Inside This Issue

Table of Contents ..................................................... 5
Fifth Judicial District Court
  Judicial Appointment ............................................. 6
Board of Bar Commissioners
  Meeting Summary ................................................. 7
2010 Annual Meeting and Bench
  and Bar Conference ............................................. 9
Clerk’s Certificates .................................................... 19
Disciplinary Board of the Supreme Court
  Chief Disciplinary Counsel Sought, Request
  for Applications ................................................. 53

Rules/Orders

  No. 10-8300-022: In the Matter of the
  Approval of Amendments to Forms 10-424
  and 10-425 NMRA and Adoption of New
  Form 10-456A NMRA of the Children’s
  Court Rules ...................................................... 25

  Proposed Revisions to the Children’s Court
  Forms ............................................................... 28

From the New Mexico Supreme Court

  2010-NMSC-029, No. 32,032:
  Jolley v. Associated Electric & Gas
  Insurance Services Limited .................................. 32
  2010-NMSC-030, No. 31,860:
  United Rentals Northwest, Inc. v. Yearout
  Mechanical, Inc .................................................. 35
  2010-NMSC-031, No. 31,637:
  Akins v. United Steel Workers of America,
  AFL-CIO, CLC, Local 187 .................................... 41

From the New Mexico Court of Appeals

  2010-NMCA-056, No. 28,900:
  State v. Reger ................................................... 47
Hats Off to Our 2010 Annual Meeting
Bench & Bar Conference
Sponsors and Exhibitors

Sponsors

Gavel 1 - $5000
Hinkle Hensley Shanor & Martin, LLP

Gavel 2 - $2500
ARAG
GSI-Document Service
Lewis & Roca, LLP
NM Paralegal Division
Rimkus Consulting Group
Rodey Dickason Sloan Akin & Robb, PA

Gavel 3 - $1250
Darwin National Assurance
The Bar Plan

Gavel 4 - $500
Center for Civic Values
Cuddy & McCarthy, LLP
Dixon Scholl & Bailey, PA
Montgomery & Andrews PA

Sponsorship Listings
Lawit & Kitson
Peacock & Myers, PC
Susan C. Little
Vickie R. Wilcox, PC

Exhibitors

ABA Retirement Funds
Adapting Technologies
ARAG
Bean & Associates, Inc.
Center for Legal Education
CourtCall, LLC
Casemaker
Darwin National Assurance
Expert Consulting Services, Inc.
Fastcase, Inc.
Gertrude Zachary Jewelry, Etc.
Health Agencies of the West
LAI Professional Insurance Programs
MRC of New Mexico/Richard Radecki, MD

New Mexico Business Weekly
New Mexico Compilation Commission
Rimkus Consulting Group
Robertson Engineering Investigations
SBNM Membership Services
SBNM Public and Legal Services Department
The Bar Plan
The Edward Goup
The Liability Place, Inc.
Tyler Consultants
US New Mexico Federal Credit Union
West, a Thomson Reuters business
Zia Trust, Inc.

State Bar of New Mexico
CONSTITUTION DAY

Seeking attorney volunteers across New Mexico to teach 5th graders about the Constitution!

Constitution Day is designated by Public Law 108-447 Sec. 111 Division J - SEC. 111(b) which states that all levels of educational institutions receiving federal funds are required to educate students about the U.S. Constitution.

Constitution Day is an event taking shape across the country designed to teach 5th graders about the Constitution. Each fifth grader participating will receive a pocket-size Constitution!

During the week of September 13-17, volunteer attorneys will be partnered with 5th grade teachers in their area to co-teach a lesson on the Constitution. Suggested course materials will be provided, and you will get to deliver pocket-sized Constitutions to the children! Each presentation should last 1-1.5 hours per classroom.

Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place.

☐ YES! I’d like to be a Constitution Day Volunteer!*
   (*requires $30 donation from each attorney to cover classroom materials)

☐ I am unable to volunteer my time but I would like to donate toward the effort of putting a pocket-size constitution in the hands of all New Mexico fifth graders (Amount $________ )

NAME_____________________________________________________ Bar ID ____________

ADDRESS ___________________________________________________________________
____________________________________________________________________________
____________________________________________________________________________

(city)        (state)                              (zip)

(phone)    (fax)    (email)

Send this completed form to Marilyn Kelley
Email: mkelley@nmbar.org; or fax (505) 797-6074; or US mail:
New Mexico State Bar Foundation, Public & Legal Services Department
Attention Marilyn Kelley
PO Box 92860, Albuquerque, NM 87199

STATE BAR of NEW MEXICO
# STATE BAR VIDEO REPLAYS

State Bar Center, Albuquerque

## AUGUST 17

**Skeptically Determining the Limits of Expert Testimony and Evidence: An Investigation of Scope, Expertise and Process**
- 8:30 a.m. – 3:45 p.m.
- 4.7G, 1.0E, 1.0P
- **$219**

**The 25th Annual Bankruptcy Year in Review**
- 8:15 a.m. – 3:45 p.m.
- 6.0G, 1.0P
- **$219**

## SEPTEMBER 7

**Multicultural Challenges in NM**
- 8:00 a.m. – 12:30 p.m.
- 4.5G
- **$159**

**Attorney’s Guide to Good Lawyering for People With Disabilities**
- 2009 Professionalism
- 1:00 – 2:00 p.m.
- 1.0P
- **$49**

**2009 Ethics Risks Practicing Law**
- (From Surviving to Thriving 2009)
- 1:00 – 2:00 p.m.
- 1.0
- **$49**

**7th Annual Elder Law Seminar**
- 8:00 – 11:30 a.m.
- 3.7G
- **$149**

## SEPTEMBER 21

**The ‘Write’ Way to Write Persuasively**
- 8:30 – 11:30 a.m.
- 3.0G
- **$129**

**The Zealous Advocate**
- 12:00 – 3:00 p.m.
- 3.0G
- **$129**

**Creditor’s Rights, Collections and Bankruptcy**
- 8:30 a.m. – 2:00 p.m.
- 4.0G, 1.0E
- **$179**

**2010 Professionalism and Ethics: Responding To Crisis Through Limited Representation**
- 2:15 – 4:15 p.m.
- 1.0P, 1.0E
- **$79**

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### TWO WAYS TO REGISTER

**INTERNET:** [www.nmbarcle.org](http://www.nmbarcle.org)  **FAX:** (505) 797-6071, 24 hour access

| Name ______________________________ | NM Bar # ______________________________ |
| Street ______________________________ | ________________________________________ |
| City/State/Zip ______________________ | ________________________________________ |
| Phone ______________________________ | Fax ______________________________ |
| E-mail ______________________________ | ______________________________________ |

- **☐ Purchase Order (Must be attached to be registered)**
- **☐ Check enclosed $ _____________  Make check payable to: CLE**

| Credit Card # ______________________ | Exp. Date __________________ | CVV# __________ |
| Authorized Signature __________________ | ______________________________________ |

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# Table of Contents

| Notices | .......................................................... | 6 |
| 2010 Annual Meeting and Bench and Bar Conference | .......................................................... | 9 |
| Legal Education Calendar | .......................................................... | 14 |
| Writs of Certiorari | .......................................................... | 16 |
| List of Court of Appeals' Opinions | .......................................................... | 18 |
| Clerk's Certificates | .......................................................... | 19 |
| Recent Rule-Making Activity | .......................................................... | 22 |

## Rules/Orders

- No. 10-8300-022: In the Matter of the Approval of Amendments to Forms 10-424 and 10-425 NMRA and Adoption of New Form 10-456A NMRA of the Children's Court Rules | .......................................................... | 25 |
- Proposed Revisions to the Children's Court Forms | .......................................................... | 28 |

## Opinions

### From the New Mexico Supreme Court

- 2010-NMSC-029, No. 32,032: Jolley v. Associated Electric & Gas Insurance Services Limited | .......................................................... | 32 |
- 2010-NMSC-030, No. 31,860: United Rentals Northwest, Inc. v. Yearout Mechanical, Inc. | .......................................................... | 35 |
- 2010-NMSC-031, No. 31,637: Akins v. United Steel Workers of America, AFL-CIO, CLC, Local 187 | .......................................................... | 41 |

### From the New Mexico Court of Appeals

- 2010-NMCA-056, No. 28,900: State v. Reger | .......................................................... | 47 |

## Advertising

- .......................................................... | .......................................................... | 50 |

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## Meetings

### August

- 2 Attorney Support Group, 5:30 p.m., First United Methodist Church |
- 3 Disability Committee, noon, State Bar Center |
- 4 Real Property, Trust and Estate Section BOD, 11:30 a.m., via teleconference |
- 9 Taxation Section BOD, noon, via teleconference |
- 11 Children's Law Section BOD, noon, Juvenile Justice Center |
- 11 Criminal Law Section BOD, noon, State Bar Center |
- 12 Public Law Section BOD, noon, Reynold's Building, 4th floor, Santa Fe |

### September

- 8 Lawyer Referral for the Elderly Workshop, 10–11:15 a.m., Presentation |
  1–3 p.m., Clinics |
  Ft. Sumner Senior Center, Ft. Sumner |
- 9 Lawyer Referral for the Elderly Workshop, 9:45–11 a.m., Presentation | 1–4 p.m., Clinics |
  Santa Rosa Senior Center, Santa Rosa |
- 22 Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center, Albuquerque |

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## State Bar Workshops

### August

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

### September

- 8 Lawyer Referral for the Elderly Workshop, 10–11:15 a.m., Presentation |
  1–3 p.m., Clinics |
  Ft. Sumner Senior Center, Ft. Sumner |
- 9 Lawyer Referral for the Elderly Workshop, 9:45–11 a.m., Presentation | 1–4 p.m., Clinics |
  Santa Rosa Senior Center, Santa Rosa |
- 22 Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center, Albuquerque |
Judicial Records Retention and Disposition Schedules

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

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court (505) 455-8275</td>
<td>Exhibits in criminal, civil, domestic relations, and children's court cases</td>
<td>1987–1995</td>
<td>Sept. 3</td>
</tr>
<tr>
<td>5th Judicial District Court County of Chaves (575) 622-2565, x120</td>
<td>Exhibits in civil cases</td>
<td>1992–2009</td>
<td>Oct. 1</td>
</tr>
<tr>
<td>11th Judicial District Court (505) 334-6151</td>
<td>Exhibits in criminal, civil, domestic relations, probate, children's court cases, guardianship and conservatorship and incompetency/mental health cases</td>
<td>1981–2010</td>
<td>Sept. 27</td>
</tr>
</tbody>
</table>

STATE BAR NEWS

Attorney Support Group

- Aug. 16, 7:30 a.m.—Morning groups meet regularly on the third Monday of the month.
- Sept. 13, 5:30 p.m.—(change due to Labor Day holiday) Afternoon groups meet regularly on the first Monday of the month.

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

Bankruptcy Law Section

Revised Local Rules

The revised local rules for the New Mexico Bankruptcy Court go into effect Aug. 2. Join the Bankruptcy Law Section at noon, Aug. 13, in the Animas Courtroom (13W), Dennis Chavez Federal Building, 500 Gold SW, Albuquerque, for an open forum on the new rules and their effect. The session will be moderated by Jim Jacobsen, chair of the Local Rules Advisory Committee which drafted the proposals that have now, with minor modifications, been adopted. The new rules are available on line at the court’s website: http://www.nmcourt.fed.us/usbc/files/August2LocalRules.pdf.

Judicial Records Retention and Disposition Schedules

Court for final consideration, either submit a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

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

Note that any submitted comments may be posted on the Court’s website for public viewing.

Fifth Judicial District Court
Judicial Appointment

Governor Bill Richardson has appointed James Templeman to fill the vacancy in the 5th Judicial District Court, Division IV, in Lovington. Judge Templeman opened his law practice, Templeman and Crutchfield, in Lovington nearly 40 years ago. He previously worked as a law clerk for the Secretary of State and Texas Governor Preston Smith. He holds a bachelor’s degree from Eastern New Mexico University and a law degree from the University of Texas. Judge Templeman replaces Judge Don Maddox who resigned effective July 1. The appointment is effective immediately.
A redline version showing changes from the soon-to-be replaced current local rules is at http://www.nmcourt.fed.us/usbc/files/March9localrules-redlined.pdf.

**Board of Bar Commissioners Meeting Summary**

The Board of Bar Commissioners met July 15 at the Inn of the Mountain Gods in Mescalero. The board:

- Approved the April 30 meeting minutes as submitted.
- Accepted the May 2010 financials and executive summaries.
- Approved switching the State Bar’s banking from Wells Fargo to the U.S. New Mexico Federal Credit Union.
- Approved extending the State Bar’s mailing machine lease for 39 months for a total of approximately $13,000 per year.
- Approved funding for the 16 pro bono committees in the amount of $24,000 to be funded from dues contributions.
- Accepted the 2009 audit, which received a clean report with no exceptions.
- Approved an expenditure up to $1,500 for the “Justice Gene E. Franchini Wall of Honor/ Distinction” to honor the late Justice Franchini and members who have made significant contributions to the State Bar.
- Held an executive session to discuss personnel issues.
- Approved amendments to the Annual Dues and Licensing Form to Section 3, Reporting of Pro Bono Hours. Section 4, Mandatory State Bar Fees. and eliminated Section 7, Contributions.
- Referred the Fee Waiver Form back to the Bylaws and Policies Committee for further review of the language regarding a hardship.
- Approved eliminating the legal services discount.
- Approved an amendment to the Elder Law Section Bylaws to allow the chair to serve more than one term but no more than two consecutive terms.
- Approved adding the Criminal Law Section to the 2011 dues form and collecting the section’s dues.
- Provided thirty days’ notice of an amendment to the State Bar Bylaws Article IX, adding a new Section 9.5, Bylaw and Policy Compliance by Sections and Committees, which would result in being placed on the sunset list to be heard at the next meeting of the board for those that fail to comply. Approved an amendment to the Committees Policy adding the same language regarding compliance.
- Reappointed Cindy L. Gray to the Civil Legal Services Committee for a three-year term.
- Received a report from the Governmental Affairs Committee regarding the New Mexico Foundation for Open Government’s request to support its opposition to two of the public-access recommendations approved by the Judicial Information Systems Council. The committee will be meeting with representatives from the New Mexico Foundation for Open Government and the Judicial Information Systems Council Committee next month.
- Received a report from the Legal Research Committee. The State Bar’s contract with Casemaker expires in August 2011 and the committee will be meeting with legal research providers, including the Compilation Commission, Fastcase and Casemaker, to obtain and compare services and costs.
- Received a report on the UPL Task Force, reviewed the proposed UPL rule changes and approved forwarding the rules to various entities for input and comments.
- Appointed a special committee to look at public defender issues with indigent defense and funding in New Mexico.
- Approved holding the 2011 Annual Meeting at Buffalo Thunder Resort in Pojoaque, July 14–16, in conjunction with the State Bar’s 125th anniversary. The minutes in their entirety will be available on the State Bar’s website following approval by the Board at the Sept. 24 meeting.

**Paralegal Division Luncheon CLE Series**

The Paralegal Division invites members of the legal community to bring a lunch and attend *Understanding the Rules of Evidence* (1.0 general CLE credit) presented by Molly Schmidt-Nowara of the Freedman, Boyd, Daniels Law Firm. The program will be held from noon to 1 p.m., Aug. 11, at the State Bar Center. The registration fee is $16 for attorneys, $10 for members of the Paralegal Division, and $15 for non-members. Registration begins at the door at 11:45 a.m. For more information, contact Cheryl Passalaqua, (505) 247-0411, or Evonne Sanchez, (505) 222-9356.

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**Public Law Section Annual Meeting and CLE**

The Public Law Section will hold its annual meeting during the lunch break, Oct. 22, in conjunction with the *Administrative Law Institute* at the State Bar Center. Details on the CLE are forthcoming. All section members are encouraged to attend. Send agenda items to Chair James Martin, jmartinnm@gmail.com.

**Young Lawyers Division Volunteers Needed**

**YLD Fall Conference, Host Committee**

Volunteers are needed to be part of the Host Committee for the 2010 ABA/YLD Fall Conference to be held Oct. 14–16 at the El Dorado Hotel and Spa in Santa Fe. Energetic attorneys and paralegals are needed to help with fundraising and event planning. The registration fee will be covered for volunteers. For more information or to participate, contact Martha Chicoski, mmchicoski@gmail.com. For more information or to volunteer, contact Martha Chicoski, mmchicoski@gmail.com, or Samantha Jarrett, jarretts@jacksonlewis.com by Aug. 13.

**OTHER BARS**

**New Mexico Defense Lawyers Association CLE Seminar**

The New Mexico Defense Lawyers Association will present *Can We Talk??? Women
in the Courtroom III: Power Lessons for the Female Litigator (4.0 general, 1.0 ethics, and 1.0 professionalism CLE credits) Aug. 27 at the Jewish Community Center in Albuquerque. How do we communicate with jurors and what do they think about us? Are lawyers who we are or what we do? How do you handle the arrogant expert in deposition? How do we become good managers? Do we dare become judges? All these questions will be tackled in this seminar that will enhance the skills of female attorneys as they work together to represent their clients and advance in their firms, offices, agencies and beyond. This seminar is designed for women litigators who want to refine their litigation and trial skills and gain practical, diverse perspectives on balance, ambition and success. Those who want to recruit and retain talented female attorneys are also encouraged to attend.

For more information and to register, visit www.nmdla.org or contact nmdefense@nmdla.org or (505) 797-6021.

UNM School of Law
Summer Library Hours to Aug. 22
Building and Circulation
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 8 a.m.–5 p.m.
Sunday Noon–8 p.m.
Reference
Monday - Friday 9 a.m.–6 p.m.
Saturday–Sunday Closed
The lower level of the UNM Law Library will be closed July 27 through Aug. 6 to accommodate the installation of new carpet. During that time, there will be no access to the lower level collection. The remainder of the Law Library will remain open (including the reference and circulation desks and the upper floor). The majority of the current materials and several public computers will be available on the upper floors. For questions about accessing materials on the lower level, contact the circulation desk, (505) 277-6236, or the reference desk, (505) 277-0935, as staff may be able to retrieve the requested items, depending on the installation process. Reference questions and document delivery requests sent to the reference desk (libref@law.unm.edu) will be answered during this time period. For further information, contact Ann Hemmens, (hemmens@law.unm.edu or (505) 277-0678.

For assistance with interpreting the New Mexico Rules of Professional Conduct visit www.nmbar.org and select Attorneys/ Members, Member Services, Ethics Advisory Opinions to search the archive.

Send original questions regarding one’s own conduct to the Ethics Advisory Committee through the State Bar’s general counsel, Richard Spinello, at rspinello@nmbar.org.

Have a quick question? Need a quick answer?
Call the Ethics Helpline at 1-800-326-8155

A Benefit of Membership
Special Guest speaker was Charles P. Rose, general counsel for the U.S. Department of Education. Rose talked about changes in our education system over the years. According to Rose, the U.S. has “some of the best and some of the worst schools in the world” with a 27 percent dropout rate and math and science scores staying at early 1970’s levels. Rose pointed out that we are tenth in college completion. A generation ago we were number one. Native American youth are performing the worst with a 45 percent high school graduation rate. Rose said it is up to state and local schools to change the system, with the federal department making sure laws are complied with and money is spent wisely.

Featured speaker David Gross, named one of the “Top Ten Winning Litigators in the U.S.” by the National Law Journal, discussed the impact of the recession on the practice of law with large and small firms, private practitioners and the courts all feeling the punch. Gross identified five changes for the future: fee agreements have permanently changed; lawyers will be happier living a more balanced life and spending time with family and community; lawyers must embrace technology because clients will expect it; failure can be good—leading to other opportunities that might be better than your current situation; and you have to get back up.

Keynote Speaker Stuart A. Forsyth, owner and principal of The Legal Futurist consulting practice, urged preparation for the surprises the future will bring by seeing outside our personal situations and looking at the big picture. “The Internet will do to the legal profession what the printing press did to rabbis and priests,” Forsyth pointed out (quoting William C. Cobb, chair, 1999 ABA Seize the Future Conference). According to Forsyth, some legal services, such as wills and simple divorces, have become commodities such as those purchased at Walmart.

On a lighter note, humorist Sean Carter presented Sue Unto Others As You Would Have Them Sue Unto You. Carter turned typical professional situations into humor to make his point that courtesy and respect within the profession are essential.

CLE breakout sessions covered a variety of topics from building a successful practice to technology. The meeting offered attendees a potential 12.4 CLE credits.

A standing-room-only crowd heard the music of the lawyers-turned-musicians Woodpeckers band. Several attendees saw Charo at the Spencer Theater, and others learned cooking skills from Chef and Culinary Instructor Susan Dougherty. The golf tournament attracted several to the beautiful championship golf course.

“Everyone did a great job,” wrote one attendee. Others requested a more central location, flags on the podium, and more substantive law updates. Overall, the recurring comment was “Excellent convention.”

“Congress thought that shame would change our system,” said Charles P. Rose, general counsel for the U.S. Department of Education.

Keynote Speaker Stuart A. Forsyth urged attorneys to set goals that “stretch you, empower you, and change you.”

“The great recession and its impact on the practice of law—what can we learn from it?” Renowned attorney David Gross admitted he didn’t see it coming.
Legal Humorist Sean Carter used comedy to deliver serious messages about professionalism. “Respect and protect the image of the legal profession,” said Carter. “Respect the process and the robe, even if you disagree with a decision. And keep ads classy, not like a Chicago billboard that says ‘Life is short; get a divorce.’” Turning to legal fees, Carter asked, “How many of you can afford yourselves?”

Stuart Forsyth, Jim Calloway, and the Hon. Robert C. Brack lead a panel discussion on law practice management.

Alex Wold moderates a game of Jeopardy, a novel way of presenting ethics issues.

Debbie Foster presents one of several sessions from the ABA TECSHOW Road Show series. “Don’t waste paper printing e-mails,” she suggested. “Learn to review on the screen.”

New Mexico Supreme Court Chief Justice Charles W. Daniels praised the annual meeting as an excellent vehicle for creating and maintaining a community among the attorneys of New Mexico.
**Fundraisers, Exhibits, and Entertainment**

**Auction Raises $13,000 for Equal Access to Justice**

Judge Robert Robles and wife Karen (left) and Mary and Tony Lopez (right) dance to the great music of the Woodpeckers (top). Below: Off to see Charo at the Spencer Theater.

**Members Connect at Member-Benefit Exhibits**

Katelyn Shanor takes a cooking class from Chef Susan Dougherty.

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*Staying Connected and Cohesive... Local Law Practices Make New Mexico Advances*
2010 ANNUAL AWARDS
PRESENTED BY STATE BAR PRESIDENT STEPHEN S. SHANOR

JUSTICE PAMELA B. MINZNER
PROFESSIONALISM AWARD

RAYMOND HAMILTON
Office of the U.S. Attorney

RICHARD H. LAFOLLETTE
PRO BONO AWARD

RAINTREE, MONTGOMERY, RICHARD, and CRISS

DISTINGUISHED BAR SERVICE AWARD—LAWYER

DENNIS E. JONTZ
Lewis and Roca LLP

ROBIN GOMEZ
Lewis and Roca LLP

DISTINGUISHED BAR SERVICE AWARD—NON-LAWYER

THE HONORABLE JAMES A. HALL
Retired

CHRISTINA VIGIL
Law Office of Christina A. Vigil

RON HOLMES
Law Offices of Ron Holmes

DISTINGUISHED JUDICIAL SERVICE AWARD

SETH D. MONTGOMERY

OUTSTANDING YOUNG LAWYER OF THE YEAR AWARD

OUTSTANDING LEGAL PROGRAM AWARD

UNIVERSITY OF NEW MEXICO
School of Law
Clinical Law Programs

Accepted by
Associate Dean J. Michael Norwood,
Professor Jose Martinez, and
Dean Kevin Washburn

STAYING CONNECTED AND COHESIVE...
LOCAL LAW PRACTICES MAKE NEW MEXICO ADVANCES
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>2009 How to Do Your First Personal Injury Case</td>
<td>VR–State Bar Center, Center for Legal Education of NMSBF, 4.0 G, 1.0 E, 1.0 P, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td></td>
<td>Buy/Sell Arrangements in LLCs</td>
<td>Teleseminar, Center for Legal Education of NMSBF, 1.0 G, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>3</td>
<td>Multitasking Gone Mad: Learning to Cope In a Wired, Demanding World—P.M. Session</td>
<td>VR–State Bar Center, Center for Legal Education of NMSBF, 2.0 G, 0.7 E, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<tr>
<td>4</td>
<td>Kinship Guardianship</td>
<td>Albuquerque, Second Judicial District, Volunteer Attorney Pool, 2.0 G, (505) 944-7167</td>
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<tr>
<td>6</td>
<td>Professionalism and Ethics for Pro Bono Attorneys</td>
<td>Albuquerque, Second Judicial District, Volunteer Attorney Pool, 1.0 E, 1.0 P, (505) 944-7167</td>
</tr>
<tr>
<td>10–11</td>
<td>Estate Planning for Non-Traditional Families, Parts 1 &amp; 2</td>
<td>Teleseminar, Center for Legal Education of NMSBF, 2.0 G, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
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<td>11</td>
<td>Multitasking Gone Mad: Learning to Cope in a Wired, Demanding World—A.M. Session</td>
<td>VR–State Bar Center, Center for Legal Education of NMSBF, 2.2 G, 0.5 E, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>17</td>
<td>Understanding the Rules of Evidence</td>
<td>State Bar Center, Paralegal Division, 1.0 G, (505) 247-0411 or (505) 222-9356</td>
</tr>
<tr>
<td>17</td>
<td>25th Annual Bankruptcy Year in Review</td>
<td>VR–State Bar Center, Center for Legal Education of NMSBF, 6.0 G, 1.0 P, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>17</td>
<td>Property Tax Issues in Real Estate</td>
<td>Teleseminar, Center for Legal Education of NMSBF, 1.0 G, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>17</td>
<td>Skeptically Determining the Limits of Expert Testimony and Evidence: An Investigation of Scope, Expertise and Process</td>
<td>VR–State Bar Center, Center for Legal Education of NMSBF, 4.7 G, 1.0 E, 1.0 P, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>26</td>
<td>When Prosecutors Test the Outer Limits</td>
<td>Teleconference, TRT, Inc., 1.0 E, 1.0 P, 1-800-672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>27</td>
<td>Can We Talk??? Women in the Courtroom III: Power Lessons for the Female Litigator</td>
<td>Albuquerque, New Mexico Defense Lawyers Association, 4.0 G, 1.0 E, 1.0 P, (505) 797-6020 or <a href="mailto:nmdefense@nmdla.org">nmdefense@nmdla.org</a>, <a href="http://www.nmdla.org">www.nmdla.org</a></td>
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<td>30</td>
<td>Lawyer Substance Abuse Addictions: Causes and Results</td>
<td>Teleconference, TRT, Inc., 1.0 E, 1.0 P, 1-800-672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>31</td>
<td>Tax Pitfalls and Opportunities in Real Estate Workouts</td>
<td>Teleseminar, Center for Legal Education of NMSBF, 1.0 G, (505) 797-6020, <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
## SEPTEMBER

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<td>Selection and Use of Expert Witnesses</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>8</td>
<td>Health Care and Estate Planning: Vital Issues at Each State of Planning Process</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>21</td>
<td>Joint Ventures in Real Estate: Structure and Finance</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>10</td>
<td>21st Annual Appellate Practice Institute</td>
<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;5.8 G, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>Choice of Entity/Form for Nonprofits</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>Bankruptcy Evidence CLE</td>
<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>Joint Ventures in Real Estate: Operation and Tax</td>
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<td>The ‘Write’ Way to Write Persuasively</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;3.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>The Zealous Advocate</td>
<td>VR–State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;3.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>23</td>
<td>2010 Probate Institute</td>
<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;7.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
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<td>When Prosecutors Test the Outer Limits</td>
<td>Teleconference&lt;br&gt;TRT, Inc.&lt;br&gt;1.0 E, 1.0 P&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
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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 August 2, 2010**

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

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<thead>
<tr>
<th>No.</th>
<th>Petition Filed</th>
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<tbody>
<tr>
<td>32,499</td>
<td>State v. Aguilar</td>
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<td>32,497</td>
<td>State v. Harrison</td>
</tr>
<tr>
<td>32,447</td>
<td>Mendoza v. Tamaya Enterprises</td>
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<td>32,495</td>
<td>State v. Perkins</td>
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<td>32,493</td>
<td>Byers v. Gartman</td>
</tr>
<tr>
<td>32,486</td>
<td>City of Rio Rancho v. Amrep</td>
</tr>
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<td>32,494</td>
<td>White v. Brown</td>
</tr>
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<td>32,492</td>
<td>State v. Zimmerman</td>
</tr>
<tr>
<td>32,491</td>
<td>State v. Gammon</td>
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<tr>
<td>32,490</td>
<td>State v. Rodriguez-Ordonez</td>
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<tr>
<td>32,489</td>
<td>City of Rio Rancho v. Cloudview Estates</td>
</tr>
<tr>
<td>32,488</td>
<td>High Mesa General Partnership v. Patterson</td>
</tr>
<tr>
<td>32,483</td>
<td>State v. Jackson</td>
</tr>
<tr>
<td>32,436</td>
<td>Estate of Jaramillo v. Meteor Monument</td>
</tr>
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<td>32,478</td>
<td>Torres v. State</td>
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<td>32,468</td>
<td>Saavedra v. LeMaster</td>
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<td>32,467</td>
<td>State v. Brown</td>
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<td>32,442</td>
<td>Hill v. State</td>
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<td>32,430</td>
<td>State v. Muqqddin</td>
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<td>State v. Maso</td>
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<td>State v. Curley</td>
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<td>State v. Yellowman</td>
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<td>State v. Garza</td>
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<td>Molina v. State</td>
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#### Certiorari Granted but not yet Submitted to the Court:

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<td>31,791</td>
<td>State v. Atcity</td>
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<td>State v. Gonzales</td>
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<td>32,012</td>
<td>State v. Trujillo</td>
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<td>32,044</td>
<td>State v. Episco</td>
</tr>
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<td>32,069</td>
<td>State v. Martinez</td>
</tr>
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<td>32,126</td>
<td>State v. Myers</td>
</tr>
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<td>32,094</td>
<td>State v. Flores</td>
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<td>32,130</td>
<td>State v. Cruz</td>
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<td>32,092</td>
<td>State v. Trujillo</td>
</tr>
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<td>32,170</td>
<td>State v. Ketelson</td>
</tr>
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<td>32,137</td>
<td>State v. Skippings</td>
</tr>
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<td>32,149</td>
<td>State v. Sanoval</td>
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<td>32,234</td>
<td>State v. Trujillo</td>
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<td>32,243</td>
<td>Farmers Insurance Co of Arizona v. Chen</td>
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<td>32,175</td>
<td>Kittell v. Lovett</td>
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<td>32,263</td>
<td>State v. Williams</td>
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<td>State v. Torres</td>
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<td>State v. Vasquez</td>
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<td>32,341</td>
<td>Herzog v. Griego</td>
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<td>32,342</td>
<td>Bonney v. Herzog</td>
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<td>32,324</td>
<td>Allen v. Patehnoanis</td>
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<td>32,202</td>
<td>Summers v. Ardent Health Services</td>
</tr>
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<td>32,203</td>
<td>Lion’s Gate Water v. NM State Engineer</td>
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<td>32,339</td>
<td>McPeek v. Hubbard</td>
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<td>32,340</td>
<td>Rivera v. American General</td>
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<td>32,344</td>
<td>Provencio v. Venrich</td>
</tr>
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<td>32,360</td>
<td>State v. Figueroa</td>
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<td>32,374</td>
<td>State v. Nevarez</td>
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<td>32,376</td>
<td>Ehrenreich v. Malzahn</td>
</tr>
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<td>32,379</td>
<td>State v. Luchetti</td>
</tr>
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<td>32,388</td>
<td>State v. Harper</td>
</tr>
<tr>
<td>32,402</td>
<td>State v. Harper</td>
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<tr>
<td>32,311</td>
<td>Rodriguez v. Permian Drilling Corp.</td>
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<tr>
<td>32,425</td>
<td>State ex rel. CYFD v. Michael C</td>
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<tr>
<td>32,444</td>
<td>State v. Stanley</td>
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<td>32,456</td>
<td>State ex rel. CYFD v. Sarah B.</td>
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#### Certiorari Granted And Submitted to the Court:

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<td>31,602</td>
<td>Allstate Ins. Co. v. Guest</td>
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<td>31,603</td>
<td>Guest v. Allstate Ins. Co.</td>
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<td>Kilgore v. Fuji</td>
</tr>
<tr>
<td>31,100</td>
<td>Allen v. LeMaster</td>
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<td>31,723</td>
<td>State v. Mendez</td>
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<td>31,724</td>
<td>Albuquerque Commons v. City/Albuquerque</td>
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<td>31,907</td>
<td>Edward C. v. City of Albuquerque</td>
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<td>31,917</td>
<td>Edward C. v. Albq. Baseball Club</td>
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16 BAR BULLETIN - AUGUST 2, 2010 - VOLUME 49, NO. 31
<table>
<thead>
<tr>
<th>No.</th>
<th>Case Description</th>
<th>COA No.</th>
<th>Date</th>
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<tr>
<td>31,738</td>
<td>State v. Marlene C.</td>
<td>28,352</td>
<td>3/22/10</td>
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<tr>
<td>31,656</td>
<td>State v. Rivera</td>
<td>25,798</td>
<td>4/13/10</td>
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<td>31,015</td>
<td>State v. Demongey</td>
<td>26,453</td>
<td>4/15/10</td>
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<td>32,001</td>
<td>Oldham v. Oldham</td>
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<td>5/10/10</td>
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<td>31,567</td>
<td>State v. Guthrie</td>
<td>27,022</td>
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<td>Romero v. Progressive Northwestern Ins Co.</td>
<td>28,720</td>
<td>5/11/10</td>
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<td>31,909</td>
<td>State v. Rudy B.</td>
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<td>5/12/10</td>
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<td>32,099</td>
<td>Wachocki v. Bernalillo Co. Sheriff’s Dept.</td>
<td>27,761</td>
<td>7/19/10</td>
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<td>Wachocki v. Bernalillo Co. Sheriff’s Dept.</td>
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<td>7/19/10</td>
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<td>28,638</td>
<td>7/29/10</td>
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<td>Lucero v. Trujillo</td>
<td>29,859</td>
<td>7/29/10</td>
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<td>32,139</td>
<td>San Juan Ag. Water Users Assn. v. KNME-TV</td>
<td>28,473</td>
<td>8/9/10</td>
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<td>31,813</td>
<td>State v. Soliz</td>
<td>28,018</td>
<td>8/10/10</td>
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<td>31,980</td>
<td>Northwest Villages, L.L.C. v. Martinez</td>
<td>29,743</td>
<td>8/25/10</td>
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<td>31,740</td>
<td>State v. McCorkle</td>
<td>29,124</td>
<td>8/25/10</td>
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**Petition for Writ of Certiorari Denied:**

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<td>32,365</td>
<td>State v. Holgate</td>
<td>30,021</td>
<td>7/20/10</td>
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<td>32,458</td>
<td>Castillo v. Romero</td>
<td>12-501</td>
<td>7/20/10</td>
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<td>32,477</td>
<td>State v. Peralta</td>
<td>28,115</td>
<td>7/22/10</td>
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<td>32,479</td>
<td>State v. Salazar</td>
<td>28,980</td>
<td>7/22/10</td>
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<td>32,481</td>
<td>State v. Robles</td>
<td>29,953</td>
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**Writ of Certiorari Quashed:**

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<td>32,162</td>
<td>Garcia v. Garcia</td>
<td>28,106</td>
<td>7/27/10</td>
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## Published Opinions

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<td>29149</td>
<td>7/19/2010</td>
<td>5th Jud Dist Lea CV-07-623, D HOLGUIN v FULCO OIL (affirm in part, reverse in part and remand)</td>
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<td>26811</td>
<td>7/20/2010</td>
<td>11th Jud Dist McKinley CR-04-14, STATE v P NEZ (affirm in part, reverse in part and remand)</td>
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<td>29456</td>
<td>7/22/2010</td>
<td>WCA-06-5798, E VILLA v CITY OF LAS CRUCES (affirm)</td>
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## Unpublished Opinions

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<td>7/19/2010</td>
<td>3rd Jud Dist Dona Ana CR-05-1507, STATE v A ROBLES (affirm)</td>
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<tr>
<td>30201</td>
<td>7/19/2010</td>
<td>13th Jud Dist Valencia CV-08-537, CORRECTIONS DEPT v J CHAVEZ (reverse)</td>
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<tr>
<td>30225</td>
<td>7/19/2010</td>
<td>11th Jud Dist San Juan CR-09-376, STATE v R RODRIGUEZ (affirm)</td>
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<td>30261</td>
<td>7/20/2010</td>
<td>9th Jud Dist Curry JR-09-162, STATE v OSCAR H (affirm)</td>
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<td>7/20/2010</td>
<td>6th Jud Dist Luna CV-08-388, H TARAZON v M ZUMWALT (affirm)</td>
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<td>WCA-05-63578, J POLL0 v CTS (reverse)</td>
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<td>5th Jud Dist Lea CR-07-359, STATE v M MUNOZ (affirm)</td>
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<td>7/20/2010</td>
<td>13th Jud Dist Sandoval CR-09-186, STATE v D VEENSTRA (reverse)</td>
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<td>7/20/2010</td>
<td>2nd Jud Dist Bernalillo CV-09-14357, R DOWNS v HUNTERS RIDGE (affirm)</td>
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<td>2nd Jud Dist Bernalillo CV-09-3892, K DEIPHOLZ v PARK PLAZA (affirm)</td>
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<td>30277</td>
<td>7/21/2010</td>
<td>WCA-05-60689, J KEMPER v LITHIA OF SFE (affirm)</td>
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<td>7/21/2010</td>
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<td>7/22/2010</td>
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<td>AD AD ADM-00000, G WILCOX v ACUPUNCTURE BD (reverse)</td>
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Slip Opinions for Published Opinions may be read on the Court's website:

http://coa.nmcourts.gov/documents/index.htm
### Clerk’s Certificates

**Clerk’s Certificate Dated July 12, 2010**

### Clerk’s Certificate of Name, Address, and/or Telephone Changes

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<th>Address</th>
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<tr>
<td>Sarah J. Batzli</td>
<td>N.M. Human Services Department Child Support Enforcement Division 1015 Tijeras Avenue, NW, Ste. 100</td>
<td>Albuquerque, NM 87102-3994</td>
<td>505-222-9470</td>
<td><a href="mailto:sarahj.batzli@state.nm.us">sarahj.batzli@state.nm.us</a></td>
</tr>
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20  Bar Bulletin - August 2, 2010 - Volume 49, No. 31
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### Recent Rule-Making Activity

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective July 26, 2010**

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

#### Pending Proposed Rule Changes:

<table>
<thead>
<tr>
<th>Proposed Rule Change</th>
<th>Comment Deadline</th>
<th>Proposed Rule Change</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>14-1601 Larceny; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2203 Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
</tr>
<tr>
<td>14-1610 Shoplifting; conversion of property without payment; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2204 Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<tr>
<td>14-1611 Shoplifting; alteration of label or container; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2205 Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<tr>
<td>14-1640 Fraud; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2206 Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<tr>
<td>14-1641 Embezzlement; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2207 Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1643 Forgery; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2208 Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a violent felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1644 Issuing or transferring a forged writing; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2209 Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1650 Receiving stolen property; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2210 Aggravated assault in disguise on a peace officer; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1660 Unlawful taking of vehicle or motor vehicle; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2211 Battery upon a peace officer; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1689 Fraudulent use of credit cards obtained in violation of law; essential elements. (UJI–Criminal)</td>
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<td>14-2212 Aggravated battery on a peace officer with a deadly weapon; essential elements. (UJI–Criminal)</td>
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<td>14-1690 Fraudulent use of invalid, expired or revoked credit card; essential elements. (UJI–Criminal)</td>
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<td>14-2213 Aggravated battery on a peace officer; great bodily harm; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1691 Fraudulent use of credit card by person representing that he is the cardholder; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2214 Aggravated battery on a peace officer; without great bodily harm; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1692 Fraudulent use of credit card without consent of the cardholder; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2215 Resisting, evading or obstructing an officer; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1693 Fraudulent acts by merchants or their employees; fraudulently furnishing something of value; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-2216 “Peace officer”; defined. (UJI–Criminal)</td>
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<td>14-1694 Fraudulent acts by merchants or their employees; representing that something of value has been furnished; essential elements. (UJI–Criminal)</td>
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<td>14-4511 “Operating” or driving a motor vehicle; defined. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1701 Arson; with purpose of destroying or damaging property; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-4512 Actual physical control; defined. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-1702 Arson; with purpose of collecting insurance; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-210 Second degree murder; voluntary manslaughter lesser included offense; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
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<td>14-2201 Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements. (UJI–Criminal)</td>
<td>08/16/10</td>
<td>14-211 Second degree murder; voluntary manslaughter not lesser included offense; essential elements. (UJI–Criminal)</td>
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<td>14-2202 Aggravated assault on a peace officer; threat or menacing conduct with a deadly weapon; essential elements. (UJI–Criminal)</td>
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RULE-MAKING ACTIVITY

14-2801 Attempt to commit a felony; essential elements. (UJI–Criminal) 08/16/10
5-401 Bail. (Rules of Criminal Procedure for the District Courts) 08/09/10
5-406 Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the District Courts) 08/09/10
6-401 Bail. (Rules of Criminal Procedure for the Magistrate Courts) 08/09/10
6-406 Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the Magistrate Courts) 08/09/10
7-401 Bail. (Rules of Criminal Procedure for the Metropolitan Courts) 08/09/10
7-406 Bail bonds; exoneration; forfeiture. (Rules of Criminal Procedure for the Metropolitan Courts) 08/09/10
8-401 Bail. (Rules of Procedure for the Municipal Courts) 08/09/10
8-406 Bail bonds; exoneration; forfeiture. (Rules of Procedure for the Municipal Courts) 08/09/10
1-023 Class actions. (Rules of Civil Procedure for the District Courts) 07/26/10
5-116 Witness use immunity. (Rules of Criminal Procedure for the District Courts) 07/26/10
5-303 Arraignment. (Rules of Criminal Procedure for the District Courts) 07/19/10
5-304 Pleas. (Rules of Criminal Procedure for the District Courts) 07/19/10
5-821 Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the District Courts) 07/19/10
5-822 Commencement and continuation of fugitive actions after issuance of a governor's rendition warrant. (Rules of Criminal Procedure for the District Courts) 07/19/10
6-502 Pleas and plea agreements. (Rules of Criminal Procedure for the Magistrate Courts) 07/19/10
6-811 Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the Magistrate Courts) 07/19/10
7-502 Pleas and plea agreements. (Rules of Criminal Procedure for the Metropolitan Courts) 07/19/10
7-811 Arraignment and commitment hearing prior to issuance of the governor's rendition warrant. (Rules of Criminal Procedure for the Metropolitan Courts) 07/19/10
8-502 Pleas. (Rules of Procedure for the Municipal Courts) 07/19/10
9-406 Guilty plea proceeding. (Criminal Forms) 07/19/10
9-406A Guilty plea or no contest plea proceeding. (Criminal Forms) 07/19/10
9-408 Plea and disposition agreement. (Criminal Forms) 07/19/10
9-408A Plea and disposition agreement. (Criminal Forms) 07/19/10
9-806 Motion to extend time. (Criminal Forms) 07/19/10
9-807 Order granting extension of time. (Criminal Forms) 07/19/10
13-2300 Introduction. (UJI–Civil) 05/24/10
13-2305 Human Rights Act violation. Withdrawn; Recompiled as UJI 13-2307 (UJI–Civil) 05/24/10
13-2307 Human Rights Act violation. (UJI–Civil) 05/24/10
13-2307A Race, gender, and other discrimination under the New Mexico Human Rights Act. (UJI–Civil) 05/24/10
13-2307B Bona fide occupational qualification. No instruction drafted. (UJI–Civil) 05/24/10
13-2307C Discrimination based on serious medical condition or physical or mental handicap. (UJI–Civil) 05/24/10
13-2307D Failure to accommodate. (UJI–Civil) 05/24/10
13-2307E Undue hardship. No instruction drafted. (UJI–Civil) 05/24/10
13-2307F Determining whether impairment qualifies as a physical or mental handicap. (UJI–Civil) 05/24/10
13-2307G Determining whether impairment qualifies as a serious medical condition. No instruction drafted. (UJI–Civil) 05/24/10
13-2307H Establishing disability by showing an individual has a record of a physical or mental condition. No instruction drafted. (UJI–Civil) 05/24/10
13-2307I “Regarded as” defined. No instruction drafted. (UJI–Civil) 05/24/10
13-2307J “Otherwise qualified” defined. (UJI–Civil) 05/24/10
13-2307K “Reasonable accommodation” defined. No instruction drafted. (UJI–Civil) 05/24/10
13-2307L Constructive discharge. (UJI–Civil) 05/24/10
3-105 Assignment and designation of judges (Rules of Civil Procedure for the Metropolitan Courts) 05/03/10
3-706 Appeal from metropolitan court on the record (Rules of Civil Procedure for the Metropolitan Courts) 05/03/10
6-701 Judgment (Rules of Criminal Procedure for the Magistrate Courts) 05/03/10
6-703 Appeal (Rules of Criminal Procedure for the Magistrate Courts) 05/03/10
7-703 Appeal (Rules of Criminal Procedure for the Metropolitan Courts) 05/03/10
8-701 Judgment (Rules of Procedure for the Municipal Courts) 05/03/10
8-703 Appeal (Rules of Procedure for the Municipal Courts) 05/03/10
10-424 Advice of rights by judge (Children’s Court Rules) 04/26/10
10-425 Consent decree (Children’s Court Rules) 04/26/10
10-456A Affidavit of indigency; abuse or neglect (Children’s Court Rules) 04/26/10
10-343 Adjudicatory hearing; time limits; continuances (Children’s Court Rules) 04/17/09

RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2010 NMRA:

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

1-079 Public inspection and sealing of court records. 07/01/10

BAR BULLETIN - AUGUST 2, 2010 - VOLUME 49, NO. 31 23
RULE-MAKING ACTIVITY

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

RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS

2-112 Public inspection and sealing of court records. 07/01/10
2-105 Assignment and designation of judges. 05/14/10

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

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

CIVIL FORMS

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

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

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

RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS

6-114 Public inspection and sealing of court records. 07/01/10
6-105 Assignment and designation of judges. 05/14/10

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

7-113 Public inspection and sealing of court records. 07/01/10
7-201 Commencement of action. 05/10/10
7-504 Discovery; cases within Metropolitan Court trial jurisdiction. 05/10/10

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

8-112 Public inspection and sealing of court records. 07/01/10

CRIMINAL FORMS

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

CHILDREN’S COURT RULES AND FORMS

10-424 Advice of rights by judge. 08/30/10
10-425 Consent decree. 08/30/10
10-456A Affidavit of indigency; abuse or neglect. 08/30/10
10-166 Public inspection and sealing of court records. 07/01/10
10-313.1 Representation of multiple siblings. 05/10/10

RULES OF APPELLATE PROCEDURE

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

UJI CRIMINAL

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

RULES GOVERNING ADMISSION TO THE BAR

15-304 Oath. 03/30/10
15-103 Qualifications. 07/04/10

RULES GOVERNING DISCIPLINE

17-316 Review by the Supreme Court. 11/30/09

SUPREME COURT GENERAL RULES

23-106 Supreme Court rules committees. 05/10/10

RULES GOVERNING REVIEW OF JUDICIAL STANDARDS COMMISSION

27-106 Forms of papers. 03/03/10
27-301 Commencement of proceedings. 03/03/10
27-303 Response. 03/03/10

RULES GOVERNING THE JUDICIAL EVALUATION COMMISSION

28-201 Commission created; members; staff; meetings. 02/24/10
28-202 Judicial proceedings; excusals; recusals and withdrawals. 02/24/10
28-203 Powers and duties of the Commission. 02/24/10
28-205 Confidentiality of information. 02/24/10
28-301 Judicial evaluations. 02/24/10
28-302 Narrative profile requirements. 02/24/10
28-303 Powers and duties of the Commission. 02/24/10
28-401 Criteria for evaluation of judicial performance. 02/24/10

LOCAL RULES FOR THE THIRTEENTH JUDICIAL DISTRICT

LR13-411 Electronic filing and service pilot project. 07/01/10
RULES/ORDERS
From the New Mexico Supreme Court

No. 10-8300-022

IN THE MATTER OF THE APPROVAL OF AMENDMENTS TO FORMS 10-424 AND 10-425 NMRA AND ADOPTION OF NEW FORM 10-456A NMRA OF THE CHILDREN’S COURT RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Children’s Court Rules Committee to amend Forms 10-424 and 10-425 NMRA and to adopt new Form 10-456A NMRA of the Children’s Court Rules, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Charles W. Daniels, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that amendments of Forms 10-424 and 10-425 NMRA of the Children’s Court Rules hereby are APPROVED;

IT IS FURTHER ORDERED that new Form 10-456A NMRA of the Children’s Court Rules hereby is ADOPTED;

IT IS FURTHER ORDERED that the amendments of Forms 10-424 and 10-425 NMRA and adoption of new Form 10-456A NMRA of the Children’s Court Rules shall be effective August 30, 2010;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the above-referenced new rule by publishing the same in the Bar Bulletin and NMRA and posting the same on the New Mexico Compilation Commission web site <www.nmcompcomm.us/nprules>.

IT IS SO ORDERED.

WITNESS, Honorable Chief Justice Charles W. Daniels of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of July, 2010.

Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

10-424. Advice of rights by judge.
[For use with Rules 10-226 and 10-227 NMRA]

STATE OF NEW MEXICO
____________________ COUNTY
____________________ JUDICIAL DISTRICT
IN THE CHILDREN’S COURT

IN THE MATTER OF
____________________, A CHILD.

No. __________________

ADVICE OF RIGHTS BY JUDGE
(DELINQUENT OFFENDER)

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

Judge’s Initial

1. The child understands the charges set forth in the petition.

2. The child understands the range of possible dispositions includes commitment to __________.

3. The child understands the following constitutional rights __________.

which the child gives up by [admitting] [not contesting] [standing mute to] the offenses alleged.

(a) the right to trial by jury, if any;

(b) the right to the assistance of an attorney at the adjudicatory stage of the proceeding, and to an appointed attorney, to be furnished free of charge, if the child cannot afford one;

(c) the right to confront the witnesses against the child and to cross-examine them as to the truthfulness of their testimony;

(d) the right to present evidence on the child’s own behalf, and to have the state compel witnesses of the child’s choosing to appear and testify;

(e) the right to remain silent and to be presumed innocent until the allegations of criminal offenses are proven beyond a reasonable doubt; and

(f) the right to appeal the adjudication unless the child has reserved an issue for appeal.

4. That the child wishes to give up the constitutional rights of which the child has been advised.

5. That there exists a basis in fact for believing the child committed the offenses charged and that an independent record for such factual basis has been made.

6. That the child and the children’s court attorney have entered into an agreement that the child understands and consents to its terms. (Indicate “NONE” if a plea agreement has not been signed.)

7. That the agreement is voluntary and not the result of force or threats except the promises made in the plea agreement.

8. That the child understands that admission of, not contesting, or standing mute to the charges may have an effect upon the child’s immigration or naturalization status and that the child has been advised by counsel of the immigration consequences.

9. That under the circumstances, it is reasonable that the child admit, not contest, or stand mute to the charges alleged in the petition.

On the basis of these findings, I conclude that the child knowingly, voluntarily and intelligently agrees to [admit] [plead no contest to] [stand mute to] the alleged delinquent acts as set forth and accepts the agreement. This advice of rights shall be filed in the record proper in the above-styled case.

Children’s Court Judge __________________________ Date __________________________

CERTIFICATE BY CHILD

I certify that my attorney personally advised me of the matters noted above and that I understand the constitutional rights that I am giving up by admitting, not contesting, or standing mute to the allegations in the delinquency petition filed under this cause number.

Child __________________________

CERTIFICATE OF COUNSEL

I have reviewed the above matters with my client and have explained the matters to my client in detail.

Defense counsel __________________________
IN THE MATTER OF ____________________, A CHILD. No. __________

CONSENT DECREE

This matter came before the court on __________, and the court finds as follows:
1. The court has made a sufficient advisement of rights upon addressing the child in open court and has determined that there is a factual basis for the charges.
2. The child freely and voluntarily
   ( ) admits to or
   ( ) declares the intention not to contest or
   ( ) stands mute to the following delinquent acts filed under this cause number.
3. The state and the child have agreed that the following charges will be dismissed or will not be filed:

4. The child’s best interests will be served by suspending proceedings and placing the child on supervised probation
   ( ) for a period not to exceed six (6) months
   ( ) for an agreed-upon extended period not to exceed one (1) year.

IT IS THEREFORE ORDERED that the child is placed on probation under the terms and conditions of the plea and disposition agreement [probation agreement] [and] [or] [motion for consent decree], which shall be signed by the child [and parents (if made a party)] and the state and considered a part of this consent decree.

___________________________, Respondent(s).

_____________________________, District Judge

Children’s Court Attorney          Child’s Attorney

USE NOTE
1. The advice of rights form shall be used to document the advisement.
2. Under Section 32A-2-22 NMSA 1978, when entering into a consent decree, a child is not required to admit some or all of the allegations stated in the delinquency petition.
3. Use applicable bracketed alternative.

[Approved, effective August 1, 1999; as amended by Supreme Court Order No. 10-8300-022, effective August 30, 2010.]

--

10-456A. Affidavit of indigency; abuse or neglect.
[For use with 32A-4-10 NMSA 1978]
STATE OF NEW MEXICO
COUNTY OF __________ JUDICIAL DISTRICT

IN THE CHILDREN’S COURT

State of New Mexico ex rel. No. __________
Children, Youth and Families Department,
In the Matter of ____________________, a Child, and concerning ____________________, Respondent(s).

AFFIDAVIT OF INDIGENCY

I give upon my oath or affirmation the following statement:

My marital status is single ___ married ___ divorced ___ separated ___ widowed ___.

INFORMATION ABOUT MY FINANCES
(Check all that apply and fill in the blanks)

A. PUBLIC ASSISTANCE
   ( ) I do not receive public assistance. (If you check this blank, go directly to Section B, EMPLOYMENT/UNEMPLOYMENT.)
   ( ) I currently receive the following public assistance in __________ County (please check all applicable public assistance programs):
     Temporary Assistance for Needy Families (TANF) ___;
     Food Stamps ___;
     General Assistance (GA) ___;
     Public Housing ___;
     Department of Health Case Management Services (DHMS) ___;
     Medicaid ___;
     Supplemental Security Income (SSI) ___;
     Social Security Disability Income (SSDI) ___;
     Veterans Disability Benefits (VA) ___;
     Other (please describe) ____________________________.

B. EMPLOYMENT/UNEMPLOYMENT
   ( ) I am currently unemployed and have been unemployed for ___ months in the past year. I am unemployed because ____________________________
      ( ) I receive unemployment benefits in the amount of $ _____ per month.
      ( ) I have no income because I am unemployed.
   ( ) I am employed. My employer’s name, address, and phone number is ____________________________
      ( ) I am self-employed. ____________________________(Describe nature of the business.)
      ( ) I am paid __ daily
          __ weekly
          every other week
          twice a month
          once a month.
When I am paid, my net take-home pay minus deductions required by law, like state and federal tax withholding and FICA, is $ _____.
   ( ) I am married, and my spouse is unemployed and has been unemployed for ___ months in the past year because ____________________________
      ( ) My spouse receives unemployment benefits in the amount of $ _____ per month.

--
I do not have any other sources of income.

My spouse does not have an income because he or she is unemployed.

I am married, and my spouse is employed. My spouse’s employer’s name, address, and phone number is ____________________________ .

I am married, and my spouse is self-employed. (Describe nature of the business.)

My spouse is paid

___ daily

___ weekly

___ every other week

___ twice a month

___ once a month.

When my spouse is paid his or her net take-home pay minus deductions required by law, like state and federal tax withholding and FICA, is $ _______.

C. OTHER SOURCES OF INCOME

___ I have income from another source not mentioned above.

___ Child support $ _______

___ Alimony $ _______

___ Investments $ _______

___ Other __________________________ $ _______

___ I do not have any other sources of income.

___ I am married, and my spouse has income from another source not mentioned above.

___ Child support $ _______

___ Alimony $ _______

___ Investments $ _______

___ Other __________________________ $ _______

___ I am married, and my spouse does not have any other sources of income.

D. OTHER ASSETS (Please list other assets owned by you or your spouse that can be turned into cash. Do not include money you have in retirement accounts.)

Cash on hand $ _______

Bank accounts $ _______

Stocks/bonds $ _______

Income tax refund $ _______

Real estate (other than primary residence) value: $ _______ debt: $ _______

Vehicles (other than primary vehicle) value: $ _______ debt: $ _______

Other assets (describe below): $ _______

E. EXCEPTIONAL EXPENSES:

Medical expenses (not covered by insurance) $ _______

Medical insurance payments $ _______

Court ordered support payments/alimony $ _______

Child care payments (e.g., day care) $ _______

Any funds garnished from paycheck $ _______

Other (describe) $ _______

TOTAL EXCEPTIONAL EXPENSES $ _______

F. HOUSEHOLD

I live at ____________________________ .

Other than myself, the other members of my household are

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Employment</th>
<th>I Support</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This statement is made under oath. I hereby state that the above information regarding my financial condition is correct to the best of my knowledge. I hereby authorize the court to obtain information from financial institutions, employers, relatives, the federal internal revenue service, and other state agencies. I understand that the court may require documentation for any information listed above. If at any time the court discovers that information in this affidavit was false, misleading, inaccurate, or incomplete at the time the application was submitted, the court may require me to pay for any costs or fees that were waived based on the information in this application.

_________________________ ( )
(Signature)

_________________________ ( )
(Print name)

_________________________ ( )
(Street address)

_________________________ ( )
(City, state, zip code)

_________________________ ( )
(Telephone)

State of ____________________________ ) ss

County of ____________________________ )

Signed and sworn or affirmed to before me on ____________________________ (date) by ____________________________ (name of applicant). Notary

My commission expires: ____________________________

GUIDELINES FOR DETERMINING ELIGIBILITY

Court administration or the respondent’s attorney shall assist the respondent in completing this form. This form should be served with the petition on the respondent.

An applicant is presumed indigent if the applicant is the current recipient of aid from a state or federally administered public assistance program, such as Temporary Assistance for Needy Families (TANF), General Assistance (GA), Supplemental Security Income (SSI), Social Security Disability Income (SSDI), VA Disability Benefits, Department of Health Case Management Service (DHMS), Food Stamps, Medicaid, or public assisted housing.

An applicant who is not presumptively indigent can, nevertheless, establish indigency by showing in the application that the applicant’s available funds (annual income + assets - expenses) do not exceed one hundred fifty percent (150%) of the federal poverty guidelines established by the United States Department of Health and Human Services. (See www.aspe.hhs.gov/poverty/ for current federal poverty guidelines.)

A presumption of indigency under this rule does not require the court to find an applicant indigent and therefore entitled to a court appointed attorney if it appears from the application that the applicant is otherwise able to pay.

Even if an applicant cannot establish indigency, the court may still appoint an attorney if, in the court’s discretion, appointment of counsel is required in the interests of justice.

If at any time the court discovers that information in an application for indigency was false, misleading, inaccurate, or incomplete at the time the application was submitted, and that the determination of indigency was improvidently made, the court may require the applicant to pay the court-appointed attorney fees.

[Adopted by Supreme Court Order No. 10-8300-022, effective August 30, 2010.]
From the New Mexico Supreme Court

PROPOSED REVISIONS TO THE CHILDREN’S COURT FORMS

The Children’s Court Rules Committee has recommended proposed amendments to the Children’s Court Forms for the Supreme Court’s consideration.

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

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

Your comments must be received on or before Aug. 23, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

[For use with Rule 10215 NMRA]

STATE OF NEW MEXICO COUNTY OF

IN THE DISTRICT COURT CHILDREN’S COURT DIVISION
In the Matter of

__________________, a Child No. _____________

STATE OF NEW MEXICO COUNTY __________________
JUDICIAL DISTRICT

IN THE CHILDREN’S COURT
No.

IN THE MATTER OF

__________________, a Child

AFFIDAVIT FOR ARREST WARRANT

The undersigned, being duly sworn, [on his oath] states that [he has] there is reason to believe that on or about the day of ____________, __________, in County, New Mexico, the abovenamed respondent, a child, (insert date of birth or approximate age)
(check appropriate boxes)
[ ] committed the delinquent act of: ______________________ (state common name of delinquent act or acts)
[ ] contrary to the law of the State of New Mexico (specify the number of the section or subsection defining the offense[s] and the title and date of passage of the ordinance [and the date of passage])
[ ] violated conditions of probation, release, or supervised release

[ ] is a child in need of supervision by reason of ________________________________ (include facts in support of the credibility of any hearsay relied upon)

Affiant’s Signature

Title (if any)

Affiant’s Name

(please print or type)

Subscribed and sworn to before me in the abovenamed county of the State of New Mexico this ______ day of ____________, __________.

Officer Authorized to Administer Oaths

Title

USE NOTE
1. Either this form or the form approved for arrest warrants in adult criminal proceedings may be used in delinquency cases in the Children’s Court. [However, only this form may be used in need of supervision cases in the Children’s Court.]

[As adopted by Supreme Court Order _____, effective _____.]

10410. Arrest Warrant.
[For use with Rule 10-215 NMRA]

STATE OF NEW MEXICO IN THE DISTRICT COURT
CHILDREN’S COURT DIVISION
In the Matter of

__________________, a Child No. _____________

STATE OF NEW MEXICO COUNTY __________________
JUDICIAL DISTRICT

IN THE CHILDREN’S COURT

IN THE MATTER OF

__________________, A CHILD. No. ______________

_________________________, Child

Date: ________________

DOB: ___________________

Gender: ___________ Race: _____________

AKA: ___________________

Gang affiliation: ___________

Address: ___________________

Height: _______ Weight: _______ Eyes: _______ Hair: _______

ARREST WARRANT

THE STATE OF NEW MEXICO TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT

BASED ON A FINDING OF PROBABLE CAUSE, YOU ARE HEREBY COMMANDED to arrest the abovenamed respondent, a child, and deliver said child without unnecessary delay to probation services or to a place of detention authorized under the
IN THE CHILDREN’S COURT
IN THE MATTER OF:
________________________, a child
________________________, A CHILD. No. _____________ (number of original case)

________________________

STATE OF NEW MEXICO
COUNTY OF ________________
STATE OF NEW MEXICO

In the Matter of Competency to Stand Trial

This matter came before the court on the motion of ____________,, and after being fully advised, the court FINDS good cause exists, and

IT IS HEREBY ORDERED as follows:

1. The proceedings in this matter shall be stayed pending a determination of competency;

2. If the child is charged with an offense that would be a misdemeanor if committed by an adult, only the first evaluation listed below shall be performed. If the child is charged with an offense that would be a felony if committed by an adult, both the first and second evaluations listed below shall be performed.

[ ] An evaluation of the child’s competency to stand trial shall be performed by _______________________________.

(insert name and address of a doctoral level licensed psychologist performing the evaluation); the report shall, at a minimum contain an evaluation of the current ability to stand trial, measured by the capacity of the child to understand the proceedings, to consult meaningfully with counsel through the adjudication proceedings, measured by a capacity with a reasonable degree of rational and factual understanding of the proceedings, and to assist in the defense;¹

[ ] If the child is charged with an offense that would be a felony if committed by an adult and the child is found to be incompetent, an evaluation of whether the child can be treated to competency shall be performed by

________________________

District Judge

__________________________________________________________________________________________

1. Title 18, Section 3791.
1. A pre-dispositional diagnostic evaluation of the child shall be performed by [insert name and address of a master level clinician who will perform the evaluation with independently licensed master or doctoral level oversight]; the report shall, at a minimum, contain a current description of the child, including behavioral health diagnoses (if any) and the present level of functioning, and recommended course of action regarding treatment and rehabilitation.

2. [Defense counsel] [The juvenile probation officer] shall cause this order to be served so that it is received by the evaluator no later than five (5) days from the date of entry of this order and shall file with the court a certificate of service.

3. Child is in detention at ____________________________; or Child’s address and telephone number are ____________________________.

4. [Defense counsel] [The juvenile probation officer] shall cause this order to be served so that it is received by the evaluator no later than five (5) days from the date of entry of this order and shall file with the court a certificate of service.

5. If the evaluator is unable to contact the child, the evaluator shall immediately contact [defense counsel] [the juvenile probation officer], who will contact the child and set up the evaluation or notify the court that the evaluator cannot contact the child.

6. A copy of the evaluation report shall be sent to the [child’s attorney] [juvenile probation officer]

7. If the child needs to be transported to effect the evaluation, a separate transport order needs to be obtained.

________________________, and after being fully advised, the ____________________________

District Judge

Children’s Court Attorney

[Approved by Supreme Court Order No. ______, effective ______.]

[NEW MATERIAL]

10-496C. Order for pre-dispositional diagnostic evaluation.

FOR USE WITH § 32A-2-17(A), NMSA 1978

STATE OF NEW MEXICO

COUNTY OF _____________ JUDICIAL DISTRICT COURT

IN THE CHILDREN’S COURT

IN THE MATTER OF: _______ (number of original case)

IN THE MATTER OF: _______ , a child

Year of Birth: _____________

Social Security No. or Court-Issued ID No. (last four digits only): _______

ORDER FOR PRE-DISPOSITIONAL DIAGNOSTIC EVALUATION

This matter came before the court on the motion of _______. and after being fully advised, the court ORDERS as follows:

1. A pre-dispositional diagnostic evaluation of the child shall be performed by _______ (insert name and address of a master level clinician who will perform the evaluation with independently licensed master or doctoral level oversight); the report shall contain, at a minimum, a current description of the child, an explanation of the child’s delinquent behavior, and a recommended course of action regarding disposition.

2. [Defense counsel] [The juvenile probation officer] shall cause this order to be served so that it is received by the evaluator no later than five (5) days from the date of entry of this order and shall file with the court a certificate of service.

3. Child is in detention at ____________________________; or Child’s address and telephone number are ____________________________.
4. If the evaluator is unable to contact the child, the evaluator shall immediately contact [defense counsel] [the juvenile probation officer], who will contact the child and set up the evaluation or notify the court that the evaluator cannot contact the child.

5. A copy of the evaluation report shall be sent to the juvenile probation officer who shall serve copies on the child, defense counsel, and the court

   [ ] within fifteen (15) days of the date of receipt of this order if the child is in custody.

   [ ] within thirty (30) days of the date of receipt of this order if the child is not in custody.

6. If the child needs to be transported to effect the evaluation, a separate transport order needs to be obtained.

   DISTRICT JUDGE
   ______________________________
   Children’s Court Attorney
   ______________________________
   Attorney for Child

   [Approved by Supreme Court Order No. _____________, effective ____________ .]

   [NEW MATERIAL]

   10-496D. Order for evaluation of amenability to treatment.
   [For use with §§ 32A-2-17(A)(3) and 32A-2-20]

   STATE OF NEW MEXICO
   COUNTY OF __________ JUDICIAL DISTRICT COURT
   IN THE CHILDREN’S COURT
   No. _____________ (number of original case)
   IN THE MATTER OF:
   ________________________________ (insert name and address of a doctoral level licensed psychologist who will perform this evaluation); the report shall contain, at a minimum, an evaluation whether the child is amenable to treatment or rehabilitation as a child in available facilities, whether the child is eligible for commitment to an institution for children with developmental disabilities or mental disorders, and a recommended course of action regarding disposition in youthful offender proceedings.

   The report shall address the following factors:

   (1) the seriousness of the alleged offense;

   (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

   (3) whether a firearm was used to commit the alleged offense;

   (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

   (5) the maturity of the child as determined by consideration of the child’s home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability;

   (6) the record and previous history of the child;

   (7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and

   (8) any other factor relevant to amenability.

   2. The juvenile probation officer shall cause this order to be served so that it is received by the evaluator no later than five (5) days from the date of entry of this order and shall file with the court a certificate of service;

   3. Child is in detention at ______________________________ or Child’s address and telephone number are __________________________________

   4. If the evaluator is unable to contact the child, the evaluator shall immediately contact defense counsel, who will contact the child and set up the evaluation or notify the court that the evaluator cannot contact the child.

   5. A copy of the evaluation report shall be sent to the juvenile probation officer who shall serve copies on the child, defense counsel, and the court

   [ ] within fifteen (15) days of the date of receipt of this order if the child is in custody.

   [ ] within thirty (30) days of the date of receipt of this order if the child is not in custody.

   6. If the child needs to be transported to effect the evaluation, a separate transport order needs to be obtained.

   DISTRICT JUDGE
   ______________________________
   Children’s Court Attorney
   ______________________________
   Attorney for Child

   USE NOTE

   1. This form is for use only in youthful offender cases. In such cases the evaluator’s report is mandatory. See State v. Jose S., 2007-NMCA-146, ¶ 16, 142 N.M. 829, 171 P.3d 768. [Approved by Supreme Court Order No. _____________, effective ____________ .]
OPINION

CHARLES W. DANIELS,
CHIEF JUSTICE

{1} This case comes to us on certification from the United States District Court for the District of New Mexico to determine whether the third-party bad faith cause of action against a compulsory automobile liability insurance carrier, for failure to settle an underlying lawsuit, which we recognized in Hovet v. Allstate Insurance Co., 2004-NMSC-010, 135 N.M. 397, 89 P.3d 69, should be extended to bad faith claims by third parties against carriers providing nonmandatory excess liability insurance coverage. We conclude that neither the holding nor the doctrinal underpinnings of Hovet support such an extension, and we answer the certified question in the negative.

I. FACTUAL AND PROCEDURAL HISTORY

{2} Plaintiff Val Jolley is the personal representative of the estate of John E. Stapleton, who died at the age of nineteen in an accident that occurred in 2002. See Jolley v. Energen Res. Corp., 2008-NMCA-164, ¶ 1-2, 145 N.M. 350, 198 P.3d 376. On the day of the accident, Stapleton, Cody Amezcua, and other young people visited the Glade Run Recreation Area located on federal land outside Farmington, New Mexico. Stapleton drove backward into an unprotected natural gas wellhead operated by Energen Resources Corporation (Energen), breaking the steel gas line and causing a release of natural gas that ignited. Stapleton and Amezcua died as a result of the explosion and fire caused by the collision, and their estates filed wrongful death suits against Energen.

{3} At the time of the accident, Energen had an excess reimbursement insurance policy with Defendant, Associated Electric and Gas Insurance Services Limited (AEGIS), in the amount of $35,000,000. Under the policy, AEGIS contractually agreed to reimburse Energen for incurred damages and defense costs exceeding Energen’s self-insured retention of $500,000. Before Plaintiff’s wrongful death suit resulted in pretrial settlement discussions, Energen had exhausted its retention by payment of defense costs and claims associated with this accident. As a result, any settlement offer or trial judgment in favor of Plaintiff or the Amezcua estate would have been subject to full reimbursement by AEGIS pursuant to the insurance contract between Energen and AEGIS.

{4} The parties did not settle Plaintiff’s suit before trial, despite a voluntary mediation and a subsequent court-ordered settlement conference among Plaintiff, Energen, and AEGIS. Outside the context of a mediation or settlement conference, Plaintiff made a written settlement demand in the amount of $2,000,000. Energen rejected Plaintiff’s offer without making a counteroffer, but settled with the Amezcua estate for $2,000,000. AEGIS reimbursed that sum to Energen.

{5} Plaintiff’s wrongful death suit went to trial, and a jury returned a verdict finding that Energen was negligent and 65 percent at fault and that Stapleton was also negligent and 35 percent at fault. The jury found compensatory damages of $2,957,000, which were reduced by Stapleton’s negligence to $1,922,050. The jury also awarded $13,000,000 in punitive damages against Energen. The New Mexico Court of Appeals affirmed the verdict on September 22, 2008. Jolley, 2008-NMCA-164, ¶ 1. Energen filed petitions for writ of certiorari in this Court and the United States Supreme Court, but both were denied. Having exhausted all avenues of appeal, Energen paid a total of $20,610,413 on Plaintiff’s verdict and was fully reimbursed by AEGIS.

{6} Plaintiff then brought suit in the First Judicial District Court against AEGIS, pursuant to the Trade Practices and Frauds article of the New Mexico Statutes, Applicability; Interpretation; Legislative Intent; Miscellaneous Statutes: Trade Practices and Fraud Act Statutes: Applicability; Interpretation; Legislative Intent; and Rules of Construction.

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

JAMES A. PARKER, U.S. District Court Judge

TERRY R. GUEBERT
DONALD GEORGE BRUCKNER, JR.
GUEBERT BRUCKNER, P.C.
Albuquerque, New Mexico
for Plaintiff

ROBERT C. CONKLIN
JACQUELINE M. WOODCOCK
CONKLIN, WOODCOCK & ZIEGLER, P.C.
Albuquerque, New Mexico

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From the New Mexico Supreme Court

Opinion Number: 2010-NMSC-029

Topic Index:
Appeal and Error: Certification
Insurance: Bad Faith; Indemnity; Insurance Carrier as Party; Insurance Code; Motor Vehicle Insurance; Reinsurance or Excess Insurance; and Settlement
Miscellaneous Statutes: Trade Practices and Fraud Act
Statutes: Applicability; Interpretation; Legislative Intent; and Rules of Construction

VAL JOLLEY, personal representative of the Estate of JOHN EVERETT STAPLETON, deceased, Plaintiff,
versus
ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED (AEGIS), a foreign insurer, and JOHN DOES 1-5, Defendants.

No. 32,032 (filed: June 17, 2010)
(Article 16) of the New Mexico Insurance Code, NMSA 1978, Sections 59A-16-1 to -30 (1984, as amended through 2009), alleging that AEGIS failed to make a good faith effort to settle Plaintiff’s wrongful death lawsuit. AEGIS removed the matter to the United States District Court for the District of New Mexico and filed a motion to dismiss.

7 Senior United States District Judge James A. Parker certified two questions to this Court under the procedures in NMSA 1978, Section 39-7-4 (1997), and Rule 12-607 NMRA. Pursuant to NMSA 1978, Section 39-7-5 (1997), we reframe the certified questions as follows:

1. Whether Plaintiff, a third-party claimant, has a statutory bad faith cause of action against AEGIS, an excess liability insurer, for failure to settle an underlying lawsuit, pursuant to the New Mexico Insurance Code and as recognized by this Court in Hovet, where the excess liability insurance policy between AEGIS and the insured was not mandated by any state law.

2. If such a cause of action exists, whether the third party can recover as damages the costs and contingency attorney’s fees incurred by the third party in an underlying action where the third party was awarded at trial an amount far in excess of the third party’s highest pretrial settlement offer.

We accepted certification and now answer the first question in the negative. Having done so, we find it unnecessary to reach the second question.

II. STANDARD OF REVIEW

8 “Statutory interpretation is a question of law, which we review de novo.” Hovet, 2004-NMSC-010, ¶ 10. “Our primary goal is to ascertain and give effect to the intent of the Legislature.” State v. Nick R., 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. “To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.” Hovet, 2004-NMSC-010, ¶ 10.

III. DISCUSSION

9 The issue before this Court is whether Plaintiff has stated an actionable claim under Article 16 of our Insurance Code. This case involves the intersection of two provisions of Article 16, one granting insureds a right to be treated fairly by their insurers, and the other creating a statutory remedy for a violation of that right. Plaintiff alleges that AEGIS violated Section 59A-16-20(E), which requires insurers to “attempt[] in good faith to effectuate prompt, fair and equitable settlements of an insured’s claims in which liability has become reasonably clear.” To remedy the alleged violation of Section 59A-16-20(E), Plaintiff relies on Section 59A-16-30, which provides in relevant part that “[a]ny person . . . who has suffered damages as a result of a violation of [Article 16] by an insurer or agent is granted a right to bring an action in district court to recover actual damages.” The tension in this case is the discrepancy between the language in Section 59A-16-20(E), requiring insurers to “attempt[] in good faith to effectuate prompt, fair and equitable settlements of an insured’s claims,” and Section 59A-16-30, granting an express statutory cause of action to “[a]ny person covered by [Article 16] who has suffered damages as a result of a violation of that article . . . .” (Emphasis added.) There is no question that Plaintiff is not an “insured,” but the question before us is whether Plaintiff is a “person” who is granted a bad faith cause of action under Section 59A-16-30.

10 On two previous occasions, this Court has recognized that a third-party plaintiff who is an intended beneficiary of statutorily mandated insurance has a private right of action under Section 59A-16-30 to remedy an insurer’s breach of the duty of fair settlement practices established by Article 16. See Hovet, 2004-NMSC-010, ¶¶ 20, 23 (explaining that “[i]nitial parties, having claims against drivers who are insured under compulsory automobile liability policies, are intended beneficiaries of those insurance policies” and can “sue the insurer for unfair settlement practices under the Insurance Code”); Russell v. Protective Ins. Co., 107 N.M. 9, 13-14, 751 P.2d 693, 697-98 (1988) (allowing an injured worker to sue an insurer for bad faith refusal to pay workers’ compensation benefits because the worker “was an intended beneficiary of the contract between his employer and the insurer”).

11 Although our precedents recognize that third-party claimants may have a private action against insurers under Article 16 in certain circumstances, that right of action has been found only where specific legislation indicated that our Legislature contemplated classes of persons to be protected under the Insurance Code. In Russell, this Court rejected the insurer’s argument that only the employer, as an “insured,” could bring a statutory cause of action under the Insurance Code. 107 N.M. at 13, 751 P.2d at 697. Russell explained that, in the context of the Workers’ Compensation Act, “the legislature did not intend to limit Article Sixteen simply to the traditional notion of ‘insured’” and that the right of the worker “to recover against the insurer is consistent with the policy of the law authorizing causes of action under Article Sixteen.” Id. Because the Workers’ Compensation Act made Russell an intended beneficiary, he was a “person covered by Article 16” who has suffered damages as a result of a violation of that article by an insurer” as defined in Section 59A-16-30 and could therefore assert a private right of action against the insurer.

12 Two years later, our Legislature codified the validity of third-party suits by workers against insurers by adding a provision to the Workers’ Compensation Act that allows workers to bring claims “alleging unfair claim-processing practices or bad faith by an employer, insurer or claim-processing representative relating to any aspect of the Workers’ Compensation Act.” NMSA 1978, § 52-1-28.1(A) (1990). The Insurance Code was amended that same year to provide “that the Workers’ Compensation Act . . . provide[s] exclusive remedies.” Section 59A-16-30.

13 In Hovet, 2004-NMSC-010, ¶ 9, this Court applied the reasoning in Russell to hold that, in the context of “statutorily mandated automobile liability insurance, . . . the Legislature intended to provide a statutory cause of action under the Insurance Code to third-party claimants.” Although many jurisdictions deny third parties standing to sue insurers for violations of unfair claims practices statutes, the Hovet Court recognized that the express private right of action established by our Legislature in Section 59A-16-30, combined with the policies embodied in the New Mexico Mandatory Financial Responsibility Act (MFRA), NMSA 1978, Sections 66-5-201 to -239 (1978, as amended through 2009), demonstrated our Legislature’s intent to allow third-party rights of action. Hovet, 2004-NMSC-010, ¶¶ 11-12, 19.

14 The express legislative purpose of the MFRA is to mitigate the “catastrophic financial hardship” that can result from automobile accidents by “requir[ing] residents of New Mexico who own and operate motor vehicles upon the highways of the state either to have the ability to respond in damages to accidents arising out of the use and operation of a motor vehicle or to obtain a motor vehicle insurance policy.” Section 66-5-201.1 (1998). Owners or operators of automobiles in New Mexico are required to pay MFRA premiums, not so much for their own protection, but for the protection and benefit of injured third parties. See Hovet, 2004-NMSC-010, ¶ 19 (“[A]n insurance policy procured by force of legislative
enactment inures to the benefit of any injured member of the public.” (quoting Breeden v. Wilson, 58 N.M. 517, 524, 273 P.2d 376, 380 (1954)).

15 The policy and purpose of the MFRA have long driven New Mexico’s insurance law jurisprudence, ensuring broad protection for innocent accident victims. For example, in Estep v. State Farm Mutual Automobile Insurance Co., 103 N.M. 105, 703 P.2d 882 (1985), this Court held that an insurance contract excluding family or household members of the insured from the class of beneficiaries violated “[t]he fundamental purpose for the enactment of financial responsibility laws—namely, protecting innocent accident victims from financial hardship,” id. at 110, 703 P.2d at 887, and as a result held that such exclusions “were and are contrary to public policy and the statutes of this state.” Id. at 111, 703 P.2d at 888.

16 Similarly, in State Farm Mutual Automobile Insurance Co. v. Ballard, 2002-NMSC-030, ¶¶ 1, 4, 132 N.M. 696, 54 P.3d 537, this Court held unenforceable a provision in a Georgia insurance policy that excluded any coverage for household and family members beyond the minimum required by law. Although “[t]he policy of New Mexico is to interpret insurance contracts according to the law of the place where the contract was executed,” id. ¶ 7 (internal quotation marks and citation omitted), this Court held that applying Georgia law to validate the provision in connection with an accident that had occurred in New Mexico would be inconsistent with the principles and goals of New Mexico’s financial responsibility laws and would “violate public policy and fundamental principles of justice.” Id. ¶¶ 15, 19.

17 In Raskob v. Sanchez, 1998-NMSC-045, ¶ 6, 126 N.M. 394, 970 P.2d 580, this Court held that it was proper for a third-party plaintiff to join a liability carrier as a party defendant in a negligence action. “The general rule is that there is no privity between an injured party and the insurer of the negligent defendant in the absence of a contractual provision or statute or ordinance to the contrary. …” Id. ¶ 3. However, where insurance coverage is mandated by law for the benefit of the public, joinder of the insurer is permissible unless the law expresses legislative intent to the contrary. Id. Raskob held that the MFRA implicitly allowed direct actions against insurers.

18 As we noted in Hovet, the vast majority of states deny non-policyholder third parties standing to sue carriers for violation of unfair claims practices statutes. Id. ¶ 12. Although we have recognized carefully-drawn exceptions in Hovet and Russell, where statutory mandates required insurance coverage for the primary benefit of those whose standing to sue was recognized, we have never recognized such a general right to sue by a stranger to the insurance contract in the absence of such mandatory coverage. Indeed, in Hovet we noted a number of categories of mandatory insurance that might not be subject to the Hovet exception to the general preclusion of third-party suits. Id. ¶ 23 n.4. While we are not faced here with any issue concerning Hovet’s application to other types of mandatory insurance, we can see no principled reason for extending Hovet’s reach so far beyond its carefully limited justifications to encompass the kind of nonmandatory excess policy involved in this case. Cf. State v. Rowell, 2008-NMSC-041, ¶ 23, 144 N.M. 371, 188 P.3d 95 (“When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn elsewhere that are unrelated to those rationales.”)

22 We conclude that the precedent and public policy considerations that dictated our result in Hovet neither compel nor support a private right of action for Plaintiff in this case. Although AEGIS owed Energen an Article 16 duty to engage in fair claims practices, neither the Insurance Code nor any other statute imposed any such obligation on AEGIS with regard to Plaintiff. We find nothing indicating that our Legislature intended to extend a private action to claimants who are neither parties to the insurance contract nor special beneficiaries of a statutory scheme requiring mandatory insurance for the benefit of third parties.

23 In light of our resolution of the first certified question that there is no direct cause of action against the insurer, the second certified question, regarding the measure of damages in such a suit, is moot.

IV. CONCLUSION

24 We accordingly answer the questions certified to this Court as follows: (1) Plaintiff does not have a right to bring a statutory cause of action under Section 59A-16-30 against AEGIS, an excess liability insurer; and (2) the second certified question is not addressed on grounds of mootness.

25 IT IS SO ORDERED.

CHARLES W. DANIELS,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
From the New Mexico Supreme Court

Opinion Number: 2010-NMSC-030

Topic Index:
Appeal and Error: Certification
Contracts: Contracts Against Public Policy; Contracts, General; and Indemnification Agreement
Negligence: Indemnification
Statutes: Applicability; Interpretation; Legislative Intent; and Rules of Construction

UNITED RENTALS NORTHWEST, INC., an Oregon corporation, Plaintiff-Appellant, versus YEAROUT MECHANICAL, INC., a New Mexico corporation, Defendant-Appellee.

No. 31,860 (filed: June 17, 2010)

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
ROBERT H. HENRY, Chief Circuit Judge
TERRENCE L. O’BRIEN, Circuit Judge
CLAIRE V. EAGAN, District Judge

EDWARD RICCO
LESLIE MCCARTHY APODACA
CHARLES J. VIGIL
RODEY, DICKASON, SLOAN,
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OPINION
CHARLES W. DANIELS,
CHIEF JUSTICE

{1} The New Mexico Legislature has mandated that any indemnity clause in a construction contract that seeks to shift tort liability from one party to another “is void, unenforceable and against the public policy of the state.” NMSA 1978, § 56-7-1(A) (2005). In this case, we answer a question that has been certified to us by the United States Court of Appeals for the Tenth Circuit: Is a contract for the rental of a scissor lift to be used in the construction of an aircraft hangar a “contract or agreement relating to construction, alteration, repair or maintenance of any real property,” and therefore a “construction contract” as defined in Section 56-7-1(E)? We hold that it is.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} In 2006, Yearout Mechanical, Inc., was a subcontractor installing duct work in the new Eclipse Aviation hangar at the Albuquerque International Sunport. To perform that work along the fifty-foot-high ceiling, Yearout rented a scissor lift on March 1 from an equipment rental company, United Rentals Northwest, Inc., which delivered the lift to the job site the same day.

{3} Under the terms of the rental contract, Yearout was not authorized to perform any repairs or maintenance on the scissor lift. The contract provided that “[s]hould the Equipment become unsafe, malfunction or require repair, Customer shall immediately notify United” and that “[i]f such condition is the result of normal operation, United will repair or replace the Equipment . . . .” Yearout twice had to call United to the site to perform maintenance on the lift, once on March 28 and again on March 30.

{4} On April 1, two days after United’s last repair, two employees of Yearout, Anthony Magoffe and Camerino Michel Ramirez, boarded the aerial platform of the scissor lift in order to install new sections of duct work on the hangar ceiling. Routine inspections of the lift detected nothing that appeared to be abnormal before the men went aloft. After completing their tasks, Magoffe and Ramirez began their final descent when the scissor lift began rocking back and forth and then fell over sideways. In an effort to save himself, Magoffe grabbed onto a ceiling beam, but he was struck by the falling lift and fell headfirst to his death on the concrete floor nearly fifty feet below. Ramirez remained on the scissor lift’s platform during the fall but was ejected when the lift hit the ground. He died before he reached the hospital.

{5} The workers’ personal representatives brought wrongful death actions against both United and the manufacturer of the scissor lift, JLG Industries, Inc. United ultimately settled with the workers’ estates after several years of litigation. United then sued Yearout in federal court, arguing that Yearout should be required to reimburse United for its settlement of the workers’ suit, not because of any wrongdoing on Yearout’s part, but based instead on an “Indemnity/Hold Harmless” clause that was one of twenty-three “Additional Terms and Conditions” preprinted on the back side of United’s “Rental Out Contract” signed by Yearout when it rented the scissor lift:

3. INDEMNITY / HOLD HARMLESS.

{2} BASED UPON STRICT OR PRODUCT LIABILITY CAUSES OF CLAIM, LOSS, DAMAGE OR COSTS (INCLUDING, BUT NOT LIMITED TO, ATTORNEYS’ FEES, LOSS OF PROFIT, BUSINESS INTERRUPTION OR OTHER SPECIAL OR CONSEQUENTIAL DAMAGES, DAMAGES RELATING TO BODILY INJURY, DAMAGES RELATING TO WRONGFUL DEATH CAUSED BY OR IN ANY WAY ARISING OUT OF OR RELATED TO THE OPERATION, USE, MAINTENANCE, INSTRUCTION, POSSESSION, TRANSPORTATION, OWNERSHIP OR RENTAL OF THE EQUIPMENT, INCLUDING WHENEVER SUCH LIABILITY, CLAIM, LOSS, DAMAGE OR COST IS FOUND, IN WHOLE OR IN PART, UPON ANY NEGLIGENCE OR GROSSLY NEGLIGENT ACT OR OMISSION OF UNITED [RENTALS] OR THE PROVISION OF ANY ALLEGEDLY DEFECTIVE PRODUCT BY UNITED [RENTALS]; THIS INDEMNITY PROVISION APPLIES TO ANY CLAIMS ASSERTED AGAINST UNITED [RENTALS] BASED UPON STRICT OR PRODUCT LIABILITY CAUSES OF ACTION OR BREACH OF WARRANTY.

OPINION

CHIEF JUSTICE

Bar Bulletin - August 2, 2010 - Volume 49, No. 31  35
liability . . . .” Yearout moved to dismiss the complaint on the ground that the indemnity clause was unenforceable under Section 56-7-1’s provisions invalidating indemnification clauses in contracts related to construction that would shift responsibility for wrongdoing from a culpable party to an innocent party. The United States District Court agreed that Section 56-7-1 encompassed rental contracts related to construction projects and granted Yearout’s motion to dismiss Yearout’s claim. United appealed to the Tenth Circuit Court of Appeals, which submitted the issue to this Court, pursuant to the certification procedures of Rule 12-607 NMRA under NMSA 1978, Section 39-7-4 (1997).

II. DISCUSSION

A. Standard of Review


B. The Relevant Statutory Provisions

[8] The resolution of this case hinges on the interpretation and application of a statutory bar to indemnity clauses contained in “construction contracts”:

A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party’s employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

Section 56-7-1(A) (emphasis added). The Legislature has provided further guidance by defining the statutory term “construction contract”:

“[C]onstruction contract” means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.

Section 56-7-1(E) (emphasis added). In order to answer the question certified to us, we therefore must determine whether a contract for rental of equipment to be used in a construction project is a “contract or agreement relating to construction” within the scope of the statute.1

C. Facial Language Analysis

[9] The first guiding principle in statutory construction dictates that we look to the wording of the statute and attempt to apply “the plain meaning rule, recognizing that ‘[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.’” Truong v. Allstate Ins. Co., 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 (alteration in original) (citation omitted); State v. Johnson, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863 (“The primary indicator of legislative intent is the plain language of the statute.”). The Legislature itself has codified the plain meaning rule in the Uniform Statute and Rule Construction Act: “The text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997).

[10] Instead of writing a narrow anti-indemnification statute that addressed only contracts for construction, the Legislature defined the statutory scope as including all contracts relating to construction. “Relating to” is defined as “having connection, relation, or reference [to]” The American Heritage Dictionary of the English Language 1472 (4th ed., Houghton Mifflin Co. 2000); see also Bettini v. City of Las Cruces, 82 N.M. 633, 634, 485 P.2d 967, 968 (1971) (stating that “[s]tatutory words are presumed to be used in their ordinary and usual sense”). A contract to rent equipment that is designed and intended for use in a construction project certainly has a connection, relation, and reference to the construction project and is therefore in literal terms a contract “relating to construction.” See Elliott Crane Serv., Inc. v. H.G. Hill Stores, Inc., 840 S.W.2d 376, 380 (Tenn. Ct. App. 1992) (holding that a rental agreement for a construction crane was, in the terms of the Tennessee anti-indemnification statute, an agreement “relative to the alteration, repair or maintenance of a building, structure or appliance” (internal quotation marks and citation omitted)).

[11] The facts of this case demonstrate the relationship between the construction equipment rental contract and the construction project in which the scissor lift was to be used. The rental contract written by United specifically recited on its face the construction project itself, its location, its job number, and the particular phase of construction. United employees delivered the commercial-sized scissor lift to the construction site where it was to be used. United knew it was contracting with Yearout Mechanical, a licensed subcontractor with purchase order credit privileges allowing for payment of charges within 30 days after the rental date. All concerned had to have known the lift was rented for use in relation to construction activities.

[12] Despite all those factors, we share United’s concern that the term “relating to,” standing alone, can be an uncertain term with no clear end to its reach. See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (“[A]pplying the ‘relate to’ provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.”); cf. McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 92 (7th Cir. 1986) (noting the danger of construing the word “affecting” too broadly because “[i]n an interrelated economy almost everything affects everything else”).

[13] Examining the remainder of the statutory language, while often helpful, is not determinative in this case. On the one hand, United argues that rental agreements for construction equipment are not included in the general clause, “agreement[s] relating to construction, alteration, repair or maintenance” of real property, because rental agreements are not named or implied in the ensuing list of specifically included agreements: “architectural services, demolition, design services, development, engineering services, excavation or other improvement.

1In 2007, our Legislature declared indemnification agreements in any “rental contract for equipment,” whether or not related to construction, unenforceable as “against the public policy of this state.” NMSA 1978, § 56-7-3(A) (2007). All relevant events in this case occurred prior to Section 56-7-3’s enactment, so we do not rely on its much more comprehensive scope.
to real property.” Section 56-7-1(E). Our caselaw, on the other hand, recognizes that the use of the word “includes” to connect a general clause to a list of enumerated examples demonstrates a legislative intent to provide an incomplete list of activities:

A term whose statutory definition declares what it includes is more susceptible to extension of meaning by construction than where the definition declares what a term means. It has been said the word “includes” is usually a term of enlargement, and not of limitation. . . . It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated. . . .

In re Estate of Corwin, 106 N.M. 316, 317, 742 P.2d 528, 529 (Ct. App. 1987) (alterations in original) (internal quotation marks and citation omitted).

{14} The manner in which the Legislature actually wrote the statute—by providing a list of non-obvious examples—equally supports the contention that it sought to indicate the broad range of agreements “relating to” construction projects. A plain reading of the general phrase “relating to construction, alteration, repair or maintenance” does not clearly indicate that architectural, design, engineering, or development services would be included, nor does it make obvious that deconstruction activities, such as “demolition” and “excavation,” are included as activities related to construction projects.

{15} In support of its argument that the examples are intended to exclude construction rental contracts, United defines the class of specifically enumerated examples as “services performed in connection with a construction project” and argues that a rental service for construction equipment is not a service. While it is true that the specific terms listed, “architectural services, demolition, design services, development, engineering services, [and] excavation,” Section 56-7-1(E), are all services to be performed in connection with a construction project, renting construction equipment is also a service that can be performed in connection with a construction project. The contractor’s use of rental construction equipment is just as necessary to the completion of a construction project as the use of the designer’s vision, the architect’s plans, the engineer’s specifications, and the developer’s resources. On its face, therefore, the statute neither clearly includes nor clearly excludes construction equipment rentals.

{16} Because we cannot definitively interpret the statute by a simple consideration of statutory language that is susceptible to more than one interpretation on its face, we must look to other guides of statutory interpretation. State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (observing that where statutory language is vague or ambiguous, it “is to be construed according to its obvious spirit or reason”); Tajoya v. Garcia, 1 N.M. 480, 483 (1871) (We have long adhered to the notion that “[t]he spirit, as well as the letter of the statute, must be respected; and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.” (internal quotation marks and citation omitted)).

D. Legislative Purpose

{17} When interpreting statutes, our primary goal is “to facilitate and promote the legislature’s . . . purpose.” State v. Smith, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citations omitted); cf. Johnson, 2009-NMSC-049, ¶¶ 20, 13 (noting that even with respect to “penal statutes[, which] are narrowly construed, [the court should not] reject] that sense of the words which best harmonizes with the context and the end in view” and should interpret the statute “in light of the harm or evil it seeks to prevent”) (internal quotation marks and citations omitted).

{18} New Mexico precedent has recognized that Section 56-7-1 is “based on a public policy promoting safety in construction projects by holding each party to the contract accountable for injuries caused by its own negligence.” City of Albuquerque v. BPLW Architects & Eng’rs, Inc., 2009-NMCA-081, ¶ 19, 146 N.M. 717, 213 P.3d 1146 (distinguishing between a lawful indemnification clause requiring wrongdoers to indemnify and an unlawful indemnification clause requiring wrongdoers to be indemnified). The federal courts also have emphasized the New Mexico Legislature’s “strong public policy” of encouraging the exercise of due care in construction activities “to protect construction workers and future occupants of a building by ensuring that all those involved in its construction know that they will be held financially liable for their negligence.” Tucker v. R.A. Hanson Co., 956 F.2d 215, 217-19 (10th Cir. 1992) (holding that New Mexico’s policy against indemnification clauses in contracts related to New Mexico construction projects is sufficiently compelling to override California’s interest in enforcing terms of California contracts, because such clauses “significantly interfere with New Mexico’s efforts to produce safe workplaces and buildings”); cf. Guitard v. Gulf Oil Co., 100 N.M. 358, 362, 670 P.2d 969, 973 (Ct. App. 1983) (“the public policy behind [NMSA 1978, Section 56-7-2 (2003), invalidating indemnification clauses in agreements related to drilling and mining operations] is to promote safety”); Piña v. Gray Petroleum Mgmt. Co., 2006-NMCA-063, ¶ 19, 139 N.M. 619, 136 P.3d 1029 (“[The] safety concerns underlying Section 56-7-2 are not limited to the immediate parties to an indemnity agreement. . . . Section 56-7-2 [also] protects third parties whose person or property would be placed at risk by the indemnitee’s indifference to safety.”).

{19} In enacting the anti-indemnification statutes, the Legislature overrode competing public policies favoring the freedom to contract. In general, parties have the freedom to enter into contracts that exculpate one party from liability for its own negligence unless the agreements are “violative of law or contrary to some rule of public policy.” Berlangieri v. Running Elk Corp., 2003-NMSC-024, ¶¶ 27, 53, 134 N.M. 341, 76 P.3d 1098 (holding that legislative policy invalidated the contract clause releasing a horse stable from liability for its own negligence).

{20} In its anti-indemnification statutes, the Legislature has implicitly recognized what our courts have expressly articulated as the societal benefits that can be promoted by holding wrongdoers responsible for the harmful consequences of their own behavior. “Our fault system of recovery . . . serves the important social functions,” among others, of “deterring conduct that society regards as unreasonable or immoral, and providing a vehicle by which . . . society may give voice and form to its condemnation of the wrongdoer.” Trujillo v. City of Albuquerque, 110 N.M. 621, 624, 798 P.2d 571, 574 (1990), overruled on other grounds, 1998-NMSC-031, ¶ 2, 125 N.M. 721, 965 P.2d 305; see also Hagebak v. Stone, 2003-NMCA-007, ¶ 20, 133 N.M. 75, 61 P.3d 201 (recognizing that the public policy goal of deterring conduct that society regards as unreasonable or immoral is served by holding wrongdoers liable for their own conduct).

{21} If, as the caselaw has recognized, a legislative purpose in invalidating anti-indemnification clauses in agreements “relating to” construction projects is to make the workplace safer, it is difficult to
articulate a principled basis for excluding construction equipment rental agreements from the intended scope of the statute. For example, if Yearout had subcontracted with United to construct scaffolding to be used at the building site to install ducts on the hangar ceiling, and United’s negligence in constructing the scaffolding had caused two employees to plunge to their deaths, the statute undeniably would prohibit United’s reliance on any anti-indemnification clause to shift the economic consequences of its own liability back to Yearout. We can perceive no principled difference between that situation and the case at bar in which United, instead of constructing scaffolding, provided to Yearout and was responsible for keeping in good repair a scissor lift that Yearout used to perform the same work and that caused the same fatal results. United has articulated no policy justifying any such distinction throughout these proceedings, relying instead on formalistic statutory construction arguments. We now examine those arguments.

E. Statutory Provisions In Pari
Materia

As our precedents exemplify, where a plain language analysis does not provide a clear interpretation, we can “look to other statutes in pari materia in order to determine legislative intent.” State v. Martinez, 1998-NMSC-023, ¶ 9, 126 N.M. 39, 966 P.2d 747. This approach “has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the legislature.” Davis, 2003-NMSC-022, ¶ 12.

In 1971, the Legislature enacted two different anti-indemnity statutes: NMSA 1953, Section 28-2-1 (Vol. 5, 1975 Pocket Supp.), which voided indemnity clauses in contracts “relating to” construction activities, and NMSA 1953, Section 28-2-2 (Vol. 5, 1975 Pocket Supp.), which voided indemnity clauses in contracts “pertaining to” drilling or mining operations. Both statutes were recodified in 1978 as NMSA 1978, Sections 56-7-1 and 56-7-2, respectively, and have been amended from time to time since their original enactment.

United argues that because only Section 56-7-2, the statute addressing drilling and mining activities, contained express language referring to equipment rental agreements, the Legislature intended to exclude rental agreements from the scope of Section 56-7-1, the statute addressing construction activities. The original language of Section 56-7-2(B) provided, in pertinent part:

An “agreement pertaining to any well for oil, gas or water, or mine for any mineral” means any agreement . . . concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging or otherwise rendering services in, or in connection with, any well drilled for the purpose of producing or disposing of oil, gas or other minerals or water; and designing, excavating, constructing, improving or otherwise rendering services on, or in connection with, any mine shaft, drift or other structure intended for use in the exploration for, or production of, any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation and other goods and services furnished in connection with any such service or operation.

NMSA 1953, § 28-2-2(B) (1971) (§ 56-7-2(B) (amended 2003)) (emphasis added).

Among the numerous differences between the wording of Sections 56-7-1 and 56-7-2 is that Section 28-2-2(B) (Section 56-7-2(B)) specifically mentions equipment rentals and Section 28-2-1 (Section 56-7-1) does not. The inference United asks us to draw is that the Legislature must have intended to prohibit indemnification clauses in drilling and mining equipment rental agreements, but to permit them in construction equipment rental agreements.

We note that in general, “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted.” Howard Jarvis Taxpayers Ass’n v. City of Salinas, 121 Cal. Rptr. 2d 228, 232 (Cal. Ct. App. 2002) (alteration in original) (internal quotation marks and citation omitted). However, as with most maxims of statutory construction, the rule “is no more than a rule of reasonable inference and cannot control over the lawmakers’ intent.” Id. at 233 (internal quotation marks and citation omitted); Atchison, T. & S. F. Ry. Co. v. Town of Silver City, 40 N.M. 305, 309, 59 P.2d 351, 354 (1936) (“Canons of construction are but aids in determining legislative intent and are not controlling if they lead to a conclusion, which by the terms or character of the legislation manifestly was not intended.”).

Other varying language in the mining and construction anti-indemnification statutes exemplifies the need for caution in using simplistic and formulaic analyses of statutory wording. For example, the original language of Section 28-2-2(A) [Section 56-7-2(A)] barred indemnity agreements for “death or bodily injury to persons” in drilling- and mining-related agreements, while the language of Section 28-2-1 [Section 56-7-1] barred indemnity agreements “arising out of bodily injury to persons.” It would be unreasonable, however, to assume that Section 28-2-1’s [Section 56-7-1’s] omission of “death” and Section 28-2-2(A)’s [Section 56-7-2(A)’s] express mention of the term meant that the Legislature intended to prohibit only construction indemnity agreements shifting liability for bodily injury, but to allow liability-shifting for any deaths that might result from the same kind of actionable conduct. See Smith, 2004-NMSC-032, ¶ 10 (“This Court has rejected a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute.”).

Our precedents have repeatedly cautioned against using wording variations in pari materia statutes as a conclusive determinant of differing legislative intent. For example, in Martinez, we addressed a similar statutory construction issue in deciding whether the Legislature intended to prohibit credit for presentence confinement in third-offense DWI cases. 1998-NMSC-023, ¶ 7. The statute relating to first-offense DWI specifically provided that presentence confinement would be credited toward service of the ultimate sentence; the statute relating to fourth and subsequent offenses contained a similar express provision; but the statute applicable to second and third offenses did not mention the subject. Id. ¶ 15. Despite the different wording in the statutes, this Court found it unreasonable to conclude that “the Legislature intended to treat second and third offenders more severely than fourth and subsequent offenders.” Id. We have repeatedly viewed related statutes in light of their common legislative policies. See Davis, 2003-NMSC-022, ¶ 12 (holding that in interpreting ambiguous language in a statute relating to consecutive sentencing, it was appropriate to consider that related enactments reflected that the “legislative
intent was to get tougher on crime’’); State v. Rivera, 2004-NMSC-001, ¶¶ 14, 26, 134 N.M. 768, 82 P.3d 939 (interpreting a statute to permit service and revocation of probation while on appeal, despite statutory language that sentence was stayed on appeal). In determining legislative policy and intent, “a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.” Rivera, 2004-NMSC-001, ¶ 13.

[28] In its written opinion granting Yearout’s motion to dismiss, the United States District Court observed that “[i]t is simply inconceivable that the New Mexico Legislature, when contemporaneously enacting two anti-indemnity statutes, intended to give more protection to well and mine workers than to construction workers.” United Rentals Nw., Inc. v. Yearout Mech., Inc., Civ. No. 08-00050 RLP/CD, mem. op. and order at 6 (D.N.M. Dec. 5, 2008). We similarly can find no reason to conclude that the Legislature intended to create different protections for mine workers and construction workers simply because equipment rentals are specifically mentioned as being encompassed in the general categories of agreements “pertaining to” wells and mines in Section 56-7-2 and the same clarifying language is not mentioned with regard to the scope of agreements “relating to” construction in Section 56-7-1.

[29] United also argues that the Legislature’s 1999 removal of the specific mention of equipment rentals in Section 56-7-2 manifested an intention to exclude rental contracts from the anti-indemnity statutes altogether. We disagree.

[30] The Legislature’s 1999 amendments to Section 56-7-2 were made largely for clarity and organization. Section 28-2-2(A) [Section 56-7-2(A)] of the original act read:

[Agreements purporting to indemnify . . . against loss or liability for damages, for:
(1) death or bodily injury to persons; or
(2) injury to property; or
(3) any other loss, damage or expense arising under either Paragraph (1) or (2) or both; or
(4) any combination of these

The Legislature replaced the language in 1999 with the following equivalent phrase:

[Agreements purporting to indemnify . . . against loss or liability for damages.” The modification loses nothing of substance but makes the provision more concise and clear. Section 56-7-2(A). Similarly, the Legislature in 1999 deleted “or understanding, written or oral” from the phrase “any agreement or understanding, written or oral” in Section 28-2-2(B) [Section 56-7-2(B)] of the original act.

[31] The Legislature in 1999 also replaced the original Section 28-2-2(B) [Section 56-7-2(B)] phrase, “an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation and other goods and services furnished in connection with any such service or operation,” with “an agreement . . . to perform a portion of the work or services . . . or an act collateral thereto.” Section 56-7-2(B). In short, the Legislature removed all the specific examples of included activities and kept only the categorical term.

[32] If equipment rentals were already included in the categorical terms of the two statutes, the removal of the specific examples of included items did not decrease the scope of those general terms. In fact, an indication that the Legislature did not intend to abandon a policy of prohibiting indemnification clauses in mining and construction-related equipment rentals was the significant extension in 2007 of the Legislature’s anti-indemnification public policy to encompass all equipment rental agreements, not just those related to mining or construction. NMSA 1978, § 56-7-3 (2007).

F. Cases and Statutes in Other Jurisdictions

[33] Although it is not critical to our decision, we note that many other jurisdictions have interpreted analogous statutes to encompass indemnity clauses in construction equipment rental agreements. 3 Philip L. Bruner & Patrick J. O’Connor, Jr., Bruner & O’Connor on Construction Law § 10:79 (2002) (“Many courts have decided that equipment leases fall within the scope of these anti-indemnity laws. Equipment leases are often captured by the scope of these laws by virtue of the language that indemnity agreements ‘in connection with or collateral to’ a construction contract are barred.” (footnote omitted)).

[34] For instance, Aetna Casualty & Surety Co. v. Marion Equipment Co., 894 P.2d 664 (Alaska 1995), addressed the impact of an Alaska anti-indemnity statute on an indemnity clause contained in a lease agreement for a construction hoist. Alaska’s statute stated that an “agreement contained in, collateral to, or affecting a construction contract that purports to indemnify the promisee against liability [for its own negligence or misconduct] is against public policy and is void and unenforceable.” Id. at 666; see also Alaska Stat. § 45.45.900 (1975). The Supreme Court of Alaska, persuaded by the “body of authority, coupled with the [lease] language,” held that the equipment lease fell within the scope of its anti-indemnity statute. Aetna, 894 P.2d at 667.

[35] Aetna noted that “at least eighteen other states have enacted statutes identical or similar to AS 45.45.900, and the weight of authority from the jurisdictions that have considered this question indicates that the statute does govern such leases.” Id. at 666 (footnote omitted). A number of the cases surveyed in Aetna are instructive on the issue before this Court. In Calkins v. Loran Division of Kochring Co., 613 P.2d 143 (Wash. Ct. App. 1980), a contractor leased a crane to dismantle a chemical plant. After an employee of the contractor was injured and sued the rental company, the company invoked an indemnity clause in the rental agreement to have the contractor assume the company’s liability for the defective condition of the leased crane. Id. at 144. The court struck the indemnity clause asvasive of the policy expressed by Washington’s anti-indemnity statute. Id. The court also expressed concern about the potential impact of indemnification clauses in equipment rental agreements on the public policies embodied in workers’ compensation statutes, to avoid imposing tort liability on employers who provide workers’ compensation coverage for their employees, policies which would be frustrated by permitting indemnification clauses in construction equipment rental agreements. Id. at 145.

[36] Several cases relied on by Aetna turned on whether the piece of equipment rented was intended or expected to be used in construction activities. See, e.g., American Pecco Corp. v. Concrete Bldg. Sys. Co., 392 F. Supp. 789, 793 (N.D. Ill. 1975) (“The crane was designed to be used in construction activities. Central cannot logically claim it was unaware of the use to which the crane would be put, when the crane was in fact put to a designed use.”); Folkers v. Drott Mfg. Co., 504 N.E.2d 132, 137 (Ill. App. Ct. 1987) (striking the indemnity clause because the rental contract
provided that the rental would be “for use in construction operations”).

{37} United correctly notes that many other state courts have chosen not to interpret their anti-indemnity statutes as applicable to equipment rentals. Most of those cases are distinguishable in that the opinions emphasized that the contracting parties did not contemplate the equipment was to be used in a construction project. See McMunn, 791 F.2d at 93 (holding that the Illinois construction anti-indemnity statute did not extend to a rental contract for a bobcat loader because the equipment was not clearly intended for construction use and because bobcat loaders are most commonly used for purposes unrelated to the statute’s scope); Palmour v. Gray Ins. Co., 731 So. 2d 911, 913-14 (La. Ct. App. 1999) (holding that the Louisiana statute prohibiting anti-indemnification agreements pertaining to wells and mines did not invalidate an indemnity clause in a crane rental contract where the crane was rented for use “in some unnamed purpose”); Reliance Ins. Co. v. Chevron U.S.A. Inc., 713 P.2d 766, 767-68 (Wyo. 1986) (refusing to extend Wyoming’s oilfield anti-indemnity statute to the lease of caterpillar tractors for digging holding pits for waste water and oil created by a fire at an oil facility).

{38} Other cases are distinguishable as a matter of law because they interpret more narrowly written statutes. See, e.g., Eagle Pacific Ins. Co. v. Quintanilla, 923 So. 2d 266, 268, 270 (Miss. Ct. App. 2006) (construing a Mississippi statute that requires the contract be “for construction,” not simply “relating to construction”).

{39} It is clear that some courts in states with anti-indemnity statutes have chosen to construe the protections of their statutes in a more restrictive manner. See, e.g., Pritts v. J.I. Case Co., 310 N.W.2d 261, 267 (Mich. Ct. App. 1981) (“Although it could be argued that the instant lease was ‘relative to’ construction because the lift truck would be used in construction, we refuse to extend the statute that far.”). We decline to interpret our own anti-indemnity statutes so narrowly, in light of our analysis of the New Mexico statutory language and its underlying policies. We interpret Section 56-7-1 as prohibiting indemnification clauses in agreements for the rental of equipment designed or intended to be used in construction activities, which meet the statutory definitional standard of agreements “relating to construction.” In doing so, we are confident that we honor the New Mexico Legislature’s purposes, policies, and language.

III. CONCLUSION

{40} In order to enforce the protections of Section 56-7-1 and to honor the legislative purpose embodied in the statute, we answer the certified question by holding that the statute’s anti-indemnity protections apply to rental contracts for construction equipment because they are contracts “relating to construction.”

{41} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
From the New Mexico Supreme Court

Opinion Number: 2010-NMSC-031

Topic Index:
Agency: Fiduciary Duty
Appeal and Error
Associations and Societies: Charitable Organizations; and Non-Profit Corporations
Civil Procedure: Actions and Defenses; Bad Faith; Causes of Action; Jury Verdict; Prima Facie Case; Remittitur; and Verdict
Civil Rights: Employment Discrimination; Human Rights Act; and Racial Discrimination
Employment Law: Collective Bargaining; Discrimination; Employee Grievances; Labor Unions; and Union Organizing
Insurance: Bad Faith
Juries: Juries, General
Jury Instructions: Civil Jury Instructions; and Jury Instructions, General
Labor Law: See: Employment Law
Remedies: Additur and Remittitur; Compensatory Damages; Exemptions; Measure of Damages; Proof of Damages; and Punitive Damages

JACKIE AKINS,
Plaintiff-Respondent,
versus
UNITED STEEL WORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 187,
Defendant-Petitioner.
No. 31,637 (filed: June 22, 2010)

ORIGINAL PROCEEDING ON CERTIORARI
GARY L. CLINGMAN, District Judge

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OPINION

RICHARD C. BOSSON, JUSTICE

In virtually all claims sounding in tort, our common law permits punitive damages where appropriate to punish outrageous conduct and to deter similar conduct in the future. Similarly, in New Mexico all labor unions owe a common-law duty of fair representation (also referred to herein as “DFR”) to their members and are subject to suit for breach of that duty. In the case at bar, we are asked to limit that liability by imposing a per se exclusion of punitive damages much as the U.S. Supreme Court has done for similar actions against federally regulated labor unions. We decline to do so, and instead underscore the important public policy served by punitive damages as part of our state common-law jurisprudence. Our ruling today expands upon and clarifies that of our Court of Appeals, affirming its holding that punitive damages should be available in DFR suits where the union’s conduct is malicious, willful, reckless, wanton, fraudulent or in bad faith.

BACKGROUND

Respondent Jackie Akins (Akins) worked for the City of Carlsbad (City) from 1992 until 2002. During this time, Akins was a dues-paying member of Petitioner United Steelworkers of America, AFL-CIO, Local 187 (the Union), which served as Akins’ exclusive collective bargaining representative. Akins was the only African-American member of the Union.

In 1999 Akins began working in the City’s lube room, where he was responsible for changing oil on city vehicles, and similar duties. During his employment there, Akins’ coworkers regularly spoke in Spanish, and his supervisor Carmen Vasquez gave him orders in Spanish, despite the fact that Akins did not speak Spanish. Akins was told he needed to learn. At trial, Akins testified that various coworkers, some of them with supervisory authority, used racial slurs in his presence. Specifically, Akins testified that the term “pinche miyate [sic],” which Akins understood to mean “fucking nigger” in Spanish, was uttered on two or three occasions when he was the only black person present.

Akins made repeated requests to file a grievance, but Union President Danny Armendariz, asking him to file a grievance, Armendariz told him he was the “wrong color” and that he needed to learn to speak Spanish. The Union refused to file a grievance for racial discrimination on Akins’ behalf.

Akins testified that because of the racially hostile environment at the lube room, he accepted an option to transfer to the solid waste department in April 2001, taking a pay cut in the process. Akins discontinued his employment with the City in July 2002, due to decreased but continuing racial discrimination.

The record does not support the Court of Appeals’ assertion that “pinche miyate [sic]” means “fucking nigger.” Akins v. United Steel Workers of Am. Local 187, 2009-NMCA-051, ¶ 3, 146 N.M. 237, 208 P.3d 457. The only evidence of the meaning of that term came from Akins, who admitted that he does not speak Spanish. Similarly, the Court of Appeals asserted that Akins’ coworkers referred to him by the term “nigger.” Id. ¶ 26. Again, the only testimony on this specific issue came from Akins, and his testimony suggested that he was unsure whether the comments were directed at him.
{6} Subsequently, in March 2004, Akins filed suit against the Union and the City for two counts of breach of the Union’s duty of fair representation, and one count each of intentional infliction of emotional distress and prima facie tort, based on the conduct described above. Akins reached an agreement with the City, and the City was dismissed with prejudice. Therefore, the trial court dismissed the intentional infliction of emotional distress claim, one count of breach of the DFR, and the prima facie tort claims upon the Union’s motion for summary judgment. In response to the one remaining DFR count, the Union argued that punitive damages were unavailable as a matter of law for duty of fair representation suits. Following the denial of its motion for summary judgment, the Union filed a motion in limine to preclude punitive damages, which the district court also denied.

{7} The case against the Union proceeded to trial on the sole remaining claim that the Union breached its duty of fair representation by failing to file a grievance on Akins’ behalf for racial discrimination. The jury was instructed, consistent with our holding in Callahan v. N.M. Federation of Teachers-TVI, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51, on the required elements of the claim of breach of DFR, as follows:

To establish the claim of breach of the duty of the Union to fairly represent, [Akins] has the burden of proving each of the following contentions:

1. The existence of a contract, the Collective Bargaining Agreement, between the Union and the City of Carlsbad.
2. The breach of the terms of a Collective Bargaining Agreement by the City of Carlsbad.
3. [Akins] sought help from the Union to remedy the breach.
4. The Union failed or refused to provide [Akins] with representation related to the breach.
5. The Union’s failure or refusal to pursue Jackie Akins’ grievance was arbitrary and in bad faith.

The jury was also given the following standard New Mexico instruction on punitive damages:

If you find that the conduct of the Union was malicious, willful, reckless, wanton, fraudulent or in bad faith, then you may award punitive damages against it. . . . Punitive damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. The amount awarded, if any, must be reasonable and not disproportionate to the circumstances.

UJI 13-1827 NMRA.

{8} The jury returned a verdict in Akins’ favor, awarding him $1,661 in actual damages and $30,000 in punitive damages. Both Akins and the Union appealed. Akins appealed the trial court’s decision not to put the intentional infliction of emotional distress claim before the jury. The Union appealed three issues: whether the trial court erred in (1) applying a four-year rather than six-month statute of limitations, (2) allowing the jury to consider punitive damages, and (3) failing to order remittitur of the punitive damages award.

{9} The Court of Appeals affirmed the trial court’s rulings in their entirety. Regarding the issue of punitive damages, the Court of Appeals rejected the Union’s request to adopt a per se ban on punitive damages in breach of DFR actions. Akins v. United Steel Workers of Am. Local 187, 2009-NMCA-051, ¶¶ 19-20, 146 N.M. 237, 208 P.3d 457. The Court followed by holding that the punitive damages award in this case was not excessive, and affirmed the trial court’s decision not to order a remittitur. Id. ¶¶ 29-38.

{10} In its briefing to this Court the Union disputes several facts, but it does not raise any concrete legal argument against the jury’s finding of liability. As such, this Opinion will focus exclusively on the sole question on certiorari: whether to adopt a per se ban on punitive damages in breach of DFR suits filed against labor unions, as a matter of state common law. This is a legal question which we review de novo.

DISCUSSION

Foust is not controlling.

{11} As the exclusive representative of City employees under a collective bargaining agreement, the Union is responsible for prosecuting grievances on behalf of City employees. In New Mexico all unions owe a common-law duty of fair representation to their members, but are given considerable discretion to decide whether and how to pursue a member’s grievance, consistent with the best interests of the Union membership as a whole. See Callahan, 2006-NMSC-010, ¶¶ 9, 13. In Callahan, we limited the common-law cause of action for breach of the DFR to arbitrary, fraudulent or bad faith conduct on the part of the union; allegations of mere negligence by the union do not state a viable claim for relief. Id. ¶¶ 10, 11.

{12} To explain the policy justification for our ruling in Callahan, we cited the U.S. Supreme Court opinion of Vaca v. Sipes, 386 U.S. 171 (1967), for its discussion of why the proper balance of interests in the collective bargaining arrangement requires limiting union members’ access to the courts for DFR suits. Callahan, 2006-NMSC-010, ¶ 11. In following the liability standard for DFR actions set forth in Vaca, we observed that “requiring arbitrary, fraudulent or bad faith conduct to prove a breach of the duty of fair representation is consistent with U.S. Supreme Court precedent.” Callahan, 2006-NMSC-010, ¶ 11. The Union interprets this statement, and our adoption of the same rationale for a standard of liability as Vaca, to mean that “Callahan mandates that state courts are to develop the state [DFR] consistent with United States Supreme Court precedent in general and with Vaca in particular.” But we have never professed slavish adherence to federal case law in developing our state common-law jurisprudence.

{13} The U.S. Supreme Court relied upon Vaca’s holding in its subsequent opinion in International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979). Extending Vaca’s rationale, the Supreme Court in Foust adopted a per se ban on punitive damages in federal breach of DFR actions. Foust, 442 U.S. at 49-50. Before this Court, the bulk of the Union’s case rests on the proposition that, since Callahan supposedly wedded the New Mexico DFR law to the federal common-law standard, Foust’s per se ban on punitive damages is automatically incorporated into the New Mexico common-law standard. This reasoning misconstrues our holding.
in Callahan and is inconsistent with our common-law authority.

As a preliminary matter, we reject the Union’s interpretation of our pronouncement in Callahan. We stated that “arbitrary, fraudulent or bad faith conduct” as a standard of liability in DFR actions “is consistent with” the standard of liability embraced by the U.S. Supreme Court in Vaca. Callahan, 2006-NMSC-010, ¶ 11 (emphasis added). We did not say, as the Union represents in its brief to this Court, that “the state duty . . . [is] to be developed consistent with such precedent.” (Emphasis added.) The Union goes so far as to refer to “the Callahan rule” that New Mexico courts “are obliged to develop the state [DFR] consistent with United States Supreme Court precedent.” (Emphasis added.) Emphatically, no such “rule” exists.

In developing a body of state common law, we may look to federal law for guidance where it is persuasive and consistent with our state laws and policies. See State v. Long, 1996-NMCA-011, ¶ 7, 121 N.M. 333, 911 P.2d 227 (filed 1995). In Callahan, we relied on Vaca to fashion the appropriate standard of liability for DFR claims because its rationale was in line with New Mexico public policy. But just as we are free to embrace a federal common-law principle that comports with New Mexico’s distinct needs and conditions, we are also free to reject one that is inconsistent with or hostile to our circumstances.

The Foust majority, in denying punitive damages in federal DFR claims, explained that it was implementing a remedial scheme that would “best effectuate the purposes of the Railway Labor Act . . . to facilitate collective bargaining and to achieve industrial peace.” 442 U.S. at 51. Specially concurring, Justice Blackmun pointed out that the Foust majority based its holding, in part, on the premise that the remedial federal labor policy is “inhospitable to punitive awards.” Id. at 55 (Blackmun, J., concurring). In short, Foust was developing an area of interstitial federal common law to effectuate distinct congressional goals set forth in federal statutes governing unions in the private sector. Id. at 47-48; see also Woods v. Graphic Commc’ns, 925 F.2d 1195, 1203 (9th Cir. 1991) (“The duty of fair representation is a judicially created duty arising out of the statutory grant of exclusive representation to unions under the Railway Labor Act and the National Labor Relations Act.”) (Citations omitted)).

In contrast, our state common law on DFR is clearly not tied to federal statutes regulating the private sector, nor to any one state statute pertaining to the public sector. The relationship between the Union and its City employee members is governed by the New Mexico Public Employee Bargaining Act (PEBA), but we have never held that the DFR cause of action is intended exclusively to effectuate the policy goals of that statute. See Callahan, 2006-NMSC-010, ¶¶ 24-25 (PEBA limited to providing administrative remedies; suit for breach of DFR operates outside mandates of PEBA). But see Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-031, ¶¶ 14-15, 123 N.M. 239, 938 P.2d 1384 (holding that, generally, language of PEBA is to be interpreted in the same manner as identical National Labor Relations Act language). Certain purposes of the duty of fair representation is to facilitate the collective bargaining process and to protect union members’ rights under collective bargaining agreements. See Callahan, 2006-NMSC-010, ¶¶ 9-10; Jones v. Int’l Union of Operating Eng’rs, 72 N.M. 322, 330, 383 P.2d 571, 576 (1963). More generally, however, the DFR cause of action is a common-law means of enforcing the fiduciary obligations of unions as the exclusive collective bargaining agents of their members. See Jones, 72 N.M. at 330, 383 P.2d at 576.

We agree with Justice Blackmun’s reasoning in Foust that a court enforcing a common-law duty “should have at its disposal the full panoply of tools traditionally used by courts to do justice between parties.” 442 U.S. at 53 (Blackmun, J., concurring). Punitive damages are one such tool. We have no reason to dispute the U.S. Supreme Court’s assessment of national needs under federal labor laws. Those concerns, while certainly relevant to our consideration, do not control the development of our common law. To the extent that our duty of fair representation shares a common purpose with the federal cause of action, we are free to weigh similar considerations differently. For the reasons set forth below, we hold that New Mexico’s interest in enforcing a union’s duty of fair representation counsels against adopting a per se ban on punitive damages.

A per se ban on punitive damages is inconsistent with New Mexico public policy.

At the heart of today’s controversy is the inherent tension that exists in most collective bargaining arrangements between the interests of individual union members and the well-being of the collective (the union as a whole). Our concern for the vitality of unions as collective bargaining agents is such that we elected in Callahan to raise the threshold for liability to shield merely negligent union conduct from suit by aggrieved members. Our decision in that case came at no small cost to the individual interests of union members, but we agreed that those interests must be subordinated to the collective interests of all members in a bargaining unit. Callahan, 2006-NMSC-010, ¶¶ 9-15. We concluded that the interests of the collective are best served by a union that is able to exercise broad discretion in determining whether and how to prosecute an individual member’s grievance. Id. To now go further and shield even the most egregious union conduct from punitive damages, would, in our view, undermine the interests of both Unions and their members.

Punitive damages serve two important policy objectives under our state common law: to punish reprehensible conduct and to deter similar conduct in the future. Bogle v. Summit Inv. Co., 2005-NMCA-024, ¶ 34, 137 N.M. 80, 107 P.3d 520. These objectives are of critical importance in the DFR context, where unions appropriately enjoy broad discretionary authority and the employee has little recourse outside of the grievance process. As our Court of Appeals observed, punitive damages are the best means of deterring union misconduct because actual or compensatory damages in DFR actions may be de minimis or difficult to quantify. Akins, 2009-NMCA-051, ¶ 24; see also Sanchez v. Clayton, 117 N.M. 761, 767, 877 P.2d 567, 573 (1994) (“Indeed, if the defendant’s conduct otherwise warrants punitive liability, the need for punishment or deterrence may be increased by reason of the very fact that the defendant will have no liability for compensatory damages.” (citing 1 Dan B. Dobbs, Law of Remedies § 3.11(10), at 515-16 (2d ed. 1993))). The present case is illustrative; a compensatory award against the Union of a mere $1,661 would hardly deter similar outrageous conduct against other Union members in the future.

In Foust, the Supreme Court was persuaded that “windfall recoveries” against labor unions could “deplete union treasuries” and “impair[] the effectiveness of unions as collective-bargaining agents.” 442 U.S. at 50-51. The Union argues that the same concerns merit adopting a per se ban on punitive damages for DFR
actions in New Mexico. But nothing in the present case nor anything cited by the Union indicates that such fears are presently warranted in New Mexico’s public sector. Despite Foust’s holding in the DFR context, unions in New Mexico are currently subject to punitive damages under a variety of federal laws, such as the Labor Management Reporting and Disclosure Act (LMRDA) and 42 U.S.C. § 1981 (2006). See 29 U.S.C. §§ 411(a)(4), 412 (2006) (right to sue and civil action/jurisdiction provisions of the LMRDA); Int’l Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200 (5th Cir. 1968) (punitive damages available under LMRDA); Woods, 925 F.2d at 1204 (“Under § 1981, the common law rule is that punitive damages may be awarded in appropriate cases.”). Unions have also, up to now, been subject to punitive damages for breach of the state duty of fair representation. Thus, to adopt a per se ban here would be to depart from the status quo. Despite the potential for exposure to punitive damages from several angles, the Union cannot point to a single example where runaway punitive damages awards substantially debilitated a labor union in New Mexico. If anything, the present case suggests that our juries are entirely capable of assessing sensible and appropriate punitive damages.\(^2\)

\{22\} Should a jury’s punitive damages award exceed the bounds of reasonableness, several checks at the trial and appellate levels operate to temper jury exuberance. These checks include the trial court’s ability to order a remittitur and institutions accountable for their actions regardless of status. See Yount v. Johnson, 1996-NMCA-046, ¶ 4, 121 N.M. 585, 915 P.2d 341 (“[O]ur courts have moved forcefully towards a public policy that defines duty under a universal standard of ordinary care, a standard which holds all citizens accountable for the reasonableness of their actions. The movement has been away from judicially declared immunity or protectionism, whether of a special class, group or activity.”). For instance, like most other states, our Legislature has not adopted the doctrine of charitable immunity from suit in tort, despite policy arguments in favor of such immunity that are at least as persuasive as those in favor of immunity for unions. See Janet Fairchild, Annotation, Tort Immunity of Nongovernmental Charities—Modern Status, 25 A.L.R.4th 517 (Westlaw 2009) (citing cases completely or partially abrogating doctrine of charitable immunity in a majority of jurisdictions). But see Abramson v. Reiss, 638 A.2d 743, 750 (Md. 1994) (recognizing complete charitable immunity in Maryland); N.J. Stat. Ann. § 2A:53A-7 (West, Westlaw through L.2010, c.18) (codifying charitable immunity in New Jersey, except for “damages by a willful, wanton or grossly negligent action of commission or omission, including sexual assault and other crimes of a sexual nature”). Nor are we aware of any common-law cause of action in New Mexico for which punitive damages have been prohibited.

\{25\} In isolated circumstances, our Legislature has created limited tort immunity for certain actors and institutions. See NMSA 1978, §§ 24-15-1 to -14 (1969, as amended through 1997) (Ski Safety Act); NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2009) (Tort Claims Act); NMSA 1978, §§ 41-10-1 to -5 (1981, as amended through 1997) (Food Donors Liability Act); NMSA 1978, §§ 41-12-1 to -2 (1989, as enacted through 1997) (Athletic Organization Volunteers); NMSA 1978, §§ 42-13-1 to -5 (1993, as amended through 1995) (Equine Liability Act). With the exception of the Tort Claims Act, however, none of these statutes immunize conduct that would warrant a punitive damages award. The above statutes also suggest that the Legislature is capable of making exceptions to general tort principles when public policy so counsels. We would defer to the Legislature for such a drastic departure from current policy—if at all desirable—as that urged by the Union. See Berlangieri v. Running Elk Corp., 2003-NMSC-024, ¶ 15, 134 N.M. 341, 76 P.3d 1098 (“Courts are generally less well-equipped to address complex policy issues than legislatures.”); Torres v. State, 1995-N.M. 609, 612, 894 P.2d 386, 389 (1995) (“[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.”).

\{26\} Finally, the Union argues that we should adopt a per se ban on punitive damages in DFR actions because punitive damages are not available under the Human Rights Act, and we should seek symmetry in the remedies the law provides for like conduct. See NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007) (Human Rights Act) (prohibiting discriminatory conduct); Trujillo v. N. Rio Arriba Elec. Coop., 2002-NMSC-004, ¶ 30, 131 N.M. 607, 41 P.3d 333 (filed 2001) (punitive damages are not recoverable under New Mexico’s Human Rights Act).

\{27\} We agree that symmetry of remedies is a laudable policy goal. The Union, however, conceded at oral argument that discriminatory conduct is rarely the basis for DFR actions. It makes little sense for us to align the common-law DFR remedial scheme with that of the statutory Human Rights Act. Moreover, the Human Rights Act was modeled after federal Title VII legislation, which has since been amended to allow for recovery of punitive damages. See Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 23, 135 N.M. 539, 91 P.3d 58 (New Mexico Human Rights Act tracks language of federal Title VII); 42 U.S.C. § 1981(a) (as amended by Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071) (allowing for recovery of punitive damages). More to the point, labor unions

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\(^2\)The Union did not appeal the Court of Appeals’ rejection of its claim that the punitive damages award in this case was excessive.
may be subject to liability under Title VII “for intentionally failing to file grievances concerning a racially hostile working environment.” Woods, 925 F.2d at 1200. Thus, the exact conduct subject by the Union in this case could subject the Union to punitive damages in a federal Title VII case.

{28} As we mentioned above, we are aware of no New Mexico common-law cause of action in tort where we have held that punitive damages are unavailable as a matter of law. Absent a more compelling policy consideration than that presented by the Union, we make no exception for DFR claims. Accordingly, we adhere instead to the general common-law principle in New Mexico that punitive damages should be available as long as the wrongdoing’s conduct is willful, wanton, malicious, reckless, fraudulent or in bad faith. See UJI 13-1827; Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, ¶ 47, 127 N.M. 47, 976 P.2d 999.

The fact that the liability and punitive damages DFR standards contain overlapping terms does not mean that punitive damages are automatically available in every DFR action.

{29} The Union argues that because the general standard for punitive damages (willful, wanton, malicious, oppressive, fraudulent or in bad faith) describes essentially the same conduct as the DFR standard for liability (arbitrary, fraudulent or bad faith), unions are unfairly subject to punitive damages in every case where a plaintiff establishes liability. The Union asserts that such “automatic” exposure to punitive damages in nearly every case skews the balance established by Callahan in favor of individual members, to the greater detriment of the collective. This issue, while not a significant focus of the Union’s briefing, nonetheless warrants careful consideration, as it lies at the heart of our punitive damages jurisprudence.

{30} We agree with the Union that the liability and punitive damages standards substantially overlap, but that is not a novel occurrence in our law. Breach of the duty of fair representation is but one of several causes of action where the standard for liability closely resembles the standard for punitive damages, UJI 13-1718, usually where liability is limited to proof of a heightened culpability. Examples include: (1) intentional infliction of emotional distress, see UJI 13-1628 NMRA; Baldonado v. El Paso Natural Gas Co., 2008-NMCA-010, ¶ 28, 143 N.M. 297, 176 P.3d 286 (filed 2006), (2) fraudulent misrepresentation, see UJI 13-1633 NMRA; Garcia v. Coffman, 1997-NMCA-092, ¶ 38, 124 N.M. 12, 946 P.2d 216, and (3) insurance bad faith, see UJI 13-1704 NMRA; Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, ¶¶ 2-18, 135 N.M. 106, 85 P.3d 230. Indeed, most intentional tort cases provide at least the potential for punitive damages, because intentional conduct is “willful.” See generally Sanchez, 117 N.M. at 767, 877 P.2d at 573.

{31} In Sloan, we were asked to decide whether a punitive damages instruction is required in every insurance bad faith case, or whether some culpable mental state beyond bad faith is required. 2004-NMSC-004, ¶ 1. We held that a stricter standard for punitive damages was not required, stating we reaffirm our statement in Jessen v. National Excess Insurance Co., 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989) that “[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages.” Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff’s insurance-bad faith claim is allowed to proceed to the jury. We do, however, somewhat limit the per se Jessen rule by affording the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages. Id. ¶ 6 (alteration in original).

{32} In Sloan, we modified the jury instruction, UJI 1718, to describe the specific conduct that warrants punitive damages, in insurance bad faith cases, only a small subset of the range of establishing liability. Sloan, 2004-NMSC-004, ¶ 17 (“[W]e acknowledge the [liability] instructions as written might be interpreted . . . as permitting merely unreasonable conduct to support a finding of bad faith sufficient for an award of punitive damages . . . . While the unreasonable conduct described in these instructions may support an award of compensatory damages, such conduct does not support an award of punitive damages.”). Unlike the insurance bad faith context, however, the prima facie DFR case does not include any conduct that is necessarily outside the possible range of the punitive damages instruction—willful, wanton, malicious, reckless, oppressive, fraudulent or in bad faith. As a result, we need not draw a line between conduct that could support a punitive damages award and that which could not.

{33} Still, a punitive damages award is far from “automatic.” The distinction between a finding of liability and an award of punitive damages lies not in the parsing of adjectives, but in the nature of the jury’s inquiry, and the role of judge and counsel in guiding that inquiry. The jury must first engage in a factual inquiry to determine whether the plaintiff has proved the elements of the claim. If so, the jury must then engage in a much different inquiry—a moral determination—to decide whether the defendant’s conduct should be punished, and whether such punishment would serve to deter similar conduct in the future. It is the role of the trial judge to explain the different duties to the jury, and the role of counsel to argue the elements and policy of liability and punitive damages separately.

{34} Here, the jury was given detailed instructions on liability, which explained that “Akins ha[d] the burden of proving” numerous contentions, including that “[t]he Union’s failure or refusal to pursue [Akins’] grievance was arbitrary and in bad faith.” Jury Instruction 12 explained that the amount of compensatory damages, if any, “must be based upon proof and not upon speculation, guess or conjecture.” The trial court gave the jury a separate punitive damages instruction, which defined the conduct required to warrant punitive damages. But the instruction also explained that punitive damages are automatic, available in every DFR action.

3We also note that several other states allow punitive damages in suits against unions for breach of the duty of fair representation. See, e.g., Norton v. Adair County, 441 N.W.2d 347, 363-64 (Iowa 1989) (punitive damages are permissible in action against union for breach of duty of fair representation if actual or legal malice is demonstrated); Brown v. Me. State Employees Ass’n, 690 A.2d 956, 959 (Me. 1997) (statutory DFR grants executive branch agency broad authority to fashion remedy for breach). States that do not allow punitive damages in DFR suits, for the most part, are those that have tied their governing law to federal law in the manner the Union here urges. See, e.g., Demings v. City of Ecorse, 377 N.W.2d 275, 277-78 (Mich. 1985); Sw. Bell Tel. Co. v. Buie, 689 S.W.2d 848, 852 (Mo. Ct. App. 1985).
damages are not required by the law and are only awarded “for the limited purpose of punishment and to deter others from the commission of [sic] like offenses.”

{35} The separate jury instructions, along with the separate questions on the special verdict form, very clearly distinguished between the two inquiries required of the jury. The jury was not instructed to simply match conduct to terms; it was instructed to engage in one inquiry that focused on facts and proof and another that focused on punishment and deterrence. In both circumstances, it was necessary to match the Union’s conduct to the terms of the respective standard, but that alone was not sufficient. For liability, the jury was expected to weigh proof of the element of lost earnings, calculate compensatory damages based on lost income alone, and disregard sympathy or prejudice. For punitive damages, the jury was instructed to consider the concept of justice and aggravating or mitigating circumstances and to disregard bias, prejudice, or sympathy. We are satisfied that, despite certain overlapping terms, the jury instructions left no room for confusion between the liability and punitive damages inquiries.

{36} We emphasize that the parties also play an important role in guiding the jury to an appropriate award by litigating the issues that are specific to the punitive damages inquiry. The punitive damages instruction clearly charges that “[t]he amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown.” UJI 13-1827. The Union argues on appeal that punitive damages are especially harmful to small, unsophisticated unions like itself, whose only income is derived from the modest dues of its limited membership. The Union also argues that the punitive damages award in this case is disproportionate to the Union’s conduct as described at trial. These are precisely the sort of “mitigating circumstances” the jury instruction envisions, yet the Union failed to make these arguments, with supporting evidence, to the jury. Whatever the Union’s trial strategy in this case, the punitive damages instruction leaves ample room for the parties to argue liability and punitive damages separately, and to ensure that juries do not confuse the two.

CONCLUSION

{37} We affirm the ruling of the Court of Appeals and the judgment of the district court.

{38} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:
CHARLES W. DANIELS,
Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
OPINION

MICHAEL D. BUSTAMANTE, JUDGE

Defendant Mark Reger appeals his convictions for aggravated driving while under the influence of intoxicating liquor (DWI), and driving while license suspended or revoked. The factual setting of Defendant’s case requires us to consider whether a police officer may properly arrest an intoxicated driver standing outside his vehicle when the officer has not observed him driving. We conclude that the misdemeanor arrest rule is satisfied where the officer may reasonably infer from the direct and circumstantial evidence that the driver is intoxicated and has recently been in actual physical control of the vehicle. We affirm the district court.

BACKGROUND

Defendant’s motion to suppress evidence resulting from his arrest adopted the facts as reported by the arresting officer, Sergeant Ricardo Huerta of the Artesia police department. At the hearing on the motion, both Defendant and the State stipulated to Sergeant Huerta’s testimony. Thus, the following facts are not in dispute. On August 23, 2007, Sergeant Huerta responded to a report of a possible drunk driver who had parked his truck on private property at an auto dealership in Artesia, New Mexico. Arriving at the location, Sergeant Huerta encountered Defendant standing outside of his truck, which was parked with the hood open and the engine off. Defendant told the officer he had stopped because someone had told him one of his lights was out. The officer noticed that Defendant was slurring his speech, was unsteady on his feet, and had an odor of alcohol on his breath. The officer administered field sobriety tests and based on his observations placed Defendant under arrest for DWI.

Defendant ultimately pleaded guilty to aggravated DWI and driving while license suspended or revoked, reserving the right to appeal the district court’s denial of his motion to suppress evidence resulting from his arrest.

STANDARD OF REVIEW

“In reviewing a trial court’s denial of a motion to suppress, we observe the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts, which is subject to de novo review.” State v. Nieto, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (alteration omitted) (internal quotation marks and citation omitted). “We view the facts in the light most favorable to the [s]tate as the prevailing party, indulging all reasonable inferences in support of the district court’s ruling and disregarding all evidence and inferences to the contrary.” State v. Pacheco, 2008-NMCA-131, ¶ 3, 145 N.M. 40, 193 P.3d 587.

DISCUSSION

Defendant argues that his arrest for DWI was improper because he was not in “actual physical control” of his truck when Sergeant Huerta encountered him, nor had Sergeant Huerta observed him driving. New Mexico statutes provide that “[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.” NMSA 1978, § 66-8-102(A) (2007). “[D]river’ means every person who drives or is in actual physical control of a motor vehicle.” NMSA 1978, § 66-1-4.4(K) (2007). A person is in actual physical control when “he or she exercises direct influence over the vehicle.” State v. Johnson, 2001-NMSC-001, ¶ 19, 130 N.M. 6, 15 P.3d 1233 (filed 2000). “[M]otion of the vehicle is not a necessary element of [DWI].” Boone v. State, 105 N.M. 223, 226, 731 P.2d 366, 369 (1986). “[T]he clear purpose of the ‘actual physical control’ element of the DWI statute is to deter persons from placing themselves in a situation in which they can directly commence operating a vehicle while they are intoxicated, regardless of the location of the vehicle.” Johnson, 2001-NMSC-001, ¶ 24.

“What constitutes actual physical control has been decided based on the facts of a particular case.” State v. Sims, 2008-NMCA-017, ¶ 7, 143 N.M. 400, 176 P.3d 1132 (filed 2007), cert. granted, 2008-NMCERT-001, 143 N.M. 399, 176 P.3d 1131.
In Sims, we affirmed the conviction of a driver found passed out or asleep behind the steering wheel of a vehicle with the engine off and the key on the passenger seat. Other New Mexico cases that have found actual physical control or driving include Boone, 105 N.M. at 226-27, 731 P.2d at 369-70 (defendant stopped in a traffic lane at night with the automobile’s engine running but its lights off); State v. Rivera, 1997-NMCA-102, ¶¶ 2-3, 124 N.M. 211, 947 P.2d 168 (defendant asleep or unconscious at the wheel of his car in his front yard with the engine racing); State v. Tafaya, 1997-NMCA-083, ¶¶ 2, 5, 123 N.M. 665, 944 P.2d 894 (defendant found sleeping behind the wheel of an inoperable vehicle with the engine off but the key in the ignition in the on position); State v. Harrison, 115 N.M. 73, 74, 75-76, 846 P.2d 1082, 1083, 1084-85 (Ct. App. 1992) (defendant found unconscious or asleep in driver’s seat with engine running but wheels blocked).

[7] Our language in Sims suggests that the factual setting of that case approaches the outer limits of circumstances that may be considered actual physical control. Addressing the dissent, this Court prefaced its comments by stating: “Although we have concerns with conduct of this nature rising to the level of DWI . . . .” Sims, 2008-NMCA-017, ¶ 11. Noting the New Mexico Supreme Court’s holding in Johnson, that “the [actual physical control] test is satisfied by a person passed out in the driver’s seat with the key in the ignition,” we reasoned that distinguishing Sims on the basis that the key was a short distance from the ignition would not be “supported by any coherent rationale, other than a desire to draw a line somewhere.” Sims, 2008-NMCA-017, ¶ 11.

[8] Without purporting to draw a bright line, we conclude for several reasons that in the circumstances of the present case Defendant was not in actual physical control of his vehicle at the time Sergeant Huerta encountered him. A person standing outside a vehicle with the hood up is not “in a situation in which they can directly commence operating a vehicle,” nor is the person “exercising direct influence over the vehicle.” Johnson, 2001-NMSC-001, ¶ 19. Most obviously, the person is physically separated from and out of reach of the ignition, steering wheel, gearshift, and pedals. In Defendant’s case, operating the vehicle would require the additional step of closing the hood. We further observe that there are many circumstances in which an intoxicated person might be standing outside a vehicle where no supportable inference can be made that the person is likely to get in and drive away. However, where a person is in the driver’s seat within reach of the keys, such an inference is more reasonable.

[9] New Mexico cases discuss the concept of actual physical control in terms of ability to “directly commence operating a vehicle,” not having driven the vehicle in the recent past. Id. Thus, the question of whether a person is in actual physical control of a vehicle when the officer encounters him or her is analytically distinct from any inference that the person has recently been driving while intoxicated. If a person is found to be in actual physical control, he or she is viewed as currently driving for purposes of the DWI law. If a person is found not to be in actual physical control, he or she is not viewed as currently driving, but the possibility remains that the person recently drove. In Sims, the question of whether the defendant had recently driven was specifically not at issue. This Court observed, “[t]here is no evidence regarding how [defendant’s] vehicle came to be in the commercial parking lot. The only issue before us relates to [defendant’s] ability to drive away from that lot.” Sims, 2008-NMCA-017, ¶ 9.

[10] The State cites several cases affirming convictions where the intoxicated driver was encountered outside his vehicle, and the investigating officer did not observe any driving. Three of these cases tend to blur the distinction between current actual physical control and circumstantial evidence that the person had been driving earlier. As discussed below, failure to make a distinction between these two concepts raises a question as to whether the misdemeanor arrest rule has been violated. In Cruzes v. Sanchez, 2009-NMSC-026, ¶ 11, 146 N.M. 315, 210 P.3d 212. “[A] crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.” State v. Ochoa, 2008-NMSC-023, ¶ 11, 143 N.M. 749, 182 P.3d 130 (internal quotation marks and citation omitted). As codified in the Motor Vehicle Code, the rule provides as follows:

A. Members of the New Mexico state police, sheriffs and their salaried deputies and members of any municipal police force, may arrest without warrant any person:

1) present at the scene of a motor vehicle accident;

2) on a highway when charged with theft of a motor vehicle; or
The significant difference between at 550, 734 P.2d at 790. Id. on a guardrail.
outside a pickup truck that was suspended intoxicated defendant, who admitted he resemble those of the present case. The N.M. 549, 734 P.2d 789 (Ct. App. 1987), involved a motor vehicle accident and the eyes control, but also whether the officer has other factors amount to actual physical in this type of case may involve not only make a reasonable inference that he drove might have had additional evidence not trol when the officers found him, but also also cause to believe or reasonable grounds to

{14} Our Supreme Court has at least implied that an officer may make an arrest based on the surrounding circumstances even though he has not seen the person driving. In State v. Gomez, 2003-NMSC-012, ¶ 2, 133 N.M. 763, 70 P.3d 753, the defendant was found asleep with his feet sticking out the open driver’s door and the keys in his pocket. The defendant moved to dismiss on grounds that there was no indication that he had operated a vehicle. Id. ¶ 3. The Supreme Court held that the defendant’s motion to dismiss could not be decided without a trial on the merits, as there existed a question, not only whether the defendant was in actual physical control when the officers found him, but also a factual question—for which the state might have had additional evidence not yet disclosed—whether the officers could make a reasonable inference that he drove to the parking lot while intoxicated. Id. ¶¶ 8-10. This result suggests that the analysis in this type of case may involve not only whether the intoxicated driver’s position relative to the keys and driver’s seat and other factors amount to actual physical control, but also whether the officer has reason to believe the person drove to the spot where he is found.

{15} The facts of State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987), resemble those of the present case. The intoxicated defendant, who had admitted he had been driving, was found standing outside a pickup truck that was suspended on a guardrail. Id. at 550, 734 P.2d at 790. The significant difference between Greyeyes and the present case is that Greyeyes involved a motor vehicle accident and the present case does not. This Court, however, did not rely on the scene-of-the-accident exception in the misdemeanor arrest rule at Section 66-8-125(A)(1), although it apparently would have been appropriate to do so, as a vehicle suspended on a guardrail is almost certainly “the scene of a motor vehicle accident.” See Greyeyes, 105 N.M. at 550, 734 P.2d at 790. The defendant argued that the officer had not observed him committing a misdemeanor. Greyeyes, 105 N.M. at 551, 734 P.2d at 791. We first pointed out that “[t]he purpose of the ‘in presence’ requirement is to prevent warrantless arrests based on information from third parties.” Id. at 552, 734 P.2d at 792. Where the necessary information comes from the defendant himself by admission, the danger that the arrest will be based on false information is virtually nonexistent. In Greyeyes, we then considered the surrounding circumstances:

[The defendant was in possession of his vehicle, admitted that he was the owner, had been drinking, and had driven the vehicle into the railing. These facts, coupled with the additional facts that defendant smelled of alcohol and failed field sobriety tests administered by the officer, were sufficient to make defendant’s arrest valid. Id. We stated, “[a]lthough it is uncontested . . . that [the officer] did not personally see the defendant drink alcohol or actually operate his pickup truck, nevertheless, the ‘in presence’ requirement was satisfied here.” Id. at 551-52, 734 P.2d at 791-92.

{16} We conclude that the Greyeyes analysis is appropriate in cases such as the present one where an intoxicated person is encountered outside a vehicle. In these circumstances, the officer’s personal perceptions include observation of the circumstances surrounding the presence of the defendant and the vehicle, observation and smells evidencing the defendant’s intoxication, and hearing what the defendant and others say. What the officer perceives supplies sufficient “facts and circumstances occurring within [the officer’s] presence in connection with what, under the circumstances, may be considered common knowledge, [to] give [the officer] probable cause to believe or reasonable grounds to suspect that a crime has occurred.” Ochoa, 2008-NMSC-023, ¶ 11 (internal quotation marks and citation omitted); see, e.g., Bayse v. State, 420 So. 2d 1050, 1053 (Miss. 1982) (holding that the presence requirement was met where the officer personally observed the bodies at the scene of a hit-and-run accident, gained information from various witnesses that the defendant’s car was involved in the accident, and the defendant confessed that he was involved).

{17} We see no point in ignoring the obvious in cases where overly technical application of the misdemeanor arrest rule could supply a tiny crack for the case to fall into. We note, for example, that disallowing a warrantless arrest under the present circumstances could potentially place a burden on the officer to monitor the intoxicated person for the next several hours to ensure that he does not drive away while in that condition.

{18} Applying the above principles, we first decline to extend the meaning of “actual physical control” to include the circumstances in which the officer encountered Defendant. Defendant was, however, in possession of his truck and acknowledged that he had parked it—i.e., driven it and brought it to a stop—to check if a light was out. He showed signs of being under the influence of alcohol and admitted drinking. We conclude that these circumstances satisfied the requirement that the offense be committed in the officer’s presence.

CONCLUSION
{19} Although Defendant was not in actual physical control of his truck when Sergeant Huerta encountered him, the facts and circumstances occurring within the officer’s observation at the time of Defendant’s arrest satisfied the misdemeanor arrest rule and provided probable cause. The district court properly denied Defendant’s motion to suppress evidence resulting from his arrest. We therefore affirm Defendant’s convictions.

{20} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
TIMOTHY L. GARCIA, Judge
Unwavering
SLEUTHS

(Susan Hansen, CFE
Forensic & Litigation Services)

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Request for Applications
Chief Disciplinary Counsel for the Supreme Court Of the State of New Mexico

Deadline for Applications: The Disciplinary Board requests submission of a letter of interest and Curriculum Vitae by August 31, 2010 to the Disciplinary Board Search Committee c/o Sandra E. Rotruck, Sutin, Thayer & Browne, PC, P.O. Box 1945, Albuquerque, NM 87103. The application period will remain open until a candidate is selected. Nature of work: The position of Chief Disciplinary Counsel is a highly responsible litigation and management position. The work includes directing and supervising the day to day operations of the Office of Disciplinary Counsel which is responsible for the disciplinary system in New Mexico consistent with New Mexico Supreme Court rules and Disciplinary Board policy. Chief Counsel is responsible for the hiring and supervision of attorneys and other staff in the office and for preparing and implementing the budget of the Disciplinary Board. Chief Counsel reports to and works with the Disciplinary Board. Major Duties and Responsibilities: Directs and supervises the receipt, evaluation, investigation and prosecution of attorney disciplinary complaints and related matters, in accordance with New Mexico Supreme Court rules and other authorities. Chief Disciplinary Counsel is also expected to maintain an appropriate caseload in addition to the administrative responsibilities described hereinafter. Hires, trains (or arranges for training) supervises, evaluates performance and disciplines attorneys and staff working within the Office of Disciplinary Counsel. Supervises the work of all staff attorneys and staff within the Office of Disciplinary Counsel, monitors the caseload of staff attorneys and non-attorney staff members, reviews case progress to ensure high quality work. Holds regular staff meetings to review the progress on specific assignments and time lines. Also arranges, when necessary, for other attorneys to enter an appearance on behalf of the Office of Disciplinary Counsel. Supervises other attorneys appearing on behalf of Disciplinary Counsel during the investigation and prosecution of disciplinary complaints and oversees contractors, consultants and experts who are utilized in the course of administering the disciplinary system. Ensures that records are properly kept to compile statistical data regarding the investigation and prosecution of disciplinary complaints. Oversees the development and implementation of policies, procedures, strategic plans, and other initiatives consistent with Disciplinary Board policy, Supreme Court mandate and the public protection mission of the New Mexico disciplinary system. Oversees the formulation and implementation of short-term and long-term goals to improve the efficiency and effectiveness of the disciplinary system. Reports to the Disciplinary Board and assists the Board on issues relating to the disciplinary system and helps prepare and administer the budget of the Disciplinary Board. Meets periodically with the Chief Justice or the Supreme Court’s liaison to the Disciplinary Board regarding matters unrelated to pending cases. Establishes and maintains effective working relationships with colleagues within the New Mexico State Bar and professional relationships with judges. Is the chief spokesperson for the Office of Disciplinary Counsel and works to educate the public about the disciplinary system as well as encouraging other attorneys within the Office of Disciplinary Counsel to do the same. Assumes other duties as assigned by the Chairperson of the Disciplinary Board or the New Mexico Supreme Court. Pay Range: $85,000.00 - $110,000.00. Available benefits: 401(k), Health and dental insurance, Life insurance, Disability insurance, Paid CLE. Qualifications: Graduation from an accredited law school and active membership within the New Mexico State Bar. An out of state applicant qualifies if they successfully complete the New Mexico State Bar Exam within one year of the date of hire. A minimum of ten years of increasingly responsible legal experience, at least two of which shall be in private practice. Trial, appellate, governmental and disciplinary experience is preferred. At least five years experience in office management to include program planning, administration, budgeting and human resource experience. The experience shall demonstrate considerable knowledge of modern management and supervisory principles and practices. Extensive knowledge of the rules of professional responsibility and related case law, procedural rules and rules of evidence. Reputation for integrity and no history of disciplinary offenses as an attorney or in any other capacity. Excellent written and verbal communication skills including public speaking skills. Excellent interpersonal, communication and conflict management skills. Ability to set priorities and work with various interest groups or individuals. Proficient in the use of office equipment, including standard computers and computer software. Ability to compile data for reporting purposes. Ability to travel within and outside of New Mexico. Must be willing to submit to a background check which may include, but is not limited to, a criminal background check and a disciplinary background check.
Want to Gain Courtroom Experience?

Then the Fourth Judicial District Attorney’s Office may be the opportunity you’ve been waiting for. An entry-level attorney position is currently available. Salary will be based on the District Attorney’s Personnel and Compensation Plan. Las Vegas is a small, but historic and art-influenced community. Please forward your letter of interest and resume to Richard D. Flores, District Attorney, P.O. Box 2025, Las Vegas, New Mexico 87701; e-mail: rflores@da.state.nm.us.

Assistant District Attorney

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

Trial Attorneys

The 13th Judicial District Attorney’s Office welcomes resumes and applications for entry level and senior level Trial Attorneys. Resumes are reviewed and kept in the applicant pool for a period of six (6) months and are referred to as position openings become available. The senior level position requires prosecution of complex criminal cases. Requirement for senior level is a minimum of 7 years experience in prosecuting major felony cases. Positions may become available in the Sandoval, Cibola and Valencia counties in New Mexico. Salary is dependent on experience. Send resumes to Carmen Gonzales, Human Resources Administrator, 333 Rio Rancho Blvd., Suite 201, Rio Rancho, NM 87124, or via E-Mail to: CGonzales@da.state.nm.us.

Associate Attorney

Civil Litigation firm seeks associate attorney with strong academic credentials and 1-5 years experience for successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Thal & Baker, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Attorney

Established Albuquerque law firm seeks an attorney with 1-3 years of experience for associate position. Our practice areas include real estate, business transactions, corporate and health law and civil litigation. Applicants must be licensed to practice law in the State of New Mexico. We are looking for a self-motivated attorney with a strong work ethic who is committed to serving the needs of our clients. Preference will be accorded to those who are skilled in drafting and editing of documents and pleadings. Legal research skills are also a plus. Interested persons should send resume, law school transcript and writing sample in confidence to Georgia Manjoros-Serna, P.O. Box 90637, Albuquerque, NM 87199-0637

Attorney

Paralegal - Operational

The New Mexico Educational Retirement Board ("NMERB") has an opening for a Paralegal – O (Operational). The position is permanent, "classified" (pay band 55) and subject to the State Personnel Act. The NMERB administers the educational retirement system for public and charter schools, community colleges, and universities, serving approximately 60,000 active members, 30,000 retirees, 30,000 inactive members. Duties include providing paralegal and general office support to attorneys, creating and maintaining legal files, performing legal research, assisting with contract review and processing, reviewing court orders affecting retirement benefits, processing disability retirement applications, transcribing notes of medical review panel meetings, assisting attorneys to prepare for administrative appeals, communicating with staff, members, retirees, and the public. This position requires an Associate’s Degree in Paralegal Studies and three (3) years as a paralegal or legal assistant, to include two (2) years working with customers and/or the public. The NMERB may also make certain that authorized equivalencies are filed for the required education and/or experience. Applicants should apply through the State of New Mexico Personnel Job Site (www.spo.state.nm.us/jobseek), Job ID # 23338. In addition, applicants should submit a resume and transcripts, and a minimum of three professional references by 5:00 PM, August 11, 2010 to: Chris Schatzman, General Counsel, 701 Camino de los Marquez, Santa Fe, NM 87505; P.O. Box 26129, Santa Fe, NM 87502.

Legal Secretaries / Paralegals

Small litigation firm seeks motivated attorney with 1-2 years of experience. Must have strong research and writing skills. Salary based on experience. Send resume and salary requirements to PO Box 16270, ABQ, NM 87191-6270.

Criminal Defense Associate Attorney

The Law Office of Chip Venie is now hiring associate attorneys to practice exclusively in criminal defense. Our firm is engaged exclusively in the practice of criminal defense both state and nationwide. We have been open for 9 years, and are looking to expand. The ideal candidate will have 1-5 years experience in criminal law as either an AUSA, DA, PD, or contract defense attorney. Must be admitted to practice law in NM. Spanish speaking is a plus. Must own your own car and have access to it every day. Must be able to work independently with little supervision. If you want trial experience, you will get it. If you want to go to court every day, you will go. If you want to become a partner in 5 years or less, we are looking for someone special to find and train into partnership. The salary is $52K-$75K a year, DOE. Please review our website at www.anothernotugly.com for more information about who we are and what we do. Position open until filled. Please submit a cover letter, resume, and writing sample to chip@littledranttel.com or fax to 505 766 9001. No visits or phone calls, please.

Paralegal

Paralegal with experience needed for busy Law Firm in Journal Center area. Must multi task & be able to thrive in a high volume, fast paced practice. Great Sal & Ben (h/l, vac, sick, health, dental, retire plan & more) Submit in confidence cover letter, resume, salary history & req to: resume@littledranttel.com

Paralegal

High Desert Staffing seeks candidates with 2-5 years experience for both permanent and temporary positions. Call for interview: (505) 881-3449

Bar Bulletin • August 2, 2010 • Volume 49, No. 31
Offices for Rent
Three offices (2 furnished) for rent at Morgan / Word Building, 500 Tijeras NW, Albuquerque. Beautiful, downtown property; short or long term lease. Ten attorneys with assorted practises provide good collegiality and case referrals. Receptionist, on-site parking, conference rooms, telephone/copier/fax/scan equipment with client coding/billing system, tv/dvd, stocked kitchen. 842-1905.

Available Office Space
Executive office near Paseo/I-25 with separate secretarial area available for rent. The renter will have use of our modern conference room, color copy machine, kitchen and we provide free high speed internet. Please call 710-9245 for more information.

A True Bargain
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Legal Secretary
Law office has immediate opening for an experienced legal secretary. Position will begin as full time position for two months. Position will become part time, 25 hours per week on October 1st. The secretary will support 3 full-time attorneys. Must have 3 years legal secretarial experience with excellent word processing and organizational skills. Knowledge of Microsoft Office and Wordperfect 12 necessary. Salary DOE. E-mail resume to gromero@hinklelawfirm.com or Mail to: Attn: Office Manager, P.O. Box 2068, Santa Fe, NM 87504.
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