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Our Lady of San Guadalupe Church, Santa Fe by Deborah Moll (see page 3)
Join the ARAG Attorney Network and you’ll be partnering with a pioneer of legal insurance. Over 70 years ago, attorney Heinrich Fassbender founded ARAG on one goal – to help people protect their rights and assets and make quality legal services affordable to all. Over the years ARAG has become a global leader of legal insurance but our goal is still the same.

How ARAG Drives New Business to You
Legal insurance is based on a traditional healthcare PPO model where word-of-mouth fuels referrals. ARAG aggressively markets its legal program through the voluntary benefit channel of large employers including Fortune 500 companies. Members choose an attorney from our Network and ARAG pays the attorney directly for covered matters.

ARAG Clients in Your Area:
In New Mexico, we are proud to provide legal insurance to more than 20,000 eligibles. A few notable clients in your area include:

- City of Albuquerque
- The State of New Mexico
- Los Alamos National Security

To learn more, look for us at the New Mexico State Bar Conference in July or contact us today.
866-ARAGLAW or Attorneys@ARAGgroup.com
www.ARAGgroup.com/Attorneys
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Professionalism Tip

With respect to my clients:
I will charge only a reasonable attorney’s fee for services rendered.

Meetings

June

25 Technology Committee
4 p.m., State Bar Center

26 International and Immigration Law Section Board of Directors
noon, State Bar Center

July

1 Employment and Labor Law Section Board of Directors, noon, State Bar Center
6 Attorney Support Group, 5:30 p.m., First United Methodist Church
8 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
8 Children’s Law Section Board of Directors noon, Juvenile Justice Center

State Bar Workshops

June

23 Lawyer Referral for the Elderly Workshop
10 a.m., Presentation/12:30–3:30 p.m., Clinics Reserve Senior Center, Reserve

24 Lawyer Referral for the Elderly Workshop
10 a.m., Presentation
12:30–3:30 p.m., Clinics
Quemado Senior Center, Quemado

24 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

July

22 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

August

12 Estate Planning/Probate Workshop
6 p.m., State Bar Center, Albuquerque
SAFE NEwS
N.M. Supreme Court
Judicial Performance Evaluation Commission

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court to provide voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next regular meeting will be from 8 a.m. to 5 p.m., June 26, at the State Bar Center, Albuquerque.

Thirteenth Judicial District Court
New Hours for Clerks’ Offices

Effective Aug. 3, the 13th Judicial District clerks’ offices located in Bernalillo, Grants, and Los Lunas will have new business hours. All business with the clerks’ offices, in person or by telephone, will be conducted from 9 a.m. to noon and 1 p.m. to 5 p.m. For further information, contact Greg Ireland at (505) 865-2422.

STATE BAR NEWS
Attorney Support Group

• Afternoon groups meet regularly on the first Monday of the month:
  July 6, 5:30 p.m.
• Morning groups meet regularly on the third Monday of the month:
  July 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.

Employment and Labor Law Section Board Meeting

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, July 1, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar Web site, www.nmbar.org, or contact Bill Stratvert, (505) 242-6845.

State Bar members are seeking to establish a new section of the State Bar to focus on consumer law issues. This section would address consumer matters from both the consumer/debtor and creditor perspectives and include unfair trade practices, consumer contracts, foreclosure, the intersection of bankruptcy with other consumer actions, and mortgage fraud. To join this section or serve on the board of directors, contact David C. Kramer, (505) 620-7936 or david.c.kramer@comcast.net.

Indian Law Section Summer Mixer

Join the Indian Law Section for a summer mixer from 6 to 8:30 p.m., July 31, at St. Clair Winery & Bistro, 901 Rio Grande Blvd. NW, Albuquerque. Light appetizers and a cash bar will be available. This social event will provide an opportunity for new and existing members of the section to gather in an informal setting to relax, get acquainted, and catch up with other attorneys who are interested in Indian law. Section members and new bar members are free. Non-section members can join the section for $20. All other guests can join the fun for $20. All mixer attendees will be eligible for door prizes to be given away at the event. For further information, contact Georgene Louis, georgenelouis@yahoo.com.

Senior Lawyers Division Annual Meeting

The Senior Lawyers Division will hold its annual meeting at 12:30 p.m., July 10, during the State Bar’s annual meeting at the Buffalo Thunder Resort in Santa Fe. The discussion will focus on determining senior lawyer programs using technology that should be provided to members. Members should send issues that they would like addressed along with any other agenda items to Chair Tom Dawe, tdawe@ljlaw.com or (505) 764-5427. Lunch will be provided to members who R.S.V.P. by July 3 to Tony Horvat, thorvat@nmbar.org or (505) 797-6033.

Young Lawyers Division Annual Meeting

The Young Lawyers Division will hold its annual meeting from 10 a.m. to noon, July 11, during the State Bar’s annual meeting at the Buffalo Thunder Resort in Santa Fe.

OTher BaRS
Albuquerque Bar Association Membership Luncheon

The Albuquerque Bar Association’s membership luncheon will be held at noon, July 7, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The luncheon speaker is Mayor Martin Chavez. The CLE (1.5 general CLE credits) will immediately follow the luncheon from 1:15 to 2:45 p.m. Mel E. Yost of Scheuer, Yost & Patterson and William R. Keleher of Modrall, Sperling, Roehl, Harris & Sisk will present A Potpourri of Issues Concerning Settlement Facilitation/Mediation of Interest to Litigators, Transactional Lawyers and Mediators.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $70 members/$95 non-members with reservations; CLE only: $45 members/$60 non-members.

Register for lunch by noon, July 2. To register:
1. log onto www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. call (505) 842-1151 or (505) 243-2615;
4. fax to (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.

Taos Bar Association CLE Opportunity

The UNM School of Law will offer Elder Abuse: Criminal and Civil Remedies (2.0 general and 1.0 ethics CLE credits) from 1:45 to 5 p.m., June 24, at the Medical Arts Plaza, Room 3, 1398 Weimer Road, Los Lunas, NM. For information, contact Acting Chair Martin Chavez, (505) 878-0515 or jarrett@jacksonlewis.com.
Taos. The cost is $8. Call Janay Haas, (505) 768-6124, for registration information.

**Other News**

**Seminar on Changes to Guardianship Laws**

Understanding guardianship and conservatorship issues can be important in both one’s professional career and personal life. Guardian Angels Foundation is conducting a seminar featuring a master guardian and lawyers practicing in these fields of specialization who will present a fast-paced informative session. Lawyers who have attended this seminar have given the presenters a “standing ovation” and high marks on evaluations, as can be seen on the foundation’s Web site. Seminars will be held June 25 at the State Bar Center and July 17 at the Santa Fe Chamber of Commerce. For more details, visit www.GuardianAngelsFoundation.org or call (505) 920-2871.

**New Mexico Business Weekly Names**

**The Best of the Bar**

In partnership with the State Bar, the *New Mexico Business Weekly* presented the first annual Best of the Bar awards to 25 attorneys June 11 at the State Bar Center. The awards celebrate the “best and brightest in law.”

The NMBW sponsors several recognition publications: Women of Influence, Corporate Heroes, 40 Under Forty, Power Book, Top CEOs, Best Places to Work, and Who’s Who in Technology. This is the first year the publication has recognized members of the State Bar.

“We have been remiss in not recognizing our attorneys,” said NMBW Publisher Nancy Salem. “There isn’t a deal that does down in New Mexico without an attorney driving it.”

Both the State Bar and NWBW solicited nominations in ten categories from specialties like tax law to broader categories like litigation.

Typically, a panel of past winners selects the new group of honorees; however, since the Best of the Bar is a new effort with no past winners to turn to, legal experts, including a former New Mexico attorney general and a retired district judge, were recruited to help select the honorees. They considered factors including the nominees’ professional achievements and impact on the community. The result was a group of 25 accomplished attorneys.

State Bar President Henry A. Alaniz and Albuquerque Major Martin Chávez are on hand to present awards to honorees.
Client Expectations
While the lawyer will generally have many cases that are active at any given time, most clients are not in that situation. The client may have had no prior experience with an attorney. The client may have only the one case and views that as one case too many. Clients are not so much interested in the legal theories or public ramifications of their cases as they are in the direct impact on their lives, families, careers, businesses, or pocketbooks. Clients want their problems solved as quickly and economically as possible. In my personal experience, clients really do not understand that someone else’s case or that some aspect of your personal life may have a higher priority at a particular point in time. The telephone represents a security blanket to your client. It provides the opportunity to get a quick update. It provides an opportunity to be sure the attorney is aware of something that he or she just heard or read about. It provides an opportunity to get reassurance that the attorney cares about them and their case. Books on “how to hire an attorney” frequently recommend getting another attorney if calls aren’t returned within 24 hours.

Time management (working efficiently on the right priority item) is critical for an attorney or the legal staff to be effective. Properly assessing the priority of a telephone call, or any work item, is being able to make an informed choice, which requires taking into consideration both the importance and the time constraints (urgency) of the matter.

An attorney’s priorities cannot be set by the multitude of people that call at any given time. There must be some initial interception and triage, a classification based upon factors of urgency and importance. The attorney can have the calls intercepted by a machine and then try to establish a priority based on the information given, or the caller could be intercepted by a person and then questioned for further information or offered assistance. This could result in a possible diversion to a more proper person or total screening out of the unwanted telephone call. Clients can develop rapport with legal assistants and appreciate that they are getting quality services at a lower price. For some clients, however, the direct communication with “their attorney” is important.

Effective Phone Handling Techniques
By Donald D. Becker, Esq.

As with a jury, the telephone gives the public their first three minutes of contact with an attorney and his or her office. Important judgmental decisions will be made based upon the impressions the caller receives. Do you know what messages you are sending by telephone? Do you know what messages you want to send? Do you control your tools or do they control you? When you are away from your office, do you know how your calls are being handled? How do you want to be treated when you call someone?

1. You have to use it. If you have a system that looks nice on paper or for your insurance application but is not being used in practice, rethink it. You may be asking someone to do something he or she considers (correctly or incorrectly) extra hassles without a purpose.

2. Having a record of past telephone messages can help locate a name or telephone number. Under certain circumstances, it could be important evidence.

3. Record important information.
   A. If the message is going to result in an action such as a return call, just a little more information can make the attorney more efficient.
   B. Having the number saves time since the person returning the call does not have to run the number down.
   C. Having any applicable billing codes increases billing accuracy and expedites the return call.
   D. Knowing the matter, file, or purpose can help the returning caller prepare for the call or delegate the call to someone else who can more effectively handle the matter.
   E. Knowing the time zone for an out-of-state number lets the returning caller take into consideration lunch times and the beginning and the ending of work days.

4. The standard pink slip has an advantage because it can be “shuffled.” Some people use this method to keep the most important messages on top or to group calls by matter. A major disadvantage is that a message can get overlooked or lost. An attorney once explained that he had not returned calls because he had a backlog of pink slips that was three inches thick. Such a situation should be viewed as a sign of a problem, not a satisfactory reason for failing to communicate.

An Example of a Telephone Procedure
Currently, my telephone messages are taken by several different people during the day. Anyone taking a message enters the information from the caller in a daily log. At several designated times or at any time there appears to be an urgency, the information is transferred from the log to a telephone sheet which is kept as a document (quickly retrieved as a macro) on a computer. I can then use a single sheet of paper which provides me with the time, name, telephone number and message (with L/D codes where applicable). As I complete a telephone call, I scratch the name off the list. I might request the call be returned by a staff person. I also know when I have returned a telephone call and left a message. The old list is returned immediately prior to an updated list. I try to block out at least one-half hour in the morning and in the evening to return calls.

Each attorney must deal with client expectations and establish and follow a procedure for handling the telephone. How the attorney handles telephone communication will have a material impact on that attorney’s current effectiveness as well as his or her long-range professional career. Ultimately, your livelihood depends upon its success.
2009 CLE Awards

**CLE Pinnacle Award**
(General Credit)
James Widland
Key Issues in Real Estate Purchase Agreements
2008 Real Property Institute – December 5, 2008

**CLE Summit Award**
(Ethics Credit)
Robert L. Schwartz
Ethical Considerations Regarding Access to Health Care

**CLE Zenith Award**
(Professionalism Credit)
Samuel Roll, PhD
Dealing with Opposing Counsel in High Conflict Divorce
24th Annual Family Law Institute – October 18, 2008

**CLE Crest Award**
(Young Lawyer)
Ian Bezpalko
Technology: Don’t Leave Home Without It
From Surviving to Thriving in Private Practice – August 20, 2008

**Honorable Mention – National Speaker**
Donna M. Beegle, Ed.D.
Overcoming Poverty Barriers to Equal Justice
CONGRATULATIONS
2009 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

JUSTICE PAMELA B. MINZNER
PROFESSIONALISM AWARD
JOHN P. SALAZAR

DISTINGUISHED BAR SERVICE AWARD—
NON-LAWYER
SALLY SAUNDERS

SETH D. MONTGOMERY
DISTINGUISHED JUDICIAL SERVICE AWARD
JUDGE MARK B. McFEELEY

OUTSTANDING LEGAL PROGRAM AWARD
CENTER FOR CIVIC VALUES
NEW MEXICO HIGH SCHOOL Mock Trial Program

ROBERT H. LAFOLLETTE PRO BONO AWARD
BEN A. LONGWILL

OUTSTANDING YOUNG LAWYER
OF THE YEAR AWARD
CLARA MORAN

DISTINGUISHED BAR SERVICE AWARD—LAWYER
RANDY J. KNUDSON

THE STATE BAR OF NEW MEXICO WILL PRESENT THE AWARDS AT A RECEPTION AT 5 P.M., JULY 10, DURING THE ANNUAL MEETING AT THE BUFFALO THUNDER RESORT AT POJOAQUE, NEW MEXICO. FOR A DETAILED LIST OF PROGRAMS AND EVENTS, SEE THE INSERT IN THE APRIL 6 BAR BULLETIN.

A REGISTRATION FORM IS PROVIDED ON PAGE 9 OF THIS ISSUE, OR VISIT THE STATE BAR’S WEB SITE AT WWW.NMBAR.ORG.
# 2009 Annual Meeting and Bench and Bar Conference

**July 9-12, 2009 • Buffalo Thunder Resort in Santa Fe**

10.2 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Name ______________________________________________________________________________________ NM Bar No. ________________

Name for Badge (if different than above) ___________________________________________________________________________________

Address ______________________________________________________________________________________________________________

City _________________________________________________________________________ State _______________ Zip _________________

Phone ____________________________ Fax ____________________________ Email ______________________________________________

Guest 1 ________________________________ Guest 2 ________________________________ Guest 3 ________________________________

Name badge required to attend all functions.

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<td>Standard Early Registration Fee (Must be postmarked by May 4th)</td>
<td>$295</td>
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<td>After May 4th Fee</td>
<td>$395</td>
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<td>YLD, Paralegal, Government &amp; Legal Services Attorney</td>
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<td>After May 4th, YLD, Paralegal, Government &amp; Legal Services Attorney</td>
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<td>Guest (includes name badge, continental breakfasts, breaks and receptions)</td>
<td>$75</td>
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Conference Materials - I would like :

- CD Version only
  - Deduct $25 from Registration Fee
- Printed Version only
  - (included in Registration Fee)
- Both CD and Printed Versions
  - Add $50

**SEPARATELY TICKETED EVENTS**

**The Santa Fe Opera**, Saturday, July 11 (SOLD OUT PERFORMANCE)

TICKET SECTIONS:

- Front Orchestra $174 ______  ______
- Loge $132 ______  ______
- Section 2 $132 ______  ______
- Section 3 $84 ______  ______
- Section 8 $70 ______  ______
- Section 9 $70 ______  ______
- The Santa Fe Opera Preview Buffet $50 ______  ______
- Bus Transportation to/from opera $15 ______  ______

**Towa Golf Course at Buffalo Thunder Resort**, Thursday, July 9, 1:00 – 5:00 p.m.

- (Includes greens fee, cart, range balls, cart signs and scorecard)
- I will set up my own team and the players are: _______________________,  _______________________,  _______________________
- I would like to be placed on a team (Handicap/Average Golf Score ________)

**TOTAL ______**

**PAYMENT OPTIONS**

- Enclosed is my check in the amount of $ __________________ (Make Checks Payable to: State Bar of NM)
- VISA □ Master Card □ American Express □ Discover □ Purchase Order (Must be attached to be registered)

Credit Card Acct. No. ____________________________________________________________ Exp. Date __________ CVV# ________

Signature _____________________________________________________________________________________________________________

Register by mail, phone or fax.

Mail: SBNM, P.O. Box 92860, Albuquerque, NM 87199-2860

Phone: (505) 797-6020; Monday - Friday, 9 a.m. - 4 p.m. Fax: (505) 797-6071; Open 24 Hours (Please have credit card information ready).

Cancellations & Refunds: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the beginning date of the event (Due Date: July 2, 2009) by 5:00 p.m. a refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.
**LEGAL EDUCATION**

**JUNE**

**23–24** 2009 Estate Planning Update, Parts 1 and 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.0 G  
(505) 797-6020  
www.nmbarcle.org

**24** Legal Ethics of Representing Unpopular Causes and Clients  
Teleconference  
TRT, Inc.  
2.0 E  
1-800-672-6253  
www.trtcle.com

**25** Ethics Workout: Mental Aerobics for Solving Ethics Problems  
Teleconference  
TRT, Inc.  
2.0 E  
1-800-672-6253  
www.trtcle.com

**25** Guardianship and Conservatorship in New Mexico  
State Bar Center  
Guardian Angels Foundation  
5.0 G, 1.0 E  
(505) 920-2871  
www.GuardianAngelsFoundation.org

**26** Technical Assistance Seminar  
Albuquerque  
US Equal Employment Opportunity Commission  
6.0 G  
(505) 248-5210

**29** Subordinate Lawyers: Sit, Stay, Roll Over No More  
Telephone Seminar  
TRT Inc.  
1.0 E, 1.0 P  
1-800-672-6271  
www.trtcle.com

**25–26** Raising Business Capital in a Troubled Market, Parts 1 and 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.0 G  
(505) 797-6020  
www.nmbarcle.org

**25** Guardianship and Conservatorship in New Mexico  
State Bar Center  
Guardian Angels Foundation  
5.0 G, 1.0 E  
(505) 920-2871  
www.GuardianAngelsFoundation.org

**26** Need to Tame or Train the Billable Beast?  
Teleconference  
TRT, Inc.  
2.0 E  
1-800-672-6253  
www.trtcle.com

**26** Leverage: Debt Loan Agreements for Business  
Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**JULY**

**1** When a Prosecutor Withholds Exculpatory Evidence  
Teleconference  
TRT, Inc.  
2.0 E  
1-800-672-6253  
www.trtcle.com

**2** Overtime: Wage and Hour Update Teleseminar  
Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**7** Admitting New Partnership Members: Tax and Non-Tax Considerations  
Teleseminar  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797-6020  
www.nmbarcle.org

**7** Employment Law: The Basics and New Developments  
Video Replay  
Center for Legal Education of NMSBF  
6.1 G  
(505) 797-6020  
www.nmbarcle.org

Programs have various sponsors; contact appropriate sponsor for more information.
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<td>Santa Fe</td>
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<td>Albuquerque</td>
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<td>(505) 222-9356</td>
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<td>9–12</td>
<td>2009 State Bar Annual Meeting and Bench and Bar Conference</td>
<td>Buffalo Thunder Resort, Santa Fe</td>
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<td>(505) 797-6020</td>
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<td>21</td>
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**WRITS OF CERTIORARI**

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

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

**EFFECTIVE JUNE 22, 2009**

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No. 27786  1st Jud Dist Santa Fe CV-05-1328, M GRIFFIN v S PENN (affirm)  6/10/2009
No. 28018  3rd Jud Dist Dona Ana CR-06-929, STATE v J SOLIZ (reverse and remand)  6/12/2009

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No. 28976  5th Jud Dist Chaves CR-08-6, STATE v W SKINNER (affirm)  6/8/2009
No. 28499  1st Jud Dist Santa Fe CV-01-2895, D BISHOP v G JOHNSON (affirm)  6/9/2009
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No. 29154  5th Jud Dist Eddy CV-07-729, CITY OF CARLSBAD v C TANNER (affirm)  6/12/2009

Slip Opinions for Published Opinions may be read on the Court’s Web site:
**Recent Rule-Making Activity**

As updated by the Clerk of the New Mexico Supreme Court

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

**Effective June 15, 2009**

- To view pending proposed rule changes visit the New Mexico Supreme Court’s Web site: http://nmsupremecourt.nmcourts.gov/
- To view recently approved rule changes, visit the New Mexico Compilation Commission’s Web site: http://www.nmcompcomm.us/

### Pending Proposed Rule Changes

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Per Curiam

[1] Defendant J. Tyrone Riordan has applied for interlocutory appeal of the trial court’s order denying his motion requesting that Judge Karen Parsons recuse herself in three cases in which he is the defendant, including a case in which he was charged with capital murder. Defendant argues that because he was subsequently charged with conspiracy to commit assault with a deadly weapon against Judge Parsons, she should recuse herself in the three pending cases to avoid an appearance of impropriety. We conclude that Judge Parsons did not abuse her discretion in denying Defendant’s motion and therefore deny Defendant’s application for interlocutory appeal.

BACKGROUND

[2] The record shows that Defendant has charges pending against him in three cases assigned to Judge Parsons. In the first case, filed on May 18, 2007, Defendant was charged with capital murder, tampering with evidence, and conspiracy to commit tampering with evidence. In the second case, filed on June 29, 2007, Defendant was charged with five counts of criminal sexual penetration and five counts of contributing to the delinquency of a minor. In the third case, filed on November 30, 2007, Defendant was charged with escape or attempted escape from jail.

[3] On June 26, 2008, while these cases were pending, Defendant was charged with conspiring to commit an assault with a deadly weapon on Judge Parsons. When the conspiracy to commit assault case was filed, all the judges in the Twelfth Judicial District, including Judge Parsons, recused themselves from hearing the case. Defendant then filed a motion in the trial court requesting that Judge Parsons recuse herself from hearing his other three pending cases. Judge Parsons denied the motion, but certified for interlocutory appeal the issue of whether her status as an alleged victim in the conspiracy to commit assault case required her to recuse in the three pending cases to avoid creating an appearance of impropriety. Defendant filed an application for interlocutory appeal in the Court of Appeals, which denied the application pursuant to State v. Smallwood, 2007-NMSC-005, ¶ 10, 141 N.M. 178, 152 P.3d 821 (holding that this Court has jurisdiction to hear interlocutory appeals in cases involving a sentence of life imprisonment or death). Defendant then filed his application for interlocutory appeal in this Court.

DISCUSSION

[4] Pursuant to NMSA 1978, Section 39-3-3(A) (1972), Defendant seeks interlocutory appeal in all three cases, including the capital case. “Allowance of an interlocutory appeal is discretionary with the appellate court.” State v. Hernandez, 95 N.M. 125, 126, 619 P.2d 570, 571 (Ct. App. 1980). We first discuss the application in the capital case before addressing the applications in the non-capital cases.

THE CAPITAL CASE

[5] This Court is “vested by law with exclusive appellate jurisdiction in cases involving a sentence of life imprisonment or death,” which extends under Section 39-3-3(A) to jurisdiction over interlocutory appeals in such cases. Smallwood, 2007-NMSC-005, ¶ 10. In the case before us, Defendant was charged with capital murder under NMSA 1978, Section 30-2-1 (1994). At the time Defendant allegedly committed the offense resulting in the capital murder charge, a conviction for a capital offense was punishable by a sentence of life imprisonment or death. See NMSA 1978, § 31-18-14(A) (1993, prior to 2009 amendments). Accordingly, because Defendant was charged with a capital crime, this Court has appellate jurisdiction to review Defendant’s application for interlocutory appeal.

[6] Regarding Defendant’s motion requesting that Judge Parsons recuse herself from his cases, recusal rests within the discretion...
of the trial judge, and will only be reversed upon a showing of an abuse of that discretion. Demers v. Gerety, 92 N.M. 749, 752, 595 P.2d 387, 390 (Ct. App. 1978), rev'd in part on other grounds, 92 N.M. 396, 406, 589 P.2d 180, 190 (1978). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” State v. Rojo, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citations omitted).

Although Defendant argues that the question before us is one of law that should be reviewed de novo, disqualification requires an examination of the specific facts in the case. See United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008).

{7} Defendant argued to the trial court that Judge Parsons’ recusal was required to avoid an appearance of impropriety. In addition, Defendant argues in his application that both the New Mexico Constitution and the Victims of Crime Act give Judge Parsons a constitutionally vested interest in the outcome of the conspiracy to commit assault case, which prevents her from being impartial. See N.M. Const. art. II, § 24; NMSA 1978, §§ 31-26-1 to 31-26-14 (1994, as amended through 2005).

{8} Rule 21-200 NMRA provides that “[a] judge shall avoid impropriety and the appearance of impropriety in all the judge’s activities.” The committee commentary to Rule 21-200 defines an appearance of impropriety as “conduct [that] would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”]” Consistent with this admonition, Rule 21-400(A) NMRA states that “[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”

{9} Stating that no New Mexico case is directly on point, Defendant relies on United States v. Greenspan, 26 F.3d 1001 (10th Cir. 1994), to argue that because Judge Parsons knew she was allegedly the intended victim of a conspiracy to commit assault with a deadly weapon, her impartiality toward Defendant might reasonably be questioned, and thus her recusal was required. In Greenspan, shortly before a federal judge was scheduled to sentence a defendant on drug charges, the FBI told the judge of an alleged conspiracy to assassinate him and reported that the defendant in the drug case was involved in the conspiracy. Id., 26 F.3d at 1006. The Tenth Circuit held that the judge should have recused himself under 28 U.S.C. Section 455(a), which, like Rule 21-400, states that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” See Greenspan, 26 F.3d at 1007.

{10} The Tenth Circuit applied “[S]ection 455(a)’s objective standard” to “decide whether the judge’s impartiality might reasonably have been questioned in this particular case.” Id. at 1006. The court acknowledged that “threats or attempts to intimidate a judge will not ordinarily satisfy the requirements for disqualification.”]” Id. Indeed, the court stated that “if a death threat is communicated directly to the judge by a defendant, it may normally be presumed that one of the defendant’s motivations is to obtain a recusal[.]” Id. However, in reaching its conclusion that the judge should have recused himself, the court focused on the judge’s knowledge of the threat and its effect on the totality of the circumstances surrounding the sentencing hearing. Id. Specifically, the court observed that after being told of the threat, the judge had “accelerated the date of Greenspan’s sentencing, for the stated reason that the court wanted to get Greenspan into the penitentiary system as quickly as possible,” and that the judge had “refused to grant a continuance of the sentencing hearing even though defendant’s counsel had been appointed only two days before the sentencing date.” Id. Under those circumstances, the court reasoned, “[a]lthough any one of these actions standing alone would not provide sufficient reason to believe a judge was biased against the defendant, when considered in light of the judge’s knowledge of the alleged threats against him, these factors might provide further bases for questioning the court’s impartiality.” Id. Thus, the court was convinced by the record that “the judge’s impartiality might reasonably be questioned,” and held that his recusal was required. Id.

{11} The holding in Greenspan does not persuade us that Judge Parsons should have recused herself from presiding over Defendant’s other three pending cases. Judge Parsons’ knowledge of the threat against her is not, in itself, a reason to require disqualification. Indeed, a different federal appellate court has specifically noted that it was “wary” of the Tenth Circuit’s focus on the judge’s awareness of the threat against him described in Greenspan. In re Basciano, 542 F.3d 950, 957 n.6 (2nd Cir. 2008). In Basciano, in determining whether a trial judge must recuse when learning of evidence that the defendant has plotted or threatened to kill the judge, the Second Circuit wrote that “[t]he judge should have recused himself in any proceeding in which his impartiality might reasonably be questioned.” See Greenspan, 26 F.3d at 1007.

{12} In the case before us, the State argued to the trial court that Defendant’s conduct of refusing to leave his cell for court proceedings, refusing to confer with his attorneys, refusing to eat, and refusing medical treatment demonstrated a pattern of obstruction and delay. Thus, there was evidence before the trial court that Defendant may have been attempting to manipulate the system. In addition, in contrast to Greenspan, the judge found “that no objective evidence of bias on the part of the Court has been presented and that under the circumstances of this case there is no appearance of impropriety for the Court to remain on these cases.”

{13} In addition, we are persuaded that recusal should not automatically be required when a judge is threatened. See Basciano, 542 F.3d at 956 (listing cases concluding that recusal is not ordinarily required when a judge faces threats). State v. Robinson, 2008-NMCA-036, ¶ 10, 143 N.M. 646, 179 P.3d 1254 is also instructive. In Robinson, our Court of Appeals addressed the situation of when threats against a prosecutor require the prosecutor’s removal and held that a prosecutor does not have to be removed from a case simply because the defendant has threatened the prosecutor. Id., ¶ 24. The court reasoned that “as [a] matter of policy, a defendant does not create a disqualifying interest and cannot choose his or her prosecutor for an underlying offense by the use of threats.”
Id. Of direct import to the issue before us, the Court of Appeals quoted Resnover v. Pearson, 754 F. Supp. 1374, 1388-89 (N.D. Ind. 1991) for the principle that “[t]he law is clear that a party, including a defendant in a criminal case, cannot drive a state trial judge off the bench in a case by threatening him or her.” 2008-NMCA-036, ¶ 24. We endorse this statement as a sound principle to apply to the issue of recusal when a judge is threatened by a defendant.

[14] Consistent with the view that absent some showing of bias, threats alone do not require recusal, we have held that in the context of contempt hearings, recusal is only required “when a judge has become so embroiled in the controversy that he cannot fairly and objectively hear the case[].” State v. Stout, 100 N.M. 472, 475, 672 P.2d 645, 648 (1983). We agree, therefore, with the requirement in the federal cases that the facts and circumstances of the case must demonstrate that “the defendant’s behavior has resulted in actions by the judge which might be viewed by ‘an objective, disinterested observer’ as evidencing bias.” Basciano, 542 F.3d at 957.

[15] Neither party provides us with a detailed account of the evidentiary hearing on the recusal motion, and we note that it is the appellant’s burden under Rule 12-203(B) NMRA to provide this Court with “a statement of the facts necessary to an understanding of the controlling question of law[].” However, the State represents that Defendant “offered no examples of actual bias” and the judge stated that she had no personal bias or animosity toward Defendant. Moreover, in the order denying Defendant’s motion, the court found “that no objective evidence of bias on the part of the Court has been presented and that under the circumstances of this case there is no appearance of impropriety for the Court to remain on these cases.” Under these circumstances, where the judge held a hearing at which no evidence was presented that the judge demonstrated bias against Defendant, we presume Judge Parsons correctly declined to recuse herself from hearing Defendant’s cases. See State v. Aragon, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that there is a presumption of correctness in the rulings or decisions of the trial court, and the party claiming error bears the burden of showing such error).

[16] Defendant also argues that Judge Parsons’ status as an alleged victim in an unrelated case involving Defendant (in which Judge Parsons has recused) gives her a “constitutionally vested interest” in the case, which requires recusal in the pending cases under Rule 21-400(A). Specifically, Defendant contends that because Article II, Section 24 of the New Mexico Constitution and the Victims of Crime Act, §§ 31-26-1 to 31-26-14, provide victims of crimes with additional rights in court proceedings, this unique constitutional provision makes federal case law inapplicable. Defendant’s application does not indicate, however, that this argument was made to the trial court, and the court does not address it in its order. Assuming that this argument was preserved, we are not persuaded that Article II, Section 24 of either the New Mexico Constitution or the Victims of Crime Act alters our analysis of this case.

[17] Both Article II, Section 24 and Section 31-26-3 provide victims of specific crimes listed in the Constitution and the Act with defined rights in judicial proceedings. Judge Parsons is the alleged victim of conspiracy to commit aggravated battery, criminal damage to property, and possession of a deadly weapon. None of these offenses are listed in Article II, Section 24 or Section 31-26-3, for which rights are granted. Perhaps more importantly, Judge Parsons does not have any “victim’s rights” in Defendant’s cases that are pending before her. As a result, neither the New Mexico Constitution nor the Victims of Crime Act gives Judge Parsons any additional rights that affect our analysis or would require her recusal under Rule 21-400. Accordingly, we deny Defendant’s application for interlocutory appeal from the trial court’s denial of his motion requesting her recusal in the capital case.

THE NON-CAPITAL CASES

[18] As discussed above in Smallwood, we concluded that “the legislature intended for us to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death.” 2007-NMSC-005, ¶ 11.

[19] The offenses with which Defendant was charged in the other two cases assigned to Judge Parsons are fourth degree felonies, not capital crimes. Therefore, jurisdiction over the interlocutory appeals from the trial court’s order in those cases lies in the Court of Appeals, and we deny the application on those grounds. See NMSA 1978, § 34-5-5-8(A)(3) (1983); § 39-3-3. Although the Court of Appeals denied Defendant’s application, believing that it lacked jurisdiction, Defendant did not petition this Court for a writ of certiorari in those cases. We note, however, that such a petition would have been denied for the reasons set out in this opinion.

CONCLUSION

[20] For the foregoing reasons, Defendant’s application for interlocutory appeal is denied.

[21] IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

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

Opinion Number: 2009-NMSC-023

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Judgment: Summary Judgment

HILLREY BEGGS, individually,
MELVINA LANCASTER CROCKETT, individually,
JOSE M. GUTIERREZ, individually,
ARLY V. HAMNER, individually,
MIGUEL S. LUCERO, individually,
BETTY L. OLSON, individually,
PEGGY NEWBANKS, individually,
RALPH PELLICOTT, individually,
MARCAPIO SAIZ, individually,
CURTIS WAGNER, individually,
RALPH PELLICOTT, individually,
MARCARIO SAIZ, individually,
CURTIS WAGNER, individually,
ALAN WOFFORD, individually,
and JIM WOOD, individually,
Plaintiffs-Petitioners,
versus
CITY OF PORTALES, a municipality
existing under the laws of the State of New Mexico,
Defendant-Respondent.
No. 30,558 (filed: May 20, 2009)

ORIGINAL PROCEEDING ON CERTIORARI
ROBERT S. ORLIK, District Judge

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OPINION

CHARLES W. DANIELS, JUSTICE

This case requires us to analyze the legal consequences of a written personnel policy provision enacted by a city ordinance that required the City of Portales (“the city”) to offer to its retiring employees the option of continuing their health care coverage under the city’s group plan at the active employee premium reimbursement rate. The Petitioners (“Retirees”) accepted the city’s offers at the time each of them retired, before the city council enacted an ordinance deleting the retirement insurance provision from the city’s “Personnel Policy Manual” (“the Manual”).

The question before us is whether the city is correct in its position that the later change in the Manual necessarily extinguished any enforceable rights Retirees may continue to have under the terms that were applicable when they retired and accepted the city’s offers. We hold that the circumstances of this case present genuine issues of material fact as to whether the city’s offers and Retiree’s acceptances constituted binding contracts, and we reverse the district court’s entry of summary judgment in favor of the city.

1. BACKGROUND

In 1994, the Portales city council enacted an ordinance adopting a comprehensive personnel policy manual governing its relationships with its employees. Section 629 of the Manual, “Retiree Health Care Insurance,” provided:

The City of Portales shall offer employees upon their retirement the option of continuing their group health and life insurance coverage through the City’s group plan, provided they are enrolled in the group plan at least one year prior to retirement. The cost of the insurance for the retiree shall be the same as the cost for regular employees. If the City is paying 75% of the premium for employees, the City shall pay 75% of the premium for the retiree and shall be budgeted out of the department from which the employee retires. Retirees shall be responsible for paying their portion of the premium on a monthly, timely basis, in order to avoid the lapse of their policy coverage.

Conditions of the policy coverage shall apply in accordance with the retiree’s age and circumstances on an individual basis.

Between 1995 and 2000, nine of the fourteen Retirees retired and elected to accept the city’s offer to continue receiving health care benefits and reimbursements on the same terms as active employees.

In 2000, the city council adopted an ordinance opting into the New Mexico Retiree Health Care Act, NMSA 1978, §§ 10-7C-1 to -19 (1990) (“NMRHCA”), an act providing an alternative retiree health care benefit program for government employers and employees, which the Portales city council expressly had rejected for its employees in 1990. Even after the city’s adoption of NMRHCA, the nine Retirees who had already retired continued receiving health coverage and reimbursements from the city under the Section 629 personnel policy option, which had not yet been repealed. Over the next several years, the remaining five Retirees retired and also accepted the city’s still-continuing offers to receive health care coverage under its still-applicable terms.
In 2005, city officials began to reconsider Retirees’ rights to the reimbursement rates embodied in Section 629, in light of increasing health care costs and the city council’s provision in 2000 of alternative retiree health care benefits through NM-RHCA. In March, the city manager and the city’s finance and administration committee agreed that Retirees should continue receiving coverage and reimbursements under the terms of Section 629. In May, the city council adopted a new ordinance that modified the Manual by deleting Section 629’s health care reimbursement option entirely.

After elimination of the Section 629 policy, Retirees met with the city attorney and others regarding the continuing rights of those who had previously accepted the city’s Section 629 health insurance offer. After no consensus was reached, the city attorney submitted a resolution to the city council that would have interpreted its 2000 ordinance opting into NMRHCA as having rescinded Section 629 and as having terminated the rights of any retirees to its health care reimbursement provisions. The city council, in a divided vote, refused to adopt the resolution. Despite the city council’s rejection of the resolution, the city manager notified Retirees that the city would discontinue reimbursing their health care insurance premiums on the terms contained in former Section 629 and offered to Retirees at the time of their retirement.

Retirees filed suit in the district court of Roosevelt County to determine and enforce their rights. The district court granted summary judgment against Retirees on the ground that no vested or contractual rights could have been created by the terms of the ordinance adopting the health care insurance premiums. The two-judge majority, as had NMCA-125, ¶¶ 32, 34, 142 N.M. 505, 167 P.3d 551. Summary judgment is appropriate where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. Cates v. Regents of the N.M. Inst. of Mining & Tech., 1998-NMSC-002, ¶ 9, 124 N.M. 633, 954 P.2d 65. On the other hand, where any genuine controversy as to any material fact exists, a motion for summary judgment should be denied and the factual issues should proceed to trial. Gardner-Zemke Co. v. State, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). To that end, “[a] summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists.” Id.

In employing this test, all reasonable inferences from the record are construed in favor of the non-moving party. Garcia v. Underwriters at Lloyd’s, London, 2008-NMSC-018, ¶ 12, 143 N.M. 732, 182 P.3d 113; see State v. Intigon Indem. Corp., 105 N.M. 611, 612, 735 P.2d 528, 529 (1987) (stating that courts are “obliged to view the pleadings, affidavits and depositions in the light most favorable to the party opposing the [summary judgment] motion.”). “If there are [any] reasonable doubts, summary judgment should be denied.” Koenig v. Perez, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986) (internal quotation marks, citation, and emphasis omitted).

We conclude that this case is controlled not by Pierce and Whittington, and not by Garcia and Whittington, but by Pierce and Whitley. The general policy provisions in the statutes in Pierce and Whitley did not purport to create an employment manual that would control the terms of the employee-employer relationship, as this Court found existed in Garcia. 1996-NMSC-029, ¶ 11. In Whitley, the judicial employees alleged that the very terms of the statute at issue, without more, had given them vested rights to future accruals of personal leave, even after the statutory rate was changed. 115 N.M. at 310, 850 P.2d at 1013. In Pierce, not only were the tax exemption provisions of the statutes relied on for alleged contractual or vested rights not contained in an employee handbook, they were also “not contained within the [statutory] provisions defining the substantive rights of employees to receive benefits.” 1996-NMSC-001, ¶ 47. Retirees in this case, however, assert rights based not simply on the policies expressed in a legislative intent to create private rights of a contractual nature enforceable against the State” (internal quotation marks and citation omitted)); Pierce v. State, 1996-NMSC-001, ¶ 47, 121 N.M. 212, 910 P.2d 288 (finding no private rights of retirees to tax exemptions on retirement income after a prior tax exemption statute was repealed, on the theory that “the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state” (internal quotation marks and citation omitted)).
in an ordinance alone, but specifically on contractual rights based on the Manual, the conduct of the parties, and various oral and written representations, allegedly evidencing a binding contractual offer and acceptance.

{15} The record contains substantial evidentiary support for Retirees’ contractual claims, including evidence to support findings (1) that the city council had specifically authorized the comprehensive terms of its ordinance to be considered a “Personnel Policy manual . . . to inform employees of policies that affect their employment with the City of Portales” and to “ensure that the personnel system provides . . . policies and procedures for . . . fringe benefits . . . retirement, and other related activities”; (2) that employees were required to be provided with, and to sign acknowledgments of receipt of, the Manual; (3) that employees were bound by terms of the Manual; (4) that the city itself felt bound to comply with, and to sign acknowledgments of its own sufficient to create contractual rights; (5) that city officials made representative admissions by statements and conduct that the city was obligated to continue paying health insurance premiums for those Retirees who had accepted the city’s offer to do so after they had met the requirements of the ordinance existing at the time of their retirements; and (6) that city officials made representative admissions that provisions of the Manual became terms of an “employee contract” and that Retirees had a “vested interest” in continued health insurance benefits.

{16} The city’s course of conduct, as alleged over a period of many years, easily distinguishes the present case from Pierce and Whiteley. Here, a jury could reasonably conclude that the city not only promised to make an offer for a contract, but actually engaged in a course of conduct over an extended period of time, including use of its employee manual, in which the city both made and performed contractual commitments to its employees, thereby obligating itself into the future. In contrast, Pierce and Whiteley arose solely from enactments of our state legislature that concerned appropriations and taxation—core functions of state sovereignty for which no law-making body can find its successor.

{17} New Mexico case law has emphasized the importance of precisely that kind of evidence in determining the existence of contractual obligations in public employment contexts. See Garcia, 1996-NMSC-029, ¶ 10 (“Whether an implied employment contract exists is a question of fact, and it may be ‘found in written representations[,] . . . in oral representations, in the conduct of the parties, or in a combination of representations and conduct.’”) (quoting Hartburger v. Frank Paxton Co., 115 N.M. 665, 669, 857 P.2d 776, 780 (1993); Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, ¶ 27, 130 N.M. 563, 28 P.3d 1104 (distinguishing government employment contracts from other forms of government contracts: “As a practical matter, most employment agreements in the public sector are implied-in-fact, rooted in the conduct of the parties and in a mazer of personnel rules and regulations, as well as employee manuals that apply generically to all employees”). Garcia emphasized the comprehensive nature of the written personnel policies in finding them sufficient to create contractual obligations by a governmental employer. 1996-NMSC-029, ¶ 13. Similarly, in this case, the Manual exhaustively addressed “all phases of Personnel Administration” and was meant to “serve as conditions of employment for all employees of the City of Portales.” It covered every aspect of the employment relationship between the city and its employees, including sections relating to the Manual’s mission to provide for consistent application of personnel policies, effects of separate labor relations contracts, recruitment, probationary periods, transfer, promotion, holiday pay, salary increases, travel expenses, vacation and sick leave, disciplinary procedures, termination, and grievance procedures. As this Court said in Garcia, “if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer’s actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it.” Id. (citation omitted). Not surprisingly, the city has referred us to no authority which has ever held that a governmental employer’s contractual obligations created through an employment manual may be ignored simply because the manual was initially adopted through an ordinance. We see no principled reason to create such an exception here. In fact, the official endorsement of the city’s governing body should provide additional safeguards against unintentional or unauthorized incurring of contractual obligations by the city.

{18} In arguing against any finding of contractual or vested rights, the city points to a number of factors that would be inconsistent with the creation of the contractual rights Retirees are seeking to enforce. One of those is that the Manual and its creating ordinance provided that “[n]othing shall restrict or prohibit the City Council from making changes in this manual as it determines necessary at any time.” Another is the argument that “it makes no sense that all retirees [who satisfied the Manual’s minimum one-year premium payment requirement before retiring] would receive the same benefit regardless of their years of service, and that they would receive it for life.” While those arguments may be relevant, admissible, and perhaps even ultimately successful in persuading a jury that the city in fact neither intended to nor did enter into the contracts alleged by Retirees, they do not foreclose a fact finder’s decision that the city actually did enter into such contracts, in light of the totality of the evidence that may be presented at trial.

{19} With regard to the city’s reliance on the right to amend its ordinance creating the Manual, it is important to note that nothing in either the Manual or the ordinance contained language stressing that no contractual rights would be created between the city and its employees during the time the Manual’s provisions were in effect, nor that later amendments would be argued to void obligations that had been incurred before the changes.

{20} Moreover, it is important to remember that this case does not involve simply the interpretation of a change of benefits in an ordinance, it involves also the terms of a personnel manual and statements and actions of the parties surrounding the alleged formation of a contract at the time Retirees allege that they accepted an offer made by their employer in connection with their retirement. As this Court observed in Cockrell v. Board of Regents of New Mexico State University, “employers are certainly free to issue no personnel manual at all or

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2The New Mexico Retiree Health Care Act contains language that clearly does not create contractual rights:

The legislature declares that the expectation of receiving future benefits may be modified from year to year in order to respond to changing financial exigencies, but that such modification must be reasonably calculated to result in the least possible detriment to the expectation and to be consistent with any employer-employee relationship established to meet that expectation. The legislature does not intend for the Retiree Health Care Act to create trust relationships among the participating employees, retirees, employers
to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract . . . .” 2002-NMSC-009, ¶ 26, 132 N.M. 156, 45 P.3d 876 (alteration in original) (internal quotation marks and citations omitted). However, even where a personnel manual purports to disclaim any intentions of forming contractual obligations enforceable against an employer, a fact finder may still look to the totality of the parties’ statements and actions, including the contents of a personnel manual, to determine whether contractual obligations were created. Id.

{21} The fundamental dispute in this case relates to exactly what, if anything, the city and Retirees contractually agreed to at the time Retirees retired and accepted the city’s offer that was authorized by Section 629 of the Manual, in its direction that the city “shall offer” retiring employees certain health insurance benefits. The city did not appear to dispute Retirees’ evidentiary showings that there was an offer of health benefits of some kind by the city at the time of their retirement, that Retirees manifested their acceptance, that there was consideration in the form of their required participation in the health plan for the minimum one-year period before retirement, in declining other employment and staying employed by the city until retirement, and in paying Retirees’ portions of the premiums after retirement. However, the city and Retirees vigorously dispute whether the offer made to Retirees and accepted by them was for permanent health benefits or was for monthly benefits only during the time the city chose to continue providing them, and both sides point to substantial evidentiary support for their respective theories.

{22} We are persuaded that this record shows that the evidence submitted in opposition to the city’s motion for summary judgment, while not conclusive either way, was sufficient to show the existence of genuine issues of material fact regarding the existence of contractual rights on behalf of Retirees to continue receiving health insurance benefits at the rate they allege they and the city agreed upon at the time of their retirement. Those disputed factual issues are inappropriate for determination by summary judgment, and they should be submitted to a jury. “Reviewing this evidence in the light most favorable to [Retirees], we conclude that [Retirees are] entitled to have the factual issue of whether an implied contract exists resolved by a fact-finder at a trial on the merits.” Gormley v. Coca-Cola Enters., 2004-NMCA-021, ¶ 21, 135 N.M. 128, 85 P.3d 252 (filed 2003) (holding summary judgment improper, even where employer and employee “essentially agree[d] on the conversation giving rise to the alleged implied contract” because finding an implied-in-fact contract is a factual question meant for the jury). The district court therefore erred in granting summary judgment, and the Court of Appeals majority erred in affirming it.

{23} Plaintiffs also relied on a theory of promissory estoppel in support of their complaint and in opposition to the city’s summary judgment motion in the district court. The district court did not separately address that theory at all in relying on Pierce and Whitley in granting summary judgment in favor of the city. The Court of Appeals majority addressed the theory only briefly, holding that it did not have to decide whether promissory estoppel would apply against a city, because its decision on the central contract issue led it to conclude that Retirees could not have legitimately relied on any promises or offers a city agent may have made that, as the court determined, were unauthorized by law. Beggs, 2007-NMCA-125, ¶¶ 15-16. The city addresses the promissory estoppel theory only in passing in its briefing in this Court, although Retirees continued to press the point. Given our determination that a jury could find that the city may in fact have made legally enforceable promises to Retirees, we therefore reverse on this issue as well. By doing so, we do not prejudge any resolution of issues that potentially could have been, but were not, properly presented to this Court.

IV. CONCLUSION

{24} Because we determine that there were genuine issues of material fact regarding whether a contract was formed and the scope of its terms, we hold that the district court’s entry of summary judgment was error. We reverse the Court of Appeals and the district court, and we remand this matter to the district court for further proceedings consistent with this opinion.

{25} IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice

and the authority administering the Retiree Health Care Act nor does the legislature intend to create contract rights which may not be modified or extinguished in the future; rather the legislature intends to create, through the Retiree Health Care Act, a means for maximizing health care services returned to the participants for their participation under the Retiree Health Care Act.

NMSA 1978, § 10-7C-3(B) (1990).
From the New Mexico Supreme Court

Opinion Number: 2009-NMSC-024

Topic Index:
- Appeal and Error: Appeal and Error, General; Harmless Error; and Standard of Review
- Constitutional Law: Confession; and Suppression of Evidence
- Criminal Procedure: Motion to Suppress
- Evidence: Admissibility of Evidence; and Rule of Completeness

STATE OF NEW MEXICO, Plaintiff-Appellee, versus JOSHUA BARR, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LUNA COUNTY
HENRY R. QUINTERO, District Judge

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OPINION

PATRICIO M. Serna, Justice

{1} Pursuant to Rule 12-102(A)(1) NMRA, Joshua Barr (Defendant) appeals his convictions for first degree murder and tampering with evidence, contrary to NMSA 1978, Section 30-2-1(A) (1963, as amended through 1994) and Section 30-22-5(A) (1963, as amended through 2003), in the shooting death of Robert Lustig (Victim).

1. Factual Background

2. On April 17, 2005, a body wrapped in trashbags and tape was found in a refrigerator near an abandoned house fifteen miles south of Deming. An autopsy revealed that the individual had been killed by a gunshot wound to the head. After investigation, police determined that the body was that of Victim, who had disappeared from the area approximately one year previously.

3. An investigation into Victim’s background led a group of five law enforcement officers to visit the Columbus Police Department where Victim had worked as an auxiliary police officer. Defendant was also an auxiliary officer with the Columbus Police Department and happened to be present when the officers visited the station looking for information about Victim. Defendant gave the officers a two and a half page handwritten statement summarizing his knowledge of Victim. He wrote that he, Victim, and Varkevisser had all lived together in Victim’s home, that Victim had had problems with Varkevisser, that Defendant had been evicted from the shared home, and that Defendant and Varkevisser had subsequently rented another home together. Defendant’s statement did not include the dates of when the incidents he described occurred.

4. The five officers sat down with Defendant and reviewed his statement in an effort to ascertain a timeline of the end of Victim’s life. However, Defendant was unable to provide the officers with the dates that they wanted, explaining that he was “bad with dates.” One of the officers testified that Defendant appeared “very nervous” during this interview and was rocking his chair back and forth and sweating profusely. A second officer testified that Defendant was “uneasy” and “nervous,” though he did not recall seeing him sweat.

5. In the ensuing days, the officers investigated the leads that Defendant had provided in his statement. They learned that Victim’s landlord and another friend had gone to Victim’s home to communicate with him once he had fallen behind on his rent and had noticed that Victim’s computer and CDs were missing. When they checked the records of a pawn shop near Victim’s home, the officers learned that Varkevisser had pawned approximately 100 CDs and 25 DVDs at about the time that Victim disappeared. However, the officers were unable to locate Varkevisser at that time.

6. Approximately three days after Defendant’s initial interview, two of the officers went to the Columbus police station and asked whether Defendant would be willing to come with them to the Deming sheriff’s office for another interview. They wanted Defendant to try again to assist them in composing a timeline of the end of Victim’s life. One of the officers testified that Defendant was not a suspect at the time; rather, it was Varkevisser who was of most interest. The officers chose to interview Defendant in Deming because there was no appropriate space at the Columbus police station; at the initial interview, there had been people coming in and out of the room and the room was too small for Defendant and all of the officers to comfortably fit. Defendant agreed to come with the officers and accompanied them in their car from Columbus to Deming, about thirty miles.

7. Defendant was interviewed in a room normally used for eating and taking breaks. There were four law enforcement officers in the room with Defendant. He was given his Miranda warnings and signed a waiver of Miranda rights form. One of the officers testified that Defendant was mirandized before the interview began, while Defendant testified that he was mirandized at some point during the interview.

8. The accounts given by the two testifying officers and Defendant differ in some minor respects with regard to what occurred at the interview, but the essential facts are relatively clear.

9. The interview began with a review of the statement that Defendant had provided the officers at the initial interview. The tone at this point was relatively “easygoing,” “cooperative,” and “smooth.”
Gradually, the interview grew more intense as the officers began to press Defendant. One of the officers sensed that Defendant was nervous because his hands twitched, he avoided eye contact, and he was evasive. One or more of the officers told Defendant that they felt he was holding something back. One of the officers asked Defendant what should happen to the person who killed Victim, to which Defendant responded that the perpetrator should get the death penalty. Both officers and Defendant testified that this was the first mention of the death penalty. Then one of the officers told Defendant something to the effect of “[t]hat’s what you could get.” There was some discussion of the penalties for the varying degrees of murder. At about this time, Defendant said “[y]ou son a bitches think I did it.” After some further discussion, Defendant asked “[w]hat kind of deal can I get?” or “[w]hat can I get?” The officers told Defendant that they could not offer him a deal; however, they may have offered to speak to the district attorney on his behalf, if he made a statement. Defendant told them that he did not want to get the death penalty because he was afraid of dying. Defendant then confessed to the murder.

Defendant told the officers that he and Victim were at Victim’s home playing computer games with Victim and Defendant. He corroborated Defendant’s version of events and told the officers that Defendant had shot Victim in the back of the head for no apparent reason while Victim was playing a computer game. Varkevisser told the officers that Defendant had threatened him in such a manner that he was forced to help wrap and dispose of Victim’s body. He said that he had not reported the murder for fear that he would be charged with accessory.

In addition to the substantive information about the night of Victim’s murder, Varkevisser’s videotaped statement also contained numerous extraneous utterances by both him and the officers that may have been improper if made on the witness stand. For example, the officers prompted Varkevisser to speculate about any possible motive Defendant may have had. Some of the speculation impugned Defendant’s character, such as Varkevisser’s statements that Defendant “is a drinker” and “has a bad history.” The officers asked Varkevisser whether Defendant was “all there.” Varkevisser also stated that he was “still scared of [Defendant].” One of the officers responded “I can understand that” and another said “[w]ell, he’s in jail.”

Varkevisser’s videotaped statement also included discussion of Defendant’s prior bad acts. For example, the officers asked Varkevisser how many burglaries he and Defendant had committed and Varkevisser told the officers that Defendant put a knife or sword to Varkevisser’s head sometime after the death of Victim.

Finally, there were also statements in the video that may have had the potential to bolster Varkevisser in the eyes of the jury. To that effect, Varkevisser states that he would “even take a lie detector test.” The video also shows one of the officers telling Varkevisser that he would tell the district attorney that Varkevisser had cooperated and told the truth and that Varkevisser could tell his parents that he cooperated.

Though Defendant made no mention of Varkevisser’s involvement or presence at Victim’s home that night, the officers nonetheless wanted to speak with him. They located and interviewed Varkevisser about one week after Defendant’s confession and arrest. Varkevisser’s entire statement was videotaped. Varkevisser told the officers that, on the night of Victim’s death, he was also at Victim’s home playing computer games with Victim and Defendant. Varkevisser saw blood on Victim’s head when Victim was shot, the color of clothes that Victim was wearing when he died, what time Varkevisser picked Defendant up to go to Victim’s home on the night of the murder, and when Varkevisser first saw the gun that Defendant allegedly wielded that night.

On re-direct, the State sought to admit the videotaped statement into evidence under the rule of completeness. Defense counsel offered the following objection: "I don’t think that this is a proper offer . . . . I think you can offer certain portions of the transcript, if you want to rehabilitate [Varkevisser], but you can’t offer this video as an exhibit because the jury can go back and play the whole video. And it has stuff on there that has nothing to do with what I cross-examined him on."

The district court admitted the video under the rule of completeness, stating “if you offer part of it, and the other side wants to make sure the jury has the full clear understanding of the entire [statement], they can submit the whole thing.” The court allowed the State to play the video, though it did not allow it to go to the jury.

At the conclusion of the video, Defendant moved for a mistrial. Defense counsel argued that, in addition to “what he had said earlier about it not being proper rehabilitation of a witness,” the video also contained “a number of things that were objectionable.” Namely, defense counsel argued that the video contained improper speculation about motive, character, and prior bad acts.

The State responded that it was defense counsel who first mentioned the transcript on his cross-examination of Varkevisser. The State argued that defense counsel had been attacking the credibility of Varkevisser and that he was “picking and choosing” out of the transcript to do so.

The court denied Defendant’s motion for a mistrial. It largely agreed with the State’s framing of the issue, saying that defense counsel opened the door to the transcript and could not “pick and choose” what it would quote out of a deposition or a statement. The court went on that, if there was anything on the video that was more prejudicial than probative,
defense counsel had failed to object with the requisite specificity; defense counsel’s general objection to playing the videotape did not suffice.

{22} The jury convicted Defendant of first degree murder and tampering with evidence. Defendant moved for a new trial on the basis that the admission of the videotaped statement exceeded the scope of proper rehabilitation, enhanced the credibility of Varkevisser in the eyes of the jury, and put information before the jury that was improper for it to consider. The court denied Defendant’s motion. Defendant was sentenced to life plus three years imprisonment.

II. DISCUSSION

A. Defendant’s Confession Was Properly Admitted

{23} Defendant argues that his confession was involuntary and should have been suppressed by the district court because he has only an eighth grade education and because he was intimidated by the discussion of the death penalty during the interrogation.

{24} A reviewing court will examine the “totality of the circumstances to determine as a threshold matter of law whether the State has proved by the preponderance of the evidence that [a] [d]efendant’s confession was voluntary.” State v. Lobato, 2006-NMCA-051, ¶ 9, 139 N.M. 431, 134 P.3d 122. “Voluntariness means freedom from official coercion.” State v. Sanders, 2000-NMSC-032, ¶ 6, 129 N.M. 728, 13 P.3d 460 (internal quotation marks and citation omitted). A confession is coerced when the Defendant’s “will [was] overborne and his capacity for self-determination [was] critically impaired.” Id. (internal quotation marks and citation omitted). Direct or implied promises extended to a Defendant do not make the ensuing confession per se involuntary; rather, they are merely one factor to be considered in analyzing the totality of the circumstances. Id. ¶ 7.

{25} First, defense counsel argues that Defendant’s confession was involuntary because he has only an eighth grade education and a history of drifting from job to job. However, involuntariness requires official coercion: “there must be an essential link between coercive activity of the State . . . and a resulting confession by a defendant.” State v. Munoz, 1998-NMSC-048, ¶ 21, 126 N.M. 535, 972 P.2d 847 (internal quotation marks and citation omitted). However uneducated or unsophisticated Defendant may be, that alone is insufficient to make his confession involuntary without evidence that the officers took advantage of his lack of sophistication and used it to coerce him into making his incriminating statement. See Lobato, 2006-NMCA-051, ¶ 9 (“A confession is involuntary only if official coercion has occurred.”)

{26} Next, Defendant claims that he confessed to killing Victim only out of fear of death after the prospect of his receiving the death penalty was discussed in the interrogation. Although Defendant’s appellate counsel claims that the confession was involuntary because the officers essentially threatened Defendant with the death penalty, Defendant testified at the suppression hearing that he was the one to introduce the prospect of the death penalty during the interrogation.

{27} From Defendant’s testimony at the suppression hearing, it seems that his claim that he confessed only out of fear of death essentially collapses into a claim that the confession was involuntary because the officers promised that they would advocate on his behalf with the district attorney about not seeking the death penalty for him. However, this Court has held that the existence of promises or threats extended to a suspect does not make any ensuing confession per se involuntary; rather, it is merely one factor to be considered in analyzing the totality of the circumstances. See Sanders, 2000-NMSC-032, ¶¶ 7, 10. Since Defendant points to no more reasons why his confession was involuntary, we cannot conclude that his “will [was] overborne and his capacity for self-determination [was] critically impaired.” Id. ¶ 6 (internal quotation marks and citation omitted). The district court properly admitted Defendant’s confession.

B. Admission of Varkevisser’s Videotaped Statement Was Harmless Error

{28} Defendant argues that admission of the video of Varkevisser’s statement to the police was improper as it introduced speculations and insinuations concerning Defendant’s motive, prior bad acts, and character. The State responds that the videotaped statement’s admission was proper either as a prior consistent statement or under the rule of completeness.

{29} The admission or exclusion of evidence is within the sound discretion of the district court; that judgment will be set aside only on a showing of abuse of discretion. State v. Bell, 90 N.M. 134, 138, 560 P.2d 925, 929 (1977). A trial court abuses its discretion when it exercises its discretion based on a misunderstanding of the law. State v. Elinski, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209.

1. The Videotaped Statement Was Not Admissible as a Prior Consistent Statement

{30} In its response to Defendant’s motion for new trial, the State claimed that it had moved to admit Varkevisser’s videotaped statement under Rule 11-801(D)(1)(b) NMRA. Rule 11-801(D)(1)(b) excludes certain prior consistent statements from the definition of hearsay. It reads: [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Rule 11-801(D)(1)(b). A prior consistent statement is admissible to counter a charge of recent fabrication, improper influence, or motive only where the prior statement was made before the fabrication or the influence or motive arose. State v. Casaus, 1996-NMCA-031, ¶ 11, 121 N.M. 481, 913 P.2d 669; accord Tome v. United States, 513 U.S. 150, 156 (1995) (concluding the same under the federal rule); see also 1 Kenneth S. Broun et al., McCormick on Evidence § 47, at 226 (6th ed. 2006) ("[T]he prior consistent statement is deemed irrelevant to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated.").

{31} In the instant case, Varkevisser’s videotaped statement was not admissible as a prior consistent statement because it did not precede any alleged motive he had to lie. Rather, if Varkevisser was motivated to lie to exculpate himself in Victim’s death or to secure the district attorney’s leniency, his motive arose at the time that the police contacted him with the evidence of Victim’s murder and their knowledge of his pawning Victim’s CDs and DVDs. The police contacted Varkevisser prior to the time that he made his videotaped statement; police contact was in fact the precipitating event that led him to make his statement. Therefore, Varkevisser’s videotaped statement was not a prior consistent statement admissible under Rule 11-801(D)(1)(b).
2. The Videotaped Statement Was Not Admissible Under the Rule of Completeness

[32] The State also claims that Varkevisser’s videotaped statement was admissible under Rule 11-106 NMRA. We disagree. Because defense counsel had not created a misleading or deceptive impression of the videotaped statement and because the State had not shown that the entire video was both relevant and explained or qualified the portions initially referenced by defense counsel, the State’s reliance on the rule of completeness is misplaced.

[33] Rule 11-106 provides that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered contemporaneously with it.” Rule 11-106 is an expression of the common law rule of completeness and is a verbatim iteration of the federal rule. See Fed. R. Evid. 106; Rule 11-106; cf. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171-72 (1988) (stating that the federal rule is a partial codification of the doctrine of completeness).

[34] The primary purpose behind the rule of completeness is to eliminate misleading or deceptive impressions created by creative excerpting. The principle behind the rule of completeness is simply stated by Wigmore: “the whole of a verbal utterance must be taken together.” 7 John Henry Wigmore, Evidence in Trials at Common Law § 2094, at 604 (Chadbourn rev. 1978) (emphasis omitted). The classic illustration of a violation of the rule of completeness is quoting “there is no God” from the biblical phrase “[t]he fool hath said in his heart, there is no God.” See 1 Bough, supra, § 56, at 283-84, citing Wigmore, supra, § 2094. To that end, Rule 11-106 permits “the introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading.” State v. Carr, 95 N.M. 755, 767, 626 P.2d 292, 304 (Ct. App. 1981), overruled on other grounds by State v. Olgun, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994); accord Beech Aircraft Corp., 488 U.S. at 172 (“[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible . . . .”); United States v. Ramos-Caraballo, 375 F.3d 797, 802 (8th Cir. 2004) (recognizing that the rule is intended to avoid “misleading impressions created by taking matters out of context”); Fed. R. Evid. 106 advisory committee’s note (stating that the rule is directed at the “misleading impression created by taking matters out of context”).

[35] Rule 11-106 “does not come into play when a few inconsistencies between out-of-court and in-court statements are revealed through cross-examination; rather, it operates to ensure fairness where a misunderstanding or distortion created by the other party can only be averted by the introduction of the full text of the out-of-court statement.” Ramos-Caraballo, 375 F.3d at 803 (internal citation and quotation marks omitted); accord United States v. Avon, 135 F.3d 96, 101 (1st Cir. 1998) (“The doctrine of completeness does not permit the admission of otherwise inadmissible evidence simply because one party has referred to a portion of such evidence, or because a few inconsistencies between out-of-court and in-court statements are revealed through cross-examination . . .”), abrogated by United States v. Piper, 298 F.3d 47, 57 n.5 (1st Cir. 2002). “The rule of completeness permits nothing more than setting the context and clarifying the answers given on cross-examination; it is not proper to admit all prior consistent statements simply to bolster the credibility of a witness who has been impeached by particulars.” Ramos-Caraballo, 375 F.3d at 803 (internal citation and quotation marks omitted).

[36] Rule 11-106 does not mandate that a whole document automatically becomes competent upon introduction of a portion thereof. See Carr, 95 N.M. at 767, 626 P.2d at 304; see also 1 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 106.05 (2d ed. 2009) (“[T]here is no right to introduce all portions of a document merely because the opponent has employed some portion of it to impeach a witness.”). It is “subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction.” Carr, 95 N.M. at 767, 626 P.2d at 304 (internal quotation marks and citation omitted); see also State v. Case, 103 N.M. 574, 577, 711 P.2d 19, 22 (Ct. App. 1985) (concluding that the district court properly denied the defendant’s request that other portions of a transcript be admitted where there was no showing that the refused portions were relevant), rev’d on other grounds, 103 N.M. 501, 502, 709 P.2d 670, 671 (1985). Specifically, to be properly admitted under Rule 11-106, the party invoking the rule must show that the evidence is relevant to the issue in dispute and qualifies or explains the subject matter of the portion of the writing already admitted. See, e.g., Ramos-Caraballo, 375 F.3d at 802-03; United States v. Glover, 101 F.3d 1183, 1189-90 (7th Cir. 1996); United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981).

[37] In the instant case, Varkevisser’s videotaped statement was not admissible under Rule 11-106 because: (1) the inconsistencies brought out on cross-examination of Varkevisser did not rise to the level of creating a misleading impression of Varkevisser’s videotaped statement and (2) the State did not demonstrate that the entire videotaped statement was relevant and that it was necessary to qualify or explain the portion of the statement brought out on cross-examination.

[38] First, by attempting to impeach Varkevisser with the minor inconsistencies between his videotaped statement and his trial testimony, defense counsel did not take portions of the earlier videotaped statement out of context to create a misleading impression about the prior statement. See Carr, 95 N.M. at 767, 626 P.2d at 304.

[39] The situation in Beech Aircraft Corp. is an edifying example of a party taking a portion of a writing out of context to create a misleading impression. 488 U.S. at 170-71. Beech Aircraft Corp. was a product liability suit arising from the death of a navy flight instructor and her student in an airplane crash. Id. at 156. At issue was whether the crash was the result of equipment malfunction or pilot error. Id. at 157. The spouse of the deceased flight instructor, Rainey, had written a letter after the crash explaining why he believed it was the result of equipment malfunction.

[40] Rainey did not testify during the plaintiffs’ case in chief but was called by the defense as an adverse witness. Id. at 159. On direct examination, defense counsel asked Rainey about two statements in his letter that, when considered alone, tended to support the defense theory that the crash was the result of pilot error. Id. at 159-60. On cross-examination, Rainey’s counsel asked Rainey whether he had also concluded in the letter that the most likely cause of the crash was equipment malfunction. Id. at 160. Before Rainey could answer, the defense objected and further questioning about the letter was disallowed. Id.

[41] The United States Supreme Court concluded that the district court had abused
its discretion in not permitting Rainey to provide a more complete picture of his letter to the jury under the rule of completeness. \textit{Id.} at 170. It stated:

\{[w]e\} have no doubt that the jury was given a distorted and prejudicial impression of Rainey’s letter. The theory of Rainey’s case was that the accident was the result of a power failure, and, read in its entirety, his letter . . . was fully consistent with that theory . . . . What the jury was told, however, through the defendants’ direct examination of Rainey as an adverse witness, was that Rainey had written six months after the accident (1) that his wife had attempted to cancel the flight, partly because her student was tired and emotionally drained, and that “unnecessary pressure” was placed on them to proceed with it; and (2) that she or her student had abruptly initiated a hard right turn when the other aircraft unexpectedly came into view. It is plausible that a jury would have concluded from this information that Rainey did not believe in his theory of power failure and had developed it only later for purposes of litigation . . . . Rainey’s counsel was unable to counteract this prejudicial impression by presenting additional information about the letter on cross-examination. \textit{Id.} at 170-71.

\{42\} The use of Varkevisser’s statement in the instant case is plainly distinguishable from that of Rainey’s letter in \textit{Beech Aircraft Corp.} Here, defense counsel asked Varkevisser only whether he remembered telling the police certain details of the killing; the use of Varkevisser’s prior statement was not misleading, incomplete, or deceptive such that additional evidence was required to explain or qualify it. Defense counsel merely used Varkevisser’s prior statement to demonstrate “a few inconsistencies” between it and his in-court testimony. See \textit{Ramos-Caraballo}, 375 F.3d at 803 (internal citation and quotation marks omitted). Because Rule 11-106 is purposed on “ensur[ing] fairness where a misunderstanding or distortion [has been] created by the other party,” the State’s invocation of the rule was inappropriate. See \textit{id.} (internal citation and quotation marks omitted).

\{43\} Next, even if Rule 11-106 did apply, the videotaped statement was not properly admitted thereunder because the State failed to show that it was relevant and either qualified or explained the portion of the statement relied upon by defense counsel. See \textit{id.} at 802-03; see also \textit{State v. Sanders}, 117 N.M. 452, 458, 872 P.2d 870, 876 (1994).

\{44\} In \textit{Sanders}, the State had cross-examined the defendant about two discrete responses to police questioning that he had made in a prior statement. \textit{Id.} Like the State in the present case, the defendant in \textit{Sanders} sought to have his entire twenty-two page statement to the police admitted under the rule of completeness in an effort to put those two answers in context. \textit{Id.} The district court refused the proffer and this Court affirmed because the defendant had made no showing that the entire statement was relevant to the jury’s understanding of the admitted evidence, his two answers to the police. \textit{Id.}

\{45\} In the instant matter, Varkevisser’s videotaped statement was improperly admitted under the rule of completeness because the State did not show that the entire videotaped statement was relevant and either qualified or explained the portion of the statement relied upon by defense counsel during cross-examination. Rather, the only argument the State made in advocating for the video’s admission was: “it’s the complete transcription. Counsel is taking portions of that transcription. We, just under the rule of completeness, would like the jury to see the entire transcript.” To have the videotaped statement properly admitted, the State was required to specify which portions were relevant and qualified or explained any inconsistencies that it alleged were taken out of context. Failing such a showing, the videotaped statement was admitted in error.

3. Admission of the Videotaped Statement Was Harmless Error

a. In New Mexico, the Harmless Error Standard for Non-constitutional Errors is Lower Than the Harmless Error Standard for Constitutional Errors

\{46\} The State maintains that even if the admission of the videotaped statement was error, it was harmless. We agree and take this opportunity to clarify the proper standard for non-constitutional harm.

\{47\} Evidence admitted in violation of our rules is grounds for a new trial where the error was not harmless. \textit{See, e.g., State v. McClougherty,} 2003-NMSC-006, ¶ 32, 133 N.M. 459, 64 P.3d 486. The harmless error rule has its origins in the context of non-constitutional error; it arose as a reaction to an era marked by automatic reversal of cases for any procedural error. 7 Wayne R. LaFave et al., \textit{Criminal Procedure} § 27.6(a), at 99-100 (3d ed. 2007). Because of the prevalence of automatic reversals, there was a “widespread and deep conviction” that appellate courts “towel[ed] above the trials of criminal cases as impregnable citadels of technic[ality].” \textit{Kotteakos v. United States}, 328 U.S. 750, 759 (1946) (internal quotation marks and citation omitted).

\{48\} The harmless error rule was adopted to require appellate courts to affirm lower courts notwithstanding “technical errors, defects, or exceptions which [did] not affect the substantial rights of the parties.” 7 LaFave, supra, § 27.6(a), at 101 (internal quotation marks and citation omitted); see also 28 U.S.C. § 2111 (2000) (based on the original provision); Fed. R. Crim. Pro. 52(a) (same). The purpose of the rule was, and continues to be, to limit reversal to errors which impacted the outcome of the proceeding and “to substitute judgment for review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving [individuals] fairly convicted [a] multiplicity of loopholes . . . .” \textit{Kotteakos}, 328 U.S. at 760. Throughout the first half of the twentieth century, harmless error was applied exclusively in the context of non-constitutional error; constitutional error continued to require automatic reversal. 7 LaFave, supra, § 27.6(a), at 101.

\{49\} Then, in the 1960s, with the unprecedented expansion of federal constitutional protections into the criminal process, harmless error analysis was imported into the constitutional context. \textit{Id.} To this end, the Court in \textit{Chapman v. California} held that “there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.” 386 U.S. 18, 22 (1967).

\{50\} The United States Supreme Court has articulated two constitutional harmless error standards, while recognizing that there is “little, if any, difference” between them. \textit{Id.} at 24. Thus, the harmlessness of a constitutional error is properly analyzed asking whether “there [was] a reasonable possibility that the [error] complained of
might have contributed to the conviction,” Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), or whether the error was “harmless beyond a reasonable doubt,” Chapman, 386 U.S. at 24; see also State v. Walters, 2007-NMSC-050 ¶¶ 25, 27, 142 N.M. 644, 168 P.3d 1068 (referring to both standards in discussing harmless error analysis); State v. Johnson, 2004-NMSC-029, ¶ 9, 136 N.M. 348, 98 P.3d 998 (noting that the constitutional harmless error standard has been variously articulated).

{51} Constitutional error implicates our most basic, and most cherished, individual rights; non-constitutional error, while still serious, does not pose the same threat to liberty. Therefore, it is appropriate to review non-constitutional error with a lower standard than that reserved for our most closely held rights. See, e.g., Kotteakos, 328 U.S. at 765 (holding that the federal standard for non-constitutional harmless error is whether “one can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, the judgment was not substantially swayed by the error”); United States v. Lane, 474 U.S. 438, 460-61 (1986) (Brennan, J., concurring in part and dissenting in part) (recognizing that the federal standard for non-constitutional harmless error is less exacting than that for constitutional error); see also 7 LaFave, supra, § 27.6(b), at 110 (same).

{52} In New Mexico, however, the constitutional standard has seeped into our non-constitutional harmless error case law and it is now common for both types of error to be reviewed under the same “reasonable possibility” standard. See, e.g., State v. Torres, 1999-NMSC-101, ¶¶ 51-53, 127 N.M. 20, 976 P.2d 20 (applying the reasonable possibility standard and concluding that the improper admission of HGN evidence was harmless); Clark v. State, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (applying the reasonable possibility standard and concluding that the admission of improper impeachment evidence was harmless). To add to the confusion, in some instances, our case law makes no mention of the “reasonable possibility” standard and instead applies a long-standing three-part test for determining whether non-constitutional error amounts to harmless error. See, e.g., State v. Duffy, 1998-NMSC-014, ¶ 38, 126 N.M. 132, 967 P.2d 807 (“For an error to be deemed harmless, there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so minuscule that it could not have contributed to the conviction, and (3) no substantial conflicting evidence to discredit the State’s testimony.”) (internal quotation marks and citation omitted); State v. Moore, 94 N.M. 503, 504, 612 P.2d 1314, 1315 (1980).

{53} In light of the unsettled nature of our case law in this area, we take this opportunity to re-fortify the boundary between non-constitutional and constitutional error for the purpose of harmless error analysis. Where the defendant has established a violation of the rights guaranteed by the United States Constitution or the New Mexico Constitution, constitutional error review is appropriate. In these cases, a reviewing court should only conclude that an error is harmless when there is no reasonable possibility it affected the verdict. In contrast, where a defendant has established a violation of statutory law or court rules, non-constitutional error review is appropriate. A reviewing court should only conclude that a non-constitutional error is harmless when there is no reasonable probability the error affected the verdict. Cf. State v. Day, 91 N.M. 570, 573-74, 577 P.2d 878, 881-82 (Ct. App. 1978) (stating that the proper harmless error standard in a case of prosecutorial misconduct was whether there was a reasonable probability that the misconduct contributed to the conviction).

{54} The reasonableness standards provide elasticity that is responsive to the appropriate level of certainty needed before a reviewing court can pronounce an error harmless. The standards are necessarily difficult to explicate because they are fluid; they will acquire content through application in each case. Needless to say, the reasonable possibility standard continues to resemble the reasonable doubt standard while the reasonable probability standard requires a greater degree of likelihood that a particular error affected a verdict. In other words, the universe of harmless error is larger in the context of non-constitutional error than it is in the realm of constitutional error. To that end, non-constitutional error is reversible only if the reviewing court is able to say, in the context of the specific evidence presented at trial, that it is reasonably probable that the jury’s verdict would have been different but for the error.

{55} To determine whether an error meets the requisite standard of harmless-ness, a number of different factors come into play. In this regard, the three-part inquiry noted above provides a useful framework for determining not only whether non-constitutional error is harmless, but also for assessing the impact of constitutional error. Though the three elements have previously been characterized as a test, they are more properly described as three factors to be considered. No one factor is determinative; rather, they are considered in conjunction with one another. All three factors will provide a reviewing court with a reliable basis for determining whether an error is harmless.

{56} We therefore sanction the use of the following three-part inquiry for determining whether there is a reasonable possibility or reasonable probability that an error, constitutional or non-constitutional, contributed to a verdict. The factors are whether there is: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the State’s testimony. See, e.g., Mc Claugherty, 2003-NMSC-006, ¶ 32. Application of these factors will allow the reviewing court to determine whether there is a reasonable possibility that a constitutional error affected the verdict or whether there is a reasonable probability that a non-constitutional error affected the verdict.

{57} Finally, we emphasize that, when assessing the harmfulness of error, it is not the role of the appellate court to reweigh the evidence against a defendant:

The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee.

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Having clarified the appropriate standards for constitutional and non-constitutional error, we eliminate the second clause of this factor which existed in previous iterations of the three-part inquiry to so reflect.
Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); accord State v. Martinez, 2008-NMSC-060, ¶ 44, 145 N.M. 220, 195 P.3d 1232; Johnson, 2004-NMSC-029, ¶ 43. The harmless error analysis does not center on whether, in spite of the error, the right result was reached. Rather, the focus is on whether the verdict was impacted by the error.

b. There is No Reasonable Probability That Admission of Varkevisser’s Videotaped Statement Affected the Verdict Against Defendant

Defendant established that Varkevisser’s videotaped statement was admitted in violation of the New Mexico Rules of Evidence and, therefore, we review the error under the non-constitutional standard. First, there was substantial evidence to support Defendant’s convictions without reference to the videotaped statement. Defendant’s confession provided strong evidence against him. See State v. Alvarez-Lopez, 2004-NMSC-030, ¶ 34, 136 N.M. 309, 98 P.3d 699 (“Confessions have profound impact on the jury . . . .”) (internal quotation marks and citation omitted). Further, Defendant’s confession was corroborated both by Varkevisser’s testimony and the physical evidence.

Second, there was indeed such a disproportionate volume of permissible evidence that the improper evidence was minuscule in comparison. The improperly admitted evidence amounted to seventy minutes of slow, winding dialogue punctuated by long periods of silence. It contained mostly irrelevant speculation which had no direct connection to Victim’s murder. When compared to the volume of permissible evidence—Defendant’s confession, Varkevisser’s corroborative in-court testimony, and the corroborative physical evidence—the impact of the videotaped statement was inconsequential.

The third factor is whether there was no substantial conflicting evidence to discredit the improperly admitted statement. Because Defendant presented evidence which challenged the extraneous discussion in the video in the form of four character witnesses who testified that he was a “peaceful, nonviolent, law abiding citizen,” the jury may have used the improperly admitted video to resolve the conflict in character evidence against Defendant. Thus, this factor weighs against harmlessness.

Finally, we note that, overall, this was not a case where both sides presented significant conflicting evidence. In addition to his four character witnesses, Defendant testified on his own behalf, stating that he had nothing to do with Victim’s death and that his confession was involuntary. On the other hand, the State presented overwhelming evidence of guilt, including Defendant’s confession, Varkevisser’s corroborative eye-witness account, and the corroborative physical evidence. In light of the overwhelming evidence of guilt, the impact of the videotaped statement, which was largely cumulative of Varkevisser’s in-court testimony and Defendant’s confession, was negligible. On balance, the lack of significant conflicting evidence overall weighs in favor of the harmlessness of the admission of the video.

Because there was substantial evidence to support Defendant’s convictions without reference to the videotaped statement, such a disproportionate volume of permissible evidence that the improper evidence was minuscule in comparison, and a lack of significant conflicting evidence overall, we conclude that there was no reasonable probability that admission of Varkevisser’s videotaped statement contributed to Defendant’s conviction.

In the words of the United States Supreme Court, “[a] defendant is entitled to a fair trial but not a perfect one.” See Lutwak v. United States, 344 U.S. 604, 619 (1953). Admission of the videotaped statement was error, but we conclude that it was harmless. Defendant’s convictions are affirmed.

III. CONCLUSION

For all of the foregoing reasons, we affirm.

IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
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The Chief Legal Counsel (“CLC”) must be a member of the New Mexico Bar and a recognized leader in providing corporate, litigation, administrative, technical, business and intellectual property legal counsel services to a public private non-profit high performance computing and applications center. Expertise and prior experience in supporting private, Federal, State and Local funding and proposal development, technical business development, and project management is also desirable. The CLC is responsible for providing legal advice and counsel, on behalf of the Corporations’ goal of pursuing research and development initiatives to grow the intellectual property and technological capabilities of the State of New Mexico and New Mexican entities. We are accepting resumes until June 26. For details, requirements and desirables, log on to www.newmexicosupercomputer.com.

**Attorney**
Busy law firm seeking an attorney with at least two years experience in Social Security law. This person should have strong research and writing skills and the ability to work independently. Salary competitive and commensurate to experience and qualifications. Spanish speaking a plus. Please send resume to Nichole Henry, Whitener Law Firm, P.A., 4110 Cutler Avenue, N.E., Albuquerque, NM 87110 or e-mail to nichole@whitenerlawfirm.com.

**Associate Attorney**
The Santa Fe office of Hinkle, Hensley, Shanor & Martin seeks an associate attorney with 2-4 years experience for defense of employment discrimination and civil rights claims. Candidates should have strong academic background, excellent writing and research skills, and the ability to work independently. Please send resume and writing sample to Hiring Partner, P.O. Box 2068, Santa Fe, New Mexico 87504-2068.

**Position Announcement**
The Judicial Standards Commission is currently accepting resumes from prospective candidates for the position of Executive Director. The position is exempt (not classified), and reports directly to the Judicial Standards Commission. The salary range for this position is $43.27 to $50.58 hourly and will be commensurate with experience. The Judicial Standards Commission’s Executive Director acts as the chief executive officer of the agency. In that capacity, the Executive Director is responsible for all aspects of agency operations including the preparation, management and administration of agency appropriations and funds, supervision of agency staff, development of policies and procedures for the effective management of the agency and other additional duties as assigned by the Commission. The position also requires supervision of all matters requiring prosecution of formal disciplinary charges as approved by the Commission; the supervision and preparation of all aspects of litigation before the Commission and before the New Mexico Supreme Court in hearings or other matters involving the Commission’s recommendation of discipline, retirement or removal of a judge in accordance with N.M. Constitution art. VI Section 32. Admission to the New Mexico bar is required at the time of hire. The position requires strong research, writing and communication skills, as well as experience in managing professional staff. A high level of trustworthiness, discretion and sound judgment is required for the position. Resume with cover letter, writing sample and three (3) professional references must be received at the offices of the Judicial Standards Commission by 5:00 p.m., on July14, 2009. Materials should be sent to the attention of David S. Smoak, Chairman, at P.O. Box 27248, Albuquerque, NM 87125-7248.

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**Assistant Federal Public Defender, Del Rio, Texas**

**Attorney**
Seeking attorney with 3 years or more experience to join bankruptcy, commercial litigation & real estate practice. Court appearances will be required. Ability to use Lexis, MS Office and other computer programs required. We are looking for a long term relationship and terms of employment will include possibility of acquiring ownership. Please fax or e-mail resume’, cover letter stating reasons for interest and salary/benefits requirements, salary history and references to The Law Office of George Dave Giddens, P.C. Fax: (505) 271-4848; Giddens@giddenslaw.com.

**Associate**
Rugge, Rosales & Associates, P.C. has an opening for an associate with two to five years experience in litigation, trial and appellate practice. We are a small office looking for a hard working dedicated attorney to work in a friendly and professional environment. Practice areas include personal injury defense, insurance law, special investigations and insurance fraud, nursing home negligence, business and probate litigation. Please send resume, copy of law school transcript, and writing sample to: David Ray Rosales, 901 Rio Grande Blvd NW, #G-250, Albuq. 87104.
Assistant County Attorney
Los Alamos County

Los Alamos County is accepting applications for Assistant County Attorney. This job includes providing advice on divergent and challenging legal issues. Minimum requirements include: Juris Doctorate or Bachelors of Law Degree from an accredited law school; seven years of experience in the practice of law including two years of advising public or private sector policymakers; member of New Mexico State Bar or if from another state must be awaiting State Bar exam results and be a member of New Mexico State Bar within four months of employment. Salary range is $78,842 to $126,147. Applications and full information are available at www.losalamosnm.us or by calling 505-662-8041. Application deadline is July 31, 2009 at 5:00 PM. Note: Applications may be reviewed and interviews may begin as early as July 10, 2009. A selection may be made prior to the closing date. (EOE)

Paralegal

Paralegal wanted for busy downtown law firm. Must have previous legal experience, with emphasis on civil, personal injury and probate; have excellent research and writing skills, be organized and able to work under pressure. Please email resume: donna@smdlegal.com.

Associate Attorney

Scott & Kienzle, P.A. seeks associate attorney with 0 to 5 years of experience. Practice areas include litigation, bankruptcy, collections, insurance, and election law on the Republican side. Responsibilities include opening a file through pretrial, arbitration, trial, and appeal. Please email a letter of interest, salary requirements, and resume to Paul Kienzle at paul@kienzlelaw.com.

Litigation Paralegal

Walsh, Anderson, Brown, Aldridge & Gallegos, P.C., is seeking a Litigation Paralegal for its Albuquerque, New Mexico office. Candidates should possess 2+ years paralegal experience in a Governmental or Legal setting, be familiar with Word/Word Perfect, Access, Power Point and Westlaw. Please note all candidates are subject to a criminal background check.

Litigation Support

Walsh, Anderson, Brown, Aldridge & Gallegos, P.C., is seeking a Litigation Support Specialist. Responsibilities include opening a file through pretrial, arbitration, trial, and appeal. Please email a letter of interest, salary requirements, and resume to Paul Kienzle at paul@kienzlelaw.com.

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Large Uptown Suite


Law Office For Rent

Law office for rent, front door parking, across the street from Flying Star Restaurant. 8010 Menaul NE, Albuquerque. Two other attorneys in offices. Contact: Hal Simmons, 299-8999.

Prestigious Santa Fe Office Space

Prestigious Santa Fe office space available for prime tenant. Leasing 6700 square feet. Paseo de Peralta & Don Gaspar. Outstanding visibility and location. Contact Lisa Tometich (505) 690-1440 or Fred Soldow (719) 239-0520.

Miscellaneous

Albuquerque Plaintiff’s law firm is seeking information regarding mediations conducted with the University of New Mexico Hospital that involved heavy-handed or oppressive mediation practices. If you or your client was subjected to heavy-handed or oppressive mediation techniques with UNMH within the last 3 years, please contact Roni @ 842-5602 or e-mail bellemnga@yahoo.com.
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The State Bar of New Mexico congratulates the New Mexico Compilation Commission on the 30th anniversary of the NMSA 1978

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