District Court**

In accordance with the appropriate sections of the New Mexico Procurement Code (Chapters 13-1-28 through 13-1-199 NMSA 1978 amended), the Administrative Office of the Courts is accepting sealed proposals from licensed New Mexico attorneys or firms to provide professional services, in the Fourth Judicial District, Mora, Guadalupe and San Miguel counties, as described below: Attorneys to act as Guardian ad Litem and/or Youth Attorney of a child or children who are the subject of a delinquency, children with families in need of court ordered supervision (FINCOS), abuse and neglect, adoption, or guardianship proceedings arising under the New Mexico Children's Code; for all cases filed or reopened during the contract period; and all review hearings for which Notice was filed during the contract period; or (2) attorney for the primary respondent(s), or (3) attorney for conflict custodian(s) when necessary and ordered, where no potential conflict exists. Proposals are being considered for Fiscal Year 2010 beginning July 1, 2009, through June 30, 2010. Under the terms of Section 13-1-150, contracts may be subject to extensions not to exceed four years. The Fourth Judicial District Court reserves the right to negotiate additional provisions with the successful bidder. All contracts must be reviewed and approved by the AOC. For additional information, please contact Deborah Dungan at 505-827-4909 or aocsd@nmcourts.gov. NOTE: The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978, imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

**Re-Advertised - City Attorney City of Espanola, Espanola, NM**

Appointed by the City Mayor and under the general direction of the City Manager, the successful applicant must be an attorney licensed to practice law in Federal and State Court in the State of New Mexico. A background in municipal law is preferred, with an emphasis in employment law. The city attorney serves as Chief Prosecutor in enforcing all ordinances, including municipal criminal and municipal code ordinances. Provides advice in legal and administrative proceedings and on personnel matters to the Mayor, City Council, and City Manager. Currently advises on issues regarding municipal planning and zoning, resolutions, ordinances, leases, contracts, policies, procedures, annexations, sale and purchase agreements and memorandums of understanding and agreement relevant to municipal government. Salary range $65,000 - $85,000 excellent benefit package. Open until filled. Please submit letter of interest, Resume, and three (3) references to: Human Resources Department, 405 N. Paseo De Onate, Espanola, NM 87532.
University Of New Mexico School of Law
Temporary Faculty Positions
The Law School invites applications for temporary faculty to teach during the 2009 Summer Session. Course needs are Law Practice Clinic and Southwest Indian Law Clinic. To apply, send a signed letter of interest that addresses your qualifications and a resume to Antonette Sedillo Lopez, UNM School of Law, MSC11 6070, 1 University of New Mexico, Albuquerque, NM 87131-0001. J.D. or equivalent legal degree is required. Previous clinical teaching experience and practice experience in poverty law, family law, and/or Indian Law are preferred. For best consideration, submit applications by April 30, 2009. The positions will remain open until filled. The University of New Mexico is an equal opportunity, affirmative action employer and educator.

Three Full Time Positions
WILLIAM F. DAVIS & ASSOC., P.C. a law firm located in North East Albuquerque, is accepting applications for three full time positions. Our practice consists primarily of Chapter 7, 11 & 13 bankruptcy proceedings and general business and commercial litigation. Our firm offers competitive salary, excellent benefits and positive work environment. All positions are available immediately.

ASSOCIATE ATTORNEY – with 3 to 5 years experience in bankruptcy, commercial law, litigation and real estate. Candidates should have a strong academic background, excellent writing and research skills and be licensed in New Mexico. Salary is commensurate with experience. ATTORNEY – with 0 to 2 years experience with motivation to learn and grow in a dynamic law firm concentrating in the area of bankruptcy. Candidate should be willing to work hard and learn the bankruptcy practice; this position is a tremendous opportunity for professional development. Law school courses/experience in Bankruptcy, Tax Law and UCC preferred. Candidate must be licensed in New Mexico.

RECEPTIONIST/LEGAL SECRETARY – must be proficient in word processing/computer skills, organizational & communications skills, with a positive and friendly personality as necessary in a high-volume fast-paced practice requiring direct interaction with clients. Opportunity to progress into Paralegal duties and pay level. Salary in accordance with experience and education. Please send resume via email to: rbaca@nmbankruptcy.com and state the position you are applying for in the subject text.

Associate Trial Attorney/Assistant Trial Attorney or Senior Trial Attorney
The Eighth Judicial District Attorney’s Office is accepting applications for entry level Associate Trial Attorney, Assistant Trial Attorney or Senior Trial Attorney in the Raton Office. This position will be responsible for a felony and misdemeanor caseload plus administrative duties. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Daniel L. Romero, Chief Deputy District Attorney, 920 Salazar Road- Suite A, Taos, New Mexico 87571. Position open until filled.

Assistant District Attorney
The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Carlsbad and Roswell, New Mexico. Salary will be based upon the District Attorney Personnel and Compensation Plan with starting salary range of an Associate Trial Attorney to a Senior Trial Attorney ($41,685.00 to $72,575.00) dependent upon experience. Please send resume to Janetta B. Hicks, District Attorney, 400 N. Virginia Ave., Suite G-2, Roswell, NM 88201-6222 or e-mail to jhicks@da.state.nm.us.

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

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MISCELLANEOUS

Heirs Of Francisco Aragon
Seeking any information concerning the identities and whereabouts of heirs of Francisco Aragon, presumed to be a member of the Navajo Nation as of 1918. Please call Stephen D. Ingram, Esq., at 505/243-5400.

North Albuquerque Acres
1 Acre, North of Elena, East of Eubank. Borders Sandia Pueblo, fantastic views Walled, gated, private cul-de-sac, all utilities in. Price reduced $50K to $450K. Call Scott Clark, Owner/Broker, (505) 933-1300.

Notice
A probate proceeding is pending in the Second Judicial District Court regarding the Estate of Erma M. Padilla, deceased. Anyone having any information regarding the existence of a Last Will and Testament of Erma M. Padilla and/or any heirs of Erma M. Padilla, please contact William F. Aldridge at 505/266-8787 or Cynthia A. Loehr at 505/764-5400.

Request For Proposals
Bond Counsel Services
San Juan County will accept sealed proposals for PROPOSAL NO. 08-09-45, BOND COUNSEL SERVICES, until 5:00 p.m. (MDT), May 15, 2009, at the Central Purchasing Office, 213 South Oliver Drive, Aztec, NM 87410. Proposal documents may be obtained by accessing the San Juan County web page, www.sjcounty.net (under “Most Requested Information”, select “Bids/Proposals Listing”). Proposal documents may also be obtained by calling (505) 334-4551.

Office Space
Law Office for Sale in the Heart of Nob Hill:
Newly renovated w/new addition, totaling 1,620/Sq.Ft., 3-4 office areas, conference room, employee kitchen, ample space for storage/filing, finished basement, off-street parking, landscaped. Same block as three other law offices. Perfect for about two attorneys/two offices, priced to sell at about $245/sq. ft.($397,000). Visit the website to see details/photos: www.3610Campus.Blogspot.Com Or call 505-255-6300 (Brad Hall) to inspect in person.
## Program Schedule

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Presenter(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Registration/Check-in</td>
<td></td>
</tr>
<tr>
<td>8:30 a.m.</td>
<td>Professional Conduct - Review of the New Mexico Rules</td>
<td>Michael Browde, Esq.</td>
</tr>
<tr>
<td>9:30 a.m.</td>
<td>Worker's Compensation</td>
<td>Peter White, Esq.</td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>Coming Attractions - Pending Cases</td>
<td>Lee Hunt, Esq.</td>
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<tr>
<td>10:30 a.m.</td>
<td>Break</td>
<td></td>
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<tr>
<td>10:45 a.m.</td>
<td>Protecting a Minor’s Assets I</td>
<td>F. Michael Hart, Esq.</td>
</tr>
<tr>
<td>11:30 a.m.</td>
<td>Protecting a Minor’s Assets II - the Trust Option</td>
<td></td>
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<tr>
<td>11:50 a.m.</td>
<td>Legislative Update</td>
<td>Peter Mallery, Esq. and David Duhigg, Esq.</td>
</tr>
<tr>
<td>12:00 p.m.</td>
<td>Lunch (provided)</td>
<td></td>
</tr>
<tr>
<td>12:30 p.m.</td>
<td>Recent Developments in the New Mexico Uniform Jury Instructions</td>
<td>Hon. Linda M. Vanzi</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>Tax Ramifications of Personal Injury Settlements</td>
<td>John Wright, CPA and Skip Philippi, CPA</td>
</tr>
<tr>
<td>1:30 p.m.</td>
<td>Lessons from Tafoya v. Rael</td>
<td>Bruce Thompson, Esq.</td>
</tr>
<tr>
<td>2:15 p.m.</td>
<td>Break</td>
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<tr>
<td>2:30 p.m.</td>
<td>Governmental Torts</td>
<td>Jolene Youngers, Esq.</td>
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<tr>
<td>3:00 p.m.</td>
<td>Insurance Roundup</td>
<td>Maureen Sanders, Esq.</td>
</tr>
<tr>
<td>4:00 p.m.</td>
<td>Evidence: New Developments, Old Lessons</td>
<td>Shannon Kennedy, Esq.</td>
</tr>
<tr>
<td>4:30 p.m.</td>
<td>The Rest of the Story</td>
<td>David J. Jaramillo, Esq.</td>
</tr>
<tr>
<td>5:00 p.m.</td>
<td>Adjourn</td>
<td></td>
</tr>
<tr>
<td>5:15 p.m.</td>
<td>Adjourn</td>
<td></td>
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**Payment Options:**
- Check Enclosed
- Visa
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- Over 10 years

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