Inside This Issue

Table of Contents ................................................. 5
Bernalillo County Metropolitan Court
  Judicial Appointment ........................................ 6
Registration Information, 2010 State Bar
  Annual Meeting–Bench & Bar Conference ............. 7
A Model of Action and Professionalism:
  Vigil and Bosson Earn National Recognition
  for Efforts on Behalf of Law Client Protection
  Program, by Christine Joseph ......................... 9
Hearsay ............................................................... 10
Rules/Orders
  Proposed Revisions to the Rules of Criminal
  Procedure for the District Courts,
  Rules of Criminal Procedure for the
  Magistrate Courts, Rules of Criminal
  Procedure for the Metropolitan Courts,
  Rules of Procedure for the Municipal Courts,
  and Criminal Forms ....................................... 18
From the New Mexico Court of Appeals
  2010-NMCA-048, No. 28,798:
    State v. Figueroa ............................................. 33
  2010-NMCA-049, No. 28,599:
    State v. Nevarez ............................................. 37
  2010-NMCA-050, No. 28,447:
    State v. C.L .................................................. 42

Special Insert:
IOLTA News

www.nmbar.org
Maddox, Holloman & Kirksey, P.C.  
Celebrating 40 Years

July 1, 2010 marks the 40th anniversary of the founding of the firm of Maddox, Holloman & Kirksey, P.C. in Hobbs, New Mexico by brothers Don and Jim Maddox.

The attorneys and staff at the firm offer their warm congratulations to Jim on his forty years of professional, dedicated, and successful practice.

The firm is privileged to serve the businesses, families, and individuals of Southeast New Mexico, West Texas, and beyond. We look forward to many more years of serving our clients together.

Address:
P.O. Box 2508
Hobbs, NM
88241-2508

Website:
www.hobbsnmlaw.com

Telephone:
575-393-0505

James M. Maddox
Scotty Holloman
Lee A. Kirksey
Kathleen A. Moran
Andrew J. LeMieux
is pleased to announce that

BRENDAN K. EGAN
has joined the firm as an associate attorney in the Santa Fe office. Brendan received his BA from the University of Notre Dame and his JD from the University of New Mexico School of Law. Previously, Brendan served as a staff attorney for the ACLU-NM. He practices in the areas of civil rights, civil litigation and criminal defense.

DANIEL P. ESTES
has joined the firm as an associate attorney in the Albuquerque office. Daniel received dual BA degrees in Physics and History from the University of New Mexico and his JD from the University of Colorado School of Law. He practices in the areas of civil rights, civil litigation and criminal defense.

APRIL ERIN OLSON
has joined the firm as an associate attorney in the Tempe office. April received her BS degree from Eastern New Mexico University and her JD from Arizona State University Sandra Day O’Connor College of Law. Previously, April was counsel for the Gila River Indian Community. She practices in the area of federal Indian law.
2010 Annual Meeting – Bench and Bar Conference
Inn of the Mountain Gods, Mescalero, New Mexico • July 15-17, 2010

Special Guest

CHARLES P. ROSE is the general counsel for the U.S. Department of Education. He was nominated by President Obama on March 18, 2009, and confirmed by the United States Senate on May 1, 2009. In this position, Rose serves as the chief legal officer for the department and as the legal adviser to the secretary of education on all matters affecting the department’s programs and activities.

Prior to his appointment, Rose was engaged in the private practice of law. He was a founding partner and corporate secretary of Franczek Radelet PC (formerly Franczek Radelet & Rose PC), established in 1994. There he represented school districts, municipalities, and other public employers across Illinois with respect to labor relations and collective bargaining matters, general matters of labor and employment law, and education law. Rose served as the lead negotiator on hundreds of collective bargaining agreements for a wide variety of public employers, including the Chicago Public Schools and the City of Chicago.

Keynote Speaker

STUART A. FORSYTH is owner and principal of The Legal Futurist, an independent consulting practice providing long-range strategic planning and visioning services to all components of the justice system including courts, bar associations, law firms, CLE providers, lawyers, judges and educators. His presentations on the future of the legal profession, courts and continuing education have received nationwide acclaim.

Forsyth served as consultant to the American Bar Association’s Committee on Research About the Future of the Legal Profession and was a founding member of the Association of Professional Futurists.

A visionary bar executive, he served five years as executive director of the Los Angeles County Bar Association—the largest metropolitan bar in the nation—where he focused on creating products and services to meet the professional needs of lawyers in the 21st century. Under his leadership, the bar held its first community-wide Diversity Summit, dramatically improved relationships with its sections and introduced technology for distance learning.

Featured Speakers

Author of the critically acclaimed book If It Does Not Fit, Must You Acquit? Your Humorous Guide to the Law (2002), SEAN CARTER has been called America’s funniest lawyer. A graduate of Harvard Law School, Carter’s humorous yet practical CLE presentations have been heard by over 200 organizations and his humor columns have appeared in such publications as the National Law Journal and on websites such as Findlaw.com. His Sue Unto Others As You Would Have Them Sue Unto You will be a must-see professionalism program at the Annual Meeting.

DAVID GROSS is a magna cum laude graduate of Harvard Law School. Named as one of the “Top Ten Winning Litigators in the U.S.” by the National Law Journal in 2009, Gross has previously been listed as one of the nation’s 50 “Rising Litigation Stars” by The American Lawyer (2008) based on his track record of high profile IP litigation victories as well as his prominence as a national speaker on trial practice and patent litigation. The 2007 recipient of the Center for Legal Education’s National Speaker of the Year Award, Gross is a former clerk to the Honorable Levin H. Campbell of the U.S. Court of Appeals for the First Circuit in Boston and a former trial attorney for the Civil Division of the U. S. Department of Justice in Washington, D.C. He is the co-author of the NITA publication The Power Trial Method and has served as lead attorney for a nationwide pro bono investigation resulting in a national report on the status of Hurricane Katrina evacuees.

For more information visit www.nmbar.org
Table of Contents

Notices .................................................................................................................................................6
Registration Information, 2010 State Bar Annual Meeting–Bench & Bar Conference...............7
U.S. District Court, District of New Mexico: Public Notices Concerning Reappointment of
Full-Time U.S. Magistrate Judges ..............................................................................................8
A Model of Action and Professionalism: Vigil and Bosson Earn National Recognition
for Efforts on Behalf of Law Client Protection Program, by Christine Joseph .......................9
Hearsay ....................................................................................................................................................10
Legal Education Calendar ..................................................................................................................11
Writs of Certiorari .................................................................................................................................13
List of Court of Appeals’ Opinions ........................................................................................................15
Recent Rule-Making Activity ................................................................................................................16
Rules/Orders
Proposed Revisions to the Rules of Criminal Procedure for the District Courts,
Rules of Criminal Procedure for the Magistrate Courts, Rules of Criminal Procedure
for the Metropolitan Courts, Rules of Procedure for the Municipal Courts,
and Criminal Forms ............................................................................................................................18
Opinions
From the New Mexico Court of Appeals
2010-NMCA-048, No. 28,798: State v. Figueroa ........................................................................ 33
2010-NMCA-049, No. 28,599: State v. Nevarez ........................................................................ 37
2010-NMCA-050, No. 28,447: State v. C.L. ................................................................................... 42
Advertising ............................................................................................................................................45

Meetings

July
7
Real Property, Trust and Estate Section
BOD, 11:30 a.m., via teleconference
7
Bankruptcy Law Section BOD
noon, U.S. Bankruptcy Court
7
Employment and Labor Law Section
BOD, noon, State Bar Center
8
Board of Editors
8:30 a.m., State Bar Center
8
Intellectual Property Section BOD
noon, Law Office of Diane Albert
8
Public Law Section BOD
noon, Risk Management Division,
Santa Fe

State Bar Workshops

July
28
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

August
25
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

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

Cover Artist: Paintings by Todd Lenhoff (tlenhoffartist@aol.com) give an in-depth, vibrant view of his interpretation of people. Through color, line, and shape, he is able to bring character, culture and life to the canvas. He sees his work like that of the subject matter—a continuous evolution. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
NOTICES

COURT NEWS
N.M. Supreme Court
Administrative Office of the Courts

The Administrative Office of the Courts is in need of a volunteer summer extern in the Santa Fe office to work with state and tribal judges and AOC staff performing legal research and assisting with the Tribal-State Judicial Consortium’s summer regional meetings on implementing the sex offender registries. A small stipend is available to cover transportation costs. For more information, call Kathy, (505) 827-4808, or e-mail aockbs@nmcourts.gov.

Board of Bar Examiners Board Vacancy

One vacancy exists on the Board of Bar Examiners for a membership position that expires July 12. Persons interested in volunteering time on this board may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for submissions is July 7.

Second Judicial District Court
Settlement Week 2010

The 2nd Judicial District Court’s 22nd Annual Settlement Week is scheduled for Oct. 18–Oct. 22.
- Domestic relations changes are on the Court Alternatives website.
- For complete details regarding referral requests, see LR2-602, Section C, of the 2nd Judicial District Court's Local Rules governing the Settlement Facilitation Program. Blank referral forms are available in the Clerk’s Office, Court Alternatives, and online at http://www.nmcourts.gov/seconddistrictcourt/cal2.html. Note: All referrals should be filled out completely and sent directly to the assigned judge in the case. Include names, addresses and contact numbers of all parties/artees (especially pro se parties) involved and any other individuals requiring notice of the settlement facilitation. For more information, call Court Alternatives, (505) 841-7412.

Bernalillo County Metropolitan Court
Furloughs Begin July 30

Bernalillo County Metropolitan Court judges have voted to approve a furlough plan for court employees that will make up a $674,000 shortfall this fiscal year. Beginning July 30, the court will furlough all employees for two hours per month, or one hour per pay period. That means the court will close two hours early (3 p.m.) on the last working Friday of each month. On months that include three paydays, the court will close three hours early (2 p.m.) on the last working Friday.

Judicial Appointment

Governor Bill Richardson has appointed Yvette Gonzales to fill the vacancy created by Judge Victoria J. Grant’s retirement. Gonzales began as a sole practice in Albuquerque earlier this year after working as special counsel for Speaker of the House Ben Lujan. She previously worked at the 2nd Judicial District Attorney’s Office for twelve years. While at the District Attorney’s Office she handled large caseloads in both District and Metro courts. Gonzales holds a Bachelors degree from the University of New Mexico and is a 1997 graduate of the University of New Mexico School of Law. She is a member of the New Mexico Hispanic Bar Association.

U.S. District Court for the District of New Mexico
Las Cruces Courthouse Dedication Ceremony

The Honorable Martha Vázquez, the judges of the U.S. District Court for the District of New Mexico, and J.D. Salinas, regional administrator, U.S. General Services Administration, cordially invite the legal community to attend the dedication ceremony at 4 p.m., July 9, for the Las Cruces U.S. Courthouse, 100 North Church Street, Las Cruces. A reception will immediately following the ceremony.

STATE BAR NEWS
Attorney Support Group

- July 19, 7:30 a.m.—Morning groups meet regularly on the third Monday of the month.
- July 5, 5:30 p.m.—Afternoon groups meet regularly on the first Monday of the month:
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Judicial Records Retention and Disposition Schedules

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

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic relations, probate, and children’s court cases</td>
<td>1987–94</td>
<td>July 2</td>
</tr>
</tbody>
</table>
Board of Bar Commissioners
Civil Legal Services Commission Appointment
The Board of Bar Commissioners will make one appointment to the New Mexico Civil Legal Services Commission for a three-year term. Members wishing to serve on the commission should send a letter of interest and brief resume by June 30 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Employment and Labor Law Section Board Meeting
The Employment and Labor Law Section board of directors welcomes section members to attend its meetings, which are usually held on the first Wednesday of each month. The next meeting will be held at noon, July 7, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar website, www.nmbar.org, or contact Chair Aaron Viets, (505) 766-7588 or aviets@rodey.com.

Young Lawyers Division Volunteers Needed
The Young Lawyers Division is seeking volunteers to be part of the Host Committee for the 2010 ABA/YLD Fall Conference to be held Oct. 14–16 at the El Dorado Hotel and Spa in Santa Fe. Energetic attorneys and paralegals are needed to help with fundraising and event planning. The registration fee will be covered for volunteers. For more information or to participate, contact Martha Chicoski, mary.martha.chicoski@farmers.com.

Other Bars
Albuquerque Bar Association
Member Luncheon
The Albuquerque Bar Association’s Member Luncheon will be held at noon, July 13, at the Embassy Suites Hotel, 1000 Woodward Place NE, Albuquerque. The speaker is District Attorney Kari Brandenburg. The CLE (2.0 general CLE credits) will immediately follow the luncheon from 1:15 to 3:15 p.m. UNM School of Law Professor Nathalie Martin will present Payday Loans/Consumer Protection.
Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $85 members/$115 non-members with reservations; CLE only: $60 members/$80 non-members. Register for lunch by noon, July 9. To register:
1. log on to www.abqbar.org;
2. e-mail abqbar@abqbar.org;
3. fax to (505) 842-0287;
4. call (505) 842-1151 or (505) 243-2615; or
5. mail to PO Box 40, Albuquerque, NM 87103.

UNM
School of Law
Summer Library Hours
Building and Circulation
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 8 a.m.–5 p.m.
Sunday Noon–8 p.m.
Reference
Monday - Friday 9 a.m.–6 p.m.
Saturday–Sunday Closed
Independence Day, July 4–5 Closed

MEMBER BENEFIT OF THE WEEK
The Edward Group
Disability Income Insurance
Disability insurance is offered by Berkshire Life Insurance Company of America (A+ A.M. Bests) at discount prices. Policies have very strong guarantees and coverage cannot be changed or canceled by the carrier. Policies are available for personal income protection, retirement plan protection or for overhead expenses or partner buyout.
The Edward Group offers coverage with over 50 other carriers for disability, life, long-term care insurance and employee benefits.
Visit http://www.edwardgroup.net/disability1.htm and contact John Edward, 1-877-880-4041 toll free or e-mail jbedward@edwardgroup.net.

2010-2011 Bench & Bar Directory
Purchase online at www.nmbar.org or call 505.797.6000

REGISTRATION INFORMATION
2010 STATE BAR ANNUAL MEETING—BENCH & BAR CONFERENCE
INN OF THE MOUNTAIN GODS,
JULY 15–17, 2010
Register for the State Bar Annual Meeting—Bench & Bar Conference today.
Visit https://www.nmbar.org/Attorneys/AM/AM10Registration.html or see the May 10 (Vol. 49, No. 19) Bar Bulletin.
Those registering at the meeting will receive materials on CD. While supplies last, the CD may be exchanged for a hard copy binder at the conclusion of the annual meeting. Visit the registration desk or the State Bar Center.
U. S. District Court for the District of New Mexico

Public Notices Concerning Reappointment of Full-Time U. S. Magistrate Judges

The current term of office for incumbent full-time United States Magistrate Judge Alan C. Torgerson will expire on March 2, 2011. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Alan C. Torgerson to a new eight-year term.

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

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Alan C. Torgerson to a new term of office should be considered. All comments will be kept confidential and should be submitted to the personal attention of the undersigned not later than July 2, 2010.

Mark Baker
Long, Pound & Komer PA
PO Box 5098
Santa Fe, NM 87502-5098

The current term of office for incumbent full-time United States Magistrate Judge Robert H. Scott will expire on March 31, 2011. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Robert H. Scott to a new eight-year term.

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

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Robert H. Scott to a new term of office should be considered. All comments will be kept confidential and should be submitted to the personal attention of the undersigned not later than July 2, 2010.

Mark Baker
Long, Pound & Komer PA
PO Box 5098
Santa Fe, NM 87502-5098

The current term of office for incumbent full-time United States Magistrate Judge Lourdes A. Martinez will expire on March 31, 2011. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Lourdes A. Martinez to a new eight-year term.

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

United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Lourdes A. Martinez to a new eight-year term.

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Lourdes A. Martinez to a new term of office should be considered. All comments will be kept confidential and should be submitted to the personal attention of the undersigned not later than July 2, 2010.

Mark Baker
Long, Pound & Komer PA
PO Box 5098
Santa Fe, NM 87502-5098

The current term of office for incumbent full-time United States Magistrate Judge Robert H. Scott will expire on March 31, 2011. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Robert H. Scott to a new eight-year term.

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

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Robert H. Scott to a new term of office should be considered. All comments will be kept confidential and should be submitted to the personal attention of the undersigned not later than July 2, 2010.

Mark Baker
Long, Pound & Komer PA
PO Box 5098
Santa Fe, NM 87502-5098

The current term of office for incumbent full-time United States Magistrate Judge Alan C. Torgerson will expire on March 2, 2011. The United States District Court has established a panel of citizens, as required by law, to consider the reappointment of Magistrate Judge Alan C. Torgerson to a new eight-year term.

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

The public and members of the bar are invited to submit comments as to whether the reappointment of Magistrate Judge Alan C. Torgerson to a new term of office should be considered. All comments will be kept confidential and should be submitted to the personal attention of the undersigned not later than July 2, 2010.

Mark Baker
Long, Pound & Komer PA
PO Box 5098
Santa Fe, NM 87502-5098
“A Model of Action and Professionalism”

Vigil and Bosson Earn National Recognition for Efforts on Behalf of Law Client Protection Program

By Chris Joseph, Program Administrator

The board of directors of the National Client Protection Organization unanimously selected Justice Richard C. Bosson of the Supreme Court of New Mexico and Charles J. Vigil, past president of the State Bar and the first chair of the Client Protection Fund Commission, as the joint recipients of the 2010 Isaac Hecht Law Client Protection Award. The award, presented June 4 at the American Bar Association’s 26th Law Client Protection Forum in Seattle, recognizes individuals or professional organizations that have demonstrated excellence in the field of law client protection.

“In a sense,” states the official program for the awards ceremony, “the award goes to them as representatives of 8,600 members of the legal profession in New Mexico, lawyers and judges alike. The award, in fact, commemorates their persistence, leadership and success in establishing a viable and effective law client protection program in the State of New Mexico.”

The State Bar first established its Client Protection Fund in 1992 using commercial insurance for the payment of reimbursement claims. As claims increased each year, so did the insurance premiums. The upshot was the State Bar’s decision in 1999 to discontinue its insurance coverage because the premiums were equal to the amount of the policy. The following year the Supreme Court appointed a task force to make financial recommendations, which included a State Bar commitment of $25,000 annually from its general revenues, with a $2,500 cap on individual claims. That approach also failed. At the close of 2002, the fund’s assets had been depleted because of claims submitted arising from thefts by one member of the State Bar. The State Bar discontinued funding in 2003, and its Client Protection Fund was effectively terminated.

The State Bar requested help from the American Bar Association’s Standing Committee on Client Protection in the hopes of reactivating its protection program. Toward that end, the State Bar committed $50,000 in funding for claims in 2004 and 2005. Under the leadership of Vigil, the State Bar petitioned the Supreme Court to approve $551,000 in interim financing from unused funds from New Mexico’s Mandatory Continuing Legal Education Board and proposed a new structure for a client protection commission consistent with the ABA’s model rules.

Law client protection in New Mexico, by order of the Supreme Court, is currently administered by a commission under the auspices of the State Bar. The commission is comprised of members appointed by the Supreme Court and the State Bar. Vigil serves as the current chair and Justice Bosson serves as the commission’s liaison to the Supreme Court. Justice Bosson is also credited with a leading role in the Supreme Court’s decision in 2009 to establish a $15 annual assessment on each member of the State Bar to finance the Client Protection Fund.

The fund’s initial cap of $2,500 per claim has been increased to its current $10,000 limit. In four years, 70 clients have been reimbursed for a total of $209,887. All but eight client losses were fully reimbursed.

The commission is active in numerous projects and initiatives. It publishes educational materials for new and veteran lawyers. It has endorsed programs to require disclosure of malpractice insurance coverage and trust account overdrafts. Currently, the commission is working on a payee notification rule with New Mexico’s insurance regulating authority. Together with the State Bar, it is also active in the field of lawyer assistance with the goal of protecting clients by developing an early warning system for lawyers with alcohol and drug problems.

According to the NCPO, “In a multi-year joint effort, the State Bar and the Supreme Court, with the help of the American Bar Association, identified and overcame the structural and financial challenges to having an effective client protection program. Vigil and Justice Bosson were key players.”

The NCPO found the effort in New Mexico to be a “model of action and professionalism for bar associations, law societies, and client protection funds everywhere,” also noting that total reimbursement of client losses is still an aspiration.

Current members of New Mexico’s Client Protection Fund Commission are Chair Charles J. Vigil; Treasurer Henry A. Kelly; Secretary Daniel J. O’Brien; Hon. Richard C. Bosson; Briggs F. Cheney; Andrew J. (Drew) Cloutier; Gaelle D. McConnell; Stuart D. Shanor; State Bar Executive Director Joseph Conte; State Bar General Counsel Richard B. Spinello; and State Bar Program Administrator Christine Joseph.

“Clients of New Mexico lawyers are well served and protected by the efforts of the Supreme Court and the State Bar to re-establish a viable and sustainable client protection fund worthy of the Isaac Hecht Award,” said John Gleason, president of the NCPO.

To contact the State Bar’s Client Protection Fund, call (505) 797-6054 or 1-800-876-6227.
Clifford Atkinson, John Thal and Douglas Baker of Atkinson, Thal & Baker PC have been selected for inclusion in the 2010 issue of Southwest Super Lawyers for their expertise in business litigation. Baker was selected as one of the “Top 25 of New Mexico.”

John P. (Jack) Burton has been selected by Lawdragon Magazine as a member of the “2010 Lawdragon Top 3000,” an elite list of the nation’s top attorneys. His selection is based on his work in, dedication to, and true leadership in the legal profession. Burton, a partner with the Rodey Law Firm, has a state-wide, multi-disciplined, commercial practice involving transactions, alternative dispute resolution and litigation in federal and state courts, and legislative representation. Lawdragon provides reviews of lawyers and judges submitted by clients, peers and jurors. It bases its rankings on these reviews, as well as on its own extensive research.

Joan D. Marsan has joined Brownstein Hyatt Farber Schreck’s Albuquerque office as an associate in the natural resources group. With experience in natural resources, water law, Indian law, real estate and land use planning, Marsan’s practice has included cases pending before the U.S. Supreme Court and various state and federal, trial and appellate courts. Prior to joining the firm, she was an associate at Modrall, Sperling, Roehl, Harris & Sisk PA in Albuquerque. She also served as a judicial intern for Senior Judge John L. Kane, U.S. District Court, District of Colorado. Marsan earned her bachelor’s degree at the University of Illinois, her master’s degree at Northwestern University, and her law degree at the University of Colorado School of Law.

Philomena M. Hausler, Adam H. Greenwood and David C. Kramer have joined Robles, Rael & Anaya, PC. Hausler is a cum laude graduate of the University of Miami School of Law and is a doctoral candidate in the Department of Anthropology at the Harvard University Graduate School of Arts and Sciences. She began her practice as a law clerk for the 11th Circuit Court of Appeals and the US District Court for the Southern District of Florida. After entering private practice she began representing clients in civil litigation, with a focus on Indian law issues. Hausler currently practices in the fields of civil rights litigation, administrative law, and general civil representation, including representing clients before state and federal agencies. She previously worked as an archaeologist and native language specialist in Alaska. She also served as a municipal planning and zoning commissioner, and a commissioner for one of Alaska’s key coastal resource districts. Greenwood is a magna cum laude graduate of University of Notre Dame Law School and began his practice clerking for the 9th Circuit Court of Appeals. He has a wide-range of civil litigation experience, including public law, environmental law, employment law, constitutional rights litigation, contract litigation, and administrative law. He also has substantial experience appearing before state and federal agencies in New Mexico. Prior to entering the legal field, Greenwood served as a sergeant in the Army National Guard, acting as a counter-intelligence agent/linguist. Kramer is a magna cum laude graduate of Suffolk University Law School in Boston and holds a Master of Arts degree in sociology from the University of Washington. He served as law clerk to the Honorable Cynthia A. Fry of the New Mexico Court of Appeals from 2004 to 2006. Prior to and during law school, Kramer worked in the financial services industry, most recently for Fidelity Investments in Boston. He has a wide-range of civil litigation experience, including insurance law, civil rights law and construction-defect litigation.

The New Mexico Criminal Defense Lawyers Association (NMCDLA) awarded Ousama M. Rasheed its 2010 Charles Driscoll Award, named for a long-time criminal defense lawyer who later became a Catholic priest. The award is in memory of Driscoll’s passion and zeal and honors those whose outstanding work improves criminal defense in New Mexico. Rasheed, a private practice attorney and president-elect of NMCDLA, received his law degree in 1990 from the UNM School of Law and began his private law practice 16 years ago after a stint with the district attorney’s office. Rasheed has volunteered countless hours coordinating and presenting at numerous seminars, testifies annually at the State Capitol in Santa Fe, and is regularly consulted by various members of the Legislature regarding proposed legislation. Recently, Rasheed was appointed to serve on the New Mexico Department of Transportation Senate Memorial Task Force on Ignition Interlocks. In his continuing efforts to educate the public about the role of criminal defense lawyers and the complexities of DWI, Rasheed speaks at public community events and to reporters with both television and print media.

Louis Puccini, Jr., of Puccini Law PA, has been selected to appear in Southwest Super Lawyers 2010. Puccini is board certified in business bankruptcy law with the American Board of Certification. His practice is primarily limited to the areas of bankruptcy and civil litigation.
## JUNE

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>Helping Your Client Select the Best Entity Option</td>
<td>Albuquerque&lt;br&gt;NBI, Inc.&lt;br&gt;5.5 G, 1.0 E&lt;br&gt;1-800-930-6182&lt;br&gt;www.nbi-sems.com</td>
</tr>
<tr>
<td>29</td>
<td>Negligent Hiring</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>30</td>
<td>Lawyer Substance Abuse Addictions: Causes and Results</td>
<td>Teleconference&lt;br&gt;TRT, Inc.&lt;br&gt;1.0 E, 1.0 P&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
</tr>
</tbody>
</table>

## JULY

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>Kinship Guardianship</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;4.0 G, 1.0 E, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>6</td>
<td>Like-Kind Exchange of Businesses and Business Interests</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>6</td>
<td>Property Taking Through Eminent Domain</td>
<td>Albuquerque&lt;br&gt;NBI, Inc.&lt;br&gt;6.0 G&lt;br&gt;1-800-930-6182&lt;br&gt;www.nbi-sems.com</td>
</tr>
<tr>
<td>6</td>
<td>Tag Team Clydesdales in the Courtroom</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;6.5 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>8</td>
<td>2010 Sexual Harassment Update</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>8</td>
<td>When Prosecutors Test the Outer Limits</td>
<td>Teleconference&lt;br&gt;TRT, Inc.&lt;br&gt;1.0 E, 1.0 P&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
</tr>
<tr>
<td>9</td>
<td>Lawyer Substance Abuse Addictions: Causes and Results</td>
<td>Teleconference&lt;br&gt;TRT, Inc.&lt;br&gt;1.0 E, 1.0 P&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
</tr>
<tr>
<td>13–14</td>
<td>Business Torts, Parts 1 &amp; 2</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;2.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>14</td>
<td>EEOC Law Update</td>
<td>State Bar Center&lt;br&gt;Paralegal Division&lt;br&gt;1.0 G&lt;br&gt;(505) 247-0411 or (505) 222-9356</td>
</tr>
<tr>
<td>15–17</td>
<td>2010 State Bar Annual Meeting–Bench &amp; Bar Conference</td>
<td>Inn of the Mountain Gods&lt;br&gt;Mescalero, N.M.&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;10.4 G, 1.0 E, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>20</td>
<td>ABCs of Foreclosure Law</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;3.7 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>20</td>
<td>Attorney’s Guide to Dealing With Stress in Tough Economic Times</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;2.0 E, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>20</td>
<td>Indian Child Welfare Act</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;3.3 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>20</td>
<td>Special Needs Trust Planning</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
</tbody>
</table>
### Legal Education

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Title</th>
<th>Location</th>
<th>Credits</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>Construction Contracts Teleseminar</td>
<td>Center for Legal Education of NMSBF</td>
<td>1.0 G</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>26</td>
<td>Best Practices and Ethics in Adult Guardianship Law Teleconference</td>
<td>TRT, Inc.</td>
<td>1.0 G, 1.0 E</td>
<td>1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>27</td>
<td>Annual Legal Seminar</td>
<td>Santa Fe National Rural Electric Cooperative Association</td>
<td>7.5 G, 1.0 E</td>
<td>(703) 907-5656 <a href="http://www.nreca.org">www.nreca.org</a></td>
</tr>
<tr>
<td>27</td>
<td>Goodwill in Business Transactions Teleseminar</td>
<td>Center for Legal Education of NMSBF</td>
<td>1.0 G</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>29</td>
<td>Trust &amp; Estate Guide to Terminations &amp; Elections: A Practical Guide for Practitioners Teleseminar</td>
<td>Center for Legal Education of NMSBF</td>
<td>1.0 G</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>26</td>
<td>When Prosecutors Test the Outer Limits Teleconference</td>
<td>TRT, Inc.</td>
<td>1.0 E, 1.0 P</td>
<td>1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>29</td>
<td>Lawyer Substance Abuse Addictions: Causes and Results Teleconference</td>
<td>TRT, Inc.</td>
<td>1.0 E, 1.0 P</td>
<td>1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
</table>

### August

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Title</th>
<th>Location</th>
<th>Credits</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>2009 How to Do Your First Personal Injury Case VR–State Bar Center Center for Legal Education of NMSBF</td>
<td>4.0 G, 1.0 E, 1.0 P</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World—A.M. Session VR–State Bar Center Center for Legal Education of NMSBF</td>
<td>2.2 G, 0.5 E</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Understanding the Rules of Evidence State Bar Center Paralegal Division</td>
<td>1.0 G</td>
<td>(505) 247-0411 or (505) 222-9356</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>25th Annual Bankruptcy Year in Review VR–State Bar Center Center for Legal Education of NMSBF</td>
<td>6.0 G, 1.0 P</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Skeptically Determining the Limits of Expert Testimony and Evidence: An Investigation of Scope, Expertise and Process VR–State Bar Center Center for Legal Education of NMSBF</td>
<td>4.7 G, 1.0 E, 1.0 P</td>
<td>(505) 797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>When Prosecutors Test the Outer Limits Teleconference</td>
<td>TRT, Inc.</td>
<td>1.0 E, 1.0 P</td>
<td>1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>30</td>
<td>Lawyer Substance Abuse Addictions: Causes and Results Teleconference</td>
<td>TRT, Inc.</td>
<td>1.0 E, 1.0 P</td>
<td>1-800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
</table>
## 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 28, 2010**

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

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Title</th>
<th>Date Petition Filed</th>
<th>Date Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>32,460</td>
<td>State v. Padilla</td>
<td>6/18/10</td>
<td></td>
</tr>
<tr>
<td>32,459</td>
<td>State v. Williams</td>
<td>6/17/10</td>
<td></td>
</tr>
<tr>
<td>32,458</td>
<td>Castillo v. Romero</td>
<td>6/16/10</td>
<td></td>
</tr>
<tr>
<td>32,456</td>
<td>State ex rel. CYFD v. Sarah B.</td>
<td>6/16/10</td>
<td></td>
</tr>
<tr>
<td>32,455</td>
<td>State v. Lozoya</td>
<td>6/16/10</td>
<td></td>
</tr>
<tr>
<td>32,453</td>
<td>Eker v. Rehders</td>
<td>6/16/10</td>
<td></td>
</tr>
<tr>
<td>32,454</td>
<td>State v. Schwartz</td>
<td>6/15/10</td>
<td></td>
</tr>
<tr>
<td>32,452</td>
<td>Prue v. Romero</td>
<td>6/15/10</td>
<td></td>
</tr>
<tr>
<td>32,451</td>
<td>State v. C De Baca</td>
<td>6/15/10</td>
<td></td>
</tr>
<tr>
<td>32,449</td>
<td>State v. Gardner</td>
<td>6/14/10</td>
<td></td>
</tr>
<tr>
<td>32,448</td>
<td>State v. March</td>
<td>6/14/10</td>
<td></td>
</tr>
<tr>
<td>32,443</td>
<td>State v. Tapia</td>
<td>6/14/10</td>
<td></td>
</tr>
<tr>
<td>32,446</td>
<td>State v. Justice</td>
<td>6/11/10</td>
<td></td>
</tr>
<tr>
<td>32,445</td>
<td>State v. Ontiveros</td>
<td>6/11/10</td>
<td></td>
</tr>
<tr>
<td>32,444</td>
<td>State v. Stanley</td>
<td>6/11/10</td>
<td></td>
</tr>
<tr>
<td>32,442</td>
<td>Hill v. State</td>
<td>6/10/10</td>
<td></td>
</tr>
<tr>
<td>32,441</td>
<td>State v. Delgado</td>
<td>6/10/10</td>
<td></td>
</tr>
<tr>
<td>32,439</td>
<td>State v. Dean</td>
<td>6/9/10</td>
<td></td>
</tr>
<tr>
<td>32,438</td>
<td>State v. Zuniga</td>
<td>6/9/10</td>
<td></td>
</tr>
<tr>
<td>32,435</td>
<td>Ford v. State</td>
<td>6/7/10</td>
<td></td>
</tr>
<tr>
<td>32,431</td>
<td>Johnson v. Skate Away USA Inc.</td>
<td>6/7/10</td>
<td></td>
</tr>
<tr>
<td>32,430</td>
<td>State v. Muqqddin</td>
<td>6/4/10</td>
<td></td>
</tr>
<tr>
<td>32,429</td>
<td>State v. Lucero</td>
<td>6/4/10</td>
<td></td>
</tr>
<tr>
<td>32,428</td>
<td>Valdez v. R-Way, L.L.C.</td>
<td>6/2/10</td>
<td></td>
</tr>
<tr>
<td>32,427</td>
<td>State v. Lewis</td>
<td>6/2/10</td>
<td></td>
</tr>
<tr>
<td>32,426</td>
<td>State v. May</td>
<td>6/2/10</td>
<td></td>
</tr>
<tr>
<td>32,425</td>
<td>State v. Michael C.</td>
<td>6/2/10</td>
<td></td>
</tr>
<tr>
<td>32,424</td>
<td>State v. Bowden</td>
<td>6/2/10</td>
<td></td>
</tr>
<tr>
<td>32,423</td>
<td>State v. Bird</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,420</td>
<td>State v. Montoya</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,419</td>
<td>Jernigan v. Jaramillo</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,418</td>
<td>State v. Valdez</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,417</td>
<td>State v. Perea</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,416</td>
<td>State v. Bolin</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,413</td>
<td>State v. Vasquez</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,415</td>
<td>State v. Esparza</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,414</td>
<td>State v. Reyna</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,408</td>
<td>Baker v. Mosaic</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,407</td>
<td>Devon v. Mosaic</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,402</td>
<td>State v. Harper</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,398</td>
<td>State v. Maso</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,395</td>
<td>State v. Curley</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,390</td>
<td>State v. Yellowman</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,394</td>
<td>State v. Garza</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,380</td>
<td>Molina v. State</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,375</td>
<td>Stone v. Janecka</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,328</td>
<td>Ayala v. Hatch</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,365</td>
<td>State v. Holgate</td>
<td>6/1/10</td>
<td></td>
</tr>
<tr>
<td>32,311</td>
<td>Rodriguez v. Permian</td>
<td>6/1/10</td>
<td></td>
</tr>
</tbody>
</table>

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

(Responding parties preparing briefs)

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Title</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,791</td>
<td>State v. Atcitty</td>
<td>6/12/09</td>
</tr>
<tr>
<td>31,891</td>
<td>State v. Gonzales</td>
<td>9/15/09</td>
</tr>
<tr>
<td>31,927</td>
<td>State v. Sanchez</td>
<td>9/28/09</td>
</tr>
<tr>
<td>32,012</td>
<td>State v. Trujillo</td>
<td>11/18/09</td>
</tr>
<tr>
<td>32,041</td>
<td>State v. Puliti</td>
<td>12/7/09</td>
</tr>
<tr>
<td>32,044</td>
<td>State v. Episco</td>
<td>12/7/09</td>
</tr>
<tr>
<td>32,069</td>
<td>State v. Martinez</td>
<td>12/29/09</td>
</tr>
<tr>
<td>32,126</td>
<td>State v. Myers</td>
<td>1/12/10</td>
</tr>
<tr>
<td>32,094</td>
<td>State v. Flores</td>
<td>1/12/10</td>
</tr>
<tr>
<td>32,129</td>
<td>State v. Wylie</td>
<td>1/22/10</td>
</tr>
<tr>
<td>32,130</td>
<td>State v. Cruz</td>
<td>1/25/10</td>
</tr>
<tr>
<td>32,092</td>
<td>State v. Trujillo</td>
<td>1/26/10</td>
</tr>
<tr>
<td>32,165</td>
<td>State v. Henry</td>
<td>2/11/10</td>
</tr>
<tr>
<td>32,170</td>
<td>State v. Ketelson</td>
<td>2/11/10</td>
</tr>
<tr>
<td>32,137</td>
<td>State v. Skippings</td>
<td>2/18/10</td>
</tr>
<tr>
<td>32,149</td>
<td>State v. Sandoval</td>
<td>3/1/10</td>
</tr>
<tr>
<td>32,234</td>
<td>State v. Trujillo</td>
<td>3/10/10</td>
</tr>
<tr>
<td>32,243</td>
<td>Farmers Insurance Co of Arizona v. Chen</td>
<td>4/1/10</td>
</tr>
<tr>
<td>32,175</td>
<td>Kittell v. Lovett</td>
<td>4/1/10</td>
</tr>
<tr>
<td>32,263</td>
<td>State v. Williams</td>
<td>4/1/10</td>
</tr>
<tr>
<td>32,291</td>
<td>State v. Torres</td>
<td>4/23/10</td>
</tr>
<tr>
<td>32,320</td>
<td>State v. Vasquez</td>
<td>5/5/10</td>
</tr>
<tr>
<td>32,341</td>
<td>Herzog v. Griego</td>
<td>5/5/10</td>
</tr>
<tr>
<td>32,342</td>
<td>Bonney v. Herzog</td>
<td>5/5/10</td>
</tr>
<tr>
<td>32,324</td>
<td>Allen v. Paptheofanis</td>
<td>5/6/10</td>
</tr>
<tr>
<td>32,202</td>
<td>Summers v. Ardent Health Services</td>
<td>5/10/10</td>
</tr>
<tr>
<td>32,302</td>
<td>Lion's Gate Water v. NM State Engineer</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,339</td>
<td>McPeek v. Hubbard</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,340</td>
<td>Rivera v. American General</td>
<td>6/2/10</td>
</tr>
</tbody>
</table>
**WRITS OF CERTIORARI**

http://nmsupremecourt.nmcourts.gov

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>COA No.</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>32,344</td>
<td>Provencio v. Wenrich</td>
<td>28,882</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,360</td>
<td>State v. Figueroa</td>
<td>28,798</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,374</td>
<td>State v. Nevarez</td>
<td>28,599</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,376</td>
<td>Ehrenreich v. Malzahn</td>
<td>29,835</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,379</td>
<td>State v. Luchetti</td>
<td>28,447</td>
<td>6/2/10</td>
</tr>
<tr>
<td>32,388</td>
<td>State v. Harper</td>
<td>27,830</td>
<td>6/2/10</td>
</tr>
</tbody>
</table>

**CERTIORARI GRANTED AND SUBMITTED TO THE COURT**

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

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>COA No.</th>
<th>Submission Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,374</td>
<td>Schultz v. Pojoaque Tribal Police Dept.</td>
<td>28,508</td>
<td>5/11/09</td>
</tr>
<tr>
<td>31,637</td>
<td>Akins v. United Steel</td>
<td>27,132</td>
<td>10/13/09</td>
</tr>
<tr>
<td>31,092</td>
<td>State v. Mailman</td>
<td>27,966</td>
<td>11/10/09</td>
</tr>
<tr>
<td>31,602</td>
<td>Allstate Ins. Co. v. Guest</td>
<td>27,253</td>
<td>12/4/09</td>
</tr>
<tr>
<td>31,603</td>
<td>Guest v. Allstate Ins. Co.</td>
<td>27,253</td>
<td>12/4/09</td>
</tr>
<tr>
<td>31,750</td>
<td>Kilgore v. Fuji</td>
<td>27,470</td>
<td>1/11/10</td>
</tr>
<tr>
<td>31,218</td>
<td>State v. Henley</td>
<td>27,925</td>
<td>1/27/10</td>
</tr>
<tr>
<td>31,745</td>
<td>State v. Jackson</td>
<td>28,107</td>
<td>1/27/10</td>
</tr>
<tr>
<td>31,100</td>
<td>Allen v. LeMaster</td>
<td>(12-501)</td>
<td>2/15/10</td>
</tr>
<tr>
<td>31,723</td>
<td>State v. Mendez</td>
<td>28,261</td>
<td>2/16/10</td>
</tr>
<tr>
<td>31,433</td>
<td>Romero v. Philip Morris, Inc.</td>
<td>26,993</td>
<td>2/22/10</td>
</tr>
<tr>
<td>31,724</td>
<td>Albuquerque Commons v. City/Albq.</td>
<td>(24,026/24,027/24,042/24,425)</td>
<td>2/22/10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>COA No.</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,909</td>
<td>State v. Rudy B.</td>
<td>27,589</td>
<td>5/12/10</td>
</tr>
<tr>
<td>32,099</td>
<td>Wachocki v. Bernalillo Co. Sheriff’s Dept.</td>
<td>27,761</td>
<td>7/19/10</td>
</tr>
<tr>
<td>32,131</td>
<td>Wachocki v. Bernalillo Co. Sheriff’s Dept.</td>
<td>27,761</td>
<td>7/19/10</td>
</tr>
<tr>
<td>32,162</td>
<td>Garcia v. Garcia</td>
<td>28,106</td>
<td>7/19/10</td>
</tr>
<tr>
<td>32,063</td>
<td>Jordan v. Allstate Insurance Co.</td>
<td>28,638</td>
<td>7/29/10</td>
</tr>
<tr>
<td>32,203</td>
<td>Lucero v. Trujillo</td>
<td>29,859</td>
<td>7/29/10</td>
</tr>
<tr>
<td>32,139</td>
<td>San Juan Ag. Water Users Assn. v. KNME-TV</td>
<td>28,473</td>
<td>8/9/10</td>
</tr>
<tr>
<td>31,813</td>
<td>State v. Soliz</td>
<td>28,018</td>
<td>8/10/10</td>
</tr>
<tr>
<td>31,980</td>
<td>Northwest Villages, L.L.C. v. Martinez</td>
<td>29,743</td>
<td>8/25/10</td>
</tr>
<tr>
<td>31,740</td>
<td>State v. McCorkle</td>
<td>29,124</td>
<td>8/25/10</td>
</tr>
</tbody>
</table>

**PETITION FOR WRIT OF CERTIORARI DENIED:**

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>COA No.</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>32,393</td>
<td>State v. Barela</td>
<td>29,995</td>
<td>6/8/10</td>
</tr>
<tr>
<td>32,401</td>
<td>State v. Rankin</td>
<td>30,125</td>
<td>6/15/10</td>
</tr>
<tr>
<td>32,403</td>
<td>State v. Pinkerton</td>
<td>29,832</td>
<td>6/15/10</td>
</tr>
<tr>
<td>32,404</td>
<td>State v. Pena</td>
<td>29,925</td>
<td>6/15/10</td>
</tr>
<tr>
<td>32,405</td>
<td>Gerke v. Romero</td>
<td>28,652</td>
<td>6/15/10</td>
</tr>
<tr>
<td>32,412</td>
<td>Munoz v. Bravo</td>
<td>(12-501)</td>
<td>6/15/10</td>
</tr>
</tbody>
</table>
**OPINIONS**

**Published Opinions**

<table>
<thead>
<tr>
<th>No.</th>
<th>Date Opinion Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>28240</td>
<td>6/17/2010</td>
</tr>
</tbody>
</table>

**Unpublished Opinions**

<table>
<thead>
<tr>
<th>No.</th>
<th>Date Opinion Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>29088</td>
<td>6/14/2010</td>
</tr>
<tr>
<td>28926</td>
<td>6/14/2010</td>
</tr>
<tr>
<td>28657</td>
<td>6/16/2010</td>
</tr>
<tr>
<td>29914</td>
<td>6/16/2010</td>
</tr>
<tr>
<td>30003</td>
<td>6/16/2010</td>
</tr>
<tr>
<td>30173</td>
<td>6/16/2010</td>
</tr>
<tr>
<td>28876</td>
<td>6/17/2010</td>
</tr>
</tbody>
</table>

**Slip Opinions for Published Opinions may be read on the Court's website:**

http://coa.nmcourts.gov/documents/index.htm
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 14, 2010

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:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-2300</td>
<td>Introduction. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2305</td>
<td>Human Rights Act violation. Withdrawn; Recompiled as UJI 13-2307 [UJI–Civil]</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307</td>
<td>Human Rights Act violation. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307A</td>
<td>Race, gender, and other discrimination under the N.M. Human Rights Act. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307B</td>
<td>Bona fide occupational qualification. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307C</td>
<td>Discrimination based on serious medical condition or physical or mental handicap. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307D</td>
<td>Failure to accommodate.1 (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307E</td>
<td>Undue hardship. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307F</td>
<td>Determining whether impairment qualifies as a physical or mental handicap. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307G</td>
<td>Determining whether impairment qualifies as a serious medical condition. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307H</td>
<td>Establishing disability by showing an individual has a record of a physical or mental condition. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307I</td>
<td>“Regarded as”defined. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307J</td>
<td>“Otherwise qualified” defined. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307K</td>
<td>“Reasonable accommodation” defined. No instruction drafted. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>13-2307L</td>
<td>Constructive discharge. (UJI–Civil)</td>
<td>05/24/10</td>
</tr>
<tr>
<td>3-105</td>
<td>Assignment and designation of judges (Rules of Civil Procedure for the Metropolitan Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>3-706</td>
<td>Appeal from metropolitan court on the record (Rules of Civil Procedure for the Metropolitan Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>6-701</td>
<td>Judgment (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>6-703</td>
<td>Appeal (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>7-703</td>
<td>Appeal (Rules of Criminal Procedure for the Metropolitan Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>8-701</td>
<td>Judgment (Rules of Procedure for the Municipal Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>8-703</td>
<td>Appeal (Rules of Procedure for the Municipal Courts)</td>
<td>05/03/10</td>
</tr>
<tr>
<td>10-424</td>
<td>Advice of rights by judge (Children’s Court Rules)</td>
<td>04/26/10</td>
</tr>
</tbody>
</table>

RECENTLY APPROVED RULE CHANGES

Effective Date

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

1-079 Public inspection and sealing of court records. 07/01/10
1071.1 Statutory stream system adjudication suits; service and joinder of water rights claimants; responses. 06/08/10
1071.2 Statutory stream system adjudication suits; stream system issue and expedited inter se proceedings. 06/08/10
1071.3 Statutory stream system adjudication suits; annual joint working session. 06/08/10
1071.4 Statutory stream system adjudication suits; ex parte contacts; general problems of administration. 06/08/10
1071.5 Statutory stream system adjudication suits; excusal or recusal of a water judge. 06/08/10

RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS

2-205 Assignment and designation of judges. 05/14/10

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

3-112 Public inspection and sealing of court records. 07/01/10

CIVIL FORMS

4-102 Certificate of excusal or recusal. 05/14/10
4-103 Notice of excusal. 05/14/10
4-104 Notice of recusal. 05/14/10

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

5-605 Jury trial. 11/30/09
5-704 Death penalty; sentencing. 11/30/09
5-123 Public inspection and sealing of court records. 07/01/10
5-302A Grand Jury Proceedings. 05/14/10
### Rule-Making Activity

**Rules of Criminal Procedure**

**Rules of Criminal Procedure for the Magistrate Courts**
- **6-114** Public inspection and sealing of court records. 07/01/10
- **6-105** Assignment and designation of judges. 05/14/10

**Rules of Criminal Procedure for the Metropolitan Courts**
- **7-113** Public inspection and sealing of court records. 07/01/10
- **7-201** Commencement of action. 05/10/10
- **7-504** Discovery; cases within metropolitan court trial jurisdiction. 05/10/10

**Rules of Procedure for the Municipal Courts**
- **8-112** Public inspection and sealing of court records. 07/01/10

**Criminal Forms**
- **9-218** Target notice. 05/14/10
- **9-219** Grand jury evidence alert letter. 05/14/10

**Children’s Court Rules and Forms**
- **10-166** Public inspection and sealing of court records. 07/01/10
- **10-313.1** Representation of multiple siblings. 05/10/10

**Rules of Appellate Procedure**
- **12-213** Briefs. 04/12/10
- **12-214** Oral argument. 04/12/10
- **12-305** Form of papers prepared by parties. 04/12/10
- **12-314** Public inspection and sealing of court records. 07/01/10
- **12-607** Certification from other courts. 05/11/10

**UJI Criminal**
- **14-121** Individual voir dire; death penalty cases; single jury used. 11/30/09
- **14-121A** Individual voir dire; death penalty cases; two juries used. 11/30/09

**Rules Governing Admission to the Bar**
- **15-304** Oath. 03/30/10
- **15-103** Qualifications. 07/04/10

**Rules Governing Discipline**
- **17-316** Review by the Supreme Court. 11/30/09

**Supreme Court General Rules**
- **23-106** Supreme Court rules committees. 05/10/10

**Rules Governing Review of Judicial Standards Commission**
- **27-106** Forms of papers. 03/03/10
- **27-301** Commencement of proceedings. 03/03/10
- **27-303** Response. 03/03/10

**Rules Governing the Judicial Evaluation Commission**
- **28-201** Commission created; members; staff; meetings. 02/24/10
- **28-202** Judicial proceedings; excusals; recusals and withdrawals. 02/24/10
- **28-203** Powers and duties of the Commission. 02/24/10
- **28-205** Confidentiality of information. 02/24/10
- **28-301** Judicial evaluations. 02/24/10
- **28-302** Narrative profile requirements. 02/24/10
- **28-303** Powers and duties of the Commission. 02/24/10
- **28-401** Criteria for evaluation of judicial performance. 02/24/10
The Rules of Criminal Procedure for the District Courts Committee, the Rules for Courts of Limited Jurisdiction Committee, and the Metropolitan Courts Rules Committee have recommended proposed amendments to their respective Rules of Criminal Procedure and Criminal Forms for the Supreme Court's consideration.

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

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

Your comments must be received on or before July 19, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

5303. Arraignment.

A. Arraignment. The defendant may appear at arraignment as follows:

1. through a two way audiovisual communication in accordance with Paragraph [H] of this rule; or
2. in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant’s right to counsel.

B. Reading of indictment or information. The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. Bail review. At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. Pleas. A defendant charged with a criminal offense may plead as follows:

1. guilty;
2. not guilty;
3. no contest, subject to the approval of the court; or
4. guilty but mentally ill, subject to the approval of the court.

E. Refusal to plead. If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on the defendant’s behalf.

F. Advice to defendant. The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

1. the nature of the charge to which the plea is offered;
2. the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;
3. that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;
4. that if the defendant pleads guilty, no contest or guilty but mentally ill there will not be a further trial of any kind, so that by pleading guilty, no contest or guilty but mentally ill the defendant waives the right to a trial;
5. that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant’s immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
6. that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
7. that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.

G. Ensuring that the plea is voluntary. The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant’s willingness to plead guilty, no contest or guilty but mentally ill results from prior discussions between the attorney for the government and the defendant or the defendant’s attorney.

H. Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, no contest or guilty but mentally ill, the record shall include, without limitation, the court’s advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. Audiovisual appearance. The arraignment or first appearance of the defendant before the court may be through the use of a two-way audiovisual communication if the following conditions are met:

1. the defendant and the defendant’s counsel are together in one room at the time of the first appearance before the court have the ability of private, unrecorded communication;
2. the judge, legal counsel and defendant are able to communicate and see each other through a two-way audiovisual
system which may also be heard and viewed in the courtroom by members of the public; and

(3) no plea is entered by the court except a plea of not guilty.

J. Waiver of arraignment. With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

[As amended, effective October 1, 1974; October 1, 1976; July 1, 1980; May 19, 1982; October 1, 1983; March 1, 1987; September 1, 1990; August 1, 1992; as amended by Supreme Court Order 06830010, effective April 15, 2006; by Supreme Court Order 07830029, effective December 10, 2007; as amended by Supreme Court Order _________, effective ______________.]

Committee commentary. — Paragraphs A, B, [through] D and E of this rule were included in this rule as originally adopted in 1972. Paragraphs A, B and [THROUGH] E of this rule conformed to the then existing practice for New Mexico arraignments. By referring only to indictments and informations in Paragraph B of this rule the rule tacitly acknowledges that misdemeanors will rarely be prosecuted on a complaint in the district court. However, the same procedure would be used for arraignment on a complaint.

Paragraph [E]D of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure. See, e.g., State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). The elimination of this plea brought the New Mexico practice into line with the federal practice. See generally, 1 Wright, Federal Practice and Procedure, § 176 (1969). However, under Rule 5602 NMRA, the defendant must give notice of the defense of insanity at the arraignment or within twenty (20) days thereafter. See also, Rule 12.2 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 29598 (1974).

Section 3193 NMSA 1978 enacted by the 1982 legislature provides that a plea of guilty but mentally ill may be accepted by the court if the defendant has undergone examination by a clinical psychologist or psychiatrist and the court has examined the reports and after a hearing is satisfied that there is a factual basis for the plea. Paragraph G of Rule 5304 NMRA provides for an inquiry to determine the factual basis of any guilty plea.

Paragraph [E]D of this rule also specifically allows the plea of no contest with the approval of the court. The provision was taken from Rule 11 of the Federal Rules of Criminal Procedure. See generally, 1 Wright, Federal Practice and Procedure, § 177 (1969). Rule 11(b) of the Federal Rules of Criminal Procedure would add a provision that the court consider the views of the parties and the interests of the public before accepting a plea of no contest. See 62 F.R.D. 271, 275 (1974).

A plea of no contest is, for the purposes of punishment, the same as a plea of guilty. North Carolina v. Alford, 400 U.S. 25, 3536 (1970); cf. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966). See generally, 62 F.R.D. 271, 27778 (1974). Consequently, Paragraphs [E]F and [F]G of this rule require the court to give the defendant the same advice given when a plea of guilty is entered and also insure that the plea is voluntary. However, unlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea. See Paragraph G of Rule 5304 NMRA.

Elimination of the inquiry into the factual basis for the no contest plea is consistent with the use of the plea where the defendant does not want to admit any wrongdoing. A defendant may want to avoid pleading guilty because a guilty plea can be introduced in subsequent litigation. Under Rule 11410 NMRA, a plea of no contest is not admissible. (The Rules of Evidence contain an inconsistency, however, in that the no contest plea, declared inadmissible under Rule 11410 NMRA, is declared to be not excluded by the hearsay rule under Paragraph V of Rule 11803 NMRA.) The fact that the plea of no contest will not be admissible in subsequent litigation should be considered in the court's decision to approve the plea. See generally, 63 F.R.D. 271, 27778, 286 (1974).

Paragraphs [E]F, G and J, governing plea procedures, were added in 1974. They were taken from Rules 11(c), (d) and (g) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271, 27586 (1974).

Paragraph [F]E of this rule prescribes the advice the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. Except for Subparagraphs (5), (6) and (7), added in 1990 and 2007, the rule codifies the constitutional requirements set forth in Boykin v. Alabama, 395 U.S. 238 (1969). See also Henderson v. Morgan, 426 U.S. 637 (1976), holding that the trial judge must explain the nature of the charge of murder, i.e., the court must explain intent to kill to the defendant if intent to kill is an element of the offense, prior to acceptance of a plea of guilty. The trial judge may want to refer to essential elements in UJI Criminal, particularly when they have not been set forth in the accusatory pleading. Although it has been a common practice in New Mexico to also advise the defendant that he is giving up a right to appeal, that advice is not included in either the rule or in the approved form for a guilty plea proceeding. A guilty plea does not prevent an appeal in New Mexico. Cf. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Subparagraph (5), requiring the court to “warn” the defendant that a conviction could affect the defendant’s immigration or naturalization status, was added in 1990. Subparagraphs (6) and (7), added in 2007, require the court to advise the defendant of certain limitations on the right to bear arms and sex offender registration requirements that might result depending on the crimes that are the subject of the plea. In 2010, Subparagraph (2) was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. See Marquez v. Hatch, 2009-NMSC-040, ¶ 13 (providing that “if the district court is aware of the defendant’s prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant’s sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information”).

Paragraph [F]G of this rule requires the court to determine that a plea of guilty or no contest is voluntary before accepting either plea. As noted above, Paragraph G of Rule 5304 NMRA
also requires that the court satisfy itself that there is a factual basis for a plea of guilty. Both of these requirements have been in the federal rules since 1966, and also have a basis in constitutional law. See Santobello v. New York, 404 U.S. 257 (1971). The court must not only inquire of the defendant, but must, “make a separate and distinct inquiry” of defense counsel and counsel for the government as to the existence of any agreement or discussions relative to the plea. State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Finally, it should be noted that Paragraph [G] of this rule makes it clear that plea proceedings before the court must be on the record. See Santobello v. New York, supra.

**AUDIOVISUAL ARRAIGNMENTS.**

Paragraph [H] provides that a defendant may be arraigned by way of a twoway closed circuit audiovisual communication between the defendant, his legal counsel and the court and the prosecutor. The committee assumes that proper equipment will be installed prior to conducting an audiovisual arraignment pursuant to Paragraph [H]. Proper equipment includes a direct cable connection to the court’s audio recording system to assure that a “record” is made of the arraignment.

**Right of Confrontation.**


Actual presence in the courtroom, however, is not always necessary. The right can be waived in misdemeanor cases by the accused’s counsel. The defendant’s presence is not required during a pretrial detention hearing. See United States v. Zaccaro, 645 F.2d 104, 106 (2d Cir.) (cert. denied, 454 U.S. 823, 102 S. Ct. 110, 70 L.Ed 2d 96 (1981)). The continued presence of an accused is not required if the accused voluntarily absents himself after the trial has commenced or if the accused engages in conduct which justifies his being excluded from the courtroom. See Rule 5112 NMRA.

Although the general rule is that the accused has a right to a face to face confrontation, this rule is subject to policy or necessity considerations. See State v. Tafoya, [N.M. Ct. App. No. 9604, decided October 7, 1986] 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), finding that the right to face to face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm. In Tafoya, the New Mexico Court of Appeals held that a defendant is “present” during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings.

**Use of AudioVideo System during Arraignment Proceedings.**

The use of a twoway audiovisual system to arraign a defendant while in jail is apparently becoming fairly common in many areas. Although the use of an audiovisual system in which the defendant would participate in the trial from a hospital by use of a single television and a telephone by which he could communicate with counsel may be insufficient, People v. Piazza, 92 Misc.2d 813, 401 NYS2d 371 (1977), the conducting of an arraignment on felony charges via a closed circuit twoway audiovisual system has been upheld. Commonwealth of Pennsylvania v. Terebiencie, 408 A.2d 1120 (1979).

**Guilty Plea.**

It is clear that a guilty plea cannot be accepted without a record showing that the defendant intelligently and voluntarily entered the plea. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 170, 23 L. Ed. 2d 274 (1969). Paragraph [H] limits audiovisual arraignments to those proceedings in which the defendant will have his rights explained and enter a plea of not guilty. [Commentary, as amended by Supreme Court Order effective ___________]

**5304. Pleas.**

**A. Alternatives**

(1) In general. The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty, no contest or guilty but mentally ill to a charged offense or to a lesser or related offense, the attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty, no contest or guilty but mentally ill, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

**B. Notice.** If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty, no contest or guilty but mentally ill in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed it shall be reduced to writing substantially in the form approved by the Supreme Court, and the court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the State would only recommend a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

**C. Acceptance of plea.** If the court accepts the plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court’s judgment and sentence will embody a different disposition as authorized by law.

**D. Rejection of plea.** If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford either party the opportunity to withdraw the agreement and advise the defendant that if the defendant persists in a guilty plea, plea of no contest or guilty but mentally ill the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. This paragraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

**E. Time of plea agreement procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at such time, as may be fixed by the court.

**F. Inadmissibility of plea discussions.** Evidence of a plea of
guilty, later withdrawn, a plea of no contest or guilty but mentally ill, or of an offer to plead guilty, no contest or guilty but mentally ill to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

G. Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty or guilty but mentally ill, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

H. Form of written pleas. A plea and disposition agreement or a conditional plea shall be submitted substantially in the form approved by the Supreme Court. [As amended, effective August 1, 1989; January 15, 1998; as amended by Supreme Court Order __________, effective __________.] Committee commentary. — Paragraphs A through F of this rule provide for a “plea bargaining” procedure. They originally were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271, 276, 28086 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the [supreme court] Supreme Court, See State v. Scarborough, 75 N.M. 702, 708, 410 P.2d 732 (1966). By the adoption of this rule, the [court] Court has specifically eliminated all judicial involvement in the plea bargaining discussions. The judge’s role is explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. See generally, 62 F.R.D. 271, 28384 (1974).

Paragraph B of this rule requires the parties to reduce the agreement to writing if it is contemplated that a specific sentence should be imposed or that other charges will be dropped. Following the adoption of the rule, the court administrator approved a form titled “Plea and Disposition Agreement” for use with this rule. Use of the form also obviates the necessity of filing new pleading since by its terms it amends the pleadings containing the pending charges. On July 26, 1979, the supreme court issued an order requiring plea and disposition orders to be filed in the original case. It may be held that the defendant was denied effective assistance of counsel if he is advised to plead guilty without a written plea agreement. See State v. Lucero, [supra, at 35] 97 N.M. 346, 351, 639 P.2d 1200, 1205 (Ct. App. 1981).

With the exception of Paragraph D of this rule, providing for withdrawal of the plea when the court rejects the plea bargain, these rules do not govern the withdrawal of a plea. Withdrawal of a voluntary plea is within the discretion of the court. State v. Brown, 33 N.M. 98, 263 P. 502 (1927). Santobello v. New York, [supra] 404 U.S. 257 (1971). The American Bar Association Standards Relating to Pleas of Guilty, Section 2.1 (Approved Draft 1968) [Standards for Criminal Justice: Pleas of Guilty, Section 14-2.1 (3d ed.1999), recommends the following considerations in dealing with a request to withdraw a plea of guilty: [1] the court should allow the defendant to withdraw his plea of guilty or no contest whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(i) a motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein and is not necessarily barred because made subsequent to judgment or sentence.

(ii) withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

     (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
     (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
     (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed”; (the ABA Standards here include a provision for a plea bargain situation which would not apply since the adoption of Rule 21(g)

     (4) (see Paragraph D of this rule)

     (iii) the defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

     “(b) in the absence of a showing that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw his plea of guilty or no contest as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant’s plea.”

In Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978), the New Mexico Supreme Court held that when the trial judge rejects the recommendation of the district attorney for a suspended sentence this is tantamount to the rejection of the plea and disposition agreement.)

(a) After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. In determining whether a fair and just reason exists, the court should also weigh any prejudice to the prosecution caused by reliance upon the defendant’s plea.

(b) After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice. A timely motion for withdrawal is one made with due diligence, considering the nature of the allegations therein.

(i) Withdrawal may be necessary to correct a manifest injustice when the defendant proves, for example, that:

     (A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;
     (B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant’s behalf;
     (C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed;
     (D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement, which was either tentatively or fully concurred in by the court, and the defendant did not affirm the plea after being advised that the court no longer concurred and after being called upon to either affirm or withdraw the plea; or
     (E) the guilty plea was entered upon the express condition, approved by the judge, that the plea could be withdrawn if the charge or sentence concessions were subsequently rejected by the court.
(ii) The defendant may move for withdrawal of the plea without alleging that he or she is innocent of the charge to which the plea has been entered.

(c) As an alternative to allowing the withdrawal of a plea of guilty or nolo contendere, the court may order the specific performance by the government of promises or conditions of a plea agreement where it is within the power of the court and the court finds, in its discretion, that specific performance is the appropriate remedy for a breach of the agreement.

In State v. Pieri, 2009-NMSC-019, ¶ 29, ___ N.M. ___, 207 P.3d 1132, the Court overruled Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978), and held that “if the court rejects a sentence recommendation or a defendant’s unopposed sentencing request, and the defendant was aware that the court was not bound to those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea.” But within the context of a plea that leads to a subsequent request by the State to enhance the sentence for the crime that was the subject of the plea, the Court in Marquez v. Hatch, 2009-NMSC-040, ¶ 13, ___ N.M. ___, ___ P.3d ___, held that if the defendant is not advised of the possible sentence enhancements at the time of the plea “the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information.”

[Commentary, as amended by Supreme Court Order ____________, effective _____________.]

5821. Arraignment and commitment hearing prior to issuance of the governor’s rendition warrant.

A. Time. If the defendant has not been arraigned in the magistrate or metropolitan court, the defendant shall be brought before the district court for an arraignment and commitment hearing, as soon as practicable, but in no event later than forty-eight (48) hours after arrest as a fugitive.

B. Procedure. At the arraignment, the court shall:

1. inform the defendant of the defendant’s right to retain counsel;

2. provide the defendant with copies of any documents on which the prosecution has relied;

3. inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to petition for a writ of habeas corpus pursuant to law; and

4. ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. Waiver of extradition. The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. Identity question. If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. Conditions of release. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release pending the issuance of the rendition warrant by the governor.

F. Time limits for governor’s rendition. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor’s rendition warrant for a period of not more than sixty (60) additional days.

G. Dismissal of fugitive complaint. If a governor’s rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Approved, effective January 1, 2002; as amended by Supreme Court Order ____________, effective _____________.]

5822. Commencement and continuation of fugitive actions after issuance of a governor’s rendition warrant.

A. Filing of warrant and return. If a person accused to be a fugitive is arrested on a rendition warrant for extradition issued by the governor, and a fugitive action based on the same demand is not pending in the district court, a fugitive action shall be commenced by filing in accordance with Paragraph F of Rule 5-103 NMRA the following:

1. a copy of the demand for extradition on which the rendition warrant is based together with the documents required by statute to accompany the demand;

2. the name and address of the agent of the demanding state authorized to receive the alleged fugitive; and

3. the rendition warrant together with supporting documents.

B. Where commenced. If a fugitive action based on the same demand is pending in the district court, the warrant shall be filed in that action. If no fugitive action based on the same demand is pending in the district court when the fugitive is arrested on the governor’s rendition warrant, the action shall be commenced in a district court of the district where the fugitive was arrested. If a fugitive action based on the same demand is pending in a magistrate or metropolitan court of this state, the action shall be transferred to the district court for further proceedings pursuant to these rules.

[Approved, effective January 1, 2002; as amended by Supreme Court Order ____________, effective _____________.]

6502. Pleas and plea agreements.

A. Pleas. A defendant who elects to waive the right to a trial may enter:

1. a plea of guilty; or

2. a plea of no contest, subject to the approval of the court.

B. Advice to defendant. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 6-110A NMRA, informing the defendant of and determining that the defendant understands the following:

1. the nature of the charge to which the plea is offered;

2. the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;
that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;
(4) that if the defendant pleads guilty or no contest there will not be a trial in this case, so that by pleading guilty or no contest the defendant waives the right to a trial;
(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant’s immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act (Sections 29-11A-1 through 29-11A-10 NMSA 1978).

C. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats of or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant’s willingness to plead guilty or no contest results from prior discussions between the government and the defendant or the defendant’s attorney.

D. **Plea agreement procedure.**

(1) The government or its agent and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the government or its agent will make, in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, it shall be reduced to writing substantially in the form approved by the Supreme Court, and the court shall require the disclosure of the agreement in open court at the time that the plea is offered. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the State would only recommend a particular sentence or not oppose the defendant’s request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) If the court accepts the plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court’s judgment and sentence will embody a different disposition as authorized by law.

(4) If the court finds the provisions of the agreement unacceptable after reviewing it and any presentence report, the court will allow the withdrawal of the plea, and the agreement will be void. This subparagraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

(5) Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

E. **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[As amended, effective May 1, 1986; January 1, 1987; May 1, 1997; as amended by Supreme Court Order 07830030, effective December 15, 2007; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008; as amended by Supreme Court Order __________, effective ______________.]

**Committee commentary.** — In 2010, Subparagraph (2) of Paragraph B was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. See *Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, N.M. , P.3d (providing that “if the district court is aware of the defendant’s prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant’s sentence based on those prior convictions, the court must conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information”). Subparagraphs (2), (3) and (4) of Paragraph D were also amended in 2010 to clarify the potential consequences of rejected plea recommendations in light of *State v. Pieri*, 2009-NMSC-019, ¶ 29, N.M. , 207 P.3d 1132, which held that “if the court rejects a sentence recommendation or a defendant’s unopposed sentencing request, and the defendant was aware that the court was not bound by those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea.”

[As adopted by Supreme Court Order No. __________, effective ______________.]
6811. Arraignment and commitment hearing prior to issuance of the governor’s rendition warrant.

A. Time. Within two (2) business days after arrest, the defendant shall be brought before the court for an arraignment and commitment hearing.

B. Procedure. At the arraignment, the court shall:

1. inform the defendant of the defendant’s right to retain counsel;
2. provide the defendant with copies of any documents on which the prosecution will rely at the commitment hearing;
3. inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to obtain a writ of habeas corpus pursuant to law; and
4. ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. Waiver of extradition. The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. Identity question. If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. Conditions of release. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release on the surrender of the defendant upon issuance of the rendition warrant by the governor.

F. Time limits for governor’s rendition. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor’s rendition warrant for a period of not more than sixty (60) additional days.

G. Dismissal of fugitive complaint. If a governor’s rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Adopted, effective October 1, 1996; as amended by Supreme Court Order _______________, effective _______________.]

7-502. Pleas and plea agreements.

A. Pleas. A defendant who elects to waive the right to a trial may enter:

1. a plea of guilty;
2. a plea of no contest, subject to the approval of the court; or
3. if the plea is for a driving while intoxicated or domestic violence offense, after an adverse determination of a pretrial motion on a dispositive issue, enter a conditional plea of guilty or no contest, reserving in writing the right to appeal the adverse determination of the specified pretrial motion. A conditional plea is subject to approval of the court. A defendant who prevails on appeal shall be allowed to withdraw a conditional plea of guilty or no contest.

B. Advice to defendant. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 7-110A NMRA, informing the defendant of and determining that the defendant understands the following:

1. the nature of the charge to which the plea is offered;
2. the mandatory minimum penalty provided by law, if any; and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;
3. that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;
4. that if the defendant pleads guilty or no contest:
   a. there will not be a trial in this case, so that by pleading guilty or no contest the defendant waives the right to a trial; or
   b. if the plea is a conditional plea, that the defendant waives the right to a trial unless the defendant prevails on appeal;
5. that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant’s immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
6. that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
7. that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [2911A1 NMSA 1978].

C. Ensuring that the plea is voluntary. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant’s willingness to plead guilty or no contest results from prior discussions between the government and the defendant or the defendant’s attorney.

D. Plea agreement procedure.

1. The government or its agent and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the government or its agent will move for dismissal of other charges, or will recommend or not to persist in that plea if it has already been made;

2. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest [in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed], it shall be reduced to writing substantially in the form approved by the Supreme Court, and the court shall require the disclosure of the agreement in open court at the time that the plea is offered. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was...
instead made with the expectation that the State would only recommend a particular sentence or not oppose the defendant’s request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) If the court accepts [the] a plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court’s judgment and sentence will embody a different disposition as authorized by law.

(4) If the court finds the provisions of the agreement unacceptable after reviewing it and any presentence report, the court will allow the withdrawal of the plea, and the agreement will be void. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceeding shall be admissible against the defendant in any criminal proceedings. This subparagraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

(5) Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

E. Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

As amended, effective May 1, 1986; May 1, 1997; February 16, 2004; as amended by Supreme Court Order 07830030, effective December 15, 2007; as amended by Supreme Court Order No. 09830026, effective September 10, 2009;

Committee commentary. — In 2010, Subparagraph (2) of Paragraph B was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. See Marquez v. Hatch, 2009-NMSC-040, ¶ 13, N.M. at __, P.3d at __ (providing that “if the district court is aware of the defendant’s prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant’s sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information”).

Subparagraphs (2), (3) and (4) of Paragraph D were also amended in 2010 to clarify the potential consequences of rejected plea recommendations in light of State v. Pieri, 2009-NMSC-019, ¶ 29, N.M. at __, 207 P.3d 1132, which held that “if the court rejects a sentence recommendation or a defendant’s unsupported sentencing request, and the defendant was aware that the court was not bound by those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea.”

As amended, effective May 1, 1986; May 1, 1997; February 16, 2004; as amended by Supreme Court Order 07830030, effective December 15, 2007; by Supreme Court Order No. 09830026, effective September 10, 2009; as amended by Supreme Court Order _______________, effective _______________.

7811. Arraignment and commitment hearing prior to issuance of the governor’s rendition warrant.

A. Time. Within two (2) business days after arrest, the defendant shall be brought before the court for an arraignment and commitment hearing.

B. Procedure. At the arraignment, the court shall:

(1) inform the defendant of the defendant’s right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution will rely at the commitment hearing;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to obtain a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. Waiver of extradition. The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. Identity question. If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. Conditions of release. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release on the surrender of the defendant upon issuance of the rendition warrant by the governor.

F. Time limits for governor’s rendition. If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending [receipt of] arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending [issuance of] arrest on a governor’s rendition warrant for a period of not more than sixty (60) additional days.

G. Dismissal of fugitive complaint. If a governor’s rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as [within the times] provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this
rule do not constitute the deadline for the completion of extradi-

tion proceedings under Rule 5-822 NMRA.

[Adopted, effective October 1, 1996; as amended by Supreme
Court Order ______________, effective _______________.]

8502. Pleas.

A. Pleas. A defendant who elects to waive the right to a trial
may enter:

(1) a plea of guilty; or

(2) a plea of no contest, subject to the approval of the court.

B. Advice to defendant. The court shall not accept a plea
of guilty or no contest without first, by addressing the defendant
personally in open court, which shall include an appearance
through an audio-visual proceeding under Rule 8-109A NMRA,
informing the defendant of and determining that the defendant
understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law,
if any, and the maximum possible penalty provided by law
for the offense to which the plea is offered, including any possible
sentence enhancements;

(3) that the defendant has the right to plead not guilty, or
to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty or no contest there
will not be a trial in this case, so that by pleading guilty or no
contest the defendant waives the right to a trial;

(5) that, if the defendant pleads guilty or no contest, it may
have an effect upon the defendant’s immigration or naturalization
status, and if the defendant is represented by counsel, the court
shall determine that the defendant has been advised by counsel
of the immigration consequences of a plea.

C. Ensuring that the plea is voluntary. The court shall not
accept a plea of guilty or no contest without first, by addressing
the defendant personally in open court, determining that the plea
is voluntary and not the result of force or threats or of promises
apart from a plea agreement. The court shall also inquire as to
whether the defendant’s willingness to plead guilty or no contest
results from prior discussions between the government and the
defendant or the defendant’s attorney.

D. Plea agreement procedure.

(1) The government or its agent and the attorney for the
defendant or the defendant when acting pro se may engage in
discussions with a view toward reaching an agreement that, upon
the entering of a plea of guilty or no contest to a charged offense
or to a lesser or related offense, the government or its agent will
move for dismissal of other charges, or will recommend or not
oppose the imposition of a particular sentence, or will do both.
The court shall not participate in any such discussions.

(2) If a plea agreement has been reached by the parties
which contemplates entry of a plea of guilty or no contest [in the
expectation that a specific sentence will be imposed or that other
charges before the court will be dismissed], it shall be reduced to
writing substantially in the form approved by the Supreme Court,
and the court shall require the disclosure of the agreement in open
court at the time that the plea is offered. If the plea agreement was
not made in exchange for a guaranteed, specific sentence, and was
instead made with the expectation that the State would only recom-

mend a particular sentence or not oppose the defendant’s request
for a particular sentence, the court shall inform the defendant
that such recommendations and requests are not binding on the
court. Thereupon, the court may accept or reject the agreement,
or may defer its decision as to acceptance or rejection until there
has been an opportunity to consider the presentence report.

(3) If the court accepts the plea agreement that was
made in exchange for a guaranteed, specific sentence, the court
shall inform the defendant that it will embody in the judgment
and sentence the disposition provided for in the plea agreement.
If the court accepts a plea agreement that was not made in ex-
change for a guaranteed, specific sentence, the court may inform
the defendant that it will embody in the judgment and sentence
the disposition recommended or requested in the plea agreement
or that the court’s judgment and sentence will embody a different
disposition as authorized by law.

(4) If the court finds the provisions of the agreement unac-
ceptable after reviewing it and any presentence report, the court
will allow the withdrawal of the plea, and the agreement will be
void. This subparagraph does not apply to a plea for which the
court rejects a recommended or requested sentence but otherwise
accepts the plea.

(5) Except for good cause shown, notification to the court
of the existence of a plea agreement shall be given at the arrain-
ment or at such other time, prior to trial, as may be fixed by the
court.

(6) Evidence of a plea of guilty, later withdrawn, or a plea
of no contest, or of an offer to plead guilty or no contest to the
crime charged or any other crime, or of statements made in con-
nection with any of the foregoing pleas or offers, is not admissible
in any civil or criminal proceeding against the person who made
the plea or offer.

E. Determining accuracy of plea. Notwithstanding the ac-
ceptance of a plea of guilty, the court should not enter a judgment
upon such plea without making such inquiry as shall satisfy it that
there is a factual basis for the plea.

[As amended, effective March 1, 1987; October 1, 1987; Septem-
ber 1, 1990; October 1, 1996; November 1, 2000; as amended by
Supreme Court Order 07830030, effective December 15, 2007;
as amended by Supreme Court Order No. 08-8300-47, effective
December 31, 2008; as amended by Supreme Court Order
______________, effective _______________.]

Committee commentary. — In 2010, Subparagraph (2) of
Paragraph B was amended to make clear that, when advising
the defendant of the mandatory minimum and maximum pos-
sible penalties, the court must also advise the defendant of any
possible sentence enhancements that may result based on any
prior convictions the defendant may have. See Marquez v. Hatch,
2009-NMSC-040, ¶ 13, ___ N.M. ___, ___ P.3d ___ (providing
that “if the district court is aware of the defendant’s prior convic-
tions that would require a sentence enhancement if subsequently
requested by the State, the court should inform the defendant
of the maximum potential sentence, including enhancements.
If the defendant enters a guilty or no contest plea without being
advised of possible sentence enhancements and then the possible
existence of prior convictions comes to light when the State files
a subsequent supplemental information seeking to enhance
the defendant’s sentence based on those prior convictions, the court
should conduct a supplemental plea proceeding to advise the
defendant of the likely sentencing enhancements that will result,
and determine whether the defendant wants to withdraw the plea
in light of the new sentencing enhancement information”).
Subparagraphs (2), (3) and (4) of Paragraph D were also amended
in 2010 to clarify the potential consequences of rejected plea rec-

ommendations in light of State v. Pieri, 2009-NMSC-019, ¶ 29,
STATE OF NEW MEXICO
COUNTY OF ________________
IN THE DISTRICT COURT
No. ________________
STATE OF NEW MEXICO
v. ________________

GUilty PleA PROCEEDING

The defendant personally appearing before me, I have ascertained the following facts, noting each by initialing it.

Judge’s Initial

1. That the defendant understands the charges set forth in the [complaint] [information] [indictment].
2. That the defendant understands the range of possible [sentence] sentences for the offenses charged, including any mandatory minimum penalties, maximum possible penalties, and possible sentence enhancements as follows: [from a suspended sentence to a maximum of ]
3. That the defendant understands the following constitutional rights which the defendant gives up by pleading [guilty] [guilty but mentally ill]:
   a. the right to trial by jury, if any;
   b. the right to the assistance of an attorney at trial, and to an appointed attorney, to be furnished free of charge, if the defendant cannot afford one;
   c. the right to confront the witnesses against him and to cross-examine them as to the truthfulness of their testimony;
   d. the right to present evidence on his own behalf, and to have the state compel witnesses of his choosing to appear and testify;
   e. the right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt.
4. That the defendant wishes to give up the constitutional rights of which the defendant has been advised.
5. That there exists a basis in fact for believing the defendant is [guilty] [guilty but mentally ill] of the offenses charged and that an independent record for such factual basis has been made.
6. That the defendant and the prosecutor have entered into a plea agreement and that the defendant under-

9406. Guilty plea proceeding. [For use with District Court Rule 5303 NMRA]

District Judge    Date

CERTIFICATE BY DEFENDANT

I certify that the judge personally advised me of the matters noted above, that I understand the constitutional rights that I am giving up by pleading [guilty] [guilty but mentally ill] and that I desire to plead [guilty] [guilty but mentally ill] to the charges stated.

Defendant

Defense Counsel

[USE NOTE] USE NOTE

For use in the district court when there is no plea and disposition agreement.

[As amended, effective September 1, 1990; withdrawn, effective May 1, 1998; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007; as amended by Supreme Court Order ________________ , effective ________________ .]
STATE OF NEW MEXICO
[COUNTY OF ________________________]
[CITY OF ________________________]
________________________________ COURT
[STATE OF NEW MEXICO]
[COUNTY OF ________________________]
v.        No. __________
________________________, Defendant.

GUilty Plea or NO Contest Plea Proceeding

The defendant personally appearing before me, I have ascertained the following facts:

1. That the defendant understands the charges set forth in the complaint and agrees to plead [guilty] [no contest] to the following charges:

2. That the defendant understands the range of possible sentences for the offense charged, including any mandatory minimum penalties, maximum possible penalties, and possible sentence enhancements as follows: [a mandatory minimum of ________________________, and up to a maximum of ________________________].

3. That, if pleading no contest, the defendant has been advised and understands that a plea of no contest has the same effect as a plea of guilty in this court.

4. That the defendant has been advised and understands the following constitutional rights which the defendant gives up by pleading [guilty] [no contest]:
   (a) the right to trial;
   (b) the right to trial by jury, if any;
   (c) the right to the assistance of an attorney at all stages of the proceeding, and to an appointed attorney, to be furnished free of charge, if the defendant cannot afford one;
   (d) the right to confront the witnesses against the defendant and to crossexamine them as to the truthfulness of their testimony;
   (e) the right to present evidence and to have the court compel witnesses to appear and testify;
   (f) the right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt;
   (g) the right to appeal the conviction.

5. That the defendant wishes to give up those constitutional rights of which the defendant has been advised.

6. That there is a factual basis for the plea.

7. That the plea is voluntary and not the result of force, threats or promises (other than a plea agreement).

8. That under the circumstances, it is reasonable that the defendant plead [guilty] [no contest].

9. That the defendant understands that a plea of guilty or no contest may have an effect upon the defendant’s immigration or naturalization status, as well as the defendant’s legal rights and personal opportunities, and that, if the defendant is represented by counsel, the defendant has been advised by counsel of the immigration consequences of the plea.

10. [Domestic violence cases only] That the defendant understands that a plea of guilty or no contest for a crime of domestic violence will affect the defendant’s constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence.

11. That, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act (Sections 29-11A-1 through 29-11A-10 NMSA 1978).

The judge advised me of the matters noted above. I understand the constitutional rights that I am giving up and plead [guilty] [no contest] to the charges specified above.

Date     Defendant
__________________ ____________________________

I certify that prior to the defendant’s entry of a plea of guilty or no contest in this case:

Date       Judge
__________________ ____________________________

I have discussed this case with my client in detail and I have explained the consequences of a plea of guilty or a plea of no contest.

In my opinion the plea of [guilty] [no contest] was voluntarily and understandingly made.

Date     Attorney for defendant
__________________ ____________________________

On the basis of these findings, I conclude that the defendant knowingly, voluntarily and intelligently pleads [guilty] [no contest] to the specified charges and accepts such plea.

Date     Judge
__________________ ____________________________

[Use Notes] USE NOTE

1. This form is to be used if the defendant may be incarcerated in jail. This form may be used in all cases in which the defendant is charged with a domestic violence offense, a battery, a violation of substance abuse laws, driving while under the influence or with an offense which has a mandatory minimum jail term.

2. (b) is not applicable to municipal court and may be eliminated because there is no right to a trial by jury in municipal court.

3. To be completed if the defendant has not signed a written waiver of counsel.

[Adopted, effective September 1, 1990; May 1, 1997; May 15, 2003; as amended by Supreme Court Order 07830030, effective December 15, 2007; as amended by Supreme Court Order No. 08-8300-48, effective December 31, 2008, as amended by Supreme Court Order _______________, effective _______________].
9408. Plea and disposition agreement.  
[For use with District Court Rule 5304 NMRA]

STATE OF NEW MEXICO
________________________ COUNTY
________________________ JUDICIAL DISTRICT
No. __________

STATE OF NEW MEXICO
v.
_____________________, Defendant

DOB: ____________________
SSN: ____________________

PLEA AND DISPOSITION AGREEMENT

The State of New Mexico and the defendant hereby agree to the following disposition of this case:

Plea:
The defendant agrees to plead [guilty] [no contest] [guilty but mentally ill] to the following offenses: _______________________.

Terms:
This agreement is made subject to the following conditions:

1. Agreement as to sentence. That the following disposition will be made of the charges:

________________________________________________.

[1. No agreement as to sentence. There are no agreements as to sentencing. The [maximum penalties for these charges] mandatory minimum penalties, maximum possible penalties, and possible sentence enhancements are as follows: _________.

(set forth [maximum] possible penalties) [¶].]

2. Additional charges. The following charges will be dismissed, or if not yet filed, shall not be brought against the defendant[¶]: _________.

3. Restitution. The defendant agrees to pay restitution as follows:

[3. Restitution. The defendant agrees to pay restitution as follows:

4. Effect on charging document. That this agreement, unless rejected or withdrawn, serves to amend the complaint, indictment, or information to charge the offense to which the defendant pleads, without the filing of any additional pleading. If the plea is rejected or withdrawn, the original charges are automatically reinstated.

5. Waiver of defenses and appeal. Unless this plea is rejected or withdrawn, the defendant gives up any and all motions, defenses, objections or requests which the defendant has made or raised, or could assert hereafter, to the court’s entry of judgment and imposition of a sentence consistent with this agreement. The defendant waives the right to appeal the conviction that results from the entry of this plea agreement.

6. Withdrawal permitted if agreement rejected. If after reviewing this agreement and any presentence report the court concludes that any of its provisions are unacceptable, the court will allow the withdrawal of the plea, and this agreement will be void. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceedings shall be admissible as evidence against the defendant and in any criminal proceedings.

I understand that entry of a plea for a crime of domestic violence or other felony will affect my constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence.

I understand that entry of this plea agreement may require me to register as a sex offender under the Sex Offender Registration and Notification Act [29-11A-1 NMSA 1978] and I acknowledge that, if I am represented by an attorney, my attorney has advised me of the requirement to register. [ ] (check here if inapplicable)

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading [guilty] [no contest] [guilty but mentally ill] I will be giving up my right to a trial by jury, to confront, cross examine and compel the attendance of witnesses and my privilege against self incrimination.

I understand that if the court grants me probation, a suspended sentence, a deferred sentence or a conditional discharge, the terms and conditions thereof are subject to modification in the event that I violate any of the terms or conditions imposed.

Date Defendant

DEFENSE COUNSEL REVIEW

I have reviewed the plea and disposition agreement with my client. I have discussed this case with my client and I have advised my client of my client’s constitutional rights and possible defenses.

Defence counsel Date

PROSECUTOR REVIEW

I have reviewed and approve this plea and disposition agreement and find that it is appropriate and consistent with the best interests of justice.

Prosecutor Date

DISTRICT COURT APPROVAL

The defendant personally appearing before me and I have concluded as follows:

1. That the defendant understands the charges set forth in the [complaint] [information] [indictment].

2. That the defendant understands the range of possible sentences for the offenses charged, from probation to a maximum of _________.

3. That the defendant understands the following constitutional rights which the defendant gives up by pleading [guilty] [no contest] [guilty but mentally ill]:

(a) the right to trial by jury, if any;
(b) right to the assistance of an attorney at trial, and to an appointed attorney, to be furnished free of charge, if the defendant cannot afford one;
(c) the right to confront the witnesses against the defendant and to cross examine them as to the truthfulness of their testimony;
(d) the right to present evidence on the defendant’s own behalf, and to have the state compel witnesses of the defendant’s choosing to appear and testify;
(e) the right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt.
4. That the defendant wishes to give up the constitutional rights of which the defendant has been advised.
5. That there exists a basis in fact for believing the defendant [is [guilty] [guilty but mentally ill] of [committed] the offenses charged and that an independent record for such factual basis has been made.
6. That the defendant and the prosecutor have entered into a plea agreement and that the defendant understands and consents to its terms.
7. That the plea is voluntary and not the result of force, threats or promises other than a plea agreement.
8. That under the circumstances, it is reasonable that the defendant plead [guilty] [no contest] [guilty but mentally ill].
9. That the defendant understands that a conviction may have an effect upon the defendant’s immigration or naturalization status and that, if the defendant is represented by counsel, the defendant has been advised by counsel of the immigration consequences of the plea.
10. That the defendant understands that a conviction may require the defendant to register as a sex offender under the Sex Offender Registration and Notification Act and that if the defendant is represented by counsel, the defendant has been advised by counsel of the requirement to register.

On the basis of these findings, I conclude that the defendant knowingly, voluntarily and intelligently pleads [guilty] [no contest] [guilty but mentally ill] to the above charges and accepts such plea. These findings shall be made a part of the record in the abovestyled case.

District Judge   Date

[USE NOTE] USE NOTE
1. This form is used instead of Form 9-406 NMRA if there is a plea agreement. This form is not used for conditional plea. See Criminal Form 9408C NMRA if there is a conditional plea.
2. [Use appropriate alternative.] If the plea agreement is not made in exchange for a guaranteed, specific sentence, this paragraph should state as follows: “The State agrees to recommend the following sentence - or agrees not to oppose the defendant's request for a particular sentence, and the defendant understands that the court is not bound to those recommendations or requests and may sentence the defendant to a more unfavorable disposition.”
3. [An example of a description of maximum penalties is as follows:] "An unlawful taking of a vehicle is a fourth degree felony with a basic sentence of 18 months and a fine of $5000.00, followed by 1 year parole. Any basic sentence may be altered up to one third for aggravating and mitigating circumstances." This paragraph is used if there are other pending or known criminal charges against the defendant that will be disposed of by this agreement.

[As amended, effective September 1, 1990; May 1, 1998; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007, as amended by Supreme Court Order ____________________, effective __________.]
indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this agreement, I am granted probation, a suspended sentence or a deferred sentence by the court, the terms and conditions thereof are subject to modification in the event that I violate any of the terms or conditions imposed.

I understand that entry of this plea agreement may have an effect upon my immigration or naturalization status, as well as my legal rights and personal opportunities, and I acknowledge that, if I am represented by an attorney, my attorney has advised me of the immigration consequences of this plea agreement.

(For use only in Magistrate and Metropolitan Court.)
(Domestic violence cases only) I understand that an entry of a plea for a crime of domestic violence will affect my constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence.

(For use only in Magistrate and Metropolitan Court.)
I understand that entry of this plea agreement may require me to register as a sex offender under the Sex Offender Registration and Notification Act (Sections 29-11A-1 through 29-11A-10 NMSA 1978), and I acknowledge that, if I am represented by an attorney, my attorney has advised me of the requirement to register.

(Check and complete if applicable.)
Conditional plea
[ ] I understand that the plea of guilty that I have entered is conditioned upon my appeal. If I file an appeal on the issue of [ ] , (describe pretrial motion upon which appeal will be based) and I win my appeal on this issue I may withdraw my plea.

Date ____________________
Defendant

I have discussed this case with my client in detail and I have advised my client of my client’s constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date ____________________
Defense Counsel

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

Date ____________________
Prosecutor
Approved:

Date ____________________
Judge

USE NOTE

1. If the plea agreement is not made in exchange for a guaranteed, specific sentence, this paragraph should state as follows: "The State agrees to recommend the following sentence - or agrees not to oppose the defendant’s request for a particular sentence, and the defendant understands that the court is not bound to those recommendations or requests and may sentence the defendant to a more unfavorable disposition."

2. This paragraph is used if there are other pending or known criminal charges against the defendant that will be disposed of by this agreement.

[Adopted, effective May 1, 1997; as amended May 15, 2003; as amended by Supreme Court Order 07830029, effective December 10, 2007; as amended by Supreme Court Order No. 08-8300-48, effective December 31, 2008; as amended by Supreme Court Order _______________, effective _______________.]

9-806. Motion to extend time.

[For use with District Court Rule 5-821 NMRA, Magistrate Court Rule 6811 NMRA and Metropolitan Court Rule 7811 NMRA]

STATE OF NEW MEXICO
COUNTY OF__________________________, N.M.

[_____________ JUDICIAL DISTRICT]
[___________________________COURT]

[STATE OF NEW MEXICO]
[COUNTY OF__________________________, N.M.]

[__________________________ COURT]
No. ______________

[STATE OF NEW MEXICO]
[COUNTY OF__________________________ , N.M.]

v. _______________________________, Defendant.

_______________________________
No. ______________

MOTION TO EXTEND TIME

(name and title of prosecutor) moves the court to extend the time for the confinement of Defendant pending arrest on the Governor’s rendition warrant for extradition in this case for ______ days after (date previously granted) because the demanding state has been unable to perfect its extradition within the time allotted.

Prosecutor

I hereby certify that a copy of the foregoing pleading was sent to ________________________________, N.M.
on the ___ day of ____________, ______.

_______________________________
Prosecutor

[Adopted, effective October 1, 1996; as amended by Supreme Court Order _______________, effective _______________.]
ORDER GRANTING EXTENSION OF TIME

This matter coming before the court on the ____ day of __________, ______ on motion of __________________ (name and title);

IT IS ORDERED that the time for the confinement of Defendant pending arrest on the Governor’s rendition warrant for completion of extradition in this case be extended ________ days [and shall expire on _______________ (date)] beyond the time previously granted.

Judge

Approved:

Prosecutor, if any

Attorney for the defendant, if any

[Adopted, effective October 1, 1996; as amended by Supreme Court Order __________, effective __________.]
A NM Wrong That Should Be Righted

Stacey Leaman, Development Director, New Mexico Center on Law and Poverty

Joe was employed as a milker at New Mexico dairies for over 10 years. At his most recent job, he worked six days a week, 11 hours per day, for less than $6.00 an hour. He milked cows, cleaned the milking machinery, and moved cows and bulls to various locations within the farm. In November 2008, while working at the dairy, Joe was attacked by a bull. He suffered serious damage to his upper body, including crushed ribs and spinal injuries. He required emergency medical attention and repeated hospitalization. Joe has been unable to work since the attack. He is in constant pain and continues to need medical care.

Following the accident, Joe and his family were devastated financially. Because he cannot work, his wife has had to take three jobs to make ends meet. The family had to apply for public benefits and was forced to move when they could no longer afford their rent.

Joe and his family needed help with their loss of income and medical bills after the accident. Workers’ compensation would have provided just that help, if Joe had been employed in some other industry. However, he worked in agriculture, and agricultural laborers are specifically excluded from coverage under the New Mexico Workers’ Compensation Act.

Joe’s case is not unusual. Roughly 15,000 agricultural laborers toil on New Mexico’s farms, ranches and dairies in hard and dangerous jobs, for very low pay. Field laborers earn on average less than $7,000 a year, and dairy laborers make roughly $18,000 per year. In a 2003 study of farm workers in West Texas and Southern New Mexico, 21% reported having been injured on the job and 57% said they have suffered symptoms of pesticide exposure. Many of these workers, born and raised in New Mexico, have worked hard all their lives, sometimes for the same employer, until a job-related injury ends their ability to work. Then, because they do not have the right to even the minimal protections of the state’s workers’ compensation system, their families slip further into poverty.

Workers’ compensation is rarely sufficient to cover all of the needs of injured workers, but its basic benefits are far better than being left to cope with the medical and financial implications on one’s own, as most agricultural laborers are now. In some cases, employers will assist their employees when they are injured on the job. However, that assistance is usually far less than what the workers need. In Joe’s case, his employer gave him approximately $1,800 in lost wages, and his employer’s insurance paid him $5,000 to cover some of his medical expenses. Although this might be considered generous, given that his employer was not obligated to do anything, these payments are barely tokens toward the complete loss of income and the mountain of medical bills that Joe has been facing. Nonetheless, many workers receive much less, or nothing at all.

By excluding farm and ranch laborers from the workers’ compensation system, New Mexico has positioned itself in the minority. Thirty-three U.S. states, plus D.C., Puerto Rico, and the Virgin Islands, require some form of mandatory workers’ compensation for agricultural laborers.

(Continued on page 4)
Revenue Enhancements—(1) On January 28, 2010, the North Carolina Supreme Court issued an order adopting IOLTA rate comparability, effective July 1, 2010. This revenue enhancement strategy requires that lawyers place their IOLTA accounts only in a financial institution that pays those accounts the highest interest rate or dividend generally available at the institution to other customers when IOLTA accounts meet the same minimum balance or other qualifications. (2) The District of Columbia Court of Appeals issued an order adopting both mandatory IOLTA and interest rate comparability on March 22, 2010. These rule revisions become effective on August 1, 2010. (3) On June 10, 2010, the Supreme Court of Delaware entered an order adopting mandatory IOLTA and IOLTA rate comparability. These revisions will become effective on November 1, 2010. Delaware becomes the 43rd jurisdiction to require that all practicing lawyers participate in IOLTA, and the 33rd to adopt rate comparability.

FDIC Rule Change—On April 13, 2010, the FDIC Board of Directors approved an interim rule extending the Transaction Account Guarantee (TAG) Program to December 31, 2010. The interim rule also gives the Board the discretion to extend the program to the end of 2011 without additional rule making if it determines that economic conditions warrant such an extension. Participating institutions can opt out of the TAG Program effective July 1, 2010, but if they do not, they must remain in the program until it ends. Under the TAG Program, funds held in IOLTA accounts will continue to be fully guaranteed by the FDIC, without limit, for participating financial institutions. IOLTA funds held in institutions that opt out of the extended TAG program (or that previously opted out of the TAG program) will be insured up to $250,000 per owner (i.e., client) until December 31, 2013. Institutions are required to display their status as either participating or not participating.

IOLTA Financial Institutions

The financial institutions below are eligible to hold IOLTA accounts. They have achieved eligibility certification from CCV because they voluntarily offer IOLTA accounts and pay the highest rate of interest or dividends generally available to their non-IOLTA customers, when the IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications. When opening an IOLTA account, PLEASE remember that due to the waiver of minimum balance requirements or processing fees to CCV by our Honor Roll financial institutions, thousands of additional dollars are available annually to help the nearly 1/2 million New Mexicans who benefit from services provided by IOLTA-funded organizations.

**Honor Roll**

First National Bank of Ruidoso
First National Bank of Santa Fe
First New Mexico Bank
First Savings Bank
First State Bank of Socorro
Four Corners Community Bank
Grants State Bank
High Desert State Bank
Lea County State Bank
Los Alamos National Bank
Main Bank
My Bank
New Mexico Bank & Trust
Peoples Bank
Pinnacle Bank of Gallup
Pioneer Bank
Portales National Bank
Roswell National Bank
Southwest Securities FSB
Sunrise Bank of Albuquerque
The Bank of Clovis
The Carlsbad National Bank
The First National Bank of New Mexico
Union Savings Bank
Valley Bank of Commerce
Valley National Bank
VectraBank
Wells Fargo Bank New Mexico
Western Bank of Alamogordo
Western Bank of Clovis
Western Bank of Lordsburg
Western Commerce Bank
Western Heritage Bank

**Other Eligible Institutions**

Bank of America
Bank of the West
Centinel Bank of Taos
Citizens Bank of Las Cruces
Farmers & Stockmens Bank
First Federal Bank
Gallup Federal Savings Bank
International State Bank
Ironstone Bank
The Citizens Bank of Clovis
Nine New Mexico nonprofits that provide civil legal services for the poor or legal education for the public have received more than $300,000 in IOLTA funding for 2010. Applications were submitted in October and were considered by the seven-member IOLTA grant committee in November. That group’s recommendations were reviewed by the Center for Civic Values’ board of directors and were submitted to the Court for its approval in December. The Court approved funding for the following organizations.

**Advocacy, Inc.,** which protects and promotes the interests of at-risk children and youth, will use its $30,000 to fund a portion of the legal services necessary for court-ordered guardianships and adoptions by grandparents, relatives and friends who elect to care for children whose parents are incarcerated, drug-addicted, deceased, abusive or absent.

**Catholic Charities of Central New Mexico** creates hope for those in need by promoting self-sufficiency, strengthening families, fighting poverty and building community. It will use its $35,000 grant to advocate on behalf of battered immigrants seeking immigration relief through the continued employment of a legal assistant to support its VAWA immigration attorney.

**Catholic Charities of the Diocese of Las Cruces** provides low-cost immigration legal services to moderate and low-income residents in the ten southern counties of New Mexico. Its $10,000 grant will provide legal services to victims of domestic violence and individuals who qualify for citizenship or naturalization, but who lack the financial resources to pay legal fees.

**Enlace Communitario** works to eliminate intergenerational violence among Latino immigrants. Enlace’s $35,000 grant will be used to offer bilingual, culturally appropriate, free legal services and education about the justice system, and to assist with forms completion and court translation for Spanish-speaking victims of domestic violence.

**Legal FACs** offers face-to-face free or low cost civil legal services and referrals to low-income pro se litigants in domestic matters, representation in cases where pro se is unsuitable, and, victim advocacy. Its $30,000 in IOLTA funding will be used to continue its forms clinics and pro se web site.

**Native American Disability Law Center** offers free legal assistance, advocacy and education to Native Americans with disabilities. Its $10,000 grant will support the Center’s ability to represent the best interests of Navajo children involved in abuse and neglect cases.

**New Mexico Center on Law and Poverty** advocates for effective, systemic solutions to poverty and the problems facing those who are poor. The Center will use its $87,000 to improve the administration of public assistance, to increase access to healthcare at hospitals serving the needy, to improve protections for poor laborers, and, to augment the quantity and quality of civil legal services available to low-income New Mexicans.

**Gene Franchini High School Mock Trial** offers to schools statewide an exciting education program that gives students a hands-on experience in the law and the legal system and helps build their understanding about their rights and responsibilities within that system. Its $10,000 award will be used to support the 2011 program.

**Pegasus Legal Services for Children** promotes, supports and defends the legal rights of children to safe and stable homes, quality education and healthcare, and, a voice in the decisions that are made about their lives. Pegasus will use its $20,000 grant to help fund its Youth Law Project to provide legal services to young people which helps them overcome barriers to (Continued on page 4)
“This law is a relic of a past when discrimination against low-income workers was commonplace,” said native New Mexican Dolores Huerta, who co-founded the United Farmworkers with Cesar Chavez. “Farmworkers’ work in grueling conditions to provide us with the food we eat every day, and it is an injustice that they are treated so unfairly. We value hard work in this country. So why don’t we value the hard work of our farm and ranch workers?”

An effort is underway to reverse this injustice. With funding from the Center for Civic Values (IOLTA), the Public Welfare Foundation, the Con Alma Health Foundation and others, the NM Center on Law and Poverty has been pushing to include farm and ranch laborers in the Workers’ Compensation Act. We began by working with agricultural laborers and their advocates to learn about the problem. We made presentations to policymakers and the public. We then tried to negotiate a solution with the agricultural industry by working with the Farm and Ranch Worker Taskforce in 2008. When that failed, we tried to pass a bill during the 2009 state legislative session to amend the state Workers’ Compensation Act to include farm and ranch laborers. In the face of strong opposition from the agricultural industry, the bill was defeated. Another bill may be introduced in a future session.

In the meantime, the matter is being pursued in the courts. The Center is representing farm and ranch laborers in a lawsuit challenging the constitutionality of the exclusion. The case, Griego, et al v. New Mexico Workers’ Compensation Administration, et al, CV 2009-10130, was brought in state district court under the state constitution. The plaintiffs claim that the statutory exclusion of farm and ranch laborers from the NM Workers’ Compensation Act, see 1978 NMSA § 52-1-6, violates the equal protection clause of the state Constitution. The Center on Law and Poverty is joined in the suit by private co-counsel Nancy Simmons and by two national poverty law centers.

New Mexico’s law and policymakers should acknowledge the unfair and unnecessary suffering we put upon our agricultural workers by excluding them from the workers’ compensation system. They should amend our Workers’ Compensation Act to include agricultural workers.

2009 IOLTA Revenues

Thanks to last year’s conversion to mandatory IOLTA with comparability approved by the State Supreme Court, 2009 revenues were higher than anyone could have hoped, given the catastrophic decline in interest rates that began in late 2008. With the addition of monies from IOLTA’s Grant Stabilization Fund, CCV was able to maintain the 2010 grant budget at the 2009 level, rather than reducing it significantly. The chart below reflects 2009 revenues totaling $356,451.

(Continued from page 3)
Opinion

TIMOTHY L. GARCIA, JUDGE

[1] Defendant entered a conditional plea to possession of cocaine, reserving the right to appeal the denial of his motion to suppress. We conclude that the drugs were obtained as a result of an illegal search and reverse. Once the officer dispelled his suspicions and told Defendant he was free to go, the officer was not justified in asking further questions about drugs and weapons or in placing Defendant in a secure, spread-eagle position and patting him down. We also conclude that any consent given by Defendant was tainted by the prior illegality. Consequently, the drugs removed from Defendant’s pocket should be suppressed.

BACKGROUND

[2] Officer Mullins was the only witness at the hearing on the motion to suppress. He testified that on the date in question, at 6:59 p.m., a woman called stating that her brother had been harassing her. The police investigated but made no arrest. Later that evening, at 8:40 p.m., the police received a second call that the woman’s brother had been harassing her, this time throwing her cell phone on the roof. Officer Mullins testified that he and his partner decided to park about fifty to seventy-five yards away from the home to observe in case there were any additional problems. While they were observing, the sister came outside and told them her brother again had been calling her and harassing her.

[3] During the observation, a pick-up truck drove up and stopped in front of the house. It was facing the wrong way on the street. The driver remained in the truck with the engine running, while Defendant, the passenger, went inside the house. Officer Mullins decided to approach the truck to make sure they were not part of the “domestic problem,” though he had seen Defendant at the house when responding to the first call and knew that the woman had been reporting problems with her brother, not with Defendant. Officer Mullins added that, based on his training and experience, having a driver pull up and leave the engine running, while a passenger went inside, looked like a drug transaction.

[4] Officer Mullins talked to the driver, who said they had come to visit a friend. After one to two minutes, Defendant came out of the house. Officer Mullins approached him and asked why they were there. Defendant said he was checking on his friend. Officer Mullins asked for their identification, ran checks on the men, and found nothing. In his police report, Officer Mullins wrote that “[b]oth subjects were identified and after finding that there was no cause to keep them any further, they were given their information back and advised they could leave.”

[5] Officer Mullins testified that he gave Defendant his identification back because there was “no need to hold onto them any longer,” and “then I asked him if he had anything illegal on him.” At this point, Officer Mullins also asked him if he had any weapons. Defendant said no. Officer Mullins then asked if he could pat Defendant down; Defendant agreed. Officer Mullins admitted that Defendant was free to leave, but that he wanted to do a weapons check. He placed Defendant in a secure position, with both hands behind his back, fingers interlaced, and his feet spread apart. He checked Defendant’s pocket and asked if he could remove what he felt. Defendant agreed. Officer Mullins removed cigarettes, change, and a bundle of drugs.

[6] Defendant moved to suppress the evidence. He argued that (1) there was no reasonable suspicion to detain him; (2) the officer illegally expanded the scope of the stop; (3) once the stop was expanded, the officer was not justified in placing Defendant in a secure position and conducting a pat down search; and (4) any consent given was tainted. He further argued that the stop was not a consensual encounter because he was not free to leave. He argued that the check for weapons was unjustified and he was illegally searched. The State argued that reasonable suspicion existed to question Defendant regarding his presence at the house and possible drug activity. It also argued that, even if there was no reasonable suspicion, once the officer told Defendant he was free to leave, the encounter became
I. Preservation

[8] Defendant argues that his consent was “an extension of the continuous illegal detention.” The State contends that this issue was not preserved below. In the State’s view, only one issue was preserved, and it was very narrow: whether Defendant’s motion to suppress should have been granted because there was no reasonable suspicion to stop him at the outset. We disagree.

[9] At the suppression hearing, the State argued that the encounter became consensual and that Defendant’s consent was therefore validly given. In response, Defendant stated, “As far as consent breaking the chain, at no time was [Defendant] free to leave. In fact, Officer Mullins . . . expanded the stop after he gave him the ID back. Just by stating that he was free to leave does not make it so, especially when Officer Mullins placed[d] him in a secure position . . . . He clearly was not free to leave.”

[10] As in many search and seizure cases, the proper analysis consists of multiple steps. In this case, the facts require consideration of whether there was reasonable suspicion to justify the detention, whether the encounter became consensual after the officer told Defendant he was free to go, whether the officer’s expansion of the stop was legal, and whether Defendant’s consent was valid. The issues concerning the legality of the questions immediately after Defendant was told he was free to go and whether the comment that he was free to go transformed the seizure into a consensual encounter are squarely presented by the facts and are logically linked.

[11] Defendant specifically argued below that the officer illegally “expanded the stop” and that Defendant was not free to go matter what the officer said. These contentions focus on the expansion of the investigation and can be reasonably viewed to include the legality of the questions about weapons and drugs. From Defendant’s argument, one can legitimately conclude that his attack on this investigation included an attack on each link in the analysis, even if he did not primarily focus on the expansion during the suppression hear-

II. Suppression of Evidence

A. Standard of Review

[15] “Whether a search and seizure was constitutional is a mixed question of law and fact. We review factual determinations by the [district] court under a substantial evidence standard. We review the lower court’s determination of legal questions de novo.” State v. Duran, 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836 (citations omitted).

B. Reasonable Suspicion

[16] Defendant first contends that the officer was without reasonable suspicion to initially approach him. Defendant correctly points out that the woman’s brother, not he, had been identified as the person causing problems. Defendant also argues that a truck pulling up in front of a residence while the driver remained in the vehicle and the passenger went inside is insufficient to establish reasonable suspicion of drug trafficking.

[17] “Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts.” State v. Flores, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. “In determining whether reasonable suspicion exists, we examine the totality of the circumstances.” State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 12, 130 N.M. 386, 168 P.3d 225. “This is a fact-specific inquiry that does not lend itself to bright-line rules.” Duran, 2005-NMSC-034, ¶ 23.

[18] We agree with Defendant that the officer’s suspicion of drug trafficking was not reasonable where there was no other evidence suggesting a drug transaction. The police were observing a home for domestic violence issues; there was no evidence of any pattern of cars coming and going, staying only a brief period of time, or any other indication that drug trafficking was occurring at the house. However, we disagree with Defendant that the police were without reasonable suspicion to investigate the domestic violence circumstances that brought them to the house. Given that two reported incidents of domestic problems had occurred at the house in less than two hours, Officer Mullins was justified in making brief inquiries to find out what Defendant was doing at the woman’s house.

C. Expansion of Stop

[19] We next consider the officer’s statement that Defendant was free to go, followed immediately by his questions about drugs and weapons. The State casts these events in
a benign light, arguing that once Defendant was allowed to leave, any further questioning, physical contact, or the request to conduct a search, were consensual. By contrast, Defendant argues that the officer’s questions were unjustified, tainted by illegality, and, therefore, his consent was invalid.

[20] Initially, we must consider the factual findings made by the district court. The district court found that “Officer Mullins then asked [Defendant] if he could ask him a few more questions.” This finding is not supported by the record. The record reveals no request by Officer Mullins to ask additional questions. The actual testimony is that immediately after returning Defendant’s identification, Officer Mullins began his questioning about drugs and weapons. Consequently, we reject the State’s suggestions that Officer Mullins did nothing more than make a request and that Defendant “agreed to answer more questions.”

[21] We begin our analysis with the principle that “[a]n officer who makes a valid investigatory stop may briefly detain those he suspects of criminal activity to verify or quell that suspicion. The scope of activities during an investigatory detention must be reasonably related to the circumstances that initially justified the stop.” State v. Werner, 177 N.M. 315, 317, 871 P.2d 971, 973 (1994) (citation omitted).

[22] All questions asked by police must be analyzed to see if they “are reasonably related to the initial justification for the stop or are supported by reasonable suspicion.” Duran, 2005-NMSC-034, ¶ 35. This analysis must include an examination of “both the length of the detention and the manner in which it is carried out.” Id. (internal quotation marks and citation omitted). The scope of the questioning should be limited, and the “particular facts of each stop and the intrusiveness of the questioning will dictate what questions are reasonable or unreasonable.” Id. Follow-up questions must be reasonable. Id. ¶¶ 36, 41 (distinguishing between questions about travel plans, which are generally related to an initial stop, and questions about drugs or weapons). Questions about drugs or weapons “constitute a . . . distinct line of questioning . . . that require[s] a showing of reasonable suspicion of other criminal activity.” Id. ¶ 41.

[23] “[C]ontinued investigation beyond the scope of the initial traffic stop is justified only if the officer can articulate specific and particularized factors that give rise to an objectively reasonable suspicion that other criminal activity has been or may be afoot.” State v. Prince, 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332. “Reasonable suspicion is measured by the totality of the circumstances.” Id. ¶ 10. However, if the officer failed to articulate specific facts to establish reasonable suspicion, then the officer had no grounds for additional questioning and detention. In re Forfeiture of ($28,000.00), 1998-NMCA-029, ¶¶ 15-16, 124 N.M. 661, 954 P.2d 93 (filed 1997) (“If the initial suspicion is dispelled, the Terry stop comes to an end and the suspect is free to leave.” (internal quotations marks and citation omitted)) (hereafter cited as Forfeiture). Moreover, if “the rationale for the stop has dissipated, a frisk is impermissible.” Id. ¶ 15 (internal quotation marks and citation omitted).

[24] In Forfeiture the defendant was stopped to determine whether he had a valid license plate. Id. ¶ 11. Once it was determined that he did, it was impermissible for the officer to ask him whether he had weapons in the car, when nothing evolved during the stop that would justify that question. Id. ¶¶ 16-17. Accordingly, the subsequent search of the car was unlawful. Id. ¶ 17. The Court held “the investigation regarding weapons impermissibly exceeded the scope of the officer’s rightful authority absent some particularized showing of illicit activity.” Id. ¶ 18.

[25] As our cases indicate, the line is drawn between reasonable suspicion of other criminal activity and a mere hunch that renders continued questioning nothing more than a fishing expedition. Compare Taylor, 1999-NMCA-022, ¶¶ 18-23 (holding that where the defendant was the subject of a littering investigation, an officer’s questions about guns and drugs impermissibly expanded the scope of the investigation because during the investigation nothing gave rise to any concern about guns or drugs), with State v. Van Dang, 2005-NMSC-033, ¶ 16, 138 N.M. 408, 120 P.3d 830 (holding that where the officer found that the defendant’s name was not on the car rental contract, and explained why that, along with other conduct, raised a suspicion of drug activity, additional investigation regarding drugs was permissible). Taylor makes it clear that the police are not entitled to engage in a fishing expedition, and it holds that an expansion of the investigation must be based on particularized and objective suspicious indicators. 1999-NMCA-022, ¶¶ 22-23.

[26] Having found no reason to investigate further and no reason to detain Defendant, Officer Mullins told Defendant he was free to leave. This constituted a recognition that his suspicion about Defendant’s involvement in the domestic issue had been dispelled, and it ended his authority to detain Defendant or to investigate further. See Forfeiture, 1998-NMCA-029, ¶¶ 16-18. However, instead of letting Defendant leave, Officer Mullins successfully detained Defendant for a weapons check, even though there was no reasonable suspicion for his question about weapons and even though he articulated no danger to the officers.

[27] His decision to continue questioning Defendant about weapons crossed the line into an impermissible fishing expedition and was not reasonable. Officer Mullins had already had contact with the woman who was complaining that her brother was harassing her, had knowledge that Defendant had not been identified in any way as being a part of the problem, and had received no report at any time that weapons had been a part of whatever was going on between the brother and sister. Drugs had not been mentioned by the sister, there was no reasonable suspicion that drugs played any part in the ongoing domestic issue, nor was there any other reasonable suspicion of drug activity. Consequently, we conclude that there was no evidence to support Officer Mullins’ interest in weapons or drugs or to support his continued questioning of Defendant. For these reasons, we hold that Officer Mullins illegally expanded the scope of the initial investigatory stop.

D. Consensual Encounter

[28] The State suggests that once Defendant was told he was free to leave everything that occurred thereafter became consensual. “A consensual encounter has been defined as simply the voluntary cooperation of a private citizen in response to a non-coercive questioning by a law enforcement official.” Ferris v. State, 735 A.2d 491, 500 n.4 (Md. 1999). During a consensual encounter, a reasonable person feels that he or she is free to leave. State v. Walters, 1997-NMCA-013, ¶ 12, 123 N.M. 88, 934 P.2d 282 (filed 1996). If the encounter became consensual, then the Fourth Amendment is not implicated. See Daniel v. State, 597 S.E.2d 116, 120 (Ga. 2004), abrogation in part on other grounds recognized by Salmeron v. State, 632 S.E.2d 645, 647 (Ga. 2006); State v. Jason L., 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856.

[29] We consider “all of the circumstances surrounding the incident” to determine whether “a reasonable person would have believed that he [or she] was not free to leave.” Jason L., 2000-NMSC-018, ¶ 15 (alteration in original) (internal quotation marks and citation omitted). In making this determination, we consider “(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter.” Id. (internal quotation marks and citation omitted). We review the factual determinations for substantial evidence and the legal question of whether a reasonable person would have felt free to leave under the circumstances de novo. Id. ¶ 19.

[30] In deciding whether an initial, valid
detention has evolved into a consensual encounter, we observe that “[t]he transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred.” State v. Williams, 571 S.E.2d 703, 709 (S.C. Ct. App. 2002) (internal quotation marks and citation omitted). While an officer’s statement that a suspect is free to go is a relevant consideration, it does not automatically make the encounter consensual thereafter. As stated in Daniel, [A]n officer’s express statement that the motorist is free to leave does not by itself mean that the ensuing encounter is consensual. We recognize that even after a driver has been expressly advised that he or she is free to leave, an officer’s subsequent actions may be so inconsistent with that advice that a reasonable person could conclude that the advice was no longer operative.

597 S.E.2d at 122.

[31] On these facts, we cannot conclude that the encounter became consensual. When the officer told Defendant he was free to leave, and then immediately continued his questioning, it would be a fiction to conclude that the nature of the seizure changed into a consensual encounter. Reittinger v. Commonwealth, 532 S.E.2d 25, 26-28 (Va. 2000) (holding that where the officer told the defendant he was free to go and immediately thereafter asked questions about weapons and drugs and asked for permission to search, the comment that the defendant was free to go did not make the encounter consensual because what “transpired immediately thereafter would suggest to a reasonable person that just the opposite was the case”); Commonwealth v. Freeman, 757 A.2d 903, 907-08 (Pa. 2000) (holding that after the officer told the driver she was free to leave and walked back to his patrol car but then returned to her car and questioned her, the remark that she was free to leave did not make the renewed encounter consensual). We agree with Professor LaFave that “it is hard to swallow . . . that returning one’s credentials with a warning ticket sufficiently manifests a change in status when immediately followed by interrogation.” 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.3(g) (4th ed. 2004). We think the reality is that even if a person is told he or she is free to leave, most people will not feel free to walk away when continued police questioning seamlessly follows. See State v. Garcia, 123 S.W.3d 335, 347 (Tenn. 2003) (stating that “a citizen who has been subjected to a traffic stop is not likely to walk away from continued police questioning, despite being told that he or she is free to leave”).

[32] When faced with the question whether an initial seizure has changed into a consensual encounter, we require a showing that the nature of the encounter has truly changed. In this case, there was no break in time or location, no request for permission to continue with questioning, and nothing indicating that the seizure had changed to anything remotely consensual. We conclude that the comment that Defendant was free to go did not transform the encounter into a consensual one. See id.; see also Freeman, 757 A.2d at 907-08; Reittinger, 532 S.E.2d at 26-28. Consequently, we reject the State’s argument in this case.

[33] We emphasize that our conclusion on this issue is highly fact dependent, and our holding is limited to the facts in our case. A different result may occur where an officer is careful to clearly establish a transformation in the encounter. See, e.g., United States v. Esquivel, 507 F.3d 1154, 1157, 1159 (8th Cir. 2007) (noting that the officer asked permission to ask further questions prior to consensual encounter); Jason L., 2000-NMSC-018, ¶ 18 (noting that an explanation that the person could respond to answer the officer’s questions is relevant in determining whether the encounter was consensual); Marinaro v. State, 163 P.3d 833, 836 (Wyo. 2007) (characterizing the subsequent encounter as a “non-demanding, relatively cordial request by the trooper to ask more questions” when after telling the defendant he was free to go, the officer reapproached him and asked permission to ask more questions). No single factor is dispositive and all of the circumstances surrounding the incident must be considered. Jason L., 2000-NMSC-018, ¶ 15.

E. Consent

[34] We next address whether Defendant’s consent would provide justification for admission of the evidence. An illegal stop taints any subsequent consent to search. See Taylor, 1999-NMCA-022, ¶¶ 26-30. The burden is then on the prosecution to prove that there are “intervening factors which prove that the consent was sufficiently attenuated from the illegal stop.” State v. Bedolla, 111 N.M. 448, 456, 806 P.2d 588, 596 (Ct. App. 1991); see Taylor, 1999-NMCA-022, ¶ 27 (stating that consent must be “both voluntary and purged of all taint under a Fourth Amendment challenge”). “To determine whether the evidence discovered by the officers’ search should have been suppressed under the ‘fruit of the poisonous tree’ doctrine, we determine whether the officers obtained [the defendant’s] consent by means sufficiently distinguishable to be purged of the primary taint.” State v. Monteleone, 2005-NMCA-129, ¶ 17, 138 N.M. 544, 123 P.3d 777 (internal quotation marks and citation omitted). “If there is sufficient attenuation between the illegality and the consent to search, the evidence is admissible.” Id. “To determine whether there was sufficient attenuation, we consider the temporal proximity of the arrest and the consent, the presence of intervening circumstances, and the flagrancy of the official misconduct.” Id. (internal quotation marks and citation omitted). We review the district court’s determination that sufficient attenuation exists de novo. Id.

[35] Officer Mullins’ questioning of Defendant about weapons and drugs occurred immediately after Defendant was told that he was free to go, and there were no intervening circumstances. The officer did not request permission to ask Defendant a few more questions. Instead, he immediately asked Defendant whether he had anything illegal or weapons. The request to pat Defendant down followed immediately on the heels of Officer Mullins’ improper questions. Our previous cases dictate that such a consent is tainted, especially where there is no meaningful break in time, the officer has not asked for permission to ask more questions, and the officer has not explained that the defendant is under no obligation to answer additional questions. See State v. Rivas, 2007-NMCA-020, ¶¶ 16-18, 141 N.M. 87, 150 P.3d 1037 (filed 2006) (holding that consent was not attenuated from the illegal detention where the officer asked consent almost immediately and there was no time for intervening circumstances to break the causal chain); Prince, 2004-NMCA-127, ¶¶ 20-21 (holding that the defendant’s consent was tainted where there “was no break in the causal chain, either in terms of temporal proximity or intervening circumstances”); Taylor, 1999-NMCA-022, ¶ 26-29 (holding that there was no attenuation where the officer “asked the improper questions immediately after asking for consent to search, and no other events occurred to separate the consent and the questions”). We conclude that Defendant’s consent was not sufficiently attenuated from the prior illegality. As in Taylor, “the very purpose of seeking consent was to continue an investigation that was beyond the scope of the officer’s reasonable suspicion.” 1999-NMCA-022, ¶ 29. The State, therefore, may not rely on Defendant’s consent.

CONCLUSION

[36] For these reasons, we reverse the district court and hold that the illegal expansion of the investigation requires suppression of the evidence seized by Officer Mullins.

[37] IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge
RODERICK T. KENNEDY, Judge
Defendant also raises a new issue on appeal. Emphasizing that the open container offense described in NMSA 1978, § 66-8-138(B) (2001) provides that “[n]o person shall knowingly have in his possession on his person” (emphasis added), Defendant asserts the trial court did not submit a correct instruction to the jury and then failed to provide a curative instruction to the jury when it expressed confusion as to the possession element of the open container charge. Defendant argues that the improper instruction and the failure to provide a curative instruction created juror confusion as to the possession element of the offense and together constitute fundamental error.

3. We agree with the essence of Defendant’s position with respect to the open container issue. Accordingly, we reverse Defendant’s conviction for possession of an open container and grant a new trial on this issue. Defendant’s convictions for aggravated DWI, concealing identity, careless driving, assault, and injuring or tampering with a vehicle are supported by substantial evidence and we affirm as to these remaining convictions.

BACKGROUND

4. The testimonial accounts of the facts relating to Defendant’s arrest diverge significantly. At trial, APD Officer Ryan Nelson testified that he witnessed Defendant drive his pickup truck at a high rate of speed and squeal into a parking area. He stated that Defendant drove his vehicle so near to him and at such a high rate of speed that he had to move in order to avoid being struck. Upon approaching Defendant’s vehicle, Officer Nelson observed that Defendant’s passengers all had open containers of beer they were drinking. He testified that Defendant showed signs of intoxication, that there were open bottles of beer in the truck, and that Defendant admitted that he drank. Officer Nelson allowed the passengers to leave the scene, and then proceeded to administer field sobriety tests to Defendant, including the walk and turn and one-leg stand tests. According to Officer Nelson’s testimony, Defendant performed each of these tests improperly by stepping off the imaginary line for the walk and turn test, and failing to count properly or adequately hold his balance for either test. Defendant was placed under arrest for driving while intoxicated.

5. Officer Nelson testified he asked Defendant for his insurance and driver’s license but that Defendant denied having either. Officer Nelson also stated that when asked, Defendant said his name was Armando Lopez and gave a birth year of 1974, but did not give a month or day. While inventorying Defendant’s property, Officer Nelson discovered credit cards in Defendant’s wallet with Defendant’s true name, Saul Nevarez. Officer Nelson requested that his assisting officer, Officer Anthony Simballa, search the computer system for information on that name. At that point Defendant became agitated, laid down in the backseat of the patrol car, and began kicking the window, eventually kicking out the small vent window and breaking the window control box. Officers Nelson and Simballa attempted to remove Defendant from the patrol car but Defendant continued to kick at them, and they were able to successfully remove him only after a one-second burst of mace to the eyes and nose. Both officers testified that Defendant kicked at them and that they were grazed and nearly kicked several times.

6. At the police substation, Officer Nelson observed Defendant for approximately forty minutes and informed him that he was required to submit to a blood test, breath test, or both to determine his alcohol level. Officer Nelson read this requirement from the Implied Consent Advisory notice post-
ed at the substation. Defendant’s primary language is Spanish, and although Officer Nelson read it in English, the notice was posted in both English and Spanish and Officer Nelson testified that Defendant seemed to understand. Defendant was advised that in addition to the required test he could have an independent test performed by a qualified person of his choice at no charge to him, and that failure to submit to the test could result in revocation of his driving privileges. Defendant was twice asked to submit to testing and twice responded “fuck you pussy, viva la raza!” The testimony of Officer Simbala generally corroborated that of Officer Nelson.

Defendant’s version of these events is dramatically different. At trial, Defendant testified that he and some friends were taking a break from helping a friend move when they were approached by Officer Nelson. Defendant testified that he and his friends were gathered at the back of his sister’s pickup truck, and that his friends were drinking beer but that he was not. Defendant testified that he explained to Officer Nelson that he had not had a drink in eight years. He also testified that he never gave an incorrect name to Officer Nelson, that Armando Lopez was in fact one of Defendant’s passengers, and that Officer Nelson must have confused the two men’s names. Defendant also explained that his limited English proficiency may have contributed to Officer Nelson’s confusion.

Defendant alleged that at some point, apparently for no reason, Officer Nelson kicked him, threw him in the police car, took him to an unknown location where he and another officer continued to beat him, called him a “fucking wetback” and threatened to “take him back to the mesa to kill him.” He testified that he never lied about his name and that despite having been beaten in and out of consciousness, he remembered at some point “blowing into a machine” and giving two breath samples which showed that he had no alcohol in his system.

**DISCUSSION**

As a preliminary matter, we note the wide divergence in the testimony describing the events surrounding Defendant’s arrest. Notwithstanding, this Court will not re-weigh the credibility of the witnesses at trial or substitute its determination of the facts for that of the jury as long as there is sufficient evidence to support the verdict. *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789. Our review is limited to those questions properly before us, including: (1) whether the possession element of Section 66-8-138(B) was properly described in the jury instructions; (2) whether, because of jury misunderstanding as to the requisite possession standard, Defendant’s conviction constitutes fundamental error; and (3) whether substantial evidence supports Defendant’s convictions.

## 1. The Meaning of “Possession” Under Section 66-8-138(B)


[11] Section 66-8-138(B) states:

> No person shall knowingly have in his possession on his person, while in a motor vehicle upon any public highway within this state, any bottle, can or other receptacle containing any alcoholic beverage that has been opened or had its seal broken or the contents of which have been partially removed.

(Emphasis added.) The open container jury instruction given at trial provided:

> For you to find [D]efendant guilty of Possession of an Open Container of Alcohol, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: 1. [D]efendant drove a motor vehicle on a street; 2. [D]efendant had in his immediate possession an open bottle, can, glass or other container of alcoholic beverage with alcohol remaining in it; and 3. This happened in Bernalillo County, State of New Mexico on or about the 26th day of May, 2006.

(Emphasis added.) After retiring to deliberate, the jury sent the following question to the court: “Does immediate possession mean (1) in vehicle, or (2) or [sic] in driver’s possession?” Without objection from the parties, the court’s response to the jury was only that the jury should apply the facts to the instruction it had already been given. Defendant argues that the jury was confused, as evidenced by its inquiry, as to whether a type of constructive possession was sufficient to find him guilty under the instruction given. He asserts his conviction cannot stand because the open container statute contains a more strict possession requirement than merely “in the vehicle,” or any other theory of constructive possession.

[12] The State argues that a jury instruction requiring proof that Defendant possessed an open container “on his person” was not required because Section 66-8-138(B) may be violated by constructive possession when an open container is merely located “in the vehicle.” “Constructive possession is a legal fiction used to expand possession and include those cases where the inference that there has been possession at one time is exceedingly strong.” *State v. Barber*, 2004-NMSC-019, ¶ 22, 135 N.M. 621, 92 P.3d 633 (internal quotation marks and citation omitted). Constructive possession may be shown when a defendant merely has knowledge of and control over an open container. *See State v. Chandler*, 119 N.M. 727, 730, 895 P.2d 249, 252 (Ct. App. 1995).

[13] Absent a requirement for a more strict form of possession, constructive possession of illegal contraband is generally sufficient to sustain a conviction. *See State v. Brietag*, 108 N.M. 368, 370, 772 P.2d 898, 900 (Ct. App. 1989) (stating that in drug cases “[p]roof may be of actual or constructive possession”). For example, in *Chandler*, at issue was whether the defendant was in possession of drugs under NMSA 1978, Section 30-31-22(A) (2006), which makes it unlawful for any “person to intentionally . . . possess with intent to distribute a controlled substance.” *Chandler*, 119 N.M. at 730, 895 P.2d at 252. In *Chandler* officers conducted a raid on the defendant’s apartment where she was found “sitting in the midst of a large cache of drugs and drug paraphernalia,” and her “belongings were found in direct association with the drugs and drug paraphernalia.” *Id.* This Court affirmed the defendant’s conviction, concluding that the evidence supported a finding of constructive possession in satisfaction of Section 30-31-22(A) because the evidence
established knowledge of and control over the drugs. *Chandler*, 119 N.M. at 730-32, 895 P.2d at 252-54.

{14} Similarly, in *State v. Garcia*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72, the New Mexico Supreme Court affirmed a conviction for possession of a firearm by a felon. The statutory section at issue there stated only that “[i]t is unlawful for a felon to . . . possess any firearm . . . in this state.” NMSA 1978, § 30-7-16(A) (2001). The facts establishing possession were that the gun was located under the defendant’s seat next to an open container of beer that the defendant admitted was his, and that the defendant was exercising exclusive control over the gun’s clip by sitting on it. *Garcia*, 2005-NMSC-017, ¶ 15-16. The Court held that this evidence was sufficient to establish knowledge of and control over the gun, and affirmed the defendant’s conviction based on constructive possession. *Id.* ¶¶ 22-24, 35.

{15} In contrast, Section 66-8-138(B) contains language describing the possession element of this offense that is more restrictive than the statutes at issue in *Chandler* and *Garcia*. The statutes in *Chandler* and *Garcia* required only “possession.” Section 66-8-138(B) requires “possession on his person.”

{16} Defendant likens “possession on his person” to “actual possession” which connotes physical control or occupancy. “Actual possession” means “[p]hysical occupancy or control over property.” *Black’s Law Dictionary* 1201 (8th ed. 2004). Defendant reminds us of our observation in *State v. Patterson*, 2006-NMCA-037, ¶ 28, 139 N.M. 322, 131 P.3d 1286, that a defendant’s mere presence in a vehicle where there are open containers does not create individualized suspicion that a particular defendant has an open container “in his possession on his person.” *Id.* (internal quotation marks and citation omitted). Defendant also cites out-of-state authority requiring physical control of property in order to qualify as actual possession. *State v. Jarrett*, 845 A.2d 476, 481 n.2 (Conn. App. Ct. 2004) (noting that an individual has actual possession of a controlled substance if, for example, it is found “on his person or in his hands”); *State v. Hensley*, 661 S.E.2d 18, 21 (N.C. Ct. App. 2008) (holding that actual possession “requires that a party have physical or personal custody of the item” (internal quotation marks and citation omitted)).

{17} Most pertinently, Defendant relies on *People v. Squadere*, 151 Cal. Rptr. 616 (Cal. App. Dep’t Super. Ct. 1978). In Squadere, the court considered a California open container statute containing language mirroring that of Section 66-8-138(B). In that case, the defendant was a passenger in a vehicle with four others and was cited for possession of an open container after a search of the vehicle revealed five partially empty, cold beer bottles underneath the passenger and driver seats. *Squadere*, 151 Cal. Rptr. at 617. The court concluded that, based on the “on his person” language, the open container statute could not be violated based on constructive possession, and that the defendant could not be convicted unless the evidence established that the open container was somehow connected to his person beyond mere opportunity to access the open container. *Id.* The court reasoned that such an interpretation was proper in order to give meaning to all of the language of the statute, and give effect to the obvious distinction in the possession requirement. *Id.* at 618. We agree with the California court’s analysis of the open container statute in Squadere. *See State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 14, 127 N.M. 272, 980 P.2d 55 (stating that “the Court may view cases from other jurisdictions interpreting practically identical statutory language as persuasive authority”).

{18} The State argues that the language of Section 66-8-138(B) should be read broadly because it evinces an intent by the Legislature to expand, not narrow, what constitutes possession for purposes of this Section. The State’s reading is improper because it disregards any possible legislative purpose in including the language “on his person” as part of the offense. *See In re Adjustments to Franchise Fees*, 2000-NMSC-035, ¶ 14, 129 N.M. 787, 14 P.3d 525 (stating that statutes must be interpreted so that no part is rendered “surplusage or superfluous” (internal quotation marks and citation omitted)); *State v. Maes*, 2007-NMCA-089, ¶ 20, 142 N.M. 276, 164 P.3d 975 (“[B]ecause the power to define crimes is committed to the Legislature, and because penal statutes are to be strictly construed, we must exercise caution in employing the judicially created legal fiction of constructive possession to criminalize conduct that the Legislature has not clearly proscribed.” (citations omitted)).

{19} The language of Section 66-8-138(B) is in marked contrast, not only with the drug offense analyzed in *Chandler*, but also with the offenses punishable under the other sections of the open container statute. For example, Section 66-8-138(C) prohibits, with some exceptions, registered owners from “knowingly keep[ing] or allow[ing] to be kept in a motor vehicle . . . any [open container].” This Section contains no requirement that the open container be on the registered owner’s person, and prohibits conduct more consistent with the jury’s inquiry as to whether possession meant merely in the vehicle. Thus, when read in context, Section 66-8-138(B) prohibits a more narrow form of possession for purposes of this particular offense. *See Quantum Corp. v. State Taxation & Revenue Dep’t*, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848 (stating that statutes must be “read in connection with other statutes concerning the same subject matter”).

{20} Giving effect to the plain meaning of the Legislature’s words, we disagree with the State that Section 66-8-138(B) is violated by mere constructive possession of an open container. Defendant could not have been properly convicted based on a finding that an open container was merely in the vehicle, even if the evidence was otherwise sufficient to establish knowledge of and control over the open container.

{21} However, this holding should not be construed under Section 68-8-138(B) to mean that, as a matter of law, a defendant may be convicted only when observed with an open container in hand or perhaps within an article of clothing. Such a narrow reading would also be improper and could lead to absurd results inconsistent with legislative intent and stare decisis on this issue. We recognize, as did the court in Squadere, that “[t]here may be a variety of circumstances, impossible to foresee, where circumstantial evidence might support a conviction[,]” *151* Cal. Rptr. at 617 n.2, even where a defendant was not observed in actual physical possession of the open container. For example, in *State v. Garcia*, facts that an open beer bottle was discovered under the defendant’s seat and that the defendant admitted he had been drinking from the bottle, were sufficient to sustain a conviction for possession of an open container. *2004-NMCA-066*, ¶ 34, 135 N.M. 595, 92 P.3d 41, *aff’d in relevant part, rev’d on other grounds*, 2005-NMSC-017, ¶ 34.

{22} Therefore, we hold that Section 66-8-138(B) requires more than facts merely showing that an open container was located within a defendant’s vehicle, but does not go so far as requiring that a defendant must be observed in actual physical possession of an open container. As in Garcia, it is possible that the element of “possession
on his person” can be established by circumstantial evidence. Jury instructions implementing this section must either follow the express language of the statute, or be crafted to better capture this standard than does the language “immediate possession.”

2. The Jury’s Uncured Confusion Resulted in Fundamental Error

{23} Having determined that Section 66-8-138(B) is not violated where the open container was merely in Defendant’s vehicle or other circumstances supporting only a finding of constructive possession, we exercise our discretion to examine whether Defendant should be granted a new trial on this issue. See Rule 12-216(B) NMRA (stating that despite a lack of preservation, the reviewing court can consider “jurisdictional questions or, in its discretion, questions involving: (1) general public interest; or (2) fundamental error or fundamental rights of a party”). Given that this issue is not jurisdictional and was not preserved, we will uphold Defendant’s conviction for possession of an open container unless the trial court’s errors in first submitting an incorrect instruction and then declining to provide a curative instruction “implicated a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” Barber, 2004-NMSC-019, ¶ 18 (internal quotation marks and citation omitted). “[F]undamental error exists, a new trial will be ordered.” State v. Mascaréñas, 2000-NMSC-017, ¶ 7, 129 N.M. 230, 4 P.3d 1221 (internal quotation marks and citation omitted).

{24} “The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice.” Barber, 2004-NMSC-019, ¶ 8. New Mexico courts recognize fundamental error as a basis to protect a defendant’s substantive rights in two instances. Id. ¶¶ 15-17. The first is in cases where a defendant has been convicted of a crime despite indisputable innocence. See id. (explaining that fundamental error was applied to protect a defendant’s rights after he was convicted of a murder that occurred while the defendant was undisputedly unconscious).

However, “not all questions of fundamental error turn solely on guilt or innocence” of the defendant, id. ¶ 14, and in some circumstances our focus is directed “more on process and the underlying integrity of our judicial system.” Id. ¶ 16. Thus, the second basis for establishing fundamental error occurs when “a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused.” Id. ¶ 17.

{25} Analysis of fundamental error in this latter context generally requires, as a first step, a determination as to whether a reasonable juror would have been confused or misdirected by the jury instruction. Id. ¶ 19. In addressing this question we need look no further than the fact that the jury expressed its confusion as to the possession standard to the trial court judge, and that its confusion went uncured. We next “review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [defendant’s] conviction was the result of a plain miscarriage of justice.” Id. (internal quotation marks and citation omitted).

{26} There is no miscarriage of justice where, despite any misunderstanding by the jury, the circumstances of the case demonstrate that all the necessary elements of the offense were satisfied beyond a reasonable doubt. In Barber, the defendant was charged with possession of methamphetamine with intent to distribute. Id. ¶ 7. The defendant denied possessing the illegal drugs and argued on appeal that the jury equated possession with mere proximity, which is insufficient, and that although it was never requested at trial, it was fundamental error to not instruct the jury on the definition of possession. Id. ¶¶ 11-12. The Court agreed that failure to provide the jury with an instruction defining possession would have constituted reversible error had it been preserved, but concluded that it did not rise to fundamental error. Id. ¶¶ 12, 32. The Court reasoned that, given the jury’s unchallenged findings that the element of the offense for intent to distribute was met, if the jury misunderstood the meaning of possession it was likely because the jury equated possession with ownership rather than mere proximity. Id. ¶ 26. Based on this reasoning, the Court stated that such a misunderstanding “actually would have placed a greater burden on the prosecution, because ownership would be more difficult to prove than possession alone.” Id. Thus, the Court held that there was no fundamental error because the missing instruction did not create confusion in the jury that would “undermine the reliability of the verdict and the integrity of our judicial system.” Id. ¶ 32.

{27} However, a miscarriage of justice does occur where, based on an uncured misunderstanding by the jury, there is a distinct possibility that a defendant was convicted based on an incorrect legal standard. In Mascaréñas, for example, the defendant was convicted of negligent child abuse for inflicting shaken baby syndrome on his infant son which resulted in the child’s death. 2000-NMSC-017, ¶¶ 2, 6. How severely the child was shaken was disputed at trial, and in his defense the defendant argued that while his conduct may have been careless, it did not rise to the level of reckless disregard for the child’s safety as required for a finding of criminal negligence. Id. ¶ 15. Although there was no objection at trial, on appeal the defendant argued that the jury instruction for negligent child abuse failed to adequately define the requisite culpable mental state for criminal negligence by including language that confused criminal negligence with civil negligence. Id. ¶¶ 7-8. Under the circumstances of that case, the Court reasoned that there was a distinct possibility that the defendant was convicted based on the improper standard of carelessness. Id. ¶ 15. The Court held that it could not “state with confidence that the jury concluded that [the defendant’s] actions in shaking his baby satisfied the proper criminal negligence standard.” Id. ¶ 28. Another line of authority recognizes a general rule that the failure to give a jury instruction containing an essential element of the crime charged constitutes fundamental error requiring reversal. State v. Osborne, 111 N.M. 654, 661-62, 808 P.2d 624, 631-32 (1991) (holding that defendant could not waive claim of error based on a failure to instruct on an essential element of the crime).

We have already determined that the jury instruction given below did not accurately capture or describe the crime defined by Section 66-8-138(B). We need not decide whether “on his person” is an element of the crime such that the failure to include that verbiage in an instruction would be per se reversible error because we also know that in this case the jury expressed confusion over the type of “possession” required to commit the crime. That confusion was not dispelled because the trial court did not offer any curative instruction or explanation in response to the jury’s inquiry.

{29} At trial, both Defendant and Officer Nelson agreed that there were other men in the truck with Defendant all of whom were drinking. Defendant argued that he was not in possession of an open container, and there was evidence that Officer Nelson did not recall exactly how many open containers he observed, or exactly where they were. Even if the jury believed the contested fact that Defendant admitted to
drinking, unlike Garcia, there was no evidence to link any particular open container in the vehicle specifically to Defendant’s possession such that it might have been considered on his person.

{30} In light of these circumstances, we cannot conclude with confidence that Defendant’s guilt was proven beyond a reasonable doubt pursuant to the requisite legal standard for possession under Section 66-8-138(B). There is a distinct possibility that Defendant’s conviction was based on the mere finding that the open container was in the vehicle, as opposed to the proper standard requiring possession on Defendant’s person. Accordingly, we conclude that the jury’s uncorrected misunderstanding resulted in fundamental error and we remand to the district court for a retrial of this issue.

3. Substantial Evidence Supports Defendant’s Convictions for Aggravated DWI, Careless Driving, Concealing Identity, Assault, and Injuring or Tampering with a Vehicle

{31} Defendant’s remaining arguments are evidentiary, and in reviewing them we apply a two-step process. State v. Apodaca, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994). Initially, the evidence is viewed in the light most favorable to the verdict. Id. The appellate court must then make a legal determination of “whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” Id. (internal quotation marks and citation omitted).

{32} “Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant’s version of the facts.” State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829 (filed 1998). “Only the jury may resolve factual discrepancies arising from conflicting evidence.” Apodaca, 118 N.M. at 766, 887 P.2d at 760 (citation omitted). “The reviewing court does not weigh the evidence or substitute its judgment for that of the [jury] as long as there is sufficient evidence to support the verdict.” Mora, 1997-NMSC-060, ¶ 27.

{33} Defendant challenges his DWI conviction based on the issue of impairment. For Defendant to have been found impaired, the evidence must have justified a finding that Defendant was “less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the defendant] and the public.” State v. Sanchez, 2001-NMCA-109, ¶ 6, 131 N.M. 355, 36 P.3d 446 (internal quotation marks and citation omitted). Evidence that may tend to cast doubt on the actual level of impairment does not establish that the overall body of evidence was insufficient to prove impairment beyond a reasonable doubt. See id. ¶ 14.

{34} The evidence at trial was that Defendant drove his vehicle at a high rate of speed and turned into a parking lot with tire’s squealing, and that Officer Nelson had to move to avoid being hit by the vehicle. Officer Nelson also testified that Defendant had bloodshot, watery eyes, and that he detected an odor of alcohol from Defendant. According to Officer Nelson, Defendant also admitted to having consumed beer and failed to adequately perform field sobriety tests by losing his balance and failing to follow instructions. In addition to the inferences that can be drawn from poor balance and concentration, Officer Nelson testified that the results of the field sobriety tests indicated impairment because they demonstrated that Defendant was unable to focus on more than one thing, which is essential to the task of driving.

{35} Defendant argues that, while Officer Nelson’s testimony may have shown that Defendant had been drinking, the totality of the evidence was insufficient to find impairment beyond a reasonable doubt. Defendant argues that, in addition to evidence indicating impairment, other evidence at trial suggested that he was not impaired. For example, there was no testimony that Defendant had trouble parking or exiting his vehicle, he did not hold on to anything for balance, and he cooperated in performing the field sobriety tests. Although Defendant raises facts which, taken by themselves, may tend to prove non-impairment, such contrary evidence does not provide a basis for reversal. See id.

{36} Despite any contrary evidence professed by Defendant, the evidence was sufficient to demonstrate that Defendant had consumed alcohol and that as a result his motor skills, balance, and judgment were impaired. See State v. Neal, 2008-NMCA-008, ¶ 29, 143 N.M. 341, 176 P.3d 330 (filed 2007) (affirming a DWI conviction based on evidence that the defendant veered over the shoulder line three times, smelled of alcohol, had bloodshot watery eyes, admitted drinking, and failed to adequately perform field sobriety tests). Viewed in a light most favorable to the verdict, this evidence justifies the jury’s finding of impairment to the slightest degree.

{37} With respect to the remaining convictions for careless driving, concealing identity, assault, and injuring or tampering with a vehicle, Defendant merely reiterates his trial testimony arguing that, in light of the disputed facts, his guilt could not be established beyond a reasonable doubt. Besides pointing out that the facts were disputed, Defendant raises no substantive challenge to the evidence in support of the jury’s findings which included: that Defendant drove erratically and nearly hit Officer Nelson, that Defendant gave the false name of Armando Lopez, that Defendant became irate and kicked at officers, and that Defendant kicked out a window in the patrol car and damaged its door. Defendant acknowledges that this Court cannot judge the credibility of the witnesses who testified at trial or substitute its judgment for that of the fact finder where substantial evidence supports the outcome. Mora, 1997-NMSC-060, ¶ 27. We conclude that the evidence was sufficient to establish guilt beyond a reasonable doubt for careless driving, concealing identity, assault, and injuring or tampering with a vehicle.

CONCLUSION

{38} For the foregoing reasons, we affirm Defendant’s convictions for aggravated DWI (third offense), concealing identity, careless driving, assault, and injuring or tampering with a vehicle. We reverse Defendant’s conviction for possession of an open container and remand to the district court for a retrial of this remaining charge.

{39} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge
Opinion

CYNTHIA A. FRY, CHIEF JUDGE

The State appeals the district court’s order expunging all records relating to the arrest and subsequent court proceedings regarding Defendant. Defendant was prosecuted for negligent child abuse, pleaded guilty, received a conditional discharge, and successfully completed her term of probation. Defendant was subsequently denied two employment opportunities based on her criminal record and petitioned the district court for an expungement order. The district court entered the order after finding that exceptional circumstances warranted expungement. On appeal, the State argues that the district court did not have the authority to expunge Defendant’s criminal records and that, assuming the court did have the authority, the court abused its discretion in ordering the expungement because the circumstances do not rise to the level required for a court to expunge criminal records.

BACKGROUND

In March 2002, Defendant was indicted on one count of child abuse resulting in great bodily harm, contrary to NMSA 1978, Section 30-6-1(D) (2009), a first degree felony. In September 2003, Defendant entered an Alford plea in which she pleaded guilty to one count of child abuse not resulting in great bodily harm, a third degree felony. Defendant was sentenced to five years of supervised probation. Following Defendant’s plea, the district court found that Defendant’s case was “a fit and proper subject” for a conditional discharge and ordered Defendant’s sentence to be deferred during the course of her probation. Pursuant to the conditional discharge statute, NMSA 1978, Section 31-20-13 (1994), the district court ordered “upon expiration of the probationary period, the [c]ourt shall discharge . . . Defendant and dismiss all criminal proceedings against” her without an adjudication of guilt.

In 2006, the district court granted Defendant an early release from probation. In 2007, Defendant filed a motion seeking an order expunging or sealing all records of her conviction or arrest held by the various law enforcement agencies she had come into contact with, the district attorney’s office, and the court. Following a hearing on the matter, the district court found that “[t]here are exceptional circumstances in this matter warranting the expungement of any and all criminal records in this cause of action.” The court noted that those exceptional circumstances included the fact that Defendant was charged only as an accessory in the underlying crime, she had entered an Alford plea, she was granted a conditional discharge and was released early due to her satisfactory compliance with the terms of release, she had been denied employment opportunities as a result of her criminal record, she had been industrious and continued her education, and she had no prior criminal record.

The Conditional Discharge Statute Does Not Grant the Authority to Expunge Criminal Records

Defendant argues that the conditional discharge statute, Section 31-20-13, implicitly grants the district court the authority to expunge criminal records in order to carry out and give meaning to the statute. Whether the conditional discharge statute grants such authority is a question involving statutory construction, which we review de novo. State v. Willie, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369 (alteration in original) (internal quotation marks and citation omitted). We also consider the statutory subsection “in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.” State v. Smith, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted). We interpret statutes in a manner that avoids absurd or unreasonable results. State v. Padilla, 1997-NMSC-022, ¶ 6, 123 N.M. 216, 937 P.2d 492.
The conditional discharge statute provides that "[w]hen a person who has not been previously convicted of a felony offense is found guilty of a crime for which a deferred or suspended sentence is authorized, the court may, without entering an adjudication of guilt, enter a conditional discharge order and place the person on probation." Section 31-20-13. Defendant acknowledges that the plain language of the statute does not expressly grant the district court the authority to expunge criminal records; however, she contends that the purpose of this statute is to give a first-time offender a clean slate and that the statute therefore implicitly gives the district court the authority to expunge criminal records. According to Defendant, if the statute does not implicitly allow the district court to expunge a defendant’s criminal records, then the purpose of the statute cannot be fulfilled.

We do not agree. The purpose is fulfilled because there is a clear benefit to Defendant—without expungement—that she has already enjoyed by virtue of being sentenced pursuant to the conditional discharge statute. A sentence entered pursuant to the conditional discharge statute is entered without any adjudication of guilt. State v. Herbstman, 1999-NMCA-014, ¶ 11, 126 N.M. 683, 974 P.2d 177 (filed 1998). Thus, the court records that are publicly available to a prospective employer would not reflect that Defendant pleaded guilty or otherwise show any finding as to Defendant’s guilt—only that the case against Defendant was dismissed. In contrast, had Defendant been given a deferred or a conditional sentence, the records would reflect an adjudication of guilt. Id. (explaining that “[a] deferred sentence is entered with an entry of adjudication of guilt, but does not necessarily subject the defendant to criminal consequences”). Not only would a prospective employer be unable to determine that Defendant had pleaded guilty, but Defendant can also truthfully state that she has never been convicted of a felony if asked that question on an employment application because there has been no adjudication of her guilt. See id. ¶ 19 (noting that an individual granted a conditional discharge for a sex offense has no obligation to register as a sex offender since there has been no finding of guilt). Defendant therefore receives a special benefit from the conditional discharge statute that is not available with any other type of sentence.

Defendant’s argument is also undercut by the plain language of the statute. A district court can enter a conditional discharge order only on behalf of a “person who has not been previously convicted of a felony offense,” and the order “may only be made available once with respect to any person.” Section 31-20-13. If, as Defendant argues, the statute implicitly allows a district court to expunge all records of the conditional discharge and the underlying crime, then the Legislature’s intention of allowing a conditional discharge only for first-time offenders would be frustrated because there would be no record that an individual had previously offended.

Our conclusion is further supported by the fact that “at the same time and in the same act in which the [L]egislature enacted the conditional discharge statute, it [also] amended the habitual offender statute, NMSA 1978, [Section] 31-18-17 [(2003)], to specifically include conditional discharge orders as usable for habitual offender sentence enhancement purposes.” Herbstman, 1999-NMCA-014, ¶ 20. Because a conditional discharge may be used for purposes of determining whether an individual is a repeat offender, it would be unreasonable to interpret the conditional discharge statute as implicitly allowing a district court to expunge all records of the arrest and judicial procedures.

Defendant contends that other statutes expressly allow the expungement of criminal records and provide an additional context to establish that the Legislature intended the conditional discharge statute to implicitly grant the district court expungement power. For example, Defendant points to NMSA 1978, Section 30-31-28 (1972), which allows a court to give a conditional discharge for a first-time offender charged with possession of narcotics. It provides that a court may order the expungement of “all official records . . . relating to [the] arrest, indictment or information, trial, finding or plea of guilty, and dismissal and discharge” as long as the offender was under eighteen at the time of the arrest. Section 30-31-28(D). The effect of the order is to “restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information.” Id.

We are not persuaded. If, as Defendant argues, the statute permitting a conditional discharge automatically includes the authority to expunge criminal records, then the Legislature’s express grant of the authority to expunge in Section 30-31-28 would be mere surplusage because it would be granting a right already implied by the ability to give first-time narcotics offenders a conditional discharge. See State v. Chavez, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988 (filed 2007) (explaining that “[t]his Court presumes that the Legislature is aware of existing case law and acts with knowledge of it’’); State v. Rivera, 2004-NMSC-001, ¶ 18, 134 N.M. 768, 82 P.3d 939 (filed 2003) (explaining that when construing a statute, a court must ensure that no part of a statute is rendered surplusage or meaningless).

In addition, by including express language dictating who is eligible for the expungement of criminal records in Section 30-31-28(D), the Legislature has demonstrated the ability to expressly grant the power to expunge when it wishes to do so. If the Legislature had also intended Section 31-20-13(D) to include a right to expunge criminal records, it could have included an express grant of expungement power as it did in Section 30-31-28. See Chavez v. Desert Eagle Distrib. Co., 2007-NMCA-018, ¶ 28, 141 N.M. 116, 151 P.3d 77 (filed 2006) (concluding that “[h]ad the [s]tate wanted to provide a uniform system throughout New Mexico of operating hours for establishments serving alcohol . . . it could have included hours and days restrictions in its gaming compact with the [t]ribe”).

We therefore conclude that the conditional discharge statute did not implicitly grant the district court the authority to order the expungement of Defendant’s criminal records upon her successful completion of the terms of her probation.

Assuming the District Court has the Inherent Authority to Order the Expungement of Criminal Records, Defendant Failed to Demonstrate the Existence of Exceptional Circumstances Necessary to Exercise That Authority.

Defendant also argues that the district court has the inherent equitable authority, derived from our state constitution, to order the expungement of criminal records. We considered this argument in Toth v. Albuquerque Police Department, 1997-NMCA-079, 123 N.M. 637, 944 P.2d 285. In that case we acknowledged that a majority of jurisdictions recognize that district courts possess the inherent authority to expunge criminal records. Id. ¶¶ 5-6 (compiling cases in which courts
have and have not recognized inherent authority to expunge criminal records. However, we declined to directly address whether the courts of our state have such inherent authority because, assuming that they do, the petitioner in Toth failed to establish compelling circumstances that would justify expungement.

¶ 7. We further explained that because the petitioner had only suffered the loss of future employment prospects, a harm that was “no more than the natural consequence of arrest,” she did not demonstrate “that the dismissal of her record . . . the general interest of law enforcement agencies in retaining” the criminal records, or “the lawfulness of the underlying arrest,” and she has not demonstrated “that the dismissal of [the] charges against [her] are predicated on factual innocence.” Id. ¶ 10. Rather, like the petitioner in Toth, Defendant alleges only that she is unable to obtain employment in certain fields due to the existence of the criminal records. Courts have consistently held that being unable to find a job is insufficient to establish the extraordinary circumstances necessary to justify expungement. Id. ¶¶ 10-11 (noting that damage to future employment prospects is a natural consequence of arrest that does not rise to the level required for expungement); see United States v. Fields, 955 F. Supp. 284, 285 (S.D.N.Y. 1997) (explaining that “the difficulties faced by [the defendant] in finding and keeping a steady job do not rise to the level of ‘extreme circumstances’ required before a court will exercise its inherent power to expunge”).

¶ 18. Here, as in Toth, Defendant does not challenge the accuracy of the information in her record[,] the general interest of law enforcement agencies in retaining” the criminal records, or “the lawfulness of the underlying arrest,” and she has not demonstrated “that the dismissal of [the] charges against [her] are predicated on factual innocence.” Id. ¶ 10. Rather, like the petitioner in Toth, Defendant alleges only that she is unable to obtain employment in certain fields due to the existence of the criminal records. Courts have consistently held that being unable to find a job is insufficient to establish the extraordinary circumstances necessary to justify expungement. Id. ¶¶ 10-11 (noting that damage to future employment prospects is a natural consequence of arrest that does not rise to the level required for expungement); see United States v. Fields, 955 F. Supp. 284, 285 (S.D.N.Y. 1997) (explaining that “the difficulties faced by [the defendant] in finding and keeping a steady job do not rise to the level of ‘extreme circumstances’ required before a court will exercise its inherent power to expunge”).

¶ 19. Defendant’s good behavior since her arrest and subsequent plea, which apparently permitted her to obtain early release from probation and to regain custody of her child, is commendable. In addition, we are mindful that Defendant has worked hard to further her education and to obtain gainful employment and that she has had no other interactions with our judicial system since her arrest and subsequent plea. Yet, despite the progress Defendant has made, her inability to obtain employment is a natural consequence of her arrest, not an extraordinary circumstance that would justify expungement of records. In this case, as in Toth, if Defendant “were allowed to expunge her records solely on this basis, then expunging records would become the rule rather than the exception.” 1997-NMCA-079, ¶ 11. Defendant did not allege that her arrest was illegal, unconstitutional, based on inadequate or flawed procedures, nor did she make any other argument demonstrating extraordinary circumstances. See United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977) (noting that exceptional circumstances have been found where “procedures of mass arrests rendered judicial determination of probable cause impossible, where the court determined the sole purpose of the arrests was to harass civil rights workers, where the police misused the police records to the detriment of the defendant, or where the arrest was proper but based on a statute later declared unconstitutional” (citations omitted)). We therefore hold that the district court erred in ordering the expungement of Defendant’s criminal records.

CONCLUSION

¶ 20. For the foregoing reasons, we reverse the district court’s order.

¶ 21. IT IS SO ORDERED.

CYNTHIA A. FRY, Chief Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

TIMOTHY L. GARCIA, Judge
Current Developments in Employment Law
Thursday-Saturday, July 22-24, 2010
La Fonda Hotel, Santa Fe

For more information and to register go to
www.ali-aba.org/CS006

Features a special segment on New Mexico employment law development, and two one-hour segments on ethics and on professionalism, both approved for MCLE credit

Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation
Wednesday-Saturday, August 25-28, 2010
La Fonda Hotel, Santa Fe

For more information and to register go to
www.ali-aba.org/CS001

A comprehensive land use course to help the private sector, citizens, and government balance competing demands and work toward better land use planning and regulatory decisions

Save $300 off the price of tuition!
At checkout enter coupon code NMBAR and save $300 off the live course tuition price for either course!

BANNERMAN & JOHNSON, P.A.

Is Pleased to Announce that

REBECCA L. AVITIA

Has Joined the Firm.

Ms. Avitia handles commercial, tort, employment, real estate, healthcare and professional liability litigation. She also represents clients in business and regulatory matters.

You want the best for your clients. Look to us for the best...

- Revocable and Irrevocable Trusts
- Investment Management
- Individual Retirement Accounts
- Profit Sharing and 401(k) Plans
- Personal Injury Trusts
- Conservatorships
- Estate Administration
- Socially Responsible Investments


Tom Popejoy, JD
SVP and Manager
505.830.8106
9500 Montgomery NE
Albuquerque, NM

www.nmb-t.com

Effective June 1, 2010, the law firm of Holt Babington Mynatt P.C. will be known as

Holt Babington Mynatt Martinez P.C.

Attorneys At Law

1660 Hickory Loop
Las Cruces, New Mexico 88005
575.524.8812
www.hbm-law.com

Dog Bites

Animal Behavior Expert Analysis
Dr. Jeff Nichol, D.V.M.
35 years experience
(505) 792-5131
jnicholdvm@aol.com

Appeals require uninterrupted time.
Bill Lazar
505.988.7100

Expert Witness
Commercial Real Estate
Daniel Boardman CCIM 505.440.8070
daniel@danielboardman.com
Comeau, Maldegen, Templeman & Indall, LLP
is pleased to announce that

Michael J. Moffett

has become a partner in the firm.

Mr. Moffett will continue his practice in the areas of commercial law and litigation, corporate and business law, environmental and natural resources law, insurance law, employment law, and real estate law.

www.cmtisantafe.com
Tel: 505.982.4611 Fax: 505.988.2987
Coronado Building, 141 E. Palace, Santa Fe 87501
P.O. Box 669, Santa Fe 87504-0669

Zia Trust, Inc.
Invites You to Visit Our Booth at the
2010 Annual Meeting Bench & Bar Conference
July 15 – 17, 2010
Inn of the Mountain Gods
Leaders in Trust Administration

Personal Trusts, Charitable Trusts, Special Needs Trusts, & Conservatorships

www.ziatrust.com

HOLT BABINGTON MYNATT MARTINEZ P.C.
Attorneys At Law

is pleased to announce that

Stephen A. Hubert
(formally of Hubert & Hernandez, LLC)

is now Senior Counsel to the firm

Mr. Hubert specializes in commercial, tort, employment and natural resource litigation.

1660 Hickory Loop
Las Cruces, New Mexico 88005
575.524.8812
sah@hbm-law.com • www.hbm-law.com
Robles, Rael & Anaya, P.C. is honored to welcome Robert M. White to our firm.

Bob brings more than 30 years of unparalleled experience focusing on the areas of land use, administrative and local government law.

He served as the City Attorney for the City of Albuquerque for over 16 years. Prior to that Bob served as an Albuquerque City Councilor.

With his wealth of experience, Bob is a welcome addition to our team.

500 Marquette Ave., NW, Suite 700
Albuquerque, NM 87102
(505) 242-2228 Phone
(505) 242-1106 Fax
www.roblesrael.com
ROBERT BRUCE COLLINS
~ Attorney at Law ~
Available for
SETTLEMENT FACILITATIONS and
ARBITRATIONS
1009 Marquette Ave. NE, Albuquerque, NM 87106
Office: (505) 243-6948 • Fax: (505) 243-7708
E-mail: l.robertcollins@comcast.net

Experienced Santa Fe / NM Attorney
Established SANTA FE firm seeks Experienced SANTA FE / NM Attorney (4+ yrs) for a small busy downtown Santa Fe practice specializing in business, corporate, M&A, real estate, bankruptcy and related litigation. Must be a licensed NM lawyer. Every reply strictly confidential. Bright, aggressive, hard working and professional. Excellent verbal and written communication skills essential. One who will be a “natural” with our local and statewide clients. Non-smoking office. Please send your CV and a cover letter to: santafelaw@gmail.com

Pete Dinelii
Attorney at Law
31 Years Experience
Former Workers’ Compensation Judge
AVAILABLE FOR
MEDIATIONS and SETTLEMENT FACILITATION
Office: (505) 265-3043 • Cell: (505) 280-1471
E-mail: pdinelli@aol.com

Assistant County Attorney for Santa Fe County
Now hiring for the position of Assistant County Attorney for Santa Fe County. This job is ideal for those who are happy in a fast paced environment with a diverse practice. Each attorney’s workload varies from land use regulation to government procurement, from labor law to election reform, from advising public officials to civil litigation. We have a collaborative work environment where our small group of attorneys work together to meet the needs of Santa Fe County. Intelligence, adaptability, independence, a strong work ethic, good interpersonal and communication skills are critical. Experience in representing local government is preferred. The job remains open until filled. For a competitive salary and benefits second to none in a beautiful work setting at the heart of historic Santa Fe, apply with the Santa Fe County Human Resources Department located at 949 West Alameda Street. The position is full-time, at will, FLSA exempt and applicants must be licensed to practice law in the State of New Mexico and eligible to practice law in federal court. Minimum of three years experience is required.
Request For Letter of Interest
Workers’ Comp Legal Services
City of Albuquerque

The City of Albuquerque Risk Management Division is requesting responses to its Request for Letters of Interest—Workers’ Comp Legal Services. If you are interested in receiving the complete Request for Letters of Interest package, please call the City of Albuquerque Risk Management Division at 768-3073. Proposals may be submitted pursuant to this Request on an ongoing basis until further notice.

Lawyer A Position

The New Mexico Public Regulation Commission is accepting applications for the position of Associate General Counsel (Lawyer A). The Office of General Counsel (“OGC”) advises the Commission on administrative law matters, including personnel-related matters, and on cases pending before the Commission, which involve, among other things, regulation of utilities, telecommunications carriers, and motor transportation carriers. The OGC also assists the Commission in rulemakings, brings enforcement and other actions in state and federal courts, and defends Commission decisions in the New Mexico Supreme Court and in other state and federal courts. The position requires a hard-working attorney with superior analytic, writing and speaking skills who has the ability to work effectively with other lawyers, technical staff, clerical staff and elected officials. Minimum qualifications: five or more years of experience in working at or advising a government agency or in the practice of public utility or administrative law, or the equivalent; license to practice law in New Mexico. Salary $43,056.00 – $76,544.00 per year (with benefits), level to be based on qualifications and experience. Back- ground in regulatory law, litigation, appellate practice, engineering, economics, accounting or technical discipline preferred. Interested persons should submit an on-line application (to include a resume) through the State Personnel Website at http://www.spo.state.nm.us/; Job ID No. 23131; in addition a writing sample and the names and contact information for three references, including at least one from a current or former supervisor or client, to the New Mexico Public Regulation Commission, Human Resource Bureau, P. O. Box 1269, 1120 Paseo de Peralta, Room 345, Santa Fe, NM 87504, by no later than July 9, 2010. For additional information, contact Rene Kepler at (505) 827-4324. The State of NM is an EOE.

Assistant District Attorney

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

Litigation Associate

Santa Fe law firm with well established civil practice seeks associate with experience in business, commercial, employment, real estate and construction litigation. Applicants should have deposition and courtroom experience, good writing skills and credentials, and a New Mexico license. Excellent benefits and working environment. Please submit resume, writing sample and transcript to POB 92860 Albuquerque, NM 87199 Attn: Box C.

Access to Justice Pro Bono Coordinator

Access to Justice Pro Bono Coordinator: FT. Duties include coordination of access to justice efforts; assisting in the formation and continuation of local district court pro bono committees; providing reports and liaison with ATJ community and funders. Extensive statewide travel required. Project management experience with a degree and prior work experience in progressively more responsible management positions, a legal background and desire to advocate for access to justice issues needed. Salary range: $37 - $45K DOE with benefits. Interested persons should review the Access to Justice information available at www.nmbar.org and send a letter of interest along with a resume to HR-ATJ, PO Box 92860, Albuquerque NM 87199 or fax (505) 797-6019 or e-mail HR@nmbar.org. Position open until filled.

Part-Time Paralegal/Legal Assistant

Must be experienced in criminal law. E-mail resume and salary requests to Torraco@TorracoLaw.com

Paralegal/Legal Assistant

Extensive experience in commercial civil litigation required, including document control/management and working knowledge of computerized data bases. Seeking professional, organized, and highly skilled individual with attention to detail. Excellent computer skills required. All inquiries confidential. Competitive benefits. Resumes, Atkinson, Thal & Baker, PC, 201 Third Street NW, Suite 1850, Albuquerque NM 87102
**Positions Wanted**

Well Known Real Estate/Business/Civil Paralegal
Seeking PT to transition into FT in-office job. With previous employer for 26+ years. Had to separate due to temporary medical disability. Please contact me for resume and further details. Candy Klein; 892-3539; candyrobpq.com or candyrobpq@yahoo.com.

**Services**

Liquidate Real Estate Contracts
Sell future monthly payments for a lump sum cash offer. Fast closing, professional service. Castel Financial Services: 505.503.5335

Contract Attorney
Contract Attorney with 6 years of litigation and transactional experience available for legal research, writing, discovery review, pleadings and project work. Reasonable rates. Please email: nmcontractattorney@gmail.com.

**Office Space**

Law Office Spaces Available
Near Old Town and downtown, located at 1905 Lomas Blvd. NW. Share office space with two sole practitioners. Law office, conference room, secretarial area and/or front receptionist area available. Rent includes utilities, janitorial service, and kitchen area. Copy machine, scanner, printer, phone service, e-fax, and high speed internet available at pro-rata charge. Rent, $400 per month. Contact Joe M Romero at 505.489.9195 – 505.239.8985 joeromero01@comcast.net

Space Available-Uptown Area
Established uptown law firm offering approximately 900 square feet of space that includes five offices and three secretarial stations. Shared reception area, conference rooms, coffee bar and break room. Please contact Jessica at 830-7761 or jyv@nmcounsel.com.

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

Oso Del Rio
Beautiful Rio Grande Boulevard office for 4-6 lawyers & staff. 3707 sq. ft. available for lease September 1, 2010. Call David Martinez 343-1776

Beautiful Adobe
Close to downtown, courthouses, hospitals. Reception area, conference rooms, employee lounge included. Copy machine available. Ample free parking and easy freeway access. From $250.00 per mo. Utilities included. Oak Street Professional Bldg., 500 Oak St. N. E. Call Jon, 507-5145; Orville or Judy, 867-6566.

Office Space for Lease

Professional Office Downtown
Office with Separate Secretarial Area if Needed, Office Furnishings Optional, Free Client Parking, Library/Conference Room, Kitchen, Telephone, High-Speed Internet, Copier, Fax, Security System, Within Walking Distance from Courthouses. 715 Tijeras Ave. NW. Call Holly at 842-5924.

**Liquidate Real Estate Contracts**
Sell future monthly payments for a lump sum cash offer. Fast closing, professional service. Castel Financial Services: 505.503.5335

**Contract Attorney**
Contract Attorney with 6 years of litigation and transactional experience available for legal research, writing, discovery review, pleadings and project work. Reasonable rates. Please email: nmcontractattorney@gmail.com.

2010-2011 Bench & Bar Directory

• Includes member listings
  State Bar staff and member programs listings.

• Comprehensive listings for New Mexico courts, tribal courts, governments, law entities and programs offered to the public by the State Bar.

Purchase online at www.nmbar.org
or call 505.797.6000

State Bar of New Mexico
At the Medical Rehabilitation Center (MRC) of New Mexico, Dr. Richard Radecki, who is Board Certified in Physical Medicine and Rehabilitation, provides medical/legal services including Independent Medical Evaluations, Impairment Ratings, Chart Reviews, and Expert Witness testimony. He is certified to perform Independent Medical Evaluations by ABIME for the AMA Guides to the Evaluation of Permanent Impairment for 4th, 5th, 6th Editions. For referrals, please contact Anita at 505-977-0107.