

# BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

FEBRUARY 5, 2004 • VOLUME 43, No. 5



Kelley S. Hestir

Chaves County Courthouse, Roswell, NM

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to be featured on cover

## ORDER

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## OPINIONS

### New Mexico Court of Appeals

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**2004-NMCA-009:** In the Matter of Domenic J. Paradiso, deceased worker, and Robert and Frances Doak, as parents and guardians of Nicholas and Joshua Paradiso, minors v. Tipps Equipment and Food Industry Self-Insurance Fund

**2004-NMCA-006:** Robert Salcido, Robert Zeissel, Barbara Boltrek, Gust Karmeris, Jr., and James Hruschak, on behalf of themselves, and all others similarly situated v. Farmers Insurance Exchange, Marty Draper

# It's Not Too Late to Get Involved!



By joining a State Bar committee you will:

- Help Strengthen the Legal Profession
- Work on Legal Causes of Interest
- Improve Public Understanding
- Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. The following committees are currently accepting new members. Review the descriptions and complete the form below to request an appointment.

Please check the committee(s) you wish to join.

- |   |   |
|---|---|
| <input type="checkbox"/> <b>Alternative Methods of Dispute Resolution (ADR)</b> – Promotes and provides legal education and training in the use of alternative dispute resolution processes.  | <input type="checkbox"/> <b>Legal Services and Programs: Pro Bono Subcommittee</b> – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.               |
| <input type="checkbox"/> <b>Bench and Bar Relations</b> – Plans the statewide Bench and Bar Conference.   | <input type="checkbox"/> <b>Membership Services Advisory</b> – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance partner agreements with vendors of products and services. |
| <input type="checkbox"/> <b>Committee for the Delivery of Legal Services to People with Disabilities</b> – Provides information and assistance to ensure access to counsel for persons who have a disability.   | <input type="checkbox"/> <b>Public Legal Education</b> – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.                |
| <input type="checkbox"/> <b>Committee on Diversity in the Legal Profession</b> – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.                                     | <input type="checkbox"/> <b>Quality of Life</b> – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.        |
| <input type="checkbox"/> <b>Ethics Advisory</b> – Assists attorneys with interpretation and application of the Code of Professional Conduct.  | <input type="checkbox"/> <b>Technology Utilization</b> – Assists with the development and promotion of electronic technology applications for the legal profession.   |
| <input type="checkbox"/> <b>Historical</b> – Acquires, maintains and submits for publication historical information relating to the bar.  |   |
| <input type="checkbox"/> <b>Law Office Management</b> – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.  |   |
| <input type="checkbox"/> <b>Lawyers' Assistance</b> – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.  |   |
| <input type="checkbox"/> <b>Lawyers' Professional Liability</b> – Advises the State Bar regarding risk management activities.   |   |
| <input type="checkbox"/> <b>Legal Services and Programs: Planning Subcommittee</b> – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor. |   |

Name \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_

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**MAIL TO:** State Bar of New Mexico  
Membership and Communications Department  
PO Box 92860 • Albuquerque, NM 87199-2860  
Fax: (505) 828-3765

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### ORDERS

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## BAR BULLETIN

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Cite officially as *Bar Bulletin* (ISSN 1062-6611). Vol. 43, No. 5, Feb. 5, 2004.  
Subscription price \$80 per year. Subscriptions are nonrefundable once purchased.  
Published weekly by the State Bar, 5121 Masthead NE, Albuquerque, NM 87109  
(505) 797-6000 • 1-800-876-6227 • Fax: (505) 828-3765  
E-mail: bb@nmbar.org • www.nmbar.org

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PERIODICALS postage paid at: Albuquerque, NM 87101 • © 2004, State Bar of New Mexico  
Postmaster send address changes to: Systems Manager • Bar Bulletin • PO Box 92860, Albuquerque, NM 87199-2860

# MEETINGS

## FEBRUARY

**9**  
**Taxation Section Board of Directors**  
noon, via teleconference

**10**  
**Lawyers Professional Liability Committee**  
noon, State Bar Center

**11**  
**Bench & Bar Relations Committee**  
3 p.m., State Bar Center

**Trial Practice Section Board of Directors**  
4:30 p.m., State Bar Center

**Senior Lawyers Division, Board of Directors** 5 p.m., State Bar Center

**12**  
**Business Law Section Board of Directors**  
3:30 p.m., State Bar Center

**13**  
**Committee for Delivery of Legal Services to People with Disabilities**, noon, NM Comm. for the Blind, 2200 Yale Blvd. SE

**14**  
**Ethics Advisory Opinions Committee**  
10 a.m., Dines & Gross, P.C.

**17**  
**Solo and Small Firm Practitioners Section** noon, Albuquerque Petroleum Club

## STATE BAR WORKSHOPS

### FEBRUARY

**11**  
**Family Law Workshop**  
6 - 8 p.m., State Bar Center  
Albuquerque, NM

**19**  
**Family Law Workshop**  
6 - 8 p.m., Raton Convention Center  
901 S. 3<sup>rd</sup> St., Raton, NM

**25**  
**Consumer Debt/Bankruptcy Workshop**  
6 - 8 p.m., State Bar Center  
Albuquerque, NM

**Family Law Workshop**  
5:30 – 7:30 p.m., Branigan Library  
(2<sup>nd</sup> FL-Pearl Higgins Room), Las Cruces, NM

*For more information call Marilyn Kelley  
(505) 797-6048 or (800) 876-6227;  
or visit [www.nmbar.org](http://www.nmbar.org).*

# NOTICES

## COURT NEWS

### N.M. Supreme Court

#### Notice of Vacancy – Code of Professional Conduct Committee

One attorney vacancy exists on the Code of Professional Conduct Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

#### Notice of Vacancy – Children’s Court Rules Committee

One attorney vacancy exists on the Children’s Court Rules Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest and/or resume by Feb. 27 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

#### Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules

The Supreme Court is considering the amendment of the Magistrate Court and Metropolitan civil and criminal rules, the Municipal Court rules and civil and criminal forms. Attorneys and/or judges who would like to comment on the proposed revisions should send written comments by Feb. 20 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

**For your reference:** *The proposed amendments were published in the Jan. 29 (Vol. 43, No. 4) Bar Bulletin.*

#### Proposed Revisions to the Code of Judicial Conduct

The Supreme Court is considering proposed amendments to the Code of Judicial Conduct. Attorneys and/or judges who would like to comment on the proposed amendments should send written comments by Feb. 20 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848,

### New Mexico Supreme Court Attorney Notice

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, [Suprvn@nmcourts.com](mailto:Suprvn@nmcourts.com); faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848. Information may be e-mailed to the State Bar, at [address@nmbar.org](mailto:address@nmbar.org); faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque NM 87199-2860. The State Bar keeps both mailing and Directory addresses. Contact the State Bar for more information.

Santa Fe, NM 87504-0848.

**For your reference:** *The proposed amendments were published in the Jan. 29 (Vol. 43, No. 4) Bar Bulletin.*

### Administrative Office of the Courts Court Interpreter Training and Certification

The New Mexico Administrative Office of the Courts is seeking applicants for Court Interpreter Training and Certification. New Mexico does not have enough certified interpreters to fully meet the needs of the state courts, particularly in the rural portions of the state. Certification to become a court interpreter in New Mexico is a multi-step process consisting of a two-day mandatory orientation workshop, an optional skills building workshop and two oral proficiency exams. New Mexico, along with 29 other states, is a member of the National Consortium for State Court Language Interpreter Certification.

All training workshops will be offered in early March in Albuquerque and Las Cruces and will be taught by certified interpreters. The workshop includes: modes of interpreting, court system information, legal vocabulary and terminology and information on the certification exam. Individuals MUST attend an orientation workshop to take the certification exam.

Additional information and all registration materials are posted at: <http://www.nmcourts.com/courtadministration.html> in the section on court interpreting. The registration deadline is Feb. 15. Registration will

be postmark date until a class fills. Demand is expected to be high, so registration materials and payment should be submitted as soon as possible.

### First Judicial District Court Family Law Brownbag Meeting

The First Judicial District Court will host a family law brownbag meeting at noon, Feb. 10 in the Grand Jury Room on the second floor of the First Judicial District Courthouse. Children’s First: Co-Parenting Support Services, Max August, MA, a marriage and family therapist, and Anne Morgan, Ph.D., will discuss the Safe Haven Program designed to assist with children’s access and visitation beginning this March.

For more information, contact Sharon L. Pino, (505) 982-0199, or [sharonpino@pinolawoffice.com](mailto:sharonpino@pinolawoffice.com).

### Mastering Settlement Facilitation

The First Judicial District Court, through the Alternative Dispute Resolution Program, is sponsoring a complimentary CLE (with attorneys responsible for the MCLE fee of \$1 per hour). The CLE is intended for those attorneys who participate or wish to participate as settlement referees in the voluntary settlement conferences of the First Judicial District Court.

The workshop will be held from 8:30 a.m. to 4 p.m., Feb. 19 in Santa Fe at Plaza Resolana. Credit for 6.9 hours of general credit has been approved by the Minimum Continuing Legal Education Board.

There will be three presenters: Mark Bennett of Decision Resources, who is a professional mediator and author of books on mediation; Professor Scott Hughes of UNM is the ADR specialist at the College of Law and has conducted many ADR trainings; and David Levin, director of the Second Judicial District's Court Alternatives Program, who has also conducted many settlement and mediation trainings.

This conference will address the incorporation of mediation techniques in settlement facilitation along with other pertinent topics designed to improve ADR skills.

Contact Carolyn Lumbard, ADR Coordinator, (505) 827-5072, to register. Space is limited.

## Second Judicial District Court Judicial Assignment

Effective Feb. 1 Judge Denise Barela Shepherd, Division XVIII, will be assigned to Criminal Court and will assume all criminal cases previously assigned to Judge Frank H. Allen, Jr. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Feb. 1, to challenge or excuse the new judge pursuant to Supreme Court Rule 1-088.1.

## Thirteenth Judicial District Court Destruction of Exhibits, 1983 to 2003

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Thirteenth Judicial District Court will destroy exhibits filed with the court in civil cases, criminal cases, domestic cases, probate cases and children's cases for the years 1983 to 2003 (excluding cases on appeal.) Counsel for parties are advised that exhibits may be retrieved through April 19. Attorneys who may have cases with exhibits may verify exhibit information with the Sandoval County District Court (505) 867-2376, ext. 29, Monday through Friday from 8 a.m. to noon and from 1 to 5 p.m. Plaintiff exhibits will be released to counsel of record for the

## Bench Bar Conference Notice to Members

The State Bar of New Mexico will not hold an annual convention in 2004, so mark your calendars for Nov. 4-6, and plan to attend the 2004 State Bar Bench and Bar Conference at the Sheraton Old Town in Albuquerque. The Bench and Bar Relations Committee has begun planning this biannual event which provides attorneys and judges the opportunity to address issues of the New Mexico legal profession in an informal, relaxed setting.

Not only will the conference offer a majority of the year's CLE credit requirements, but it will also be the venue for the State Bar annual award presentations and annual membership meeting. Watch the *Bar Bulletin* and [www.nmbar.org](http://www.nmbar.org) for more details.

plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). 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.

## Bernalillo County Metropolitan Court Nominating Commission

Fourteen applications were received by the Judicial Selection Office for the judicial vacancy in the Bernalillo County Metropolitan Court, due to the appointment of Judge Denise Barela Shepherd to the Second Judicial District Court.

The Metro Judges Nominating Commission will meet at 8 a.m., Feb. 13 at the Bernalillo County Metropolitan Courthouse in Albuquerque (NW corner of Lomas and 4th) to evaluate the applicants for the judicial position, the commission meeting is open to the public. The names of the applicants in alphabetical order are:

Chavez, Rudolph B.  
Chavez, Benjamin S.  
DeMersseman, Clyde W.  
Gathings, D. (Darlan) Rusch  
Harrington, Christopher M.  
Luhan, Angela R.  
Mortimer, Timothy R.  
Mott, Linda J.  
Ortiz, Andrew P.

Pino, Juan A.  
Rogers, Linda S.  
Schultz, Christopher J.  
Stone, Jennifer L.  
Valdez, Victor E.

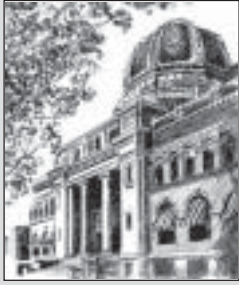
## U.S. Bankruptcy Court Brownbag Meeting – Exemptions

A brownbag session is scheduled for noon, Feb. 13, at the U.S. Bankruptcy Court, 10th floor conference room. The topic for discussion will be "Exemptions" or "How to Avoid an Objection to Exemptions by the Trustee." The session will be presented by Linda Bloom, chapter 7 trustee, and Kelley Skehen, chapter 13 trustee. For more information call (505) 243-1335.

## U.S. Court of Appeals - 10th Circuit 2004 10th Circuit Judicial Conference

The U.S. Court of Appeals for the 10th Circuit will host the 2004 10th Circuit Judicial Conference July 21-23 in Park City, Utah. This year marks the 75th anniversary of the 10th Circuit. Information regarding events and lodging are available at [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov). Online registration will begin April 1. For more information, contact Chris Lighthall, (303) 335-2823, or Julie Baehr, (303) 335-2826.

# NOTICES



## **Bar Bulletin: Call for Cover Images**

The State Bar of New Mexico is seeking additional courthouse images to be featured on the cover of the weekly *Bar Bulletin*. A different image of a New Mexico courthouse — either still in use or historical — will be featured each week. Please send photograph images by mail or e-mail to the attention of

Diana Sandoval, editor, PO Box 92860, Albuquerque,

NM 87199-2860; or dsandoval@nmbar.org. Images will be used as a reference for original drawings by State Bar artist, Kelley S. Hestir.

## **U.S. District Court for the District of New Mexico**

### **Notice to Federal Court Practitioners**

Administrators at the U.S. District Court would like to remind those attorneys who have not paid annual dues that Local Rule 83.2(c) of the United States District Court for the District of New Mexico requires that members of the Federal Bar must pay annual dues of \$25 to the clerk on or before Jan. 31 of the year following admission and every year thereafter. Checks should be made payable to: Clerk, U.S. District Court. Payment may be made in person at Intake in Albuquerque, Santa Fe or Las Cruces; or mailed to Attention: Attorney Admissions, U.S. District Court, 333 Lomas NW, Albuquerque, NM 87102.

## **STATE BAR NEWS**

### **Bankruptcy Law Section**

#### **Outstanding Bankruptcy Lawyer Award**

The State Bar Bankruptcy Law Section is soliciting nominations for its Outstanding Bankruptcy Lawyer Award for 2003. The award is given to an individual who, among other criteria, has demonstrated excellence as a bankruptcy attorney and whose personal character and dedication to bankruptcy law and service furthers the integrity and repute of the legal profession.

Submit nominations by Feb. 9 to Robert H. Jacobvitz, 500 Marquette NW,

Ste. 650, Albuquerque, NM 87102; or e-mail rjacobvitz@jtwlawfirm.com.

### **Paralegal Division**

#### **Paralegal Compensation Survey**

The State Bar Paralegal Division is conducting a Paralegal Compensation, Utilization and Benefits Survey during the month of January. The division is urging every paralegal practicing in New Mexico to complete the survey. The complete survey was published as a special insert in the Jan. 15 (Vol. 43, No. 2) *Bar Bulletin*. A link to the online survey can be found on the State Bar Web site, [www.nmbar.org](http://www.nmbar.org), and the survey can also be downloaded, completed and e-mailed to PD@nmbar.org (type "survey" in subject line) or printed and mailed to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. Deadline for submission of the survey is March 1. Confidentiality of all personally identifiable information will be strictly maintained at all times.

### **Public Law Section**

#### **Nominations Sought for Public Lawyer Award**

The State Bar Public Law Section is currently accepting nominations for the eighth annual public lawyer of the year award, which will be presented on the day before Law Day, April 30. Prior recipients of the award include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerney, Jerry Richardson and Peter T. White. Send nominations by 5 p.m., March 1

to Douglas Meiklejohn, by e-mail at [dmeiklejohn@nmelc.org](mailto:dmeiklejohn@nmelc.org); or by mail at New Mexico Environmental Law Center, 1405 Luisa St., Ste. #5, Santa Fe, NM 87505. The selection committee (comprised of the three immediate past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

For a complete list of award criteria, see the Jan. 22 (Vol. 43, No. 3) *Bar Bulletin*.

## **Solo and Small Firm Practitioners' Section**

### **2004 Luncheon Speaker Schedule**

The State Bar Solo and Small Firm Practitioners' Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque.

For all new, first-time members, the first lunch is free. Contact Helen Stirling at the number below to make a free reservation.

Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The charge is \$14 in advance and \$16 at the door.

Reservations are required. Contact Helen Stirling, Esq., (505) 345-2800. Make the check payable to "State Bar of New Mexico," c/o Helen Stirling, 6125 Fourth St. NW, Ste. A, Albuquerque, NM 87107.

**Feb. 17, noon:** "Overview of the Americans with Disabilities Act and its Application in Albuquerque," Richard Benison, ADA coordinator, city of Albuquerque.

Upcoming luncheon dates are: March 16, April 20 and May 18.

## **Young Lawyers Division**

### **Region 4 Brownbag Luncheon**

The State Bar Young Lawyers Division, Region 4, will host a brownbag luncheon with Third Judicial District Court Judge Silvia Cano-Garcia. The luncheon will be held from noon to 1 p.m., Feb. 19 in the Multi-Purpose Room at the Doña Ana County District Court. Pizza and beverages will be

provided. Those who plan to attend should R.S.V.P. by Feb. 17 to Roxanna M. Chacon, (505) 523-8270; or by e-mail to [lglrmc@zianet.com](mailto:lglrmc@zianet.com) or [lcrdrmc@nmcourts.com](mailto:lcrdrmc@nmcourts.com).

## OTHER BARS

### American Bar Association Nominations Sought for E. Smythe Gambrell Professionalism Award

Nominations are now open for the 14th Annual E. Smythe Gambrell Professionalism Awards, recognizing law schools, bar associations, law firms and nonprofit organizations for projects that enhance professionalism among lawyers. The American Bar Association Standing Committee on Professionalism will present up to three awards of \$3,500 each during the ABA 2004 Annual Meeting in August in Atlanta. The award is named for E. Smythe Gambrell, who served as president of both the ABA and the American Bar Foundation in 1955-56. Gambrell founded the Legal Aid Society in Atlanta, where he practiced law from 1922 to 1986.

Entry forms and guidelines for nominations, which are due March 31, are available online at <http://www.abanet.org/cpr/gambrell.html>. Additional information is available from Kathleen Maher, (312) 988-5307, or by e-mail at [maherk@staff.abanet.org](mailto:maherk@staff.abanet.org).

### Tax Section Pro Bono Committee

This year, the Pro Bono Committee of the American Bar Association's Tax Section is raising the level of participation in the IRS's Volunteer Income Tax Assistance ("VITA") program.

The VITA Program is available for taxpayers who are in need of assistance in preparing and filing their returns. The complexities of the tax laws can frustrate many low-income, elderly, disabled and limited English proficient taxpayers' effort to complete their own return.

Because commercial tax preparers may not be a viable option for low-income taxpayers, the VITA Program provides a location where these taxpayers can come for assistance. Members of

the community – including professionals, students and other volunteers – donate their time to help taxpayers complete their returns. Local legal and tax professionals are asked to check [www.abanet.org/tax/vita](http://www.abanet.org/tax/vita) for VITA location information, including when and how to volunteer at those locations.

For more information on this and other tax pro bono projects, visit [www.abanet.org/tax/groups/probono](http://www.abanet.org/tax/groups/probono).

### N.M. Women's Bar Association Mid-State Chapter Monthly Networking Luncheon

The Mid-State Chapter of the New Mexico Women's Bar Association will hold a networking lunch meeting from noon to 1:30 p.m., Feb. 11 at Conrad's at La Posada Hotel, Albuquerque. Visitors are welcome. Advance reservations are required. Lunch prices range from \$6 - \$11 and payment is to be made to the restaurant. Anyone interested in attending this meeting should contact Virginia R. Dugan, [vrd@atkinsonkelsey.com](mailto:vrd@atkinsonkelsey.com) or Rendie Baker-Moore, [martren@eb-b.com](mailto:martren@eb-b.com).

## OTHER NEWS

### Center for Civic Values Mock Trial Judges Needed

Judges are needed for the Albuquerque and Las Cruces regional mock trial competitions (to be held Feb. 21) and for the state finals competition to be held March 19 and 20 in Albuquerque. Interested individuals may register online at the Center for Civic Values' Web site [http://www.civicvalues.org/MT\\_registration.htm](http://www.civicvalues.org/MT_registration.htm), or may print a registration form to mail or fax from the same page.

To receive a judging registration packet by mail, leave a voice mail including name and address at (505) 764-9417, ext. 13, or e-mail name and address to [mocktrial@civicvalues.org](mailto:mocktrial@civicvalues.org), specifying "request judging packet" in the subject line. For questions or additional information, visit the mock trial pages on the CCV Web site and then contact the mock trial program via telephone or e-mail.

### Health Centers of Northern New Mexico Board Vacancy for Legal Professional

Health Centers of Northern New Mexico, a New Mexico nonprofit corporation with 15 clinics in 13 communities throughout northern New Mexico, seeks to fill a vacancy on its Board of Directors with someone from the legal profession. Board membership requires attending a full board meeting one day a month, usually in Santa Fe, as well as one or two committee meetings a month (usually by teleconference.) Travel is reimbursed. For more information, call Pat Sanchez, (505) 747-5911 or (800) 284-7284.

### National Board of Trial Advocacy National Trial Certification Exam Scheduled for April 17

The National Board of Trial Advocacy (NBTA), a nonprofit organization accredited by the American Bar Association to certify attorneys as specialists in the areas of civil, criminal and family law trial advocacy, will conduct the spring administration of the national trial certification examination on April 17, in various locations throughout the United States, including Albuquerque, Denver and San Antonio. The day-long written examination, on part of NBTA's certification application, tests an applicant's comprehensive practical knowledge of trial practice, ethics and evidence relevant to their chosen specialty. Applicants will be tested on their knowledge of the substantive law and their ability to evaluate, handle and resolve model controversies prior to the institution of suit and through post judgment proceedings. Attorneys interested in achieving national trial certification in the specialties of civil, criminal or family law trial advocacy should submit an NBTA application prior to March 1 to be eligible to sit for the April 17 examination.

Contact the NBTA staff office for information on how to apply for certification, or visit the NBTA Web site, [www.nbtanet.org](http://www.nbtanet.org).

## Workers' Compensation Administration Uninsured Employers' Fund

The newly enacted Uninsured Employers' Fund (UEF), Section 52-9-1.1 (NMSA 2003) became effective June 22, 2003. The purpose of the UEF is for the protection of a worker whose employer was required, but failed, to maintain workers' compensation insurance at the time of the workers' job accident/illness. The UEF will pay workers' compensable disability and medical benefits, and thereafter seek reimbursement from the employer. Only those job accidents/illnesses occurring on or after June 22, 2003, are eligible for UEF benefits.

For more information, call Richard Crollett, UEF fund administrator, (505) 841-6823, or visit the WCA Web site at <http://wca.state.nm.us>.

## YWCA of the Middle Rio Grande 2004 Women on the Move Awards

The YWCA of the Middle Rio Grande is accepting nominations for the 2004 Women on the Move Award, which was established to recognize outstanding New Mexico women who have positively affected others through their leadership. This year marks the 20th anniversary of the program. The YWCA encourages nomination of any woman or girl (14 or older) whose leadership has made a positive difference to her profession and/or community. All honorees will be recognized during a celebration dinner at 6 p.m., April 1 at the Albuquerque Hyatt Regency.

The following criteria will be considered in the selection: demonstration of both leadership and commitment to a healthy balance in their lives; outstanding professional achievements and/or volunteer contributions; display of values of diversity, peace and social justice promoted by the YWCA.

A \$50 nomination fee is due along with the honoree information form (see the State Bar Web site, [www.nmbar.org](http://www.nmbar.org), for pdf file) and any additional information by Feb. 23. The nomination fee includes a banquet dinner for the nominee, a Women on the Move plaque and

a sterling silver miniature of the Betty Sabo bronze Women on the Move award. Nominations should be sent to YWCA of the Middle Rio Grande, Women on the Move Selection Council, 210 Truman NE, Albuquerque, NM

87108. For more information, contact Mary Torres, 500 Fourth St. NW; Ste. 1000, PO Box 2168, Albuquerque, NM 87103; (505) 848-1800; fax, (505) 848-9710; or [mtorres@modrall.com](mailto:mtorres@modrall.com).

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# WRITS OF CERTIORARI

As UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860  
EFFECTIVE FEBRUARY 3, 2004

## PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

- NO. 28,465 Manuel v. Snedeker (12-501) 1/23/04  
NO. 28,464 Hoffman v. Snedeker (12-501) 1/21/04  
NO. 28,463 State v. Shafer (COA 24,209) 1/21/04  
NO. 28,462 State v. Ryon (COA 23,318) 1/21/04  
NO. 28,459 State v. Montano (COA 24,111) 1/13/04  
NO. 28,458 Parson v. Snedeker (12-501) 1/12/04  
NO. 28,455 State v. McDaniel (COA 23,030) 1/9/04  
NO. 28,454 State v. Smith (COA 24,071) 1/8/04  
NO. 28,453 State v. Roman (COA 24,151) 1/8/04  
NO. 28,452 State v. Vega (COA 24,006) 1/8/04  
NO. 28,449 Lucero v. Tafoya (12-501) 1/8/04  
NO. 28,448 Gaby v. Gersonde (COA 22,015) 1/7/04  
NO. 28,447 Gaby v. Gersonde (COA 22,015) 1/7/04  
NO. 28,446 Mercado v. Miller (COA 23,756) 1/7/04  
NO. 28,443 McIntire v. Snedeker (12-501) 1/6/04  
NO. 28,445 State v. Haskins (COA 24,312) 1/5/04  
NO. 28,442 Valles v. Walmart (COA 23,174) 1/5/04  
NO. 28,444 Armjo v. Williams (12-501) 12/31/03  
NO. 28,424 Cowan v. Velasquez (COA 22,819) 12/31/03  
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03  
NO. 28,438 Marquez v. Allstate (COA 23,385) 12/30/03  
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03  
NO. 28,435 Gallup LLC v. City of Gallup (COA 22,308) 12/24/03  
NO. 28,431 Albuquerque v. Park & Shuttle (COA 24,221) 12/23/03  
NO. 28,422 State v. O'Neal (COA 24,292) 12/18/03  
NO. 28,421 State v. Reveles (COA 24,260) 12/18/03  
NO. 28,420 State v. Martinez (COA 23,751) 12/18/03  
NO. 28,419 Henry v. Daniel (COA 23,356) 12/18/03  
NO. 28,417 Harris v. Snedeker (12-501) 12/18/03 *time to consider petition extended to 1/30/04*  
NO. 28,341 Lucero v. State (12-501) 11/18/03 *time to consider petition extended to 1/30/04*  
NO. 28,384 Casados-Lujan v. Lujan (COA 22,984) 11/17/03  
*EFFECTIVE 11/1/03, RULE 12-502 AMENDED AND SUBPARA. E (30 DAYS DEEMED DENIED) WAS REMOVED*  
NO. 28,091 Ramos v. State (12-501) 5/29/03 *time to consider petition extended to 1/30/04*

## CERTIORARI GRANTED AND UNDER ADVISEMENT:

- NO. 26,910 Jaramillo v. UNM Bd of Regents (COA 20,805) 5/9/01  
NO. 27,269 Kmart v. Tax & Rev (COA 21,140) 1/9/02  
NO. 22,283 State ex rel. Martinez vs. City of Las Vegas (COA 14,647) 1/16/02  
NO. 27,409 State v. Rodriguez (COA 22,558) 4/3/02  
NO. 27,817 Tomlinson v. George (COA 22,017) 1/8/03  
NO. 27,823 Gill v. Public Employees Retirement Board (COA 21,818) 2/4/03  
NO. 27,868 State v. Alvarez-Lopez (COA 22,189) 2/4/03  
NO. 27,869 State v. Alvarez-Lopez (COA 22,189) 2/4/03  
NO. 27,872 Martinez v. St. Paul Ins (COA 22,343/22,344) 2/11/03  
NO. 27,912 State v. Lopez (COA 23,456) 3/11/03  
NO. 27,938 State v. Barber (COA 22,706) 3/20/03  
NO. 27,950 Breen v. Carlsbad Schools (COA 22,858/22,859) 4/1/03  
NO. 27,966 Montano v. Allstate (COA 22,614) 4/7/03  
NO. 27,969 Hovet v. Allstate (COA 22,276) 4/7/03  
NO. 27,945 State v. Munoz (COA 23,094) 4/14/03  
NO. 27,939 Patscheck v. Snodgrass (12-501) 4/21/03  
NO. 27,995 State v. Flenniken (COA 22,715) 4/21/03  
NO. 27,996 State v. Augustin M. (COA 22,900) 4/21/03  
NO. 28,002 Chase Manhattan v. Candelaria (COA 22,625) 4/28/03  
NO. 28,009 Reynoso v. Allstate (COA 23,131) 5/13/03  
NO. 28,016 State v. Lopez (COA 23,424) 5/13/03  
NO. 28,025 Martinez v. Friede (COA 22,442) 5/14/03  
NO. 28,038 Paule v. Santa Fe County Commissioners (COA 22,988) 5/14/03  
NO. 28,046 Apodaca v. AAA Gas Company (COA 21,946) 5/28/03  
NO. 28,017 State v. Renfro (COA 23,206) 5/30/03  
NO. 28,068 State v. Gallegos (COA 22,888) 6/6/03  
NO. 28,077 Slack v. Robinson (COA 23,189) 6/11/03  
NO. 28,061 State v. Lara (COA 22,936) 6/25/03  
NO. 28,076 Celaya v. Hall (COA 22,211) 6/25/03  
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 7/15/03  
NO. 28,156 State v. Anita T. (COA 23,652/23,653/23,651) 8/5/03  
NO. 28,107 State v. Joanna V. (COA 22,876) 8/8/03  
NO. 28,007 State v. Ruiz (on reconsideration) (COA 22,282) 8/11/03  
NO. 28,198 Lentz v. Benson (COA 23,762) 9/3/03  
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 9/3/03  
NO. 28,119 State v. Dominguez (COA 23,286) 9/3/03  
NO. 28,183 State v. Ochoa (COA 23,840) 9/3/03  
NO. 28,176 State v. Golden (COA 22,769) 9/3/03  
NO. 28,159 State v. Eubanks (COA 23,923) 9/3/03  
NO. 28,241 State v. Duran (COA 22,611) 9/3/03  
NO. 28,242 Didyoung v. Dow (COA 23,417) 9/15/03  
NO. 28,233 Palmer v. St. Joseph Healthcare (COA 22,718) 9/15/03  
NO. 28,225 Huntley v. Cibola General Hospital (COA 23,916) 9/15/03  
NO. 28,234 State v. Blea (COA 24,032) 9/16/03  
NO. 28,228 State v. Sharpe (COA 23,742) 10/10/03  
NO. 28,253 Miller v. Brock (COA 24,124) 10/10/03  
NO. 28,249 Miller v. Brock (COA 24,125) 10/10/03  
NO. 28,237 State v. McDonald (COA 22,689) 10/10/03  
NO. 28,261 State v. Dedman (COA 23,476) 10/10/03  
NO. 28,272 Lester v. City of Hobbs (COA 22,250) 10/10/03  
NO. 28,270 State v. Paredez (COA 24,082) 10/27/03  
NO. 28,286 State v. Graham (COA 22,913) 11/3/03  
NO. 28,210 Cassidy-Baca v. County Comm'r (COA 24,046) 11/3/03  
NO. 28,317 Turner v. Bassett (COA 22,877) 11/6/03  
NO. 28,321 State v. Heinrich (COA 23,215) 12/2/03

continued on page 47

From the New Mexico Supreme Court

NO. 03-8300

**IN THE MATTER OF THE AMENDMENTS OF RULES 22-101 TO -103, 22-201 TO - 209, 22-301 TO - 303, 22-401 TO -403, 22-501 TO -505, 22-601 TO 619, AND 22-701 AND THE APPROVAL OF NEW RULE 22-304 NMRA OF THE RULES GOVERNING THE RECORDING OF JUDICIAL PROCEEDINGS**

**ORDER**

WHEREAS, this matter came on for consideration by the Court upon recommendation from the Rules Governing the Recording of Judicial Proceedings Committee to approve amendments to Rules 22-101 to -103, 22-201 to - 209, 22-301 to - 303, 22-401 to -403, 22-501 to -505, 22-601 to 619, and 22-701, and to adopt and approve new Rule 22-304, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that Rules 22-101 to -103, 22-201 to - 209, 22-301 to - 303, 22-401 to -403, 22-501 to -505, 22-601 to 619, and 22-701 of the Rules Governing the Recording of Judicial Proceedings hereby are AMENDED;

IT IS FURTHER ORDERED that new Rule 22-304 hereby is ADOPTED and APPROVED;

IT IS FURTHER ORDERED that the amendments of the above-referenced rules and new Rule 22-304 shall be **effective for cases filed on or after February 16, 2004**; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules and adoption of new Rule 22-304 by publishing the same in the *Bar Bulletin* and NMRA.

DONE at Santa Fe, New Mexico, this 12th day of November, 2003.

**Chief Justice Petra Jimenez Maes**  
**Justice Pamela B. Minzner**  
**Justice Patricio M. Serna**  
**Justice Richard C. Bosson**  
**Justice Edward L. Chávez**

**22-101. Scope; definitions; title.**

**A. Scope.**

(1) The examination, certification, supervision, conduct and proficiency of court reporters and court monitors engaging in court reporting or monitoring services are matters which are integrally related to the effective, impartial and prompt operation of the judicial branch of the State of New Mexico and

are hereby made subject to regulation by rule of the Supreme Court.

(2) Except as provided by the Rules of Appellate Procedure, Rules of Civil Procedure for the District Courts, Rules of Criminal Procedure for the District Courts, Children's Court Rules, the Rules of Civil Procedure for the Metropolitan Court or the Rules of Criminal Procedure for the Metropolitan Court, these rules govern transcripts and the recording of judicial proceedings by any and all means whatsoever. If a deposition taken pursuant to the rules of procedure for a court listed in this subparagraph is to be taken by stenographic or realtime voice-to-print means, the person taking the deposition shall be a certified court reporter as provided in these rules.

(3) These rules shall be reviewed on a periodic basis not to exceed three (3) years.

**B. Definitions.** As used in these rules:

(1) "board" means the Board Governing the Recording of Judicial Proceedings;

(2) "censure" means to publicly reprimand a certified court reporter or certified court monitor, with or without conditions reasonably related to the grounds for censure for conduct found to be in violation of Rule 22-605 NMRA;

(3) "certified court monitor" or "court monitor" means a person holding a certificate issued by the board to engage in the recording of judicial proceedings in this state;

(4) "certified court reporter" means a person holding a certificate issued by the board to engage in the reporting of judicial proceedings in this state and includes any firm licensed pursuant to Rule 22-202 NMRA;

(5) "certification" means licensing by the board for a court reporter, court monitor or firm to engage in the reporting or recording of judicial proceedings in this state pursuant to the Rules Governing the Recording of Judicial Proceedings;

(6) "court monitor" means a person who records judicial proceedings by audio recording;

(7) "court reporter" means a person who engages in verbatim shorthand reporting using pen or machine shorthand or realtime voice-to-print technology;

(8) "court reporting services" means providing verbatim shorthand recording in judicial proceedings using a pen, machine shorthand or realtime voice-to-print technology. "Court reporting services" shall not include services performed in the taking of depositions or statements by audio or audio-visual recording;

(9) "firm" means, but is not limited to, a limited liability company, corporation, association or other organization engaged in the practice of court reporting services in this state;

(10) "judicial proceedings" includes court proceedings, depositions and sworn statements, but does not include appellate court, Judicial Standards Commission, Disciplinary Board, magistrate court, municipal court or probate court proceedings;

(11) "official court reporter" is a certified court reporter

who is employed by New Mexico under the judicial personnel plan, and entitled to certain benefits as a state employee pursuant to the provisions of Section 34-6-20 NMSA 1978, or performs services for the judicial branch under standardized contract approved by the Supreme Court;

(12) "person" means, but is not limited to, any individual, firm, partnership, limited liability company, corporation, association or other organization; and

(13) "record" means:

(a) stenographic notes which must be transcribed when a record is required to be made;

(b) a statement of facts stipulated to by the parties for purpose of review; or

(c) any recording made by an audio recording device.

C. **Title.** These rules may be cited as the "Rules Governing the Recording of Judicial Proceedings".

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### **22-102. Penalties for violation of rules.**

Any violation of these rules or any violation of rules and regulations promulgated by the Supreme Court or by the board shall be cause for refusal of the board to issue or renew the certification of any applicant and for the discipline, fine, censure, suspension or revocation of certification as a New Mexico certified court reporter or court monitor. In addition to any discipline, fine, censure, suspension, revocation, denial or withholding renewal of certification, if the reporter or court monitor is a state employee, the reporter or court monitor may be disciplined as a judicial employee under the judicial personnel rules.

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### **22-103. Waiver of rules.**

Upon a showing of good cause, the board, in its discretion, may waive any provision of these rules to meet unusual circumstances or to avoid injustice. Appeal from denial of a waiver shall be made in conformance with procedures outlined in Rules 22-604 to 22-619 NMRA.

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### **22-201. Licensing of court reporters and monitors; power to administer oaths.**

A. **Court reporters.** Except as provided in Paragraph C of this rule, no person shall engage in court reporting services in this state unless such person is licensed as a New Mexico certified court reporter issued either by the New Mexico Supreme Court or by the Board Governing the Recording of Judicial Proceedings.

B. **Waiver of examination.** Any applicant for a license as a certified court reporter may be granted a license by the board without an examination upon a showing that the court reporter:

(1) has been engaged in the full-time practice of court reporting for three (3) years immediately prior to applying for a license; and

(2) is a holder of a valid National Court Reporters Association registered professional reporter certification.

C. **Court monitors.** If a trial or hearing is recorded by an

audio recording device, such proceedings shall be recorded by a court monitor who is certified as qualified by the Board Governing the Recording of Judicial Proceedings. In such cases, that recording shall serve as the transcript unless otherwise ordered by the court.

D. **Oath.** Certified court reporters may administer oaths to witnesses in judicial proceedings anywhere in this state.

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### **22-202. Certification of firms engaged in court reporting or tape monitoring.**

A. **Registration** All firms providing court reporting services in this state must be registered and licensed by the board.

B. **Application for firm license.** An applicant for a firm court reporting license shall:

(1) pay an initial and annual registration fee prescribed by the board; and

(2) provide information requested by the board on the board's approved application form, including, but not limited to, firm structure, address of the firm, telephone number of the firm, names of the owners, certification numbers of the owners, names and certification numbers of employees, copies of current firm licenses and federal and state tax identification numbers.

C. **Notice of changes.** If a licensed firm has a change of ownership or there is any other change in the information provided on the form for registration, the firm shall file an amended form of registration with the board administrator within thirty (30) days after the change occurs.

D. **Compliance required.** Firms shall comply with the regulations that apply to court reporters and court monitors. Failure to comply with the provisions of this rule shall be grounds for a fine, suspension, revocation, refusal to renew any firm's registration or a combination of any of these penalties.

E. **Audio recording as record.** In the event the firm employs court monitors, the audio recording shall be the record of proceeding.

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### **22-203. Application; qualifications; renewal of certification.**

A. **Application.** An applicant seeking certification as a certified court reporter or certified court monitor shall apply on forms approved by the board and obtainable from the board.

B. **Qualifications.** Prior to the issuance of a certificate as a New Mexico certified court reporter or court monitor, an applicant must meet the following minimum qualifications:

(1) be of good moral character;

(2) possess a certificate or diploma evidencing graduation from high school;

(3) if the applicant is a court reporter, the applicant must demonstrate reasonable proficiency in making verbatim records of judicial or related proceedings by means of pen or machine shorthand or real time voice-to-print technology. The reporter shall be certified for the method by which the reporter was tested. Should the reporter desire to change the method of reporting, the reporter shall immediately, prior to reporting or recording any judicial proceeding in the State of New Mexico,

become certified for that alternative method. If the applicant is a court monitor, the applicant must demonstrate reasonable proficiency in the operation of audio recording devices. "Reasonable proficiency" must also be demonstrated in the creation of tape or other audio logs. For the purpose of this rule, the applicant's demonstration of "reasonable proficiency" shall be determined by the applicant's ability to pass an examination for certification approved by the board pursuant to these rules;

(4) be in compliance with the Rules Governing the Recording of Judicial Proceedings and any rules and regulations adopted by the Supreme Court;

(5) be in compliance with all support obligations as provided in the Parental Responsibility Act, Sections 40-5A-1 through 40-5A-13 NMSA 1978; and

(6) pay the appropriate annual certification fee.

Once the applicant has met and satisfied the above qualifications, the board shall issue the applicant a certificate as a New Mexico certified court reporter or court monitor. The reporter certificate shall be valid until December 31 of the year of its issuance. The court monitor certificate shall be valid until July 31 of the year following the year of issuance.

**C. Renewals.** A person holding a certificate as a New Mexico certified court reporter or court monitor shall be responsible for applying for an annual renewal of that certificate, on forms approved by the board. Upon receipt of the appropriate renewal application, continuing education activities reporting form, the annual certification fee and the continuing education reporting fee, the board shall issue the applicant a one-year renewal certificate or other appropriate document evidencing that the applicant is licensed as a New Mexico certified court reporter or court monitor unless the applicant:

(1) is found by the board to be, or to have been in violation of these rules or any rules or regulations of the board;

(2) has not been actively practicing for three (3) years;

(3) cannot demonstrate reasonable proficiency, if required to do so;

(4) has not complied with the Parental Responsibility Act, if applicable; or

(5) has failed to comply with continuing education requirements, if applicable.

The board shall revoke the license of a court reporter or court monitor who has failed to comply with the annual renewal requirements.

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#### **22-204. Temporary certification for court monitors.**

**A. Requirements.** Temporary certification to engage in the verbatim recording of in-court proceedings or other proceedings specifically ordered by the court in any of the courts of New Mexico may be granted by the board, upon application on forms approved by the board, under the following circumstances:

(1) the applicant is of good moral character;

(2) the applicant possesses a certificate or diploma evidencing graduation from high school;

(3) the applicant demonstrates reasonable proficiency in the recording of an audible proceeding and the operation

of audio recording devices used by the courts. Reasonable proficiency must also be demonstrated in the creation of tape or other audio logs; and

(4) the applicant is in compliance with these rules and any rules and regulations adopted by the board or the Supreme Court and has paid the appropriate certification fee.

**B. Expiration.** The temporary certificate shall be valid for six (6) months following the date upon which the temporary certificate is issued, provided the holder of the temporary certificate shall progress towards final certification by the chief trainer. A maximum of one temporary certificate may be issued to an individual. A temporary certificate may be extended once for not more than ninety (90) days.

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#### **22-205. Examination and certification fees.**

**A. Examination fee.** Prior to the taking of any examination administered by the board, the applicant shall pay the appropriate examination fee fixed by the board and approved by the Supreme Court.

**B. Annual fee.** Every New Mexico certified court reporter or court monitor shall pay an annual renewal certification fee in an amount to be fixed by the board and approved by the Supreme Court.

**C. Fines.** Every New Mexico certified court reporter or certified court monitor shall pay any fines assessed by the board before certification or renewal shall be granted. The board may suspend the license of any court reporter or court monitor who fails to pay a fine within the time ordered by the board.

**D. Annual fee; firm license.** Every New Mexico firm engaging in the business of court reporting as described in Rule 22-202 NMRA shall pay an annual renewal registration fee in an amount to be fixed by the board and approved by the Supreme Court.

**E. Time of payment.** All examination, certification and registration fees shall be paid within the times and at the place designated by the board.

**F. Deposit of funds.** All funds of the board shall be deposited in an interest-bearing account in the name of the board. All financial obligations of the board over five hundred dollars (\$500) will be approved, prior to payment, by the signature of the chairperson or the vice chairperson of the board on the request for payment form.

**G. Budget.** The board shall submit on or before November 1 of each year to the Supreme Court a proposed budget for the ensuing fiscal year. The budget shall be for a fiscal year beginning January 1 and ending December 31 of the same year.

**H. Audit.** The board shall submit on or before August 1 of each year to the Supreme Court an audit of all funds received and disbursed during the prior fiscal year.

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#### **22-206. Official court reporters and court monitors; appointment; duties; records; termination of contract.**

**A. Appointment.** Subject to Rule 22-301 NMRA, each district court may appoint official court reporters or court monitors. The Supreme Court or the district court may, by order, approve pooling by reporters and monitors within a judicial district under the

supervision of a managing reporter who shall be responsible for supervision of the court reporters and court monitors within the district. A contract reporter shall not serve as a managing reporter.

**B. Court monitor duties.** Official court reporters may also serve as court monitors and record judicial proceedings in those cases in which an audio recording is permitted and shall comply with all court rules and directions and all board-approved manuals in preparing the tape or audio logs.

**C. Office.** The official court reporter or court monitor shall be provided with the office space, equipment and supplies necessary for the reporting or recording of judicial proceedings as well as the necessary equipment for transcription of the judicial proceedings. The use of state-owned equipment and supplies and state-employed personnel for free-lance reporting or recording is prohibited.

The provision of necessary office space, equipment and supplies shall be subject to standardized contract approved by the Supreme Court with official court reporters who perform services under contract.

**D. Records.** If stenographic notes, computer or audio tapes or other audio recordings containing the record of judicial proceedings and evidence taken by an official court reporter or court monitor are to be transcribed, a copy of the record, in American Standard Code of Information Interchange ("ASCII") format, shall be filed with the court clerk of the court in which the proceeding is docketed. The record shall be stored on a compact disc capable of being read or accessed on a CD-ROM which meets ISO 9660 standards or on other data storage media used by the courts. Video tapes filed with the court shall be in a format used by the courts. The maintenance, storage, distribution and reproduction of such notes, tapes, records, disks, discs and documents, including all exhibits and other evidence, shall be handled in the manner prescribed by the Administrative Office of the Courts. Disposition of such records shall be in accordance with the disposition schedules approved by the records retention and disposition schedule approved by the Supreme Court.

**E. Termination of employment.** Official reporters leaving employment with the district court are to have all stenographic or electronic notes numerically logged by date and deposited with the court clerk prior to leaving. Court monitors leaving employment with the district court are to have all audio recordings and logs bound by date and deposited with the court clerk prior to leaving. All district court cases stenographically taken are to be stored on disks or on other data storage media used by the courts and filed with the district court clerk before departure. An ASCII backup of the reporter's dictionary shall be stored with the district court clerk.

All disks, stenographic notes and tapes or other recordings of district court cases are the property of the district court.

Upon termination from district court employment, the reporter or monitor shall leave a current telephone number and address with the district court clerk and the court administrator. It is the reporter's or monitor's responsibility to inform the district court clerk of changes of address or telephone number.

Arrangements for transcript production by reporters no longer employed with district court shall be made through the district court clerk.

When the reporter is unavailable, the court administrator shall make arrangements for production of the transcripts pursuant to the Rules of Appellate Procedure.

Transcripts produced after termination of employment shall be produced at the prevailing compensatory rate set by these rules.

**F. Other duties.** Any time that an official court reporter or court monitor is not required to take proceedings, or prepare transcripts of official judicial proceedings in indigent cases or for court use, or other specific duties assigned by the chief judge, presiding judge, court administrator or managing reporter, the court reporter or court monitor may be assigned other court duties as required by Section 34-6-20 NMSA 1978, unless the reporter or court monitor has been granted approved leave. The chief judge, presiding judge, court administrator or managing reporter of the district court shall have the authority to reassign temporarily the official court reporter or court monitor within the judicial district to act as reporter or monitor for another judge or to perform duties required by Subsection B of Section 34-6-20 NMSA 1978.

**G. Outside reporting.** Subject to the licensing requirements of these rules, an official court reporter or court monitor may engage in outside reporting or recording duties if the following criteria are met:

(1) the chief judge, presiding judge, court administrator or managing reporter has given express authorization;

(2) the reporter's or monitor's official work is caught up and no transcripts are being prepared in which an extension of time has been granted by any court; and

(3) the reporter or monitor has been authorized to take annual leave during the time the outside work is scheduled unless:

(a) the outside work is scheduled during hours that the court is not open for business; or

(b) the reporter or monitor has been granted time off in compensation for overtime previously worked.

## **22-207. Compensation.**

Except as may otherwise be provided by Supreme Court rule or order:

**A. Rates.** Official court reporters shall be entitled to receive no more than:

(1) in civil cases:

(a) if there is an appeal, three dollars fifty cents (\$3.50) per 25-line page for transcribing proceedings for the original and two (2) copies to be filed with the appellate court; and

(b) if there is no appeal, three dollars twenty-five cents (\$3.25) per 25-line page for the original and one (1) copy;

(2) in criminal cases:

(a) if there is an appeal, two dollars fifty cents (\$2.50) per 25-line page for transcribing proceedings in free

process appeals for the original and two (2) copies to be filed with the appellate court; and

(b) if there is no appeal, two dollars (\$2.00) per 25-line page; and

(3) for a copy of a previously transcribed proceeding, one dollar twenty-five cents (\$1.25) per 25-line page.

**B. Additional compensation prohibited.** When the court reporter is required by the district judge to transcribe portions of the record of proceedings for court use only, such transcription shall be performed during the salaried hours for which the court reporter is compensated, and no additional compensation shall be charged the state for such services.

**C. Other court personnel.** It shall be a violation of these rules for an official court reporter to compensate any court employee to perform services for the court reporter if such services are to be performed during salaried working hours.

**D. Use of duplicating machine.** In cases where free process has not been granted, the certified court reporter may make the required number of copies of a transcript on the district court's duplicating machine. The district court clerk shall charge the court reporter no more than ten cents (\$.10) for each copy made pursuant to this paragraph. Certified court reporters shall be billed by the district court clerk upon completion of the preparation of the transcript.

**E. Special expedited transcript charges.**

(1) expedited copy: delivery in four (4) days;

(2) overnight copy: delivery by 9:00 a.m. of the day following the proceedings;

(3) daily copy: delivery by 7:00 p.m. of the day of the proceedings;

(4) split-rush copy: delivery of the morning session by 1:30 p.m. and the afternoon session by 7:00 p.m. of the day of the proceedings;

(5) hourly copy: delivery of the transcript produced each hour;

(6) rough real-time copy: immediate computer-screen visualization and instantaneous transcription of testimony. Rough real-time transcripts are to be used as attorney work-product only and may not be quoted in court for impeachment purposes. Certified realtime transcripts may be used in court proceedings.

Arrangements for expedited services shall be made in writing between the managing court reporter and the requesting parties on a case-by-case basis. In judicial districts that do not employ a managing reporter, arrangements shall be between the individual reporters and the requesting parties. \_\_\_\_\_

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**22-208. Surety bond.**

**A. Official court reporters and court monitors.** Pursuant to the provisions of the Surety Bond Act, the clerk of the district court shall assure that the applicable premium is paid to the Risk Management Division of the General Services Department for official court reporters and court monitors employed by the district.

**B. Named insured.** The State of New Mexico shall be named in the bond as the insured.

**C. Independent contractors.** Official court reporters who are independent contractors shall be bonded as provided in their contracts.

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**22-209. Continuing education requirements for certified court reporters.**

**A. Hours required.** Each certified court reporter shall complete five hours of continuing education credits during each calendar year. For court reporters initially certified during a calendar year, the initial compliance year shall be the first full compliance year following the date of first certification.

**B. Earning continuing education credits.** The following categories of activities are acceptable for the earning of continuing education credits:

(1) attending an annual National Court Reporters Association or New Mexico Court Reporters Association seminar as a registrant, instructor or panelist or attending a continuing legal education seminar that is approved for continuing legal education credits by the Minimum Continuing Legal Education Board. Continuing education credits awarded are based on review and prior approval of seminar speakers by the National Court Reporters Association or, in the case of continuing legal education, are the number of continuing legal education credits approved for the program;

(2) attending a National Court Reporters Association approved seminar as a registrant, instructor or panelist. Continuing education credits based on prior approval of seminar by the National Court Reporters Association;

(3) attending a National Court Reporters Association approved videotape workshop as a registrant, instructor or panelist. Continuing education credits based on prior approval of seminar by National Court Reporters Association;

(4) proof from the National Court Reporters Association of qualifying on any one section of the certificate of merit test for the first time - five continuing education credits;

(5) proof from the National Court Reporters Association of qualifying on any one section of the National Court Reporters Association speed contests for the first time - five continuing education credits;

(6) successfully completing an adult education course in an academic subject at an accredited school; one continuing education credit for every four class hours. A transcript from the accredited school must be provided in addition to the continuing education activities reporting form. The board may, at its discretion, decline to award points for the class taken, based on content;

(7) the viewing of a videotape or listening to an audiotape of a National Court Reporters Association or New Mexico Court Reporters Association approved continuing education activity and successful completion of a questionnaire regarding content of the videotape or audiotape;

(8) the viewing of a videotape or listening to an audiotape contained in the Board Governing the Recording of Judicial Proceedings continuing education library. A fee per tape rental will be assessed as set by the board. The amount of continuing education points awarded are based on National



Court Reporters Association points previously given for that seminar;

(9) proof from the National Court Reporters Association of having earned continuing education points during the applicable one (1) year period through the performance of a continuing education activity not enumerated above;

(10) speaking for an accredited continuing education course shall enable the speaker to apply these credits toward the speaker's continuing education requirements;

(11) other comparable educational activities, with the prior permission of the board or its delegate, the points for which shall be determined by the board or its delegate.

**C. Excess credits.** Court reporters may carry forward a maximum of five hours of continuing education credits from one year to the next.

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### **22-301. Recording of judicial proceedings; transcripts.**

**A. Certification.** Transcripts of all judicial proceedings shall be signed and certified by a New Mexico certified court reporter or court monitor. The certified court reporter or court monitor who physically reports a judicial proceeding shall sign and include the court reporter's or court monitor's certification number on the original transcript of the judicial proceeding. The form of certification required is established by the Board Governing the Recording of Judicial Proceedings.

**B. Transcripts.** Except as provided in these rules, certified court reporters shall stenographically report the record of judicial proceedings. If a transcript is requested or designated, a certified court reporter licensed by the board under Rule 22-202 NMRA shall transcribe, process, bill for, certify and deliver the record of all judicial proceedings, unless:

(1) the district court has insufficient funds in its budget to pay for stenographic transcripts in indigent cases as determined by the chief judge; or

(2) a certified court reporter is not available.

If the district court does not have sufficient funds to pay for transcripts in indigent cases, such cases may be recorded by a recording device used by the courts. In non-indigent criminal cases, the court reporter may stenographically report the proceedings at the request of counsel and district court approval. All other taped or audio recorded judicial proceedings may be stenographically reported at the request of counsel and approval of the district court judge. If the district judge has appointed a court monitor, the record of all judicial proceedings before that judge shall be recorded by a recording device used by the courts.

Upon appointment of a district judge or upon filling the vacancy of a district judge's court monitor, the judge shall hire a certified court reporter if one is available.

**C. Record proper.** Except depositions, as provided in this paragraph, the record proper (court file), including the cover page and indices thereto, shall be prepared and reproduced by the clerk of the district court. Depositions shall be forwarded to the appellate court in their original form if they have been filed in the record proper or read into open court. If they are read in open court, the court reporter or court monitor shall mark the

entire deposition or excerpts as court exhibits and ensure the exhibits are filed with the appellate court regardless of request therefore.

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### **22-302. Transcript; format.**

**A. Transcript; format.** All transcripts, including compressed transcripts, of judicial proceedings shall be prepared in compliance with the certified court reporters manual.

**B. Forms manual.** The forms manual prepared and modified by the board is mandated as the model to be followed by all certified court reporters.

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### **22-303. Audio recording of judicial proceedings.**

**A. Official record.** When an audio recording is authorized to be used for the creation of the official record of any judicial proceeding, the following procedures shall be followed by the certified court monitors in recording the proceedings, storing the recording and making copies of the recording.

(1) A separate master tape or other recording may be used for each case. The tape or other recording shall at all times be kept secure in the court clerk's office. If more than one case is to be included on a master tape or other recording, a cross-reference system shall be developed by the judicial district, which will assure that all proceedings in a case are easily located and available for purposes of an appeal or other judicial proceedings.

(2) On appeal, the master (original) recording and two (2) copies of the master recording and log shall be transmitted to the appropriate appellate court in accordance with the Rules of Appellate Procedure. One (1) copy shall be retained in the court file until final disposition of the case. The log shall be typewritten in accordance with the court monitors manual upon the filing of the notice of appeal and shall be filed with the district court clerk within ten (10) days after the filing of the notice of appeal.

(3) Upon final disposition of the appeal, the appellate court clerk may return the duplicates to the clerk of the district court for erasure and reuse.

**B. Cases not appealed.** If the case is not appealed, the clerk of the district court shall retain the master copy of the tape in a place and manner approved by the Supreme Court.

**C. Minimum standards for audio recordings.** When an audio recording is authorized to be used for the creation of the official record of any judicial proceeding, the audio cassette tapes, discs or other media used to store the recording, shall be compatible with equipment used by the courts.

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### **22-304. Transcript authorized.**

The court reporter shall be deemed to be authorized to transcribe the testimony at any deposition recorded by stenographic means, unless instructed otherwise. Upon payment of reasonable charges, the court reporter shall furnish the transcript of any deposition to any party or the deponent.

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### **22-401. Board Governing the Recording of Judicial Proceedings.**

**A. Creation.** In order to supervise the examination, certification and conduct of court reporters and court monitors engaged in reporting judicial proceedings of this state, the Board Governing the Recording of Judicial Proceedings is hereby created.

**B. Members.** The Board Governing the Recording of Judicial Proceedings shall be composed of eight persons, appointed as follows:

(1) two licensed attorneys in good standing in this state appointed by the Supreme Court;

(2) two members appointed by the Supreme Court who are judges of the Court of Appeals or district court, a staff attorney of the Court of Appeals or a managing court reporter of the district court; provided at least one member of the board shall be a Court of Appeals or district court judge;

(3) three members appointed by the New Mexico Supreme Court who are licensed New Mexico certified court reporters, one of whom is an official reporter employed by the courts and one of whom may be appointed upon recommendation of the New Mexico Court Reporters Association; and

(4) one member who is a certified court monitor employed by the courts appointed by the Supreme Court; and

(5) one or more former chairpersons of the board appointed by the Supreme Court who shall be non-voting members.

All candidates for appointment shall have demonstrated an interest in the board and shall have conducted themselves in a manner consistent with the ethical standards established by their profession.

**C. Terms; appointments.** The members of the board shall hold office for staggered terms of three (3) years to expire on December 31 of the calendar year for a maximum of two consecutive terms. Vacancies occurring on the board shall be filled in the same manner as other appointments to the board. An appointee to fill a vacancy shall serve during the unexpired portion of the term of the member replaced and such appointment shall constitute an appointment to the subsequent three (3) year term.

If any board member does not participate in three consecutive meetings, that member may be deemed to have resigned from the board. The resignation shall be reported to the Supreme Court by the board.

**D. Officers.** At the first meeting of the calendar year, the board may elect one of its members as chair and one member as vice chair. A majority of the board shall constitute a quorum.

**E. Compensation.** The board members shall receive no compensation other than per diem and mileage at the rate set forth in the Per Diem and Mileage Act.

**F. Records of the board.** The administrator for the board shall keep a record of its meetings and all official action taken by the board. In addition, the board shall maintain a register of all applicants for certification.

**G. Staff.** The board shall provide for necessary staff and legal counsel.

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#### **22-402. Powers and duties of the board.**

**A. Procedural rules.** The Board Governing the Recording of Judicial Proceedings shall have the authority, under the supervision of the New Mexico Supreme Court, to make and promulgate reasonable rules and regulations governing the practice of court reporting and court monitoring within New Mexico.

**B. Powers.** The board shall arrange to:

(1) coordinate appropriate examinations for all applicants for certification as a New Mexico certified court reporter or court monitor to ensure that the applicants have reasonable proficiency in making verbatim records of judicial or related proceedings and in operating audio equipment;

(2) promulgate reasonable rules and regulations for the testing and licensing of New Mexico certified court reporters and court monitors;

(3) issue advisory opinions to clarify the rights and obligations of court reporters and court monitors under these rules, and any additional standards adopted by the Supreme Court;

(4) make recommendations to the Supreme Court relating to the adoption of any additional standards or ethics governing the conduct of New Mexico certified court reporters and court monitors other than those specified within these rules;

(5) recommend to the Supreme Court necessary rules and regulations with respect to the discipline, fine, censure, suspension, revocation, denial or withholding renewal of certification of New Mexico certified court reporters and court monitors;

(6) issue standards and procedures for investigating complaints;

(7) administer a continuing education program for certified court reporters;

(8) take appropriate action, subject to review by the Supreme Court, for the discipline, fine, censure, suspension, revocation, denial or withholding renewal of certification of certified court reporters and court monitors. Board hearings shall be held in accordance with rules and regulations approved by the New Mexico Supreme Court; and

(9) have the power to subpoena witnesses. Witnesses may be summoned by subpoena issued by the board chair upon request of the board, the court reporter or the court monitor who is the subject of a proposed disciplinary proceeding. Witnesses appearing before the board must be examined under oath or affirmation. Testimony may be taken by deposition. A record must be made of the proceedings.

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#### **22-403. Decisions of the board. [WITHDRAWN]**

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#### **22-501. Examination standards.**

**A. Exam frequency.** The Board Governing the Recording of Judicial Proceedings may coordinate or administer as many examinations per year as necessary, but shall administer at least one examination per year.

**B. Examinations.** The scope of the examination, the speed, the percentage of accuracy and the methods of procedure shall

be prescribed by the board.

(1) The board may use entry level tests conducted by the National Court Reporters Association, but candidates must pass all three skills parts of the examination at one sitting. The written examination may be passed separately.

(2) The board may use such other examinations administered or conducted by such other organizations as approved by the board for real-time voice-to-print reporting examinations.

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#### **22-502. Fees.**

A. **Firms.** All firms shall pay an initial and an annual fee to be set by the board; provided no fee is required to be paid by a firm that is owned by one or more court reporters who have paid initial and annual registration fees. Any firm which fails to return an annual application for renewal of certification as a court reporter or court monitor and fees, according to the provisions of Rule 22-202 NMRA, by February 1, must reapply for certification and pay the initial application fee.

B. **Court reporters.** With respect to licensing provisions of Rule 22-203 NMRA, the initial and annual registration fee for certification as a court reporter shall be set by the board.

C. **Court monitors.** The training fee and annual certification fee as a court monitor shall be set by the board.

D. **Test fees.** The following test fees shall be set by the board:

- (1) application fee;
- (2) oral exam only;
- (3) written exam only; and
- (4) both oral and written.

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#### **22-503. Furnishing depositions without consent.**

A certified reporter or court monitor shall be subject to disciplinary action for unprofessional conduct under Rule 22-605 NMRA if the reporter or monitor furnishes, for pay or otherwise, a copy of any deposition or portion thereof to any person other than the deponent, a party or an attorney in the matter in which the deposition was taken, without the consent of the parties in the case in which the deposition was taken or is to be filed, or without a written order of the court.

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#### **22-504. Retention of notes.**

A. **Retention periods.** Official court reporters shall retain their notes in accordance with the Supreme Court approved records retention schedule. All other certified court reporters shall retain:

(1) untranscribed shorthand or tape or other recorded notes of depositions or other proceedings, other than trial proceedings, for not less than three (3) years;

(2) notes of transcribed depositions or other proceedings described in Subparagraph (1) of this paragraph, shall be retained for not less than one (1) year by the certified court reporter who reported the judicial proceedings.

B. **Storage of notes.** The original paper notes shall be retained or an electronic copy of either the shorthand notes or the English transcript of the notes shall be stored on computer

disks, cassettes, backup tape systems or optical or laser disk systems. All such notes shall be safely stored and appropriately identified and dated by the court reporter. Notes of all trial or other courtroom proceedings, whether transcribed or not, shall be delivered to the clerk of the court or court administrator as provided under the Supreme Court's record retention schedule.

#### **22-505. Code of professional ethics. [NOT AMENDED]**

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#### **22-602. Authority. [WITHDRAWN]**

#### **22-603. Definitions. [WITHDRAWN]**

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#### **22-604. Denial of a certificate.**

A. **Denial of application.** All decisions of the board denying any application for certification, or denial of waiver under Rule 22-103 NMRA, for any cause other than failure to pass an examination, shall be made in writing, and the reasons for denying the application for certification shall be included in the decision of the board.

##### **B. Notice.**

(1) If an application for a temporary or permanent certificate as a certified court reporter or court monitor or an application for a firm licensed under Rule 22-202 NMRA is to be denied for reasons other than failure to pass an exam, the board shall give written notice to the applicant of its intent to deny the application for certification.

(2) The notice of denial of a certificate shall set forth a short and plain statement of the reasons for the denial and the applicable law so that the applicant has notice of the reasons for the denial.

(3) The notice of denial shall advise the applicant that the applicant may appear before the board to object to the denial of the application for a certificate. Within twenty (20) days after mailing of the notice, the applicant may request a hearing on the proposed denial of the application for temporary or permanent certification. Upon request, the board shall hold a hearing on the denial not less than ten (10) days nor more than thirty (30) days after written notice of hearing is mailed to the applicant.

C. **Final decision.** Within thirty (30) days after a hearing on the proposed denial of a certificate, or if a hearing is not requested by the applicant, within thirty (30) days after the mailing of the notice of intent to deny a certificate, the board shall issue a final decision in accordance with Paragraph A of this rule.

D. **Appeal.** If the applicant has requested a hearing under Subparagraph (3) of Paragraph A of this rule, within thirty (30) days after the mailing of a notice of denial of an application for a temporary or permanent certificate, the applicant may appeal to the Supreme Court in accordance with Paragraph E of this rule.

E. **Appeal.** Any decision of the board with respect to the denial of certification for any cause other than failure to pass an examination may be reviewed by the New Mexico Supreme Court by filing a notice of appeal with the Supreme Court within thirty (30) days after the date of mailing of the decision of the

board by certified or registered mail to the applicant's last known address. The notice of appeal shall be accompanied by a statement setting forth the reasons why the decision of the board should be reversed. Within twenty (20) days after the filing of the notice of appeal and the appellant's statement setting forth reasons for reversal, the board shall respond to each of the reasons given for reversal. The decision of the board shall automatically be affirmed if the Supreme Court has not reversed the board's decision within sixty (60) days after the filing of the notice of appeal. No other briefs or oral argument shall be allowed.

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**22-605. Grounds for disciplinary action.**

The following shall be considered by the board as grounds for disciplinary action against a certified court reporter or court monitor pursuant to these rules:

- A. unprofessional conduct;
- B. willful violation of duty;
- C. gross negligence, or incompetence, in the performance of activities authorized by the certificate;
- D. fraud, dishonesty or corruption;
- E. if the person is a certified court reporter, having become unable to perform the duties of a court reporter at a level of skill required by the board for applicants for permanent certification as a certified court reporter;
- F. if the person is a court monitor, having become unable to perform the duties of a court monitor at a level of skill required by the board for certification as a court monitor;
- G. fraud or misrepresentation in obtaining a certificate;
- H. if the person is a certified court reporter, aiding or assisting any person to engage in the verbatim reporting of judicial proceedings, when such person is not a certified reporter in New Mexico;
- I. conviction in any court of competent jurisdiction of a felony or of any other offense which offense involves moral turpitude and is reasonably related to the activities authorized by the certificate;
- J. adjudication of insanity or incompetency;
- K. entering into any contractual arrangement whether oral or written, with any person or entity which prohibits or restricts an attorney from using a court reporter of the attorney's choice; contracting or agreeing with any person or entity not acting as a party to litigation, other than a government entity, to provide reporting or incidental services in any action not yet pending; failing to provide comparable services, in both quality and price, to all parties in any given action; or entering into any agreement or arrangement with any court reporting agency not licensed by the board, any insurance company, any attorney representing an insurance company or other group, or any attorneys affiliated with such other companies, groups or associations which may be viewed as allowing the agency, company or attorney to assume the right to control or direct the time, manner or method of executing deposition services, including staffing, marketing, billing, fees, record retention, billing invoice formats or any other practice that has the appearance of impropriety or appears to allow someone else to control or direct the certi-

fied court reporter's or firm's work. This rule does not prohibit agreeing to provide incidental services prior to the institution of litigation. It also does not prohibit an agreement to provide reporting services for non-litigation matters. It shall be the responsibility of the individual court reporter and the court reporting firm to know whether a contractual relationship exists requiring disclosure. The purpose of this rule is to protect the integrity of the record and to avoid the appearance of partiality;

L. presence of the court reporter's or court monitor's name on the certified list compiled by the Human Services Department pursuant to the Parental Responsibility Act showing the certified court reporter or court monitor is not in compliance with a judgment and order of support entered by a district court or a tribal court; or

M. violation of any rule or order promulgated or issued by the Supreme Court governing the obligations or duties of court reporters or court monitors.

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**22-605.1. Prehearing procedures and confidentiality. [NO AMENDMENTS.]**

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**22-606. Opportunity for hearing.**

**A. Notice and opportunity to be heard.** Every court reporter or court monitor shall be afforded notice and an opportunity to be heard before the board prior to the board taking action to:

- (1) suspend a certificate;
- (2) revoke a certificate;
- (3) fine a certified court reporter or certified court monitor;
- (4) censure a certified court reporter or certified court monitor; or
- (5) deny or withhold the renewal of a license.

**B. Nonsubmittal of required documents or fees.** The provisions of Paragraph A shall not apply if the board's action is based upon failure of the certified court reporter or court monitor to submit to the board, within the time provided by these rules, evidence, documents or fees required for renewal of certification.

**C. Examination in lieu of hearing.** In adjudicatory proceedings brought pursuant to Subparagraph (5) of Paragraph A of Rule 22-605 NMRA, in lieu of a hearing, a certified court reporter or court monitor may, with the consent of the board, take the examination given to applicants for permanent certification as a certified court reporter or court monitor. The examination given shall be identical to the most recent examination given applicants for certification as permanent certified court reporters or court monitors. Passing the examination shall be deemed by the board to be sufficient proof of competency and shall preclude the board from conducting a hearing to determine whether the certified court reporter or court monitor has the skill required to perform the duties required for the position. Failure to pass the examination shall be deemed to be sufficient proof without additional evidence that the certified court reporter or court monitor does not have the skill to

perform the duties required for the position. Upon failure of the examination, the board may revoke or suspend the certificate or deny the renewal of the certificate.

**D. Parental Responsibility Act suspensions.** If the proposed disciplinary action is being taken pursuant to Subparagraph (12) of Paragraph A of Rule 22-605 NMRA of these rules, the license shall be suspended until the court reporter or court monitor files with the board a certified statement from the Human Services Department that the court reporter or court monitor is in compliance with the court reporter's or court monitor's child support obligation.

**E. Definitions.** As used in this rule:

(1) "revoke a certificate" means to prohibit the conduct authorized by the certificate or license; and

(2) "suspend a certificate" means to prohibit, whether absolutely or subject to conditions which are reasonably related to the grounds for suspension, for a defined period of time, the conduct authorized by the certificate or license.

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### **22-607. Notice of hearings.**

**A. Notice.** If the board believes that the certificate of a certified court reporter or court monitor should be revoked or suspended or that a certified court reporter or court monitor should be censured or that a renewal of certification should be denied, the board shall give the certified court reporter or court monitor notice of the right to a hearing as provided in Rule 22-612 NMRA of these rules. Within twenty (20) days after the mailing of a notice, the certified court reporter or court monitor may request in writing a hearing by the board on the action proposed to be taken.

**B. Contents.** The notice required by Paragraph A of this rule shall:

(1) set forth a short and plain statement of the asserted facts and applicable law so that the certified court reporter or court monitor has sufficient notice of the issues involved;

(2) a statement of the proposed action to be taken by the board;

(3) a statement that if the reporter or monitor objects to the action to be taken and desires an opportunity to be heard, the reporter or monitor is required to request a hearing in writing within twenty (20) days after the date of mailing of the notice by the board; and

(4) a statement of the rights set forth in Rule 22-613 NMRA.

**C. Failure to request hearing.** If the reporter or monitor does not request a hearing within the time and in the manner required by this rule, the board may take the action contemplated in the notice and such action shall be final and not subject to review by the Supreme Court.

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### **22-608. Disciplinary proceedings; designation and notice of hearing.**

**A. Notice of hearing.** If a timely request for a hearing is made pursuant to Rule 22-607 NMRA, an adjudicatory hearing shall be held by the board after notice to the certified court reporter or certified court monitor. The notice shall include a statement

of the time, place and nature of the hearing.

**B. Time for hearing.** No hearing conducted pursuant to this rule shall be held less than fifteen (15) days from the date of service of such notice, nor more than sixty (60) days from that date unless the hearing is continued by the board for good cause.

**C. Notice to complainants.** A copy of the notice of hearing shall be mailed to any person who has submitted a complaint to the board which alleges grounds for disciplinary action by the board.

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### **22-609. Decision and appeal.**

**A. Time for decision.** A final written decision based on a hearing shall be made by a quorum of the board within thirty (30) days after the conclusion of the hearing. The board may, for good cause, delay the issuance of a final written decision for a period which is reasonable under the circumstances, which period shall not exceed sixty (60) days. Should a delay of a final written decision be necessary, the board shall forthwith notify the reporter or monitor of the delay, the reason for the delay, and when a decision is expected to be issued.

**B. Notice.** All decisions of the board imposing discipline, fine, censure, suspension, revocation or denial of certification shall be made in writing, and the reasons for such discipline, fine, censure, suspension, revocation or denial of certification shall be included in the decision. The decision shall be attested by an officer of the board.

**C. Mailing of decision.** A final written decision shall be served on the certified court reporter or court monitor in the manner provided by Rule 22-612 of these rules within ten (10) days after it is executed by the board.

**D. Time for appeal.** If the final written decision is for disciplinary action against the certified court reporter or court monitor, the reporter or monitor may, within thirty (30) days after the date of mailing of the decision of the board, file a notice of appeal with the Supreme Court pursuant to Paragraph E of this rule and shall serve a copy of the notice of appeal on the board. If the notice of appeal is not filed within the time prescribed, the decision of the board shall be deemed to be approved by the Supreme Court.

**E. Supreme Court review.** Upon service of a copy of a notice of appeal on the board, the board shall, within thirty (30) days after receipt of the notice of appeal, transmit a copy of the decision to the Supreme Court for its review. The decision of the board shall become effective within sixty (60) days after the filing of the transcript with the Court unless the Supreme Court reverses the board's decision within such period.

**F. Judicial personnel rules.** Nothing in these rules shall be construed to restrict the Supreme Court from taking any action to enforce any order, rules or regulations approved by the Supreme Court or any regulations of the board. Any violation of an order of the Supreme Court or any rule or regulation approved by the Supreme Court may also be deemed to be cause for appropriate disciplinary proceedings under the judicial personnel rules.

### **22-610. Rehearing.**

The board may grant a rehearing, either upon written application by the reporter or court monitor showing good cause before an appeal is filed, or at any time on its own motion before an appeal is filed. Any application for rehearing must be received by the board within ten (10) days of the service of its decision. The board need not reconvene and may be polled by telephone about whether to grant or deny a rehearing, but the application and the board's written determination shall be made part of the record. The decision to grant or deny a rehearing must be made and served upon the reporter or court monitor within ten (10) days of the date the board receives the application.

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### **22-611. Venue. [NO AMENDMENTS.]**

### **22-612. Service of notices and decisions.**

Any notice required by these rules, any request for hearing and any decision of the board provided for by these rules may be served either personally by any person over the age of eighteen (18) years, or by certified mail, return receipt requested. Notices mailed to the court reporter or court monitor shall be sent to the court reporter's or court monitor's last known address as shown by the records of the board. Service by certified mail is deemed complete upon mailing.

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### **22-613. Rights of parties to hearing.**

**A. Rights specified.** A certified court reporter or court monitor shall have the right to be represented by an attorney at any hearing or conference conducted by the board. Any party shall have the right to present evidence by means of witnesses and books, papers, documents and other evidence; to examine all opposing witnesses who appear on any matter relevant to the issues; and where necessary, to timely request subpoenas and subpoenas duces tecum be issued by the board chair to compel the attendance of witnesses and the production of relevant books, papers, documents and other evidence, upon making written request therefor to the board. All notices of hearings issued pursuant to these rules shall contain a statement of these rights. The party requesting a subpoena shall pay all costs of service of the subpoena, including witness fees.

**B. Discovery; witnesses and documents.** Upon written request to another party, any party is entitled to:

(1) obtain the names, addresses and a summary of anticipated testimony of witnesses who will or may be called by the other party to testify at the hearing; and

(2) inspect and copy any documents or items which the other party will or may introduce in evidence at the hearing.

**C. Time for compliance.** The party to whom a request is made pursuant to Paragraph B of this rule shall comply with it within fifteen (15) days after receipt of the request. All such requests must be complied with at least ten (10) days before the hearing. For good cause shown, the time for compliance may be shortened.

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### **22-614. Admissibility of evidence. [NO AMENDMENTS.]**

### **22-615. Record of hearings. [NO AMENDMENTS.]**

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### **22-616. Conduct of hearings.**

**A. Presiding official.** Unless a hearing officer is designated by the board, the board chairperson shall preside at the hearings of the board conducted pursuant to these rules. If the chairperson is unable to preside at the hearing, the chairperson shall appoint another member of the board to preside.

**B. Oath or affirmation.** Witnesses at the hearing must be examined under oath or affirmation.

**C. Order of hearing.** Evidence supporting the grounds for denial of an application for certification or for disciplinary action against a certified court reporter or court monitor who is the subject of the hearing shall be presented first. The reporter or monitor may then introduce any evidence the reporter or monitor desires the board to hear.

**D. Closing argument.** The board may, in its discretion, permit the parties to make closing argument and summations.

**E. Findings and conclusions.** The board, in its discretion, may request and consider proposed findings of fact and conclusions of law submitted by the parties to be submitted within a time allowed by the board.

**F. Conduct of hearings.** Subject to these rules, the conduct of the hearing shall be at the discretion of the board.

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### **22-617. Hearings; public.**

**A. Conduct of hearings.** All hearings shall be conducted either by a quorum of the board or by a hearing officer designated by the board.

**B. Findings.** If the board finds that it has not been proven that there are grounds for disciplinary action, it may explain in writing its reasons for the finding.

**C. Open hearings.** All hearings shall be open to the public. However, the court reporter or court monitor may with the approval of the board, and for good cause shown, require the board to hold a closed meeting.

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### **22-618. Failure to appear for hearing.**

If a certified court reporter or certified court monitor who has requested a hearing does not appear, and no continuance has been granted, the board or hearing officer may hear the testimony of witnesses who have appeared, and the board may proceed to consider the matter and dispose of it on the basis of the evidence before it. If because of accident, sickness or other good cause a certified court reporter or certified court monitor fails to appear for a hearing requested by the reporter or monitor, the court reporter or court monitor may within a reasonable time apply to the board to reopen the proceedings, and the board upon finding good cause shall immediately set a time and place for a hearing and give the court reporter or court monitor notice thereof as required by these rules. At that time and place, a hearing shall be held in the same manner as the hearing set by the original notice.

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### **22-619. Hearings; powers of board.**

**A. Powers specified.** In connection with any hearing held

pursuant to these rules, the board may be advised by counsel and require the certified court reporter or certified court monitor to produce relevant books, papers, documents, tapes, logs and other evidence; issue oaths or affirmations to witnesses; examine witnesses; and shall have the authority to direct a continuance of any case. The board may also order and hold conferences before or during the hearing for the settlement or simplification of the issues.

**B. Subpoena.** At the request of any party, the board chairperson may issue a subpoena for the appearance of any witness at any hearing.

**C. Enforcement.** If any person fails to comply with a subpoena issued by the board chairperson in accordance with the provisions of this rule or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, at the request of the officer issuing the subpoena, the board may apply to the Supreme Court for an order directing that person to take the requisite action. The Supreme Court may issue such order or may quash the subpoena. Should any person willfully fail to comply with an order of the Supreme Court, the Court may punish such person for contempt of court. Any person who has been served with a subpoena pursuant to this rule may apply to the Supreme Court for an order to quash such subpoena.

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**22-701. Informal adjudicative proceedings; checklist.  
CERTIFIED COURT REPORTER AND COURT MONITOR  
COMPLAINT PROCEDURE CHECKLIST**

Rules 22-601 through 22-619 NMRA of the Rules Governing the Recording of Judicial Proceedings provide for all informal adjudicative proceedings to be conducted by the board. These include proceedings concerning discipline, fine, censure, suspension, revocation, denial or withholding renewal of a certificate of a certified court reporter or court monitor. (*See* Rule 22-605 NMRA, "Grounds for disciplinary action".)<sup>1</sup>

The following checklist applies when a complaint is filed against a certified court reporter.

A. Formal complaint received.

B. Board secretary or administrator acknowledges receipt of complaint to complainant and respondent in writing. Respondent is given fifteen (15) days from the receipt of the acknowledgment letter to respond.

C. Complaint and response are reviewed in executive session at the next meeting of the Board Governing the Recording of Judicial Proceedings.

D. If further action warranted, the board may submit written questions to the complainant or the respondent, or the board may appoint a subcommittee to investigate.

E. Investigative evidence is thereafter presented to the board.

F. If the board believes the complaint has merit, the complaint may be referred to the attorney general for action, and notice is given to respondent of the right of the respondent to a hearing before the board. Rule 22-607 NMRA, "Notice of hearings", sets out the necessary contents of any notices. *See also*, Rule 22-613 NMRA, "Rights of parties to hearing".

G. The respondent must respond in writing within twenty (20)

days after the mailing of the notice in order to request a hearing by the board on the board's proposed action, if respondent desires such a hearing.

H. The board sets a date and time for hearing if respondent requests a hearing. The board prepares a notice of hearing. The notice of hearing is mailed by certified mail or personally served on the respondent. (*See* Rule 22-612 NMRA, "Service of notices of hearings" for method of service.) A copy of the notice must also be sent to the complainant.

No hearing conducted pursuant to Rule 22-613 NMRA shall be held less than fifteen (15) days from date of service of said notice, nor more than sixty (60) days from date of service, unless the hearing is continued by the board for good cause.

I. The board establishes whether any party desires a record of the hearing; if so, satisfactory arrangements must be made to pay the cost of such record prior to the commencement of the hearing.

J. The board establishes whether any of the parties desire a closed hearing. (*See* Section 22-617, "Hearings; public".)

K. A quorum of the board holds the evidentiary hearing in accordance with the notice. (Consult Rule 22-616 NMRA, "Conduct of hearings".) In the alternative, the board may designate a hearing officer. (*See* Rule 22-617 NMRA, "Hearings; public".)

L. The board must render its written decision within thirty (30) days after the conclusion of the hearing. A written decision may be delayed for good cause shown for a period not to exceed sixty (60) days. (*See* Rule 22-609 NMRA, "Decision and appeal".)

M. If delay is necessary, the board notifies respondent of the delay, the reason therefor and when a decision can be expected.

N. The decision must be mailed via certified mail within ten (10) days after it is executed by the board.

O. If discipline is indicated in the decision, the reporter or monitor may file a notice of appeal with the Supreme Court pursuant to Rule 22-609 NMRA within thirty (30) days after the date of mailing the decision and must serve copy of notice of appeal on the board.

P. After receipt of respondent's notice of appeal, the board must within thirty (30) days transmit a copy of the decision to the Supreme Court for its review.

The decision of the board shall become effective within sixty (60) days after the filing of the transcript with the court, unless the Supreme Court reverses the board's decision within such period.

**USE NOTE**

1. If the matter concerns denial of a certificate, *see* Rule 22-604 NMRA, "Denial of certificate", for time limitations and the appeal process.

## Certiorari Not Applied For

### From the New Mexico Court of Appeals

Opinion Number:  
2004-NMCA-008

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
versus  
JOE EVERISTO GURULE,  
Defendant-Appellant.  
No. 22,426  
(filed: November 18, 2003)

### APPEAL FROM THE DISTRICT COURT OF RIO AR-RIBA COUNTY

STEPHEN PFEFFER,  
District Judge

PATRICIA A. MADRID  
Attorney General  
ARTHUR W. PEPIN  
Assistant Attorney General  
Santa Fe, New Mexico  
ELIZABETH BLAISDELL  
Assistant Attorney General  
Albuquerque, New Mexico  
for Appellee

JOHN B. BIGELOW  
Chief Public Defender  
KATHLEEN T. BALDRIDGE  
Assistant Appellate Defender  
Santa Fe, New Mexico  
for Appellant

## OPINION

KENNEDY, Judge

{1} Following a jury trial, Defendant Joe Gurule appeals his convictions for second-degree murder contrary to NMSA 1978, § 30-2-1(B) (1994), and tampering with evidence contrary to NMSA 1978, § 30-22-5 (1963). On appeal, Defendant argues that the trial court erred in (1) admitting into evidence a videotaped statement of an unavailable witness, (2) denying Defendant's request for a self-defense jury instruction, and (3) finding that there was sufficient

evidence to convict Defendant of second-degree murder. Another issue raised by Defendant is moot.

{2} We agree that the videotape was erroneously admitted under Rule 11-804(B)(5) NMRA 2003, the catch-all exception to the hearsay rule, particularly in light of the trial court's specific findings that independent indices of trustworthiness pertinent to other "firmly rooted" hearsay exceptions were not sufficiently present for its admission under those exceptions. We hold the evidence was sufficient to support Defendant's conviction for second-degree murder. We also discuss the propriety of denying Defendant's self-defense jury instruction in the context of this trial because the issue will likely be raised again.

### BACKGROUND

#### General Facts

{3} The jury found that Defendant fatally stabbed Jerry Ortiz on May 24, 2000, in Espanola, New Mexico. On that date, two groups of people, one including Defendant, and one including Ortiz, met for a fight outside of Defendant's residence. Ortiz was part of a group that traveled to Defendant's trailer to vindicate a friend, Solomon Ramirez, for a beating Ramirez had allegedly received at Defendant's trailer earlier in the afternoon. Both groups conceded that they had been drinking and using drugs that day. In fact, at the time Ortiz's group arrived at Defendant's residence, Defendant and his girlfriend, Deanna Martinez, were in the trailer shooting heroin. Ortiz had a blood alcohol concentration of .36% at the time of his death.

{4} The evidence established that Defendant was inside his trailer along with Martinez, Carlos Talavera, and Alfonso Jose "Smokey" Quintana when the car carrying Ortiz and his group drove onto Defendant's property. Those in the car left the vehicle and began yelling. According to some witnesses, Defendant, Martinez, Talavera, and Quintana went outside. Martinez stated in her videotaped statement that as Defendant went out, he grumbled about those "jodidos." ("Jodidos" is translated as "punks" or "f\*\*\*\*\*").

{5} Arguments between the two groups ensued, and several people were said to be brandishing "poles," "sticks," or "boards" of some sort. After Defendant exited the trailer, he argued with Ortiz, who was

immediately thereafter observed on the ground bleeding from a severe stab wound at the base of his neck. No witness actually observed the stabbing. Ortiz's aorta was severed, resulting in massive bleeding, which led to his death.

{6} In her videotaped statement to the police, Martinez stated that after Ortiz was stabbed, Defendant returned to his trailer, rinsed blood off a knife in the sink, gave it to her telling her to get rid of it, and then attempted to leave the scene in his truck along with Martinez and Talavera. They were almost immediately blocked in the driveway by police officers who were responding to reports of gunshots fired on Defendant's property.

{7} Defendant, Martinez, and Talavera were ordered out of the truck and the officers separated them. None of them was free to leave. Defendant was arrested and removed from the property. Martinez was initially held by the police for possession of drug paraphernalia, and she admitted that she was using drugs. Talavera remained at the trailer for questioning. During this time following the incident, while Martinez remained at the scene of the stabbing, she provided officers with four statements concerning the events of the evening, the last of which was videotaped. Martinez was never charged with any crime.

{8} Many of those who were present at the incident ultimately were subpoenaed by the State, but had no desire to testify. Some professed a fear of Defendant to justify their reticence. The trial court went so far as to instruct them as a group that they could be held in contempt of court if they did not honor their subpoenas and appear to testify. At trial, those witnesses who took the stand testified that they did not see what happened, or refused to testify at all. Some witness testimony during the trial conflicted with prior statements that were made to the authorities. These witnesses were impeached with their prior statements made to the police; those statements were only used for impeachment purposes, not as substantive evidence.

{9} Martinez could not be located to be served with a subpoena prior to trial, and she did not appear in court. Based on her unavailability, the State sought to use the videotaped statement that Martinez had given to the police



approximately four hours after the stabbing, and the trial court admitted the video into evidence. The defense objected to the use of this evidence on several occasions throughout the trial. After the trial court ruled to allow the videotaped statement as evidence, the defense requested and was granted the opportunity to present Martinez's three earlier oral and written statements made to various officers which contained some information that conflicted with that on the video statement. These statements were admitted by the trial court as substantive evidence, not just for purposes of impeachment. The defense was also allowed to call its investigator to testify about an interview he conducted with Martinez some four months after the stabbing which contained information that was inconsistent with the statements provided on the videotape.

#### Martinez's Statements

{10} During the three hours following the incident, Martinez gave four statements to investigating officers. She gave oral statements to Officers Guillen and Sanchez, which were apparently included in the police reports that are not in the record proper, and a separate handwritten statement to Officer Viarreal. In these statements, Martinez said that she had not seen the altercation, but had heard noise outside and gone out to see Ortiz lying on the ground bleeding. While in the police unit approximately four hours after the incident, and following the handwritten statement she gave to Viarreal, Viarreal stated that Martinez decided that she wanted to give a complete statement concerning the incident, which resulted in the videotaped interview with Lieutenant Montoya and Detective Trujillo.

{11} In the videotape, Martinez described the events that occurred throughout the day in question, including Defendant's use of and contact with the knife used in the stabbing. She stated that he opened the folding knife when the group of screaming people arrived at his trailer. He went outside, after referring to the group as "jodidos," and the argument ensued. After engaging in an altercation with one of Ortiz's female companions, Martinez stated she became aware that Ortiz was down, saw Ortiz bleeding, and went inside to grab a sheet in an attempt to stop the bleeding. After Ortiz was taken away, Defendant came back in the trailer where Martinez was, and Martinez saw him rinse blood off the same knife he held when he exited the trailer. After he rinsed

it, Defendant handed her the knife, and told her to get rid of it.

{12} The video interview reveals that Martinez continued to maintain, as she had in the previous statements, that she did not witness the stabbing itself. She said that after Defendant told her to "get rid of it," she took the knife and hid it under the seat of Defendant's truck, where it was later found by investigators. Further, when asked, she identified the knife and said that the knife belonged to Defendant, he had washed blood off of it in the trailer after the stabbing, the handle of the knife had parts missing which made it unique and identifiable, and she had seen it on prior occasions, including the time when Defendant had held it to her throat and threatened to kill her.

{13} Some four months later, Martinez gave another statement to a defense investigator. In this statement, Martinez said she had never seen a knife, or Defendant washing one, and returned to her original story that she came out of Defendant's trailer only after Ortiz had been stabbed.

#### DISCUSSION

Martinez's Videotaped Statement Was Not Admissible Under Rule 11-804(B)(5) and the Admission of Such Evidence Violated Defendant's Right to Confront Witnesses

{14} The case proceeded to trial, and the State moved to admit the videotape under the "catch-all" exception Rule 11-804(B)(5) when it became apparent that Martinez could not be found to testify. The defense objected to admitting the videotape into evidence on Confrontation Clause grounds. The defense also objected to the State's secondary argument that the videotape should be admitted as an excited utterance or a statement against penal interest. The trial court decided against the excited utterance and penal interest arguments, and ruled that the videotape was admissible under Rule 11-804(B)(5) as substantive evidence. The evidence was presented to the jury. The defense sought and was granted use of Martinez's prior and subsequent statements for purposes of impeachment and as substantive evidence.

#### Hearsay and Confrontation Clause

##### Standard of Review

{15} On appeal Defendant rightly argues that Martinez's videotaped statement was hearsay. It was an out of court statement made by an absent declarant, and was of-

fered as evidence by the State for the truth of its contents—namely, the only evidence directly associating Defendant with the knife. Rule 11-801(C) NMRA 2003. The admission of an extrajudicial statement as an exception to the hearsay rule is reviewed for an abuse of discretion. *State v. Johnson*, 99 N.M. 682, 687, 662 P.2d 1349, 1354 (1983). However, in this case, Defendant also contends that the videotaped statement violated his due process right to confront witnesses under the United States and New Mexico Constitutions. See U.S. Const. amends. VI, XIV; N.M. Const. art. II, § 14. This Court reviews Confrontation Clause violations separate from the question of admissibility under hearsay rules because a due process violation raises a question of law. *State v. Ruiz*, 120 N.M. 534, 536, 903 P.2d 845, 847 (Ct. App. 1995); *State v. Martinez*, 99 N.M. 48, 51, 653 P.2d 879, 882 (Ct. App. 1982) ("The breadth of the hearsay rule and the confrontation clauses of the state and federal Constitutions are not coextensive."). Therefore, the question of whether Martinez's out of court videotaped statement is admissible under the Confrontation Clause is a question of law, subject to de novo review. *Ruiz*, 120 N.M. at 536, 903 P.2d at 847.

#### Excited Utterance and Statement Against Interest Exceptions

{16} The State sought admission of the videotape primarily under the catch-all exception. It also offered the evidence under the excited utterance exception Rule 11-803(B) NMRA 2003, and as a statement against interest Rule 11-804(B)(3). We summarize the trial court's analysis of these hearsay exceptions because it informs our review of the catch-all exception under which the trial court ultimately admitted the videotape.

{17} The trial court rejected the State's argument that Martinez's statement was an excited utterance for two reasons: first, there had been a time lapse of four hours since the incident, and the videotape was the fourth time she had given a statement to officers; second, because the statement was given in response to police inquiry. The trial court further found that there was enough time between the event and the statement for Martinez to have prepared a story.

{18} The trial court also rejected the State's argument that Martinez's videotaped statement was against her penal interest. The

trial court so found because she indicated some fear of Defendant, which the trial court thought could have been an effort on her part to exculpate herself from any tampering with evidence charge resulting from following Defendant's instruction to "get rid of" the knife, perhaps by a duress defense. "[A] confession that shifts or spreads blame from the declarant to incriminate co-criminals" is the type of statement "whose reliability is particularly suspect." *Denny v. Gudmanson*, 252 F.3d 896, 903 (7th Cir. 2001). Further, the trial court found that the degree to which she was inculcating herself on the other matters, such as possession of drug paraphernalia, was insufficient to be a statement "so far" against her penal interest. See *State v. Reyes*, 2002-NMSC-024, ¶ 36, 132 N.M. 576, 52 P.3d 948 (concluding that declarant's statement was admissible because it "so far tended to subject a person to criminal liability, rather than to relieve him or her of it, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true") (emphasis added); *State v. Torres*, 1998-NMSC-052, ¶ 11, 126 N.M. 477, 971 P.2d 1267 (determining that non-self-inculpatory statements inculcating a defendant may not be admitted under the statement against interest exception as part of a broader narrative that may be self-inculpatory as to other topics). The trial court could reasonably have so found.

#### Catch-All Exception to Hearsay Rule Hearsay Analysis

{19} After rejecting the State's arguments that Martinez's statement was either an excited utterance under Rule 11-803(B) or a statement against penal interest under Rule 11-804(B)(3), the trial court ruled that the video would be admitted under the catch-all exception to the hearsay rule under Rule 11-804(B)(5) because the video statement had the requisite "guarantees of trustworthiness." Rule 11-804(B)(5) applies when a witness is unavailable to testify and provides in relevant part:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible], if the court determines that

- (a) the statement is offered as evidence of a material fact;
- (b) the statement is more proba-

tive on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and  
(c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

{20} In this case, it is not contested that Martinez was an unavailable witness within the meaning of Rule 11-804(A). In addition, Martinez's videotaped statement was offered as evidence of a material fact, and the videotaped statement, if accepted, was likely more probative than any other evidence on the question of Defendant's connection to the instrumentality of Ortiz's death. However, Defendant contends that the admission of Martinez's videotaped statement violated his constitutional right to confront witnesses.

{21} In finding the requisite guarantees of trustworthiness for the purposes of Rule 11-804(B)(5), the trial court made findings contradictory to its rulings denying admission under the excited utterance and statement against interest exceptions. In its previous rulings the trial court had found that the videotaped statement did not constitute an excited utterance or a statement against penal interest because there were three previous statements in response to questioning by police, there was time for Martinez to fabricate, and the statements themselves were not sufficiently self-inculcating. Despite this, when evaluating the same evidence for Rule 11-804(B)(5) purposes, the trial court said, "it appears fairly obvious that she's still excited from a fairly traumatic event at the time," and "I don't see anything about lack of candor in this particular situation. She has implicated herself, in effect, for having hid the knife, and that she participated in that." Finally, the trial court was impressed that Martinez expressed a willingness to bare her soul, "to tell all" as the trial court phrased it, because of the horrendous event she witnessed. These contradictory findings reflect that the videotapes statement lacked guarantees of trustworthiness.

{22} A catch-all exception should not be used as a fall-back for second rate evidence that does not pass muster under other exceptions. See *State v. Taylor*, 103 N.M. 189, 199, 704 P.2d 443, 453 (Ct. App. 1985) (affirming the principle that the catch-all exception should be stringently applied in

criminal cases). It should be a method by which evidence that is of equal reliability but does not fall under a "firmly rooted" exception is admitted. This is the essence of requiring "particularized guarantees of trustworthiness" to admit hearsay when the established and named hearsay exceptions fail. The word "guarantee" bespeaks a requisite certainty equal to the assumed trustworthiness of the firmly rooted exception. Analysis under the tests for sufficient reliability with respect to the Confrontation Clause proves this point.

#### Confrontation Clause

{23} Defendant maintains that the admission of Martinez's videotaped statement violated his right to confront the State's only witness who could link Defendant to the knife used in the stabbing.

In New Mexico, the Confrontation Clause permits admission of a non-available declarant's hearsay statement if it falls within a "firmly rooted exception" to the hearsay rule. If the disputed statement does not fall within a firmly rooted hearsay exception, then there must be "particularized guarantees of trustworthiness" equivalent to those associated with a firmly rooted exception.

*State v. Lopez*, 2000-NMSC-003, ¶ 15, 128 N.M. 410, 993 P.2d 727 (internal quotation marks and citation omitted). When a declarant is unavailable, the Confrontation Clause of the Constitution requires that out of court statements must bear sufficient "indicia of reliability" to be admissible. *State v. Woodward*, 1996-NMSC-012, ¶ 38, 121 N.M. 1, 908 P.2d 231 (internal quotation marks and citation omitted). These indicia must be sufficiently strong to guarantee the trustworthiness of the evidence.

{24} For this reason, "catch-all" exceptions, such as Rule 11-804(B)(5), are not considered to be "firmly rooted." See 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 807.03[2][c], at 807-20 (2d. ed. 2003). In fact, statements admitted under this rule are considered by New Mexico courts to be "presumptively unreliable and inadmissible." *Lopez*, 2000-NMSC-003, ¶ 16 (internal quotation marks and citations omitted). Because the "catch-all" exception is not firmly rooted, statements admitted

pursuant to this rule must be separately proven to be reliable and trustworthy. In evaluating the “sufficient guarantees of trustworthiness” of the statement under the Confrontation Clause, this Court considers “four factors leading to unreliability: (1) ambiguity; (2) lack of candor; (3) faulty memory; and (4) misperception.” *Id.* ¶ 17 (internal quotation marks and citation omitted). While conducting this evaluation, courts may not consider extrinsic “evidence that corroborates the veracity of the statement.” *Id.* (internal quotation marks and citation omitted). Rather, the court must only consider the totality of the circumstances under which the statement was made and “[w]hen a court can be confident . . . that ‘the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,’ the Sixth Amendment’s residual ‘trustworthiness’ test allows the admission of the declarant’s statements.” *Lopez*, 2000-NMSC-003, ¶ 15 (quoting *Lilly v. Virginia*, 527 U.S. 116, 119 (1999) (internal citation omitted)). This is a robust test with stringent controls. We believe that the characterization of this exception as “residual” points to admitting evidence that can pass muster only under degrees of trustworthiness equal to, but separate from the other enumerated exceptions. Perhaps more importantly, the inclusion of a test where truthfulness must also be so clear that “cross-examination would be of marginal utility” sets a standard that precludes the admission of hearsay statements that contain equivocation and contradiction.

#### Corroborating Evidence May Not Be Considered

{25} Applying the Supreme Court’s directives to the facts in this case, the videotaped statement must stand or fall on its own merits. The trial court cannot consider that Martinez’s statement of what she did with the knife in the truck was corroborated by physical evidence of its location. Thus, we look to see if the totality of circumstances surrounding her statements provide independent, particularized guarantees of trustworthiness. *Ross*, 122 N.M. at 24, 919 P.2d at 1089. Here, the trial court supported its admission of the videotape with the statement that “[i]nasmuch as the knife was under the seat where she said it would be . . . I think that would be sufficient to my mind.” The State concedes that the trial court considered

these facts, together with the State’s proffer that DNA evidence, later suppressed, would show Ortiz’s blood on the knife. We see this as weakening the case for the videotape’s admission because it indicates that corroborating evidence was part of the trial court’s calculus of admission.

#### Ambiguity

{26} Martinez’s statement is not ambiguous in its description of the events surrounding the murder of Ortiz. With regard to ambiguity, the court determines whether there is a “danger that the meaning intended by the declarant will be misinterpreted by the witness and hence the jury.” *State v. Trujillo*, 2002-NMSC-005, ¶ 17, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citations omitted). This videotaped statement is the most clear, detailed, and definite statement Martinez gave. It is also contradicted in crucial points by her other statements, which are also not ambiguous. For this statement, the declarant was videotaped, and the jury saw the videotape. “[T]he jury had the opportunity to interpret [her] statement themselves rather than rely on some other witness’s interpretation.” *Id.* ¶ 18. The trial court found that the videotaped statement was clear and not ambiguous because it did not conflict with Martinez’s first three statements. Rather, the trial court found that Martinez merely omitted information she provided in the video from the three previous statements. However, her other statements were not capable of or accorded the powerful presentation of video, and the contradictions could not be explored by cross-examination.

#### Candor

{27} Under this element, the court considers the danger of the declarant consciously lying. *Id.* ¶ 17. The trial court found that there was no lack of candor in this particular situation in that Martinez implicated herself for having hid the knife and by indicating that she was on drugs. In her written statement, Martinez indicates that Defendant was looking out the bathroom window from the trailer when she heard one of the women outside yelling for a towel, at which time Martinez ran outside. In her oral statement to Officer Guillen, she said the same thing; she and Defendant were inside, then someone yelled that Ortiz had been stabbed. These statements are not as vivid for not having been videotaped, but they are very much at odds with the videotaped state-

ment. Some months later, in Martinez’s statement to Defendant’s investigator Mr. Delgado, she again stated that she did not see the stabbing or a knife and also said that she made her videotaped statement because the police were going to charge her with accessory. Martinez stated that she provided the video statement after contemplating the situation while she was in the police unit, because it was “the right thing” to do and “want[ed] to tell all” because she genuinely felt bad seeing a man die in her presence. See *Morales v. Portuondo*, 154 F. Supp. 2d 706, 726-28 (S.D.N.Y. 2001) (stating that such statements may be particularly trustworthy for reasons like the other hearsay exceptions). This is precisely why the contradictions and motives underlying the videotaped statement as against Martinez’s other statements would make the “test” of cross-examination particularly crucial to presenting the videotaped statement in context.

#### Faulty Memory

{28} There is no indication that Martinez’s memory was faulty or that she forgot key information at the time the videotape interview was conducted. The trial court determined that other than Martinez not hearing gunshots, she remembered all of the important points of the incident. In this case, Martinez gave her video statement approximately four hours after the stabbing incident, and to all appearances, the significant events that had transpired that day were fresh in her mind. Again, however, in all of her earlier statements, Martinez indicated that she did not witness Defendant stabbing Ortiz, and Defendant never actually told her that he was responsible for the murder.

{29} The statement Martinez gave approximately four months later to the defense investigator was also largely consistent with her other statements when it came to her recounting the circumstances of the altercation. The inconsistencies between this statement and her videotape primarily concern Defendant’s involvement and the role of police in getting her statement. The freshness of her memory is not a factor; the contents of her memory and inconsistencies between her statements are.

#### Misperception

{30} Finally, the trial judge found that Martinez did not misperceive anything. However, we conclude that there is a significantly different quantum of recollection

between Martinez's statements. Either she was present during the stabbing or she was not. Either Defendant had the knife or he did not. Either he exited the trailer for a fight, or he was inside when Ortiz was stabbed. Her statements to either side of events do not show any misperception. Martinez admitted to shooting heroin earlier in the evening which might have compromised her perception of the incident (although the jury was aware of her drug use and could factor it into its verdict). Her statements of events, though contradictory, were unequivocal.

#### Overall Lack of Trustworthiness

{31} Based on the foregoing analysis, we hold that Martinez's videotaped statement was not sufficiently trustworthy. The defense was not able to cross-examine Martinez during the trial, and a comparison of all the statements shows sufficient contradiction for us to conclude that cross-examination could have been of great utility, possibly even the single, most important factor for the jury to evaluate in deciding whether to convict.

{32} The video was more complete and probative on the point for which it was offered than any other evidence which the State could procure. Its admission was not harmless. The independent indicia of reliability to which the trial court was obligated to look were not sufficiently present to justify the trial court's admission of the statement under Rule 11-804(B)(5). The admission of the video cannot pass constitutional muster, and we must reverse the trial court's decision to admit it.

#### Self-Defense Instruction

{33} Defendant argues that the trial court erred in denying his requested jury instruction on self-defense. On appeal, the review of the denial of a defendant's requested jury instruction is a mixed question of law and fact which we review *de novo*. *State v. Gaines*, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438. We do not weigh the evidence, but rather determine whether there is sufficient evidence to raise a reasonable doubt about self-defense. *Id.*; see also *State v. Ungarten*, 115 N.M. 607, 611, 856 P.2d 569, 573 (Ct. App. 1993).

{34} For such an instruction to be given, Defendant must show "evidence sufficient to allow reasonable minds to differ as to all elements of the defense." *State v. Branchal*, 101 N.M. 498, 500, 684 P.2d 1163, 1165 (Ct. App. 1984). The foundational predi-

cate to doing this involves the existence of evidence sufficient to show that (1) there was an appearance of immediate danger or great bodily harm to Defendant as a result of Ortiz's actions, (2) Defendant actually believed he was in immediate danger and killed Ortiz to prevent death or serious injury, and (3) the apparent danger would have caused a reasonable person in the same circumstances to act as Defendant did. *State v. Gallegos*, 2001-NMCA-021, ¶ 15, 130 N.M. 221, 22 P.3d 689. The trial court correctly applied this framework when it denied the Defendant's requested instruction on self-defense.

{35} The scene at Defendant's trailer of a group of intoxicated people, including Ortiz, intent on vindicating what they thought had been the beating of Solomon Ramirez might have presented an appearance of immediate danger. At the time, though, Defendant was in his trailer shooting heroin and not in any direct contact with the group until he went outside. When the group of people initially arrived at Defendant's residence, he did not report the commotion to the police nor did he remain inside the trailer out of harm's way. Both Quintana and Martinez testified that when Ortiz and his group arrived, Defendant went straight out to meet them, spouting some expletives on his way. This is not evidence that he was afraid. The trial court found that the second element of the standard necessary to show self-defense had not been established: there had been no evidence presented that Defendant was in fear of actual great bodily harm or death from Ortiz. Quite the contrary, Quintana's testimony and Martinez's statements have Defendant taking the knife and then exiting the trailer to confront the angry group. Quintana testified that as Defendant left the trailer, he told Quintana and Martinez to "kick back" and not go outside. Defendant then confronted the mob and engaged in an altercation that left Ortiz dead. These are not the actions of a person motivated by mortal fear. No evidence suggests that Defendant was put in fear of Ortiz, that Defendant killed Ortiz because of that fear, or that a reasonable person would have killed Ortiz under these circumstances.

{36} Defendant was entitled to a self-defense instruction only if there was evidence of self-defense. The evidence presented at trial was insufficient and the trial court correctly refused the instruction.

#### Sufficient Evidence Supports the Conviction for Second-Degree Murder

{37} Finally, Defendant argues that his due process rights were violated because there was insufficient evidence before the jury to prove beyond a reasonable doubt that he committed second-degree murder. Defendant contends that the State only presented contradictory and unsubstantiated testimony concerning the events of May 24, 2000, and this alone is insufficient grounds upon which to enter a conviction. Again, we reject Defendant's argument.

{38} This Court holds that "[s]ubstantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. In reviewing claims of insufficient evidence, "we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *Id.* The jury is free to reject Defendant's version of the facts, and thus, evidence contrary to the verdict does not provide a basis for reversal. *State v. Salazar*, 1997-NMSC-044, ¶¶ 44, 46, 123 N.M. 778, 945 P.2d 996. Determining the sufficiency of the evidence "does require appellate court scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Garcia*, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). This Court reviews the evidence to determine whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to each essential element of the crime charged. *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). It is up to the jury to weigh the testimony and contradictory evidence and believe or disbelieve any testimony it hears. *State v. Foster*, 1999-NMSC-007, ¶ 42, 126 N.M. 646, 974 P.2d 140. This Court does not substitute its judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony. "Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions."

State v. Sanders, 117 N.M. 452, 457, 872 P.2d 870, 875 (1994).

{39} In this case, there was sufficient evidence to support a conviction for second-degree murder. See State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 30, 127 N.M. 540, 984 P.2d 787 (stating that in reviewing a sufficiency of the evidence issue, we consider all evidence admitted, even if we conclude that some of the evidence was inadmissible). The jury considered the evidence and found that Defendant's actions created a strong probability of death or great bodily harm as required by Section 30-2-1(B). Defendant was present at the stabbing scene and argued with Ortiz. Both Martinez and Quintana stated that the knife belonged to Defendant. Martinez saw Defendant with the knife, observed him open the knife, and recalled that Defendant washed blood off of it and instructed Martinez to dispose of it. There was evidence from both Martinez and Monique Ramirez that nobody else was involved in the altercation between

Defendant and Ortiz. The medical examiner testified that Ortiz's fatal stab wound could have been made with Defendant's knife. In addition, Defendant was apprehended fleeing from the scene shortly after the stabbing occurred. No other evidence suggests that anyone else at the incident stabbed Ortiz, except for Quintana's testimony that he stabbed victim in self-defense. The jury heard Quintana's testimony, and it had the opportunity to weigh the information Quintana provided to the trial court. Quintana's testimony was not supported by any other testimony or evidence. For example, none of the other witnesses recalled that Quintana was around Ortiz at the time of the stabbing. Nor did anyone else observe Ortiz with a knife, as suggested by Quintana. Further, in contrast to the information given by Quintana, the knife was found in Defendant's truck, not on the ground where Ortiz was stabbed and not under the neighbor's car. In light of the information provided at trial, there was sufficient evidence for the jury to

conclude that Defendant was responsible for the stabbing.

#### CONCLUSION

{40} Based on the foregoing reasons, we reverse Defendant's convictions for second-degree murder and tampering with evidence, and remand the case for a new trial.

{41} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

LYNN PICKARD, Judge

CYNTHIA A. FRY, Judge

#### Certiorari Not Applied For

#### From the New Mexico Court of Appeals

**Opinion Number:  
2004-NMCA-005**

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
versus  
JEFFREY FAIRBANKS,  
Defendant-Appellant.  
No. 22,996  
(filed: October 8, 2003)

#### APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

ANGELA JEWELL, District Judge

PATRICIA A. MADRID  
Attorney General  
Santa Fe, New Mexico  
M. ANNE KELLY  
Assistant Attorney General  
Albuquerque, New Mexico  
for Appellee

JOHN B. BIGELOW  
Chief Public Defender  
JENNIFER BYRNS  
Assistant Appellate Defender  
Santa Fe, New Mexico  
for Appellant

#### OPINION

BUSTAMANTE, Judge

{1} Defendant appeals from an Order of Conditional Discharge, which required him to pay a \$75 crime lab fee. NMSA 1978, Section 30-31-28 (1972) (governing conditional discharges). The sole issue on appeal is whether the district court properly assessed the crime lab fee pursuant to NMSA 1978, Section 31-12-8 (1988) (crime lab fee statute). We reverse.

#### FACTS AND PROCEDURAL HISTORY

{2} In July 2000 Defendant was indicted for distribution of an imitation controlled substance and possession of a controlled substance. Defendant entered into a Plea and Disposition Agreement in which he agreed to plead guilty to the possession charge and the State agreed to dismiss the distribution charge. The State also agreed to a sentence of probation. There was no other agreement as to sentence. The Plea and Disposition Agreement was filed and recorded with the district court on October 30, 2000. There is no indication in the record that the district court ever formally accepted the plea. See Rule 5-304(B) NMRA 2003. Rather, at the first hearing, the district court deferred sentencing without entering an adjudication of guilt and referred Defendant to a drug

court program. One year later, following Defendant's successful completion of the drug court program, a second sentencing hearing was held. At that time, the district court granted Defendant a conditional discharge, credited him with eighteen months probation for his completion of the drug court program, and entered an unconditional Order of Dismissal, dismissing the criminal charges with prejudice. A month later, at the presentment hearing, defense counsel refused to sign the State's proposed Order of Conditional Discharge because it was conditioned on a \$75 crime lab fee. Defendant argued that a conditional discharge is an adjudication without guilt that does not constitute a "conviction" for purposes of the crime lab fee statute. The State maintained that the guilty plea which Defendant entered was a conviction, regardless of the sentence he received. The district court agreed with the State and entered an Order of Conditional Discharge, assessing the crime lab fee against Defendant as a "cost."

#### DISCUSSION

{3} Defendant argues that the crime lab fee statute applies only to persons "convicted" of a drug offense. Although he pled guilty to possession, Defendant reads the conditional discharge statute to expressly authorize the district court to grant a conditional discharge after a

guilty plea is entered and accepted by the court. Defendant urges that under the plain language of the statute, a guilty plea followed by a conditional discharge is not a conviction. Since there was no conviction, Defendant reasons that the imposition of costs was an illegal sentence, contrary to NMSA 1978, § 31-12-6 (1972).

{4} The State does not address the conditional discharge statute in its answer brief, although it concedes that the crime lab fee statute requires a conviction before the lab fee can be imposed. Instead, the State takes the position that the district court can impose costs, even without statutory authority, if the parties agree. In the State's view, Defendant agreed to pay the fee under the terms of the plea and those terms are binding. The State also points out that Defendant expressly agreed not to appeal any sentence imposed in accordance with the terms of the plea, and since the fee was an express term of the agreement, Defendant is not an aggrieved party for purposes of this appeal. However, if the fee was improper, the State argues that the appropriate remedy is to allow Defendant to withdraw the entire plea, rather than to delete a single term.

**Dismissal of Charges Under Conditional Discharge is not a Conviction for Purposes of the Crime Lab Fee Statute**

{5} We first address the question of whether the district court had authority to impose the fee. Resolution of this issue requires a determination of whether a dismissal under the conditional discharge statute is a "conviction" as contemplated by the crime lab fee statute. Statutory interpretation is a question of law that we review de novo. *State v. Perez*, 2002-NMCA-040, ¶ 10, 132 N.M. 84, 44 P.3d 530; *State v. Herbstman*, 1999-NMCA-014, ¶ 16, 126 N.M. 683, 974 P.2d 177.

{6} The fundamental tenet of statutory construction is to give effect to legislative intent. *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994); *State v. Saiz*, 2001-NMCA-035, ¶ 2, 130 N.M. 333, 24 P.3d 365. The primary indicator of legislative intent is the plain language of the statute. *Id.* We refrain from further interpretation where the language is clear and unambiguous. *State v. Anthony M.*, 1998-NMCA-065, ¶ 13, 125 N.M. 149, 958 P.2d 107. The relevant portion of the crime lab fee statute unequivocally requires Defendant to be "convicted" of a crime before the lab fee can be imposed.

It provides: "A person convicted of a violation of the provisions of the Controlled Substances Act [30-31-1, NMSA 1978] . . . shall be assessed, in addition to any other fee or fine, a fee of seventy-five dollars (\$75.00) to defray the costs of chemical and other analyses of controlled substances." Section 31-12-8(A) (emphasis added).

{7} The conditional discharge statute provides in relevant part:

A. If any person who has not previously been convicted of violating the laws of any state or any laws of the United States relating to narcotic drugs, marijuana, hallucinogenic or depressant or stimulant substances, is found guilty of a violation of Section 23 [30-31-23 NMSA 1978], after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place him on probation upon reasonable conditions and for a period, not to exceed one year, as the court may prescribe.

. . . .

C. If during the period of his probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt. . . . A discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the penalties prescribed under this section for second or subsequent convictions or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

Section 30-31-28 (emphasis added).

{8} It is difficult to conceive of a legislative command more clear. Under the plain language of subsection (A), upon a guilty plea or verdict, the defendant is placed on probation and sentencing is deferred without an adjudication of

guilt. See *Herbstman*, 1999-NMCA-014, ¶ 11 (comparing deferred sentence where adjudication of guilt is entered and conditional discharge where it is not); *Ogden*, 118 N.M. at 242, 880 P.2d at 853 (primary indicator of legislative intent is the plain language of the statute). Once the probationary period has been successfully completed, the person must be discharged and charges must be dismissed, without an adjudication of guilt, and the discharge or dismissal may not be deemed a "conviction" for any purpose. Consequently, once a defendant successfully completes probation and charges are dismissed under a conditional discharge, the conviction whether by verdict or plea, no longer exists. See *State v. Brothers*, 2002-NMCA-110, ¶ 10, 133 N.M. 36, 59 P.3d 1268.

{9} In addition, we note that the conditional discharge statute was in existence long before the crime lab fee statute was enacted in 1981. See 1972 N.M. Laws, ch. 84, § 28 (conditional discharge); 1981 N.M. Laws, ch. 367, § 3 (crime lab fee). Yet, the legislature expressly chose to make a "conviction" the prerequisite to imposing a crime lab fee, without exception. See NMSA 1978, § 31-12-8 (1988). Since then, the legislature has not altered the language of the conditional discharge statute to authorize a fee. See § 30-31-28 and NMSA 1978, § 31-20-13 (1994); compare NMSA 1978, § 31-18-17(B) (2003) (amending habitual offender statute to permit use of conditional discharge taken pursuant to Section 31-20-13 as a prior conviction). The legislature is presumed to be aware of existing statutes when it enacts legislation. *State v. McClendon*, 2001-NMSC-023, ¶ 10, 130 N.M. 551, 28 P.3d 1092.

{10} The State is correct that New Mexico courts hold that a guilty plea typically constitutes "conviction" once the court accepts and records it. See NMSA 1978, § 30-1-11 (1963); see also *Padilla v. State*, 90 N.M. 664, 666, 568 P.2d 190, 192 (1977) (finding defendant was "convicted" for purpose of habitual offender sentencing, even though criminal charges were dismissed under deferred sentence); *State v. Larranaga*, 77 N.M. 528, 529-30, 424 P.2d 804, 805 (1967) (holding "conviction" refers to finding of guilt by guilty plea or by verdict, and does not require imposition of sentence for purpose of habitual offender act); *State v. Mondragon*, 107 N.M. 421, 424, 759 P.2d 1003, 1006 (Ct. App. 1988) (defining conviction as finding

of guilt, even before formal adjudication by court or sentencing); *State v. Castillo*, 105 N.M. 623, 624, 735 P.2d 540, 541 (Ct. App. 1987) (“For all practical purposes, this defendant was ‘convicted’ of the prior crime at the time he entered, and the judge accepted, his plea. It is the fact of a prior conviction, not a prior sentence, that is dispositive.”). However, the State is incorrect insofar as it argues that the effect of a conditional discharge is only a “sentencing argument” that is not dispositive on the issue of whether there has been a “conviction” for purposes of the crime lab fee statute. This may be true in the case of a suspended or deferred sentence, even where criminal charges are dismissed, because there has been an adjudication of guilt. See *Padilla*, 90 N.M. at 666, 568 P.2d at 192. However, a conditional discharge is different than a suspended or deferred sentence because there is no adjudication of guilt. *Herbstman*, 1999-NMCA-014, ¶ 11 (finding conditional discharge is not a conviction for purposes of sex offender registration). Consequently, even though there is a guilty plea, the successful completion of probation under the terms of a conditional discharge results in the eradication of the guilty plea or verdict and there is no conviction. *Brothers*, 2002-NMCA-110, ¶¶ 9-10 (declining to find deferred sentence results in eradication of conviction for purposes of sex offender registration, in part, because to do so would make deferred sentence no different than a conditional discharge). Accordingly, we hold that without a conviction, the imposition of the crime lab fee was unauthorized.

**Absent Ambiguity or Resolution of Ambiguity Below, the Plea Agreement Must be Construed According to Defendant’s Reasonable Interpretation**

{11} The State urges us to uphold the district court’s decision to impose the fee, even if it was not authorized by statute, since Defendant agreed to pay it under the terms of the plea agreement, and he agreed not to appeal any sentence imposed within those terms. According to the State, the plea is, therefore, binding and Defendant is not an aggrieved party because he waived his right to appeal. Defendant counters that the State never made this argument below. As such, Defendant argues that even an appellee may not raise a new argument on appeal where it is unfair to the appellant. In Defendant’s view, the existence

of either an agreement or a waiver is a fact-based issue that cannot be raised for the first time on appeal because he must be alerted to the issue and be given an opportunity to present evidence on the factual issue at the district court level.

{12} While it is true that we do not affirm the decision of the district court where it would be unfair to one party because the argument was not made below, see *State v. Franks*, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct. App. 1994) (reviewing court will not affirm on fact-dependent ground not raised below given unfairness to defendant), this issue can be resolved on the plea agreement itself. Each of the State’s arguments is premised on one fact—that Defendant clearly and unambiguously agreed to pay the lab fee under the terms of the plea. The plea agreement contained the following terms:

#### TERMS

This agreement is made according to the following conditions:

**SENTENCING AGREEMENT:** State agrees to probation at initial sentencing. State has no other agreement as to sentence.

**PENALTIES:** The maximum for this charge is:

1. POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), a fourth degree felony with a basic sentence of eighteen (18) months with a \$5,000 fine, followed by one (1) year of parole.

In addition, the defendant must pay a \$75 Crime Lab fee.

Any basic sentence for a felony may be altered up to one third for aggravating or mitigating circumstances.

**POTENTIAL INCARCERATION:** If the court accepts this agreement, the defendant may be ordered to serve a period of eighteen (18) months incarceration. He may be ordered to serve a period of probation. If the defendant later violates that probation, defendant may be incarcerated for the balance of the sentence.

**CHARGES TO BE DISMISSED:** Count 1 of Indictment CR 00-002689.

**UNDISCLOSED PRIOR**

**CONVICTIONS:** The state may bring habitual offender proceedings, as provided by law, based on any convictions not admitted in this plea. The state may also choose to withdraw this plea agreement if it discovers any such convictions.

{13} The State argues the terms of the plea unambiguously mandates that “defendant must pay a \$75 Crime Lab fee,” whereas all other terms use the word “may.” In the State’s view, Defendant unconditionally agreed to pay the fee, even if payment is not authorized by statute. The State also argues that Defendant did not condition the plea on not paying the crime lab fee if he got a conditional discharge.

{14} Defendant counters that the only agreement as to sentence was that he would get probation. In Defendant’s view, the mandatory fee provision is merely a recitation of the maximum penalty for the offense. He notes that the fee provision is contained under a term describing the maximum penalties for the offense, and it is situated between two sentences describing maximum penalties. The purpose of this provision, according to Defendant, is merely to notify him of the potential consequences of the plea. Since the judge was free to sentence Defendant to any term of probation, he would have had to pay the fee if he had been convicted under a deferred or suspended sentence or subsequently incarcerated. However, since Defendant was given a conditional discharge, and he was never convicted, the term is not applicable. Defendant also argues that the term “may” as used in the other provisions, is appropriate because the district court always has sentencing discretion. Finally, Defendant represents, that given the opportunity, he would have presented evidence of his pre-agreement negotiations between himself and the district attorney concerning the terms of the agreement.

{15} “A plea agreement is a unique form of contract the terms of which must be interpreted, understood, and approved by the trial court.” *State v. Orquiz*, 2003-NMCA-089, ¶ 7, 134 N.M. 157, 74 P.3d 91 (quoting *State v. Mares*, 119 N.M. 48, 51, 888 P.2d 930, 933 (1994)); see Rule 5-304. “Upon review, we construe the terms of the plea agreement according to what Defendant reasonably under-

stood when he entered the plea.” *Orquiz*, 2003-NMCA-089, ¶ 7. “If the trial court resolves alleged ambiguities [with the parties at the time of the plea,] and no further objection is made, the agreement is no longer ambiguous on those points addressed by the court.” *Mares*, 119 N.M. at 51, 888 P.2d at 933. However, if the ambiguities are not addressed by the district court and there is no other relevant extrinsic evidence to resolve the ambiguity, the reviewing court may rely on the rules of construction, construing any ambiguity in favor of the defendant. *See id.* at 52, 888 P.2d at 934. Under these circumstances, contract interpretation is a legal issue that this Court reviews de novo. *See Hedicke v. Gunville*, 2003-NMCA-032, ¶ 24, 133 N.M. 335, 62 P.3d 1217; *Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 711, 845 P.2d 800, 805 (1992).

{16} In this case, there is no record of any plea proceeding. The record does reflect, however, that there was no discussion of the \$75 lab fee by the parties or the court at either sentencing hearing. In fact, the first time the State ever mentioned the fee was at the presentation of the judgment and sentence, one month after the charge was unconditionally dismissed without prejudice. The record also reflects that the district court was persuaded by the construction of the crime lab fee statute, not as a construction of the terms of the plea agreement. Further, neither party requested an evidentiary hearing on the issue.

{17} Given the lack of any record that the issue was discussed, much less agreed to, and our ruling that the imposition of the fee was not authorized by statute, we find

Defendant’s understanding of the plea agreement is reasonable. Our finding is supported by the terms of the plea itself, plus the fact that Defendant immediately objected when the district court ordered him to pay the \$75 lab fee as a condition of dismissal. We also find the State’s argument is unreasonable under the facts of this case. Essentially, the State is asking this Court to read language into the plea to find that the Defendant agreed to an *illegal sentence*.

{18} Parties are free “to negotiate the terms of a plea agreement to the *full extent allowed by law*.” *Mares*, 118 N.M. at 51, 888 P.2d at 933 (emphasis added). However, the State must bear in mind that the plea might ultimately prevent the court from ordering that term. *See id.* Under the crime lab fee statute, the court is authorized to impose a fee when a defendant is convicted. The fee would be authorized if defendant entered his guilty plea and received a deferred or suspended probated sentence or if he violated the terms of his probation under the conditional discharge. § 30-31-28(B). However, since Defendant successfully completed his probation and charges were dismissed, the district court did not have authority to impose the term.

{19} The State’s reliance on *State v. Handa* for the proposition that a defendant can agree to an illegal sentence and thereby waive his right to appeal is misplaced. 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995). In *Handa* the issue was not whether defendant can agree to an unauthorized sentence, but whether a defendant can knowingly and intelligently agree not to raise an issue on appeal

and then renege on that representation. *Id.* at 46, 897 P.2d at 233. We held that defendant could not renege on the deal where the error was invited. *Id.* Here there is no agreement for Defendant to renege on and there is no evidence that he invited any error. Further, since the fee was not part and parcel of the plea, this Court is not required to vacate the entire plea. *Compare State v. Gibson*, 96 N.M. 742, 743, 634 P.2d 1294, 1295 (1981) (denying defendant’s request to set aside unauthorized portion of plea where defendant expressly agreed to condition and stating that the remedy is to vacate entire plea).

{20} In light of the foregoing, we reverse the district court’s decision and remand for entry of an Amended Order of Conditional Discharge consistent with this opinion.

{21} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

IRA ROBINSON, Judge



Certiorari Denied, No. 28,411,  
January 8, 2004

From the New Mexico  
Court of Appeals

Opinion Number:  
2004-NMCA-009

IN THE MATTER OF DOMENIC J.  
PARADISO, deceased worker, and  
ROBERT and FRANCES DOAK,  
as parents  
and guardians of NICHOLAS and  
JOSHUA PARADISO, minors,  
Worker-Appellees,  
versus  
TIPPS EQUIPMENT and  
FOOD INDUSTRY SELF-  
INSURANCE FUND,  
Employer/Insurer-Appellants.  
No. 23,562  
(filed: November 20, 2003)

**APPEAL FROM THE  
WORKERS' COMPENSATION  
ADMINISTRATION**

SARA T. HARMON, Workers' Com-  
pensation Judge

DAVID DUHIGG  
JOHN J. DUHIGG  
DUHIGG, CRONIN, SPRING,  
BERLIN & BENCOE, P.A.  
Albuquerque, New Mexico  
for Appellees

PAUL L. CIVEROLO  
STURGES & HOUSTON, P.C.  
Albuquerque, New Mexico  
for Appellants

**OPINION**

SUTIN, Judge

{1} Tipps Equipment (Employer) and Food Industry Self-Insurance Fund (Insurer) appeal adverse decisions of a Workers' Compensation Judge (WCJ) denying enforcement of a settlement agreement and granting summary judgment awarding compensation based on findings of fact entered in a parallel district court action in which the court determined it had jurisdiction to award reimbursement to Insurer and thereafter ordered reimbursement. We affirm.

**BACKGROUND**

{2} Domenic Paradiso (the decedent) was killed in 1997 while employed by Employer, leaving two minor children (Children) born in 1995 and 1996. Two actions ensued, one, a wrongful death action in district court, and the other, a proceeding in the Workers' Compensation Administration (WCA) under the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2003) (the Act), and the Workers' Compensation Administration Act, NMSA 1978, §§ 52-5-1 to -21 (1986, as amended through 2003) (the WCA Act). We will refer to Employer and Insurer together as Insurer, because their interests are the same.

{3} The personal representative of the decedent's estate, Frances Doak, and Children, through their parent (mother) and next friend, Antoinette Romero, filed a wrongful death action against a cattle rancher and the New Mexico State Highway and Transportation Department. In October 1999, anticipating a lump sum settlement in the action, Children interpleaded Insurer based on Insurer's reimbursement right under the WCA Act. At the time of the interpleader, Insurer had paid the decedent's medical and funeral expenses and had been paying workers' compensation benefits to Children. The court permitted the plaintiffs to interplead Insurer "for the limited purpose of determining the reimbursement right of [Insurer]."

{4} An attorney was appointed both Children's Guardian Ad Litem to advise the court and Children's Conservator. This attorney's law firm (the law firm) represented Conservator and Guardian. Another attorney was appointed Guardian of Children to receive and manage all monetary benefits arising out of the death of the decedent for the benefit of Children and to meet with the mother of Children on a regular basis to develop a plan for the spending of Children's benefits.

{5} In December 1999, the plaintiffs and the defendants settled the claims in the district court action. The court approved the settlement and a stipulated order was entered in March 2000 dismissing the wrongful death action based on the settlement. The issue of Insurer reimbursement remained before the district court.

{6} In their interpleader complaint to determine Insurer's reimbursement right, the plaintiffs alleged that Insurer had paid 136.25 weeks of indemnity

benefits. The plaintiffs asserted that the total indemnity benefits payable would be for 700 weeks at \$363.60 per week, totaling \$254,520, and that the potential reimbursement claim of Insurer could be the \$254,520 amount, plus medical and funeral benefits already paid. Insurer responded by alleging that 146.25 weeks had been paid and alleging its entitlement to full reimbursement for those weeks of paid compensation, and admitting that if the estate or Children were entitled to 700 weeks, the total compensation would be \$254,520, but that "this is subject to application of New Mexico cases and authorities."

{7} Insurer asserted, however, that the district court lacked subject matter jurisdiction because the WCA had exclusive subject matter jurisdiction to determine the amount of reimbursement due from a third party settlement under Section 52-5-17. Children countered that the court had jurisdiction to decide the reimbursement issue.

{8} In August 2000, while the reimbursement issue was pending in district court, Insurer filed a workers' compensation complaint in the WCA for calculation and protection of its "full statutory right of reimbursement." Insurer claimed that under *Montoya v. Akal Security, Inc.*, 114 N.M. 354, 358, 838 P.2d 971, 975 (1992), Children had been made whole by the third party settlement in the wrongful death action but that, in the district court proceedings, the parties had not settled the question of right to reimbursement. Insurer sought WCA adjudication of the issue. Children, through Guardian, sought a dismissal of Insurer's WCA complaint on the ground that the district court, having concurrent jurisdiction and having first acquired jurisdiction, "retains jurisdiction."

{9} In the WCA proceeding, the law firm represented "Worker," who was described in the caption as "In the Matter of Domenic J. Paradiso, deceased, and Antoinette Romero as parent and natural guardian of Nicholas and Joshua Paradiso, minors," hereafter, referred to as Children. The law firm also represented both Guardian and Conservator for Children.

{10} In October 2000, a WCA mediator recommended that Insurer had "a dollar for dollar reimbursement right under relevant case law." On behalf of "Worker," the law firm refused to participate in the mediation process. By special appearance, Children asserted that the WCA

had no jurisdiction and Children also rejected the recommended resolution. In November 2000, the district court entered an order determining that it and the WCA "would have jurisdiction to hear the issues presented," and that the court was "the proper forum for hearing on the merits," and was "a proper forum for disposition of the [reimbursement] claims." In December 2000, a WCJ stayed the WCA action pending the district court's determination of the issues before the court.

{11} Following an evidentiary hearing, the district court entered findings of fact in June 2001 relating to both the wrongful death settlement and the reimbursement issue. Based on several supporting findings, the district court found that the settlement amount of \$630,000 was fair and reasonable. Based on several other supporting findings, the court concluded that Insurer was entitled to reimbursement by Conservator in the amount of \$50,063.

{12} Children sought entry of an order reflecting that Insurer owed the balance due on its 700-week benefits obligation. Rejecting that proposed order because the 700-week benefits issue "wasn't litigated," because the WCA had exclusive jurisdiction "to determine how much the remaining amounts are owed," and because Children were not foreclosed from pursuing that determination in the WCA, the court entered an order on August 9, 2001, stating:

1. Pursuant to the Court's Findings of Fact and Conclusions of Law, the Conservator . . . shall pay reimbursement to the [Insurer] in the amount of \$50,063.00.

. . . .

3. The sole issue before the Court was the amount of reimbursement under §52-5-17 to be paid by the Conservator to [Insurer] for benefits from the Third Party death settlement. No finding or conclusion entered herein shall affect the rights of any party on other issues pertaining to Workers' Compensation benefits.

This order ended the district court action and no party appealed from that order.

{13} The parties moved back over to the pending WCA proceeding. Children filed a motion in August 2001 asking

the WCJ to take judicial notice of and accept the findings of fact of the district court. Children asserted that the district court had jurisdiction to determine the question of reimbursement and that the court applied "the *Gutierrez* formula" in determining that question. See *Gutierrez v. City of Albuquerque*, 1998-NMSC-027, 125 N.M. 643, 964 P.2d 807 (creating a formula for determining an equitable WCA allocation of third party recovery settlement proceeds). The crux of this motion was that the court's employment of the *Gutierrez* formula, together with the court's entry of findings of fact, including its findings that under the Act "benefits are payable for a total of 700 weeks," and that Insurer's "obligation was for the payment of lost wages in the amount of \$254,520.00 as Workers' Compensation benefits," amounted to an adjudication of the issue of Children's right to further compensation benefits.

{14} Insurer responded in November 2001 that the issue of whether the court adjudicated Children's right to further compensation had already been raised by Children in the district court, after the court entered its findings, and that the court stated that the issue had not been litigated. Insurer emphasized that "the *sole* issue for disposition before the District Court was the issue of [Insurer's] reimbursement right," and that the court "clarified its ruling that the *sole* issue tried . . . was the issue of reimbursement only." In addition, Insurer asserted that the WCJ's exclusive jurisdiction of the issue required the WCJ to determine the issues in an evidentiary hearing.

{15} In a settlement conference on October 2, 2001, before a WCJ acting as mediator, the parties orally agreed to a settlement of the issue of Insurer's obligation for future benefits. Conservator was present. Another attorney from the same law firm, acting as attorney for Guardian and Conservator, placed the agreement on the record. The parties agreed that the \$50,063 check tendered to Insurer pursuant to the district court reimbursement order would be returned to Children and Children would also receive an additional \$45,000, totaling \$95,063. The issue of attorney fees was left for later resolution. The WCJ asked the parties to prepare an order, saying nothing at the time regarding the propriety of the settlement.

{16} Before any documentation of the settlement occurred and before entry

of any order approving the settlement, Conservator on October 5, 2001, sent a letter addressed to Insurer's attorney, the WCJ-mediator (Griego), and the attorney for Guardian and Conservator, recommending against approval of any lump sum settlement. Conservator stated he did not believe the proposed settlement was in the best interest of Children and that "in view of the tender age of the minor children, bi-weekly payment of compensation benefits is in the best interest of the children." In November 2001, Insurer countered with a motion to enforce the settlement. In this motion, Insurer argued that it was Conservator who made the settlement offer, Insurer accepted it, the attorney for both Conservator and Guardian placed the settlement on the record, and the WCJ approved it. The Insurer asserted that the settlement resolved the entire controversy with respect to Insurer's reimbursement and Children's entitlement to past and future benefits, and the settlement was binding and enforceable, leaving for resolution only the issue of the amount of attorney fees recoverable by Children.

{17} The WCJ heard and denied Insurer's motion to enforce the settlement. Although the WCJ found that the parties had orally agreed to a lump sum settlement which was placed of record, the WCJ found that the settlement could not be enforced. The WCJ determined that two essential requirements were absent: (1) a joint petition verified and signed by all parties, and (2) a fair and equitable settlement consistent with the WCA Act. See §§ 52-5-13, -14. The WCJ noted that "[w]hat happened here was simply that the Conservator had second thoughts about the wisdom of the settlement," and that Insurer was "understandably concerned about the withdrawal from a settlement agreement." However, the WCJ could not overlook the fact that the statutory requirements for a lump sum settlement approval were not met prior to Conservator's withdrawal of his agreement to the settlement.

{18} In March 2002, the WCJ turned to Children's pending motion asking the WCJ to take judicial notice of the district court's findings. The WCJ determined that the parties did not disagree on the content of the district court's findings and conclusions, or on its order, they only disagreed about the effect in the WCA

forum of the court's findings, conclusions, and order. The WCJ entered an order on April 1, 2002, taking judicial notice of the district court's findings of fact and conclusions of law, but the WCJ stated that "at this time no determination is made with respect to the effect of [the court's] findings, conclusions and order in this forum."

{19} Children proceeded to file a motion for summary judgment, contending that the doctrine of collateral estoppel barred any further litigation of facts and issues relating to Children's entitlement to further benefits and Insurer's reimbursement because those issues were litigated and decided in the district court proceeding. Insurer opposed summary judgment asserting, as it had in the prior hearing on Children's judicial notice motion, that the district court's findings were on the sole issue of reimbursement under Section 52-5-17. In specific response to Children's contention that the court's findings as to future benefits arose from an adjudication of the issue, Insurer reiterated that the court not only verbally stated on the record that the future benefits issue was not litigated, the court entered an order expressly limiting the effect of its findings. In addition, Insurer argued that under the presumption in *Montoya*, Children were "made whole" by the third party wrongful death settlement and what Children received in that settlement constituted the entire remedy available to them.

{20} In September 2002, the WCJ granted Children's motion for summary judgment, holding that Insurer was precluded based on collateral estoppel from challenging the district court's findings of fact. The WCJ stated that "only one conclusion is possible with respect to the survivors' right to future workers' compensation benefits," namely, that because the "[t]ort damages were \$2,312,372.60 and the fair and reasonable recovery was only \$630,000[,] [the] survivors were therefore not made whole and are entitled to continuing workers' compensation indemnity benefits."

{21} Further, the WCJ determined that Insurer was precluded from obtaining relief from future payments to the survivors due to "the manner in which the District Court calculated the reimbursement right." The WCJ's analysis of the district court's calculation was that, although the court should have based its reimburse-

ment determination solely on paid benefits, the court instead "factored the future entitlement to survivors' benefits into the reimbursement right." Specifically, the WCJ determined that a district court finding "calculated the full undiscounted 700-week entitlement at \$254,520.00," and that this "figure was used as the numerator and the tort damage figure for wage loss, [of] \$740,021.00, was used as the denominator," making "[t]he portion of the actual tort recovery allocated to wage loss [to be] \$201,600.00." It was from this \$201,600 amount that Insurer's gross reimbursement amount was determined. The WCJ determined that, because no appeal was taken from these calculations, "[t]he calculations . . . are the law of the case." In the WCJ's opinion, Insurer could not both obtain reimbursement for benefits not yet paid, yet be relieved of any obligation to pay those future benefits. Thus, the WCJ awarded future benefits payable pursuant to Sections 52-1-17 and 52-1-46, with no further Insurer reimbursement right.

{22} Insurer appealed this summary judgment and also the WCJ's order denying Insurer's motion to enforce settlement. Insurer asserts two points on appeal: (1) the WCJ erred in denying Insurer's motion to enforce settlement, because the settlement was binding and enforceable; and the settlement must be approved by this Court; and, in the alternative, (2) the WCJ erred in granting summary judgment in favor of Children, primarily because genuine issues of material fact existed in regard to the adequacy of the death settlement, and because further discovery was necessary for development of the facts and issues for the WCJ's independent determination of those issues. We divide the discussion into the two points raised by Insurer on appeal.

#### DISCUSSION

##### I. Claimed Error of WCJ in Refusing to Enforce the Settlement

###### A. Standard of Review

{23} The facts on this point are undisputed. We therefore review the issue de novo and determine whether the applicable law was correctly applied to the facts. See *Slack v. Robinson*, 2003-NMCA-083, ¶ 7, 134 N.M. 6, 71 P.3d 514 (reviewing district court's application of law to undisputed facts de novo); *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762 (stating that appellate court

reviews legal issues de novo where facts are not in dispute).

##### B. The WCJ Did Not Err in Refusing to Enforce the Settlement

###### 1. The Applicable Law

{24} The decedent's maximum disability recovery under the Act is 700 weeks. § 52-1-41(C). His eligible dependents are entitled to recover compensation benefits for death. §§ 52-1-17 (defining "dependents"), -46 (providing what payments are to be made to eligible dependents). In the present case, Children are the eligible dependents, and at all relevant times Children's interests were represented by Guardian and Conservator.

{25} The Legislature set unmistakable policy regarding lump sum payments under the WCA Act: "lump-sum payments in exchange for the release of the employer from liability for future payments of compensation or medical benefits shall not be allowed" except as specifically provided in the WCA Act. § 52-5-12(A). The policy favoring periodic payments over lump sum payments applies to protect "the best interest of the injured worker or disabled employee." *Id.*

{26} Section 52-5-12 does not mention a worker who dies or that worker's dependents. The exceptions to the WCA Act's policy that permit lump sum payments refer only to the worker and contemplate a worker who is alive. § 52-5-12(B), (C), (D). Nevertheless, like a lump sum payment agreement between a living worker and his employer, a lump sum payment agreement between a deceased worker's dependents and the worker's employer must be presented to a WCJ for approval. § 52-5-13. Therefore, we construe the Legislature's policy favoring periodic over lump sum payments in Section 52-5-12(A) to also apply to compensation due a deceased worker's dependents under Section 52-1-46.

{27} In furtherance of that policy, the WCA Act requires the dependents and employer to present a lump sum payment agreement to the WCJ through "a joint petition signed by all parties and verified by the . . . dependents." § 52-5-13. The WCA Act goes even further and requires the WCJ to "assure that the . . . dependents understand the terms and conditions of the proposed settlement." *Id.* In addition, the WCJ can approve the lump sum payment agreement only if the WCJ finds it "to be fair, equitable and consistent with provisions of the . . .

Act,” and enters an order approving the agreement. § 52-5-14(A); *Cruz v. Liberty Mut. Ins. Co.*, 119 N.M. 301, 304-05, 889 P.2d 1223, 1226-27 (1995). The WCA Act also permits the WCJ to even refuse to approve “a settlement” if the WCJ “does not believe that it provides substantial justice to the parties.” § 52-5-14(A).

## 2. Application of the Law

{28} The lump sum payment agreement was initially oral. It was offered by Conservator and accepted by Insurer. Guardian knew of the agreement and did not object. There exists no suggestion that Conservator and Guardian did not have an opportunity to know and consider all facts and circumstances material to the settlement. Nor is there any suggestion that the negotiations were anything but fair. Conservator’s attorney read the agreement into the record in the presence of the WCJ-mediator. Afterwards, the WCJ-mediator stated: “Okay. What I will do is I will inform Judge Harmon of the resolution. Do you want to submit the order and . . . paperwork to me or would you prefer to submit it to her?” The parties agreed that the order would be submitted to Judge Griego, who was the WCJ-mediator, and that he could sign as the settlement facilitator. The WCJ-mediator responded with “all right” and “okay.”

{29} We determine that this oral agreement recorded during the October 2001 settlement conference was an expression of the parties’ intent to bind the parties to that agreement. *See Cruz*, 119 N.M. at 304, 889 P.2d at 1226 (holding lump sum settlement agreement that was written and signed to be a binding expression of the parties’ intent); *Rojo v. Loeper Landscaping, Inc.*, 107 N.M. 407, 410, 759 P.2d 194, 197 (1988) (same); *Esquibel v. Brown Constr. Co.*, 85 N.M. 487, 490, 513 P.2d 1269, 1272 (Ct. App. 1973) (holding oral agreement approved by court binding even though not reduced to writing). Children do not contend otherwise. Judge Harmon, the WCJ who decided the various motions and the merits in the WCA proceeding also determined that such an oral agreement was enforceable under prior Workers’ Compensation law and case law. However, to be enforceable, the agreement had to be approved by a WCJ. *See* §§ 52-5-13, -14(A). Nothing in the record indicates that either a WCJ in the presence of whom the settlement agreement was recorded, or any other

WCJ, determined that the settlement was “fair, equitable and consistent with provisions of the . . . Act” pursuant to Section 52-5-14(A). Nor has any WCJ entered an order containing those findings and approving the settlement, as required under Section 52-5-14(A).

{30} Insurer argues that the WCA Act’s requirements do not apply because this was not a lump sum payment as contemplated under Sections 52-5-12, -13, and -14. Insurer’s reasoning is that there was no issue as to whether a lump sum payment would be permitted instead of the continuation of periodic payments. The only issue, Insurer argues, was a disputed one concerning whether Worker or his dependents were even entitled to continued benefits, i.e., whether Children had been made whole and thereby were not entitled to benefits. Insurer therefore sees the settlement as nothing more than a settlement of a disputed claim. We reject this attempt to avoid application of the WCA Act’s requirements to the settlement at issue here. While the settlement appears to have been of disputed positions, it nevertheless affected Children’s potential opportunity, if not right, under the Act to receive continuing, periodic payments. We interpret Sections 52-5-12 through -14 to include this particular settlement agreement.

{31} This lump sum payment agreement was not enforceable in the absence of approval as required under the WCA Act. Approval by a WCJ in strict accordance with the requirements of Sections 52-5-13 and -14(A) is necessary to assure adherence to the policies established by the Legislature favoring periodic payments over lump sum payments, requiring careful effort to assure that a worker or the dependents understand the consequences of replacing periodic payments with a discounted lump sum amount, and assuring that the settlement is fair, equitable, and consistent with the Act. If a party wants to assure that a settlement agreement is enforceable, the party must obtain WCJ approval as clearly and expressly set out in the WCA Act. After consideration of all of the material circumstances surrounding the lump sum settlement agreement, the WCJ must enter an order that expressly states that the agreement is “fair, equitable and consistent with the provisions of the . . . Act.” § 52-5-14(A).

{32} We determine that the lump sum

payment agreement was not enforceable because it was not approved as required under the WCA Act. The WCJ-mediator’s statements at the hearing did not, as argued by Insurer in its reply brief, constitute an “implicit” approval of the payment agreement that satisfied the express statutory requirements, and even if they did, an implicit approval does not pass statutory muster. We therefore hold that the WCJ properly denied Insurer’s motion to enforce the payment agreement.

{33} Insurer should have, but did not, ask Judge Harmon, the WCJ before whom the motion was heard, to approve the payment agreement. Insurer sought only to enforce an agreement that was already, in Insurer’s view, properly approved. It does not appear that Judge Harmon considered whether to approve the payment agreement or to refuse to approve it. All that occurred was Insurer’s argument on its motion to enforce the payment agreement on the grounds it was binding and placed of record, followed by the WCJ’s decision denying the motion because it was not presented and approved as required under the WCA Act. Thus, what occurred was, at best, an unexpressed, implicit refusal of Judge Harmon to approve the payment agreement—something unacceptable under the WCA Act.

{34} Insurer’s main thrust is that failure to enforce the settlement agreement undermines the strong public policy favoring settlement and the enforcement of settlement agreements. We are not without concern. There is little that can discourage settlement activity more than to permit a party to renege *at will* after an agreement is reached and voluntarily placed on the record, following fair negotiations, and when the parties have had full opportunity to know the facts necessary to make knowing, informed decisions. Were it not for the express requirements of the WCA Act, Children would be bound by their agreement. Having entered into an otherwise binding agreement, the parties were entitled to request and receive express WCJ approval or rejection as required under the WCA Act.

{35} We could treat Insurer’s motion to enforce settlement as having implicitly requested the WCJ to approve or reject the agreement. However, in this Court, as it did below, Insurer insists on enforcement

of an agreement it contends was already approved. Insurer does not request that we remand for approval or disapproval of the settlement agreement. We, therefore, close this issue with our holding that the agreement is not enforceable. In choosing not to complete the process through a remand for approval or rejection of the agreement, we want to make it clear that we in no way condone the WCJ's failure to hold a hearing on Children's request that the agreement they made not be approved and the failure to make the express determinations required under the WCA Act.

{36} Because we hold that the agreement is not enforceable for lack of WCJ approval, we need not address or decide whether the circumstances leading up to the point the agreement awaited WCJ approval constituted compliance with the requirement in Section 52-5-13 of "a joint petition signed by all parties and verified by the worker or his dependents."

## II. Claimed Error of WCJ in Granting Summary Judgment in Favor of Children

### A. Standard of Review

{37} In reviewing a grant of summary judgment based on the nonmoving party's contention on appeal that genuine issues of material fact exist, we consider the whole record for any evidence that puts a material fact at issue. *Roth v. Thompson*, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992). If no genuine issue of material fact exists that would preclude judgment as a matter of law, we review legal questions de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

### B. Insurer's Point

{38} Insurer's point on appeal is that summary judgment should have been denied based on the existence of disputed material facts and based on its not having sufficient factual discovery on and development of the issues. We understand Insurer's basic contention to be that the evidentiary facts underlying the ultimate issues of fact found by the district court were disputed by the parties, and further, that it was up to the WCJ to independently make those ultimate findings after further discovery in the WCA proceeding. Insurer did not appeal

the district court's judgment, and cannot complain about the court's findings of fact and conclusions of law. Insurer's contentions succeed or fail based on whether the court's factual determinations were off limits to the WCJ. Insurer's argument centers not on factual issues, but on the WCJ's application of collateral estoppel. This is a legal issue, not a factual issue. Because we hold that the WCJ properly employed collateral estoppel, no genuine issues of material fact exist as to the award of future benefits, and no discovery or development of further facts was necessary before the WCJ awarded benefits.

### C. The Underlying Problem Elucidated

{39} The underlying problem in attempting to find the real issue is the lack of clarity of jurisdiction and also of what the district court was adjudicating and deciding. In addressing Insurer's *reimbursement*, the district court took on an issue that likely should have involved, but did not involve, contemporary analyses of (1) the extent of *reimbursement* to which an employer/insurer is entitled from a third-party tortfeasor settlement for compensation and other *benefits already paid* by the employer/insurer to a worker, and (2) whether a worker is made financially whole by the settlement funds and, if not, the extent to which the worker is entitled to further periodic compensation and other benefits and the extent to which the employer/insurer may be entitled to *reimbursement* from the settlement as a credit *against such future periodic payments* of compensation and other benefits. In the present case, however, the district court appears to have been itself unclear as to its jurisdiction, the scope of what it was to determine, assuming it had jurisdiction, and the manner in which reimbursement from a third-party settlement would be awarded when an employer/insurer is still obligated for future benefits.

{40} It appears the court intended, at the very least, to leave to the WCA the legal determination of whether Children were entitled to future benefits and, if so, what those benefits should be. The district court proceedings left us with unanswered

questions. Did the court enter findings of fact so as to permit conclusions to be drawn regarding future benefits, but decline the next step of drawing the conclusions, thinking that only the WCJ had jurisdiction to do so? Or, did the court intend its findings of fact to be so limited in purpose and effect as to be unavailable to the WCJ under the collateral estoppel doctrine? Last, did the court award Insurer reimbursement for both paid and future benefits, intending to foreclose Insurer from any further reimbursement even though Insurer may be obligated for future benefits?

{41} Insurer does not contend on appeal that the district court lacked jurisdiction to decide what it did or to enter the findings of fact and conclusions of law that it entered. Nor does Insurer contend on appeal that the WCA has exclusive jurisdiction to decide whether Children are entitled to future benefits and what those benefits should be. *See* § 52-1-6(E) (stating that the Act "provides exclusive remedies" and that no cause of action outside the WCA shall be brought by a dependent or an insurer "for any matter relating to the occurrence of or payment for any injury or death covered by the . . . Act"). Further, the parties do not raise on appeal whether the district court had jurisdiction to actually award future benefits to Children under the Act or actually awarded such benefits. We have not been invited to raise and address these jurisdictional issues sua sponte, and we choose not to do so.<sup>1</sup>

{42} The district court in the present case saw jurisdictional problems and apparently attempted to back away from them after entering its findings and conclusions by placing in its order limiting language. The WCJ did not independently evaluate the facts that necessarily were material to the issue whether Children are entitled to future benefits, what future benefit obligation Insurer has, if any, and to what reimbursement, if any, from the third party settlement, Insurer would be entitled from future payments it was required to make. Given that the district court exercised jurisdiction it believed it had, the issues are (1) whether factual issues were adjudicated in the district court

<sup>1</sup> The issue of jurisdiction of the district court to order reimbursement of paid benefits from a third party settlement, to adjudicate entitlement to future benefits, and to award such benefits from a third party settlement, are, and remain open issues in New Mexico. Cases in other states have addressed jurisdiction, coming down on both sides. *See, e.g., Hughes v. Argonaut Ins. Co.*, 105 Cal. Rptr. 2d 877, 883 (Cal. Ct. App. 2001); *Shirley v. Pothast*, 508 N.W.2d 712, 714-17 (Iowa 1993); *Nunez v. Loomis Fargo & Co.*, 807 So. 2d 1063, 1070 (La. Ct. App. 2002); *Henning v. Wineman*, 306 N.W.2d 550, 553 (Minn. 1981).

action and, if so, whether the findings are binding on the parties in the WCA action, permitting the WCJ to proceed, based on those findings, to determine the legal question whether Children are entitled to future benefits and to award the benefits; or rather (2) whether the WCJ was required, under the Act, to separately and independently consider and determine the facts and make separate, independent findings of fact before concluding whether Children are entitled to future benefits, thus precluding the application of collateral estoppel even if the doctrine were otherwise applicable. In this case, the WCJ took judicial notice of the findings of the district court and then held that the findings were binding on the parties under the doctrine of collateral estoppel.

**D. The District Court's Findings**

**1. Findings Relating to Wrongful Death Settlement**

{43} The district court set out several findings that appear intended to relate primarily or solely to the settlement of the wrongful death action. Among them were findings of the decedent's 1996-97 wages; his life and work-life expectancies; present cash value of future wage loss, totaling \$740,021; present cash value of lost household services and loss of guidance and counseling; medical and funeral expenses; value of loss of life; and total damages of \$2,312,372.60 resulting from wrongful death. The wrongful death action resulted in a settlement of all claims for \$630,000, of which, after deducting attorney fees and costs, \$384,867.51 was paid for the benefit of Children. The court found the settlement to be "fair and reasonable under all attendant circumstances, including, but not limited to, issues of proof of liability reasonably and prudently considered by Plaintiff's counsel in settling the matter."

**2. Findings Relating to Insurer Reimbursement**

{44} The court also set out findings that appear to relate solely to the reimbursement issue, although some of the court's findings relating to the wrongful death settlement were also used in connec-

tion with the court's findings relating to Insurer reimbursement. Insurer paid 180 weeks of 700 payable weeks of compensation benefits, totaling \$65,449.20, and paid medical and funeral expenses of \$32,747.60. Insurer's obligation was to pay \$254,520 as compensation benefits for lost wages, which was 34.4% of the total wage loss of \$740,021. Of the settlement amount of \$630,000, 32%, or \$201,600 was allocated to wage loss, entitling Insurer to a gross recovery of \$69,350, which represented 34.4% of the \$201,600 wage loss allocation. Based on a 38.91% cost of recovery incurred by Plaintiff and applying Insurer's pro rata share of that cost of recovery, Insurer was entitled to recover \$42,366 for the wage loss compensation that it paid. The medical and funeral expenses of \$32,747.60 represented 2% of the total damages figure and that equated to \$12,600, entitling Insurer to recover \$7,697 after deduction of its pro rata share of the cost of recovery. Adding the two recoveries of \$42,366 and \$7,697, the court entered a conclusion of law that Insurer was entitled to reimbursement of \$50,063 to be paid by Conservator.<sup>2</sup>

{45} As indicated earlier in this opinion, the court's order also stated that:

[t]he sole issue before the Court was the amount of reimbursement under §52-5-17 to be paid by the Conservator to [Insurer] for benefits from the Third Party death settlement. No finding or conclusion entered herein shall affect the rights of any party on other issues pertaining to Workers' Compensation benefits.

The court simultaneously rejected Children's proposed order requiring Insurer to pay future periodic benefits, stating, with respect to the express award of future benefits:

THE COURT: Here's my problem: I didn't litigate that. We didn't litigate that. That issue wasn't litigated.

MR. DUHIGG: I think it was not litigated because it was admitted. In other words,

there was nothing —

THE COURT: Well, nobody tendered a finding or request or anything like that. That's my problem with entering an order on something that nobody — I mean, maybe it's implied, but isn't that more appropriate for the comp administration to enter?

Children's counsel proceeded to explain further why Children's proposed order was appropriate, following which, the court stated:

THE COURT: Okay. All right. Well, I disagree with you, and I think Mr. Civerolo is right, because there may be something — you are not foreclosed, particularly under his form of order. The workmen's comp administration has exclusive jurisdiction, I believe, to determine how much the remaining amounts are owed.

The sole issue that was presented to me — maybe implicitly you are right, but maybe it was not explicit. I am uncomfortable signing an order based on findings as a result of what transpired in our courtroom, but that's not — there was no finding, no requested findings, no conclusions to that effect.

Mr. Civerolo's form of order indicates accurately that the Court has ordered reimbursement of [\$]50,000, that each party should bear their own fees and costs, and that there shall be no finding or conclusion entered herein to affect the rights of any party on other issues pertaining to workmen's compensation benefits, thereby preserving both yours and his client's rights to duke it out, if you will, in the comp administration.

Perhaps it's a procedural

<sup>2</sup> The constituent parts of the \$2,312,372.60 total damages figure broke down into the following percentages:

Medical and funeral expenses	\$ 32,747.60	2.0%
Lost Wages	740,021.00	32.0%
Household Services	257,039.00	11.0%
Lost Guidance/Counseling	282,565.00	12.0%
Lost Value of Life	1,000,000.00	43.0%

matter that could have been taken care of earlier. I'm not sure that it can be, because I don't think this Court has jurisdiction to make the kinds of determinations that you're asking me to. Okay?

### 3. The WCJ's Treatment of the District Court's Findings

{46} When the issue of what was adjudicated in the district court reached the WCJ on Children's motion for summary judgment, the WCJ viewed the critical factual issues to have already been necessarily adjudicated in the district court. The WCJ analyzed the four elements of collateral estoppel, citing *Reeves v. Wimberly*, 107 N.M. 231, 233, 755 P.2d 75, 77 (Ct. App. 1988). The WCJ determined that the parties were the same, the subject matter was different, the district court conducted a trial on the merits, the parties litigated, and the court determined critical factual issues.

{47} In particular regard to the two requirements, namely, "the ultimate facts or issues were actually litigated," and "the issue was necessarily determined," *id.*, the WCJ stated:

The District Court conducted a trial on the merits. Under *Gutierrez* . . . the parties had to litigate and the District Court had to determine the total amount of the tort damages and whether the tort recovery was fair and reasonable. In Finding of Fact 18[,] the District Court found: "Plaintiff's damages incurred as a direct and proximate result of the wrongful death of its Decedent are \$2,312,372.60." In Finding of Fact 19, the District Court found: "The settlement reached between Plaintiffs and the third-party tortfeasors . . . was fair and reasonable under all attendant circumstances, including, but not limited to, issues of proof of liability reasonably and prudently considered by Plaintiff's counsel in settling the matter."

Based on the District Court's Findings of Fact, which are given preclusive effect, only one conclusion is possible with respect to [Children's] right to future workers' compensation

benefits. Tort damages were \$2,312,372.60 and the fair and reasonable recovery was only \$630,000.00. [Children] were therefore not made whole and [Children] are entitled to continuing workers' compensation indemnity benefits.

The WCJ gave preclusive effect to the findings and granted Children's motion for summary judgment holding that Children were entitled to continuing compensation benefits.

{48} In addition, the WCJ concluded that Insurer was precluded from obtaining any further relief in regard to reimbursement because of the manner in which the district court calculated Insurer's reimbursement right. Quoting *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 34, 122 N.M. 103, 920 P.2d 1057, the WCJ determined that "[u]nder the applicable case law, the District Court should have based the reimbursement right solely on paid benefits," because "[a]ny potential right to relief from payment of future benefits should have been addressed separately [due to the fact that] [t]he right to reimbursement arises only after payment of compensation and should not precede compensation." However, according to the WCJ, the district court "factored the future entitlement to survivors' benefits into the reimbursement right" when the court "calculated the full undiscounted 700-week entitlement at \$254,520[.]" used that amount as the numerator and the tort damage wage loss figure of \$740,021 as the denominator, with a resulting \$201,600 as the portion of actual tort recovery allocated to wage loss, and allowed recovery before deduction for pro rata cost of litigation, of 34.4% of that amount, or \$69,350. The WCJ calculated Insurer's reimbursement right for wage loss before deduction for pro rata cost of litigation, stating that if the court had considered only paid benefits, the benefits would have been 8.8% of \$201,600, or \$17,740.80. Thus, the WCJ concluded, Insurer "wants to be reimbursed for future benefits that have not yet been paid[.]" yet, "[a]t the same time, . . . wants to be relieved of any obligation to pay those future benefits." According to the WCJ, "Insurer cannot have it both ways."

E. The Significance of *Montoya* and *Gutierrez*

{49} In *Montoya*, the employer was pay-

ing temporary total disability benefits to the worker when the worker sued the third party tortfeasor and settled that action for \$7,500. *Montoya*, 114 N.M. at 355, 838 P.2d at 972. Following dismissal of the tort action based on the settlement, the employer ceased paying compensation. *Id.* The worker then filed a claim to reinstate the benefits. *Id.* The WCJ granted the employer summary judgment on the basis of existing case precedent ruling that "when the worker collects in full a judgment from a third-party tortfeasor in an amount that is less than the maximum the worker would have been entitled to receive under the Act, the worker is barred from subsequently recovering workers' compensation." *Id.* at 356, 838 P.2d at 973. The rationale underlying the case precedent was the concern about "the purported double recovery that would arise should the [worker] be permitted to receive compensation," that is, recovery by the worker for the full loss suffered, making him financially whole, and also receipt of subsequent compensation. *Id.*

{50} The Supreme Court, in *Montoya*, reversed the denial of benefits to the worker by the WCJ. *Id.* at 354, 838 P.2d at 971. Under the view that the broader objective of Section 52-5-17 was "to achieve an equitable distribution of the risk of loss," *id.* at 357, 838 P.2d at 974, the Court overruled precedent that had created "the fiction that a worker has been made financially whole when the worker has received less than the compensation and related benefits to which [the worker was] entitled under the Act." *Id.* at 358, 838 P.2d at 975. The Court stated that "[i]f there is a problem with a satisfaction of a third-party claim, it does not go to double recovery. Rather, it goes to the amount of reimbursement or credit to which the employer is entitled." *Id.* at 358, 838 P.2d at 975. The Court further stated that the worker could show that a compromise settlement did not discharge fully the employer's liability to pay benefits, and that "if the worker has dealt with the third party in good faith and at arm's length, then the net amount paid presumptively would be the amount by which the employer's liability is reduced." *Id.*; see also *Gutierrez*, 1998-NMSC-027, ¶ 14 (interpreting this language in *Montoya* to require the WCJ, in making an equitable allocation of settlement proceeds, to "start from the

presumption that the employer is entitled to full reimbursement"). The Court concluded with the statement:

If fairness of the amount is contested, the [WCJ] must hold a hearing to determine whether the amount paid to satisfy the third-party claim comports with the proportionate fault of the third party and with a reasonable compromise of the liability of that party. In such a contest, it is for the [WCJ] to decide the employer's right to reimbursement and credit, if any, against liability for future compensation and related benefits.

*Montoya*, 114 N.M. at 358, 838 P.2d at 975.

{51} In *Gutierrez*, the Supreme Court revisited Section 52-5-17 and *Montoya*. *Gutierrez*, 1998-NMSC-027, ¶ 1. The Court stated *Montoya*'s holding to be "that Section 52-5-17 allows an injured worker to pursue a third-party tort claim and also receive compensation benefits for the same injury, subject to an employer's right of reimbursement depending on the relative success of the tort claim." *Id.* *Gutierrez* refined this *Montoya* holding by limiting the amount of reimbursement to which an employer is entitled to "that portion of the settlement proceeds which duplicates compensation benefits paid under the Act." *Id.*

{52} *Gutierrez* created a formula for the WCJ to use in performing the judge's duty to "equitably allocate the proceeds." *Id.* ¶ 7. The broad statement of the formula was that:

[T]he employer's extent of reimbursement for compensation paid is determined by identifying the nature and purpose of the payments made by the employer, and comparing the elements of the tort recovery with those which are duplicative of the employer's compensation payments. The total of the duplicative payments is the amount which must be reimbursed.

*Id.* ¶ 8. The Court's rationale for use of this formula was that "[a] windfall [to the employee] occurs only to the extent that the tort recovery duplicates the elements of damage covered by compensation benefits." *Id.* ¶ 10. Because a worker's "fair

but partial tort recovery" may not duplicate compensation benefits, the WCJ must "analyze and compare the worker's two recoveries in order to determine the extent of duplication, and thus determine the extent of the employer's reimbursement." *Id.* ¶ 13.

{53} *Gutierrez* set out a specific formula. The first determination is the amount of damages needed to make the plaintiff in the tort action whole, broken down into each separate element of damage, with a comparison then of each of these elements to the elements of workers' compensation benefits received by the worker in his WCA proceeding. *Id.* ¶¶ 15-16. Through this comparison, the WCJ in *Gutierrez* was to determine, with respect to each separate duplicate element, whether the compensation payments covered the entire damage amount. If not, a determination was to be made as to what percentage the payments covered the damage amount, as to each separate duplicate element. The employer then can be reimbursed that percentage of the damage amount attributed to the duplicate elements. Of course, where there exists no duplication, as when tort recovery is for the element of pain and suffering for which there exists no duplicate element under the Act, the employer gets no reimbursement. *Id.* ¶¶ 17-19. The employer's reimbursement is reduced further based on its pro rata share of attorney fees and costs. *Id.* ¶ 19. In this manner, the Court held, "an employer is entitled to recoup the amount of a worker's duplicative recovery." *Id.* ¶ 28.

#### 1. Insurer's Reliance on *Montoya*

{54} Insurer argued in district court that under *Montoya*, "if a third-party recovery is contested, it is the WCJ who must hold a hearing to determine (1) whether the amount paid is proportionate to the fault of the third-party and therefore, a reasonable compromise of liability, and (2) whether the Estate has been made whole and [Insurer's] right to reimbursement and credit for future compensation-related benefits has been protected."

{55} Insurer contends on appeal that, because of the legal presumption created in *Montoya* that the worker is made whole by virtue of a settlement, and because this presumption was not litigated or overcome in the district court action but, rather, is at issue in the WCA action, the

application of collateral estoppel was improper.

{56} Children pay little attention to *Montoya*. They argue in a footnote that *Montoya*'s rejection of the fiction of financial wholeness and statement that any problem with satisfaction of a third party claim does not go to double recovery but to the amount of reimbursement, and *Gutierrez*'s formula for determining the amount of reimbursement, have eliminated any presumption that a worker is made whole by a third party settlement.

#### 2. Children's Reliance on *Gutierrez*

{57} In their answer brief on appeal, Children contend that the district court actually applied the *Gutierrez* reimbursement formula when it determined that Insurer was entitled to \$50,063. Children reach this conclusion based on the court's analysis of each element of damages, as shown in the court's findings. Children assert that "[t]he issue as to whether [Children] are entitled to future benefits was[,] if not explicitly, implicitly litigated by the District Court in its calculation of [Insurer's] right of reimbursement utilizing the *Gutierrez* formula."

{58} In its brief in chief and reply brief on appeal, Insurer does not mention *Gutierrez*, or discuss whether the district court applied or necessarily had to have applied the *Gutierrez* formula. Insurer ignores *Gutierrez* despite the facts that the court obviously followed the *Gutierrez* formula, the WCJ relied on *Gutierrez* in her analysis, and Children relied on *Gutierrez* in their argument on appeal. We treat Insurer's silence as a concession by Insurer that the court applied the *Gutierrez* formula.

#### F. The WCJ Did Not Err in Granting Summary Judgment for Children

{59} Insurer attacks the WCJ's legal determinations on the ground that she had to reach the determinations through independent evaluation of the facts, not by invoking collateral estoppel thereby adopting the district court's findings. Insurer does not attack the WCJ's determinations as being legally erroneous. Therefore, if the WCJ correctly invoked collateral estoppel, Insurer's appellate position cannot succeed. We hold it is unpersuasive and cannot succeed.

{60} The court's *Gutierrez* analysis, factual findings, and legal determinations as to past and future reimbursement permitted the WCJ to invoke collateral



estoppel to bar Insurer from requiring the WCJ to adjudicate the issues that were already and necessarily adjudicated by the district court. Furthermore, the WCJ's unattacked legal determination that Children were not made whole permitted the additional determination that Children were entitled to recover the remainder of compensation due under the 700-week allowance.

{61} The issue regarding Children's claim to future compensation benefits was raised and discussed during the district court proceedings. The parties were well aware of that issue. They could and should have anticipated that the issue would be decided either by the court or the WCJ. Insurer could and should have anticipated that the district court's findings of fact might be employed to resolve

the issue whether Children were made whole under *Montoya* and *Gutierrez*, and the issue whether Children had a right to further benefits. Although Insurer might have reasonably believed that the court's statements regarding its findings would protect Insurer in the WCA proceeding, the findings were made, and they were made in connection with the closely related issue of Insurer's reimbursement right and amount. We do not think that Insurer's intention and belief, even considering the district court's unclear expression of its intent, are sufficient to have precluded the WCJ, under the circumstances in this case, from taking judicial notice of the findings and then adopting them as findings in the WCA proceeding under the collateral estoppel doctrine.

**CONCLUSION**

{62} We affirm the orders of the WCJ denying Insurer's motion to enforce the settlement agreement and granting summary judgment in favor of Children.

{63} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

MICHAEL E. VIGIL, Judge

**Certiorari Not Applied For**

**From the New Mexico Court of Appeals**

**Opinion Number:  
2004-NMCA-006**

ROBERT SALCIDO, ROBERT ZEISSEL, BARBARA BOLTREK, GUST KARMERIS, JR., and JAMES HRUSCHAK, on behalf of themselves, and all other similarly situated, Plaintiffs-Appellees, versus FARMERS INSURANCE EXCHANGE, MARTY DRAPER, Defendants-Appellants. No. 24,104 (filed: November 6, 2003)

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

TED BACA, District Judge

TURNER W. BRANCH  
MARGARET MOSES BRANCH  
CLYDE W. DEMERSSEMAN  
BRANCH LAW FIRM  
Albuquerque, New Mexico  
for Appellees

ANDREW G. SCHULTZ  
RODEY, DICKASON, SLOAN,  
AKIN & ROBB, P.A.  
Albuquerque, New Mexico  
for Appellants

**OPINION**

KENNEDY, Judge

{1} Defendants apply to this Court for review of the district court's order granting class certification to claims adjusters employed by Farmer's Insurance Exchange (FIE). We are presented with the threshold question of what factors will guide our discretion when considering requests for interlocutory review of class certification decisions under Rule 1-023(F) NMRA 2003. Applying the guidelines we adopt herein, we deny Defendant's application for appeal.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

{2} In July 2001, Plaintiffs brought this action under NMSA 1978, § 50-4-22(C) (2003), of the New Mexico Minimum Wage Act, seeking to recover overtime payments for work they performed as claims adjusters for FIE. Defendants represent that FIE is a reciprocal insurance exchange company that sells insurance policies, collects insurance premiums, and reinsures risks and invests premiums. FIE's sales of insurance and reinsurance business appears to primarily involve the adjustment and settlement of claims. The claims adjusters who sought class certification held the titles of personal lines claims representative, senior claims representative, and special claims representative.

{3} Before Plaintiffs brought this action, several other classes of claims adjusters throughout the country were certified in similar class action suits brought against

FIE. Three months after Plaintiffs initiated the case at bar, the class action suits in Colorado, Illinois, Michigan, Minnesota, New Mexico, Oregon, and Washington were consolidated into one multi-district litigation (MDL), by stipulation of the parties. That action was bifurcated into two phases: liability and damages. The classes in the MDL agreed to argue FIE's liability under the Federal Labor Standards Act (FLSA) and the overtime laws of the seven states where the actions originated. Also as part of the agreement, FIE stipulated to the certification of a class composed of those claims adjusters who have worked in one or more of the seven states during the class period, while holding the titles of personal lines claims representatives, senior claims representatives, and special claims representatives. The parties further agreed to jointly submit a proposed class certification order.

{4} Soon after the MDL stipulation was approved, Plaintiffs in the present action filed an emergency motion to certify their proposed class, strike Defendants' response to the certification motion, and to send notice to class members. Plaintiffs argued that Defendants should be precluded from opposing class certification based on FIE's stipulation in the MDL. Plaintiffs stated that they were willing to accept the MDL class definition even though it varied slightly from the definition they originally proposed. Rejecting Plaintiffs' argument, the district court concluded it had an obligation to evaluate the proposed class under Rule 1-023(F) independent of Defendants' stipulation

in the MDL.

{5} Following a hearing on the merits of Plaintiffs' motion for class certification, the district court certified a class composed of personal lines claims representatives, senior claims representative, and/or special claims representative who worked for FIE while in New Mexico between September 17, 2000, and the date the court approved notice to the class members is mailed. In their application for interlocutory review of the class certification, Defendants challenge certification of the class on two grounds: (1) the district court improperly relied on the class stipulation in the MDL without a separate finding that the Plaintiffs had satisfied each of the elements required under Rule 1-023; and (2) the named Plaintiffs are not members of the purported class they seek to represent.

{6} Defendants ask us to grant the application for appeal, arguing that certification in this case was manifestly erroneous, will make settlement inevitable, and that our decision would resolve an unsettled legal issue that is important to the litigation and important in itself. Although we find this case inappropriate for interlocutory review, we take this opportunity to discuss for the first time in New Mexico the factors we will consider in granting or denying review of class certification decisions.

## II. DISCUSSION

{7} In 1998, Federal Rule of Civil Procedure, Rule 23(f), became effective, allowing the courts of appeals discretion to permit appeal of district court decisions granting or denying class action certification. Shortly thereafter, in 2000, New Mexico adopted Rule 1-023(F), mirroring the language of its federal counterpart. The federal decisions establishing guidelines under Rule 23(f) recognize the highly discretionary role of the courts of appeals to grant or deny these appeals. Looking to the advisory committee note for Rule 23(f), circuit courts emphasize that "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." See, e.g., *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833 (7th Cir. 1999) (internal quotation marks and citation omitted). Further, the committee recommends that "[t]he courts of appeals [to] develop standards for granting review that reflect the changing areas of uncertainty in class litigation," explaining that "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." See, e.g., *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142 (4th Cir. 2001) (alteration in original) (internal quotation marks and citation omitted). We find guidance in the body of federal case law on the issue as we work to establish a criterion for applying Rule 1-023(F) in New Mexico.

A. Federal Circuit Standards

{8} In the first decision to apply Rule 23(f), the Seventh Circuit Court of Appeals chose not to invent a bright-line rule opting instead to craft an organic and experimental approach informed by the reasons that inspired the rule's adoption. *Blair*, 181 F.3d at 833-34. The court explained that the expansion of allowable, immediate appeals was needed to address three scenarios the advisory committee deemed appropriate for appellate review. *Id.* at 834. In the first scenario, known as a "death knell" case, an appeal may be appropriate for review where the denial of class certification effectively terminates the litigation because the individual claims are too insignificant to justify the expense of litigation. *Id.* In the second scenario, a mirror image of the "death knell" case, an appeal may be appropriate where the grant of class certification places irresistible pressure on the defendant to settle, regardless of the class's likelihood of success on the merits. *Id.* at 834-35. In the third scenario, the court explained that an appeal may be granted where it will greatly contribute to the development of the law of class actions. *Id.* at 835.

{9} Some courts have been reluctant to accept class certification appeals, describing them as "inherently disruptive, time-consuming, and expensive." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (internal quotation marks and citation omitted). Some courts' reluctance stems from the broad discretion district courts have to manage class actions and to reconsider their certification decisions throughout the litigation. *Id.* at 1276-77. However, the circuit courts that have addressed Rule 23(f) appeals all accept the factors articulated in *Blair* and continue to add further considerations. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (establishing that review is appropriate under the circumstances articulated in

*Blair and Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), but requiring that in a death knell scenario the certification decision be questionable, and adding an additional category of cases in which the certification decision is manifestly erroneous); *Lienhart*, 255 F.3d at 145-46 (elaborating on the approach of *Prado-Steiman*, viewing the five factors established in that case on a sliding scale with an eye toward the likelihood that the district court abused its discretion); *Prado-Steiman*, 221 F.3d at 1274-76 (adopting a balancing approach with guidance from *Blair and Mowbray* and adding two additional "guideposts": the nature and status of the litigation and the likelihood that future events would make immediate review more or less appropriate); *Mowbray*, 208 F.3d at 294 (adopting the categories in *Blair*, but restricting the third category to those cases in which the legal issue is important to the litigation at hand, important in itself, and is likely to escape end-of-the-case review).

{10} Notably, all the circuits have refused to create an exhaustive list of factors that would circumscribe the broad discretion granted the courts of appeal by Rule 23(f). See, e.g., *In re Delta Airlines*, 310 F.3d 953, 959 (6th Cir. 2002) (stating that "not all factors can be foreseen or stated with particularity" and that "any pertinent factor may be weighed in the exercise of that discretion"); *Prado-Steiman*, 221 F.3d at 1276 (stating that "each relevant factor should be balanced against the others, taking into account any unique facts and circumstances").

### B. New Mexico Guidelines for Granting or Denying Appeals from Class Certification Decisions

{11} Armed with unfettered discretion and the experience of the federal circuits, we adopt the three factors articulated by the D.C. Circuit to generally guide our discretion when considering class certification appeals. See *Lorazepam*, 289 F.3d at 105. Thus, we will ordinarily grant review of class certification decisions where:

- (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) when the

certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous.

*Id.*

{12} We also emphasize that these factors are guidelines; not a rigid test. Specifically, when considering whether to grant these appeals, we will avoid "both micro-management of complex class actions as they evolve in the district court and inhibition of the district court's willingness to revise the class certification for fear of triggering another round of appellate review." *Id.*; *Prado-Steiman*, 221 F.3d at 1273-74.

### C. Application of the New Mexico Guidelines

{13} With these guidelines in place, we return to the class action at hand and decline Defendants' application for appeal. In their application, Defendants argue that our decision would resolve an unsettled legal issue that is important to the litigation and important in itself, that certification will terminate the litigation and make settlement inevitable, and that class certification is manifestly erroneous.

#### 1. Death Knell Situation

{14} There is no indication that the district court's certification of the class will sound the death knell for the litigation, resulting from irresistible pressure on Defendants to settle the matter. Under this consideration, we determine whether the defendant has made a sufficient showing "that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims." *Lorazepam*, 289 F.3d at 108. FIE has been defending multiple class action suits throughout the country, and stipulated to the MDL. Defendants do not show why they will feel forced to settle this particular state litigation, while they are able to withstand and even voluntarily assume the pressure of the consolidated MDL.

{15} In connection with the death-knell factor, we will normally also look for error or a substantial weakness in the certification order. *See Blair*, 181 F.3d at 835 (recognizing the futility in granting review of a class certification decision

that is "impervious to revision," even if the decision effectively terminates the litigation). However, because Defendants have not demonstrated that the death-knell factor is at work here, we do not address whether the order is erroneous under this factor.

#### 2. Unsettled Question of Law

{16} Defendants urge us to accept their appeal in order to address the important legal question asking whether the district court could rely on a class stipulation approved in a separate proceeding to certify the class without performing the rigorous analysis required under Rule 1-023. In determining whether a legal issue should be resolved under this factor, we bear in mind the factually sensitive nature of class certification decisions, and the perhaps obvious caution that lack of case law applying Rule 1-023 in New Mexico can make it easy for a party to characterize a legal issue as novel or unsettled. *Prado-Steiman*, 221 F.3d at 1274.

{17} With the increase of class action suits, it may be important at some point to decide whether the district court has an independent obligation to examine Plaintiffs' compliance with the demands of Rule 1-023, even though defendants have stipulated to class certification under similar circumstances in other cases. *See Stirman v. Exxon Corp.*, 280 F.3d 554, 561-62 (5th Cir. 2002) (stating that "[t]he party seeking certification bears the burden of demonstrating that the rule 23 requirements have been met," and that even if certification was stipulated to, the district court is bound to rigorously analyze the proposed class). In addition, it is possible that the issue may evade effective end-of-the-case review. *See Blair*, 181 F.3d 837-38 (granting review in the recognition that "[q]uestions concerning the relation among multiple suits may evade review at the end of the case, for by then the issue will be the relation among (potentially inconsistent) judgments, and not the management of pending litigation"). However, the parties have not briefed whether the issue may evade review, and there is an insufficient factual record for us to determine whether the parties in the MDL and the current litigation overlap or may be otherwise bound by the same judgment.

{18} In any event, we are not persuaded here that the issue is fundamental to the district court's decision to certify the class. In support of their allegation that the district court relied on the approved

stipulation in the MDL, Defendants list a few questions asked by the district court concerning the arguments made to and accepted by the federal judge. *Cf. Balboa Constr. Co. v. Golden*, 97 N.M. 299, 304, 639 P.2d 586, 591 (Ct. App. 1981) (stating that a judge's oral statements do not constitute a decision, and "error may not be predicated thereon"). However, the district court's questions involving the MDL judge's decisions do not convince us that the district court failed or refused to rigorously analyze whether Plaintiffs satisfied their burden. The record provided indicates the district court rejected Plaintiffs' argument that the stipulation has preclusive effect on Defendants' challenge to class certification. Thereafter, Plaintiffs presented detailed arguments in favor of their compliance with Rule 1-023. Further, it is undisputed that the district court stated it had read all the briefs and other matters presented and had thoroughly considered them before deciding to certify the class. The record sufficiently demonstrates that the district court was advised of its obligation to independently evaluate the class and ruled on the merits of Plaintiffs' arguments under the Rule's requirements.

{19} Defendants also seem to assert that the district court's order certifying the class without any written findings is evidence that it did not engage in the rigorous analysis required of it. Of course, we encourage all district courts to request and enter factual findings to facilitate meaningful review. Findings are particularly useful for our determination of whether the law was correctly applied where a ruling is predicated upon factually intensive issues examined by us under the deferential abuse of discretion standard. *See State v. Gonzales*, 1999-NMCA-027, ¶¶ 9-16, 126 N.M. 742, 975 P.2d 355. However, Rule 1-023 does not require that a class certification order contain findings of fact. More pertinently, if Defendants wanted to have findings and conclusions accompanying the order, they could have submitted their own and requested they be entered. *DeTevis v. Aragon*, 104 N.M. 793, 800, 727 P.2d 558, 565 (Ct. App. 1986) (stating that "[t]he trial court must, if requested, adopt findings of fact resolving the material issues raised by the parties"). Defendants have not argued that the district court improperly refused such a request. In the absence of findings, we presume that the district court order is supported by the evidence. *Michaluk*

v. *Burke*, 105 N.M. 670, 676-77, 735 P.2d 1176, 1182-83 (Ct. App. 1987).

{20} For these reasons, we will not accept this appeal to address an issue of law that may be unsettled and fundamental to class actions, but is otherwise theoretical and not squarely presented by this case. See *State v. Garcia*, 2003-NMCA-045, ¶ 7, 133 N.M. 444, 63 P.3d 1164 (refusing to answer a hypothetical question of law that would have no practical effect on the litigation before it).

### 3. Manifestly Erroneous

{21} Under the manifest error guidelines, we will generally grant an appeal where the certification decision is virtually certain to be reversed on appeal from the final judgment. See *Lienhart*, 255 F.3d at 145-46. Under Rule 1-023(A), a district court may permit representative parties to sue on behalf of a class so long as:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact in common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to these prerequisites for certification—respectively known as numerosity, commonality, typicality, and adequacy of representation—the movants must prove, among other things, that proceeding as a class is superior to other methods of litigating. Rule 1-023(B). On appeal, Defendants challenge only the adequacy of representation, the representatives' typicality of the class, and the superiority of a class action for adjudicating Plaintiffs' claims.

#### a. Adequacy of Representation

{22} Defendants argue that the representatives may not adequately represent the non-New Mexico residents who may be encompassed in the class definition. Defendants contend that the class definition accepted by the district court is identical to the class definition in the MDL and allows the potential for non-New Mexico residents to join the class. However, Defendants do not explain why the representatives will not adequately protect those potential non-residents of New Mexico who must have worked for FIE in New Mexico. The district court may

have concluded that limiting the putative class to New Mexico residents was under-inclusive. See *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 296 (5th Cir. 2001) (stating that "the district court may choose one possible class definition over another in order to ensure that the requirements of Rule 23 are best satisfied").

{23} Granting review is disfavored where further discovery may change the scope and contour of the putative class because the district court is empowered to amend a class certification order at any time prior to reaching a decision on the merits. Rule 1-023(C)(1); *Prado-Steiman*, 221 F.3d at 1273. Defendants in this case admit they are currently unaware of the consequences of the class definition, and that only two depositions are complete in the discovery process, which currently has no deadline. Thus, it appears that further discovery can reveal any inadequacy in the representation of non-New Mexico residents if such exists. Therefore, the appeal is premature and inappropriate for immediate review of this claim.

{24} Defendants also argue that the representatives will inadequately protect the interests of persons who fit within the original class as described in the complaint but who are now excluded. Defendants claim that all non-personal lines claims representatives are excluded from the class as a result of the district court's adoption of the MDL class definition. The class definition contained in the complaint included claims representatives, senior claims representatives, and/or special claims representatives, while the accepted MDL class definition consists of personal lines claims representatives in certain job codes that include personal lines claims representatives, senior claims representatives, and/or special claims representatives. Defendants do not clarify the difference among the claims representatives, if any, or explain who may be omitted from the class. Further, Defendants fail to offer us more detailed argument that the class may be under-inclusive or that Defendants are harmed thereby. Neither do Defendants explain how they argued the issue to the district court. Given the record presented to this Court, Defendants have not demonstrated that the district court manifestly erred in finding that the named representatives will provide adequate representation.

#### b. Typicality

{25} Defendants argue that the representatives do not perform job duties that are typical of those performed by other members of the class. Defendants contend that Plaintiffs conceded that certain duties performed by some members of the named Plaintiffs differ from those of the class as certified. In their reply to Defendants' response to the class certification motion, Plaintiffs stated that their responsibilities and duties were similar to the certified classes, with the exception of four functions performed by some claims representatives in handling claims. However, Plaintiffs also argued that it was in the capacity of handling claims that Plaintiffs were expected to work overtime, for which they claimed entitlement to compensation.

{26} In this context, typicality speaks to the *claims* of the representatives: "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart*, 255 F.3d at 146 (internal quotation marks and citation omitted). Defendants do not contradict Plaintiffs' contention that the claims representatives, a job description under which all class members must fall, primarily handled claims for which work they were not paid overtime. Even assuming that the class representatives do not perform all of the same functions performed by all members of the class, it is payment for alleged overtime worked in handling claims that is at issue. Defendants fail to demonstrate how such differences in job duties would make the claims or defenses of the class representatives with regard to overtime compensation, significantly different from the claims and defenses of any class members.

{27} Defendants also argue that some claims representatives cannot assert the same claims because they are not entitled to overtime under an "executive or administrative" exemption found in the New Mexico overtime law. NMSA 1978, § 50-4-21(C)(2) (1983). In support, Defendants rely on federal regulations and a United States Department of Labor opinion letter interpreting a similar exemption in the Fair Labor Standards Act (FLSA). See 29 U.S.C. § 213(a)(1) (1998) (exempting from wage laws those "employed in a bona fide executive, administrative, or professional capacity"); 29 C.F.R. § 541.205(c)(5) (2003) (listing claim agents and adjusters as bona fide

administrative employees exempted under the FLSA). Defendants urged the district court to adopt the analysis set forth in the opinion letter for the application of the administrative employee exemption and to exempt the named Plaintiffs from the class.

{28} By so arguing, Defendants seek a preliminary merits hearing without a full development of the facts and claims. This is essentially an argument for summary judgment, and is inappropriate here. When class certification questions are particularly enmeshed with the merits of a case as here, immediate review is strongly disfavored. *In re Delta Air Lines*, 310 F.3d at 961. The district court is better positioned to decide the fluid and factually sensitive class certification questions, and “[w]e should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order.” *Prado-Steiman*, 221 F.3d at 1274.

**D. Superior Method of Litigation**

{29} Lastly, Defendants argue that proceeding with a class action is not the

superior method of litigating because the class in the MDL will adjudicate the same claims under the same New Mexico law, which does not serve the interests of judicial economy. In their reply to Defendants’ response to the class certification motion, however, Plaintiffs explained that the MDL plaintiffs are not currently prosecuting state law claims. Defendants do not dispute that the MDL judge issued an order suspending adjudication of the state law claims prior to a decision on the merits of the FLSA claims, in response to FIE’s motion to dismiss the state law claims. Furthermore, it appears that the MDL action requires potential members to opt-in, and the deadline for individuals to do so has passed. On these facts, it appears that the certified class in this case may only obtain the relief it seeks under the New Mexico Wage Act by filing a separate state action. Therefore, to the extent that Defendants argue that this class action is not the superior method of litigation due to the MDL, we disagree.

{30} As a result, we refuse to grant review of Defendants’ appeal on the grounds

that the district court’s certification of the class was manifestly erroneous.

**III. CONCLUSION**

{31} For these reasons, Defendants’ application for review of the district court order granting class certification is denied.

{32} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

MICHAEL D. BUSTAMANTE, Judge

## 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 Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE FEBRUARY 3, 2004

### CERTIORARI GRANTED AND UNDER ADVISEMENT:

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| <p>NO. 28,337 Colonias Dev. Council v. Rhino Env'tl. Svcs.<br/>(COA 22,932) 12/2/03</p> <p>NO. 28,353 State v. Villa (COA 23,229) 12/2/03</p> <p>NO. 28,359 State v. Moses M. (COA 23,250) 12/2/03</p> <p>NO. 28,380 Angel Fire v. Wheeler (COA 24,295) 12/3/03</p> <p>NO. 28,369 State v. Beltron (COA 24,234) 12/5/03</p> <p>NO. 28,379 State v. Cooley (COA 23,253) 12/9/03</p> <p>NO. 28,386 State v. Flores (COA 24,067) 12/16/03</p> <p>NO. 28,383 Blake v. Public Service Company (COA 23,671)<br/>12/19/03</p> | <p>NO. 28,376 Ryan v. Highway Dept. (COA 22,615) 12/19/03</p> <p>NO. 28,374 Smith v. Bernalillo County Commissioners<br/>(COA 22,766) 12/19/03</p> <p>NO. 28,402 State v. Stewart (COA 23,137) 1/13/04</p> <p>NO. 28,408 Federal Express v. Abeyta (COA 23,519) 1/13/04</p> <p>NO. 28,414 State v. O'Kelley (COA 23,272/23,364) 1/13/04</p> <p>NO. 28,416 Blancett v. Blancett (COA 24,282) 1/13/04</p> <p>NO. 28,423 Marquez v. Allstate (COA 23,385) 1/13/04</p> <p>NO. 28,410 State v. Romero (COA 22,836) 1/20/04</p> <p>NO. 28,441 Gormely v. Coca Cola (COA 22,722) 1/26/04</p> |
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### PETITIONS FOR WRIT OF CERTIORARI DENIED:

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| <p>NO. 28,387 State v. Sandoval (COA 23,282) 1/15/04</p> <p>NO. 28,405 Garcia v. Department of Labor (COA 24,241)<br/>1/15/04</p> <p>NO. 28,432 State v. McGee (COA 23,203) 1/15/04</p> | <p>NO. 28,434 State v. Grubbs (COA 24,356) 1/15/04</p> <p>NO. 28,425 State v. Herrera (COA 22,416) 1/21/04</p> <p>NO. 28,437 Truong v. Allstate (COA 24,291) 1/23/04</p> <p>NO. 28,440 State v. Uranga (COA 24,266) 1/23/04</p> |
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