Inside This Issue

Table of Contents .......................................................3

Judicial Vacancies ..........................................................4
  Fifth Judicial District Court
  Ninth Judicial District Court

Appellate Advocate Receives Charles Driscoll Award,
  by Cathy Ansheles ..................................................6

Clerk’s Certificates ......................................................12

Rules/Orders

  Proposed Revisions to the Rules of Criminal Procedure for the Magistrate Courts,
  Rules of Procedure for the Municipal Courts,
  and Criminal Forms ..................................................16


From the New Mexico Supreme Court

  2011-NMSC-019, No. 32,422:
    In the Matter of Robert Merle Schwartz ........22

  2011-NMSC-020, No. 32,411:
    State ex rel., King v. Sloan ..............................26

  2011-NMSC-021, No. 32,137:
    State v. Skippings .........................................29

From the New Mexico Court of Appeals

  2011-NMCA-057, No. 28,825:
    Charles v. NMSU Regents .................................33

  2011-NMCA-058, No. 28,695:
    Headen v. D’Antonio .......................................37

  2011-NMCA-059, No. 29,427:
    Randles v. Hanson ..........................................40

Special Insert:

  CLE At-a-Glance
The American Bar Association Members/Northern Trust Collective Trust (the “Collective Trust”) has filed a registration statement (including the prospectus therein (the “Prospectus”)) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (800) 826-8901, by visiting the website of the ABA Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute an offer to purchase, and is in no way a recommendation with respect to, any security that is available through the Program.

Who’s Watching Your Firm’s 401(k)?

And, what is it costing you?

- Does your firm’s 401(k) include professional investment fiduciary services?
- Is your firm’s 401(k) subject to quarterly reviews by an independent board of directors?
- Does your firm’s 401(k) feature no out-of-pocket fees?

If you answered no to any of these questions, contact the ABA Retirement Funds Program to learn how to keep a close watch over your 401(k).

Phone: (800) 826-8901
email: contactus@abaretirement.com
Web: www.abaretirement.com

Please visit the ABA Retirement Funds Booth at the upcoming State Bar of New Mexico Annual Meeting, for a free cost comparison and plan evaluation. July 14–16 • Buffalo Thunder Resort • Santa Fe, New Mexico

ABA Retirement Funds

Who’s Watching Your Firm’s 401(k)?

ABA
Retirement
Funds

The American Bar Association Members/Northern Trust Collective Trust (the “Collective Trust”) has filed a registration statement (including the prospectus therein (the “Prospectus”)) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (800) 826-8901, by visiting the website of the ABA Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute an offer to purchase, and is in no way a recommendation with respect to, any security that is available through the Program.
TABLE OF CONTENTS

Notices .................................................................4
Law Practice Management Committee: Tip of the Week .................................................5
New Mexico Delegation to Cuba .................................................................5
Appellate Advocate Receives Charles Driscoll Award, by Cathy Ansheles .........................6
Constitution Day Volunteers Needed .................................................................6
Bridge the Gap Mentorship Program .................................................................6
Through Your Donations to the NM State Bar Foundation ........................................6
Legal Education Calendar ........................................................................8
Writs of Certiorari .....................................................................................9
List of Court of Appeals’ Opinions ..................................................................11
Clerk’s Certificates ..................................................................................12
Recent Rule-Making Activity ..................................................................14

Rules/Orders

Proposed Revisions to the Rules of Criminal Procedure for the Magistrate Courts,
Rules of Procedure for the Municipal Courts, and Criminal Forms ..................16
Proposed Revisions to the Rules of Criminal Procedure for the Magistrate Courts,
Rules of Criminal Procedure for the Metropolitan Courts, Rules of Procedure
for the Municipal Courts, and Criminal Forms .............................................19

Opinions

From the New Mexico Supreme Court

2011-NMSC-019, No. 32,422: In the Matter of Robert Merle Schwartz .........................22
2011-NMSC-020, No. 32,411: State ex rel., King v. Sloan ...........................................26
2011-NMSC-021, No. 32,137: State v. Skippings ......................................................29

From the New Mexico Court of Appeals

2011-NMCA-057, No. 28,825: Charles v. NMSU Regents ...........................................33
2011-NMCA-058, No. 28,695: Headen v. D’Antonio ...............................................37
2011-NMCA-059, No. 29,427: Randles v. Hanson ...................................................40

Advertising ..........................................................................................46

MEETINGS

JUNE

29 NREEL BOD, noon, State Bar Center

JULY

6 Bankruptcy Law Section BOD, noon, U.S. Bankruptcy Court
7 Real Property, Trust and Estate Section BOD, 11:30 a.m., via teleconference
8 Prosecutors Section BOD, 2 p.m., State Bar Center

STATE BAR WORKSHOPS

JULY

27 Consumer Debt/Bankruptcy Workshop 6–8 p.m., State Bar Center, Albuquerque

AUGUST

10 Estate Planning/Probate Workshop 6–8 p.m., State Bar Center, Albuquerque
24 Consumer Debt/Bankruptcy Workshop 6–8 p.m., State Bar Center, Albuquerque

Cover Artist: Kamil Kubik’s work translates his artistic perception into city scenes that radiate life. His pastel of Carnegie Hall was used as the first American poster in China and was presented by Isaac Stern to the foreign minister of the People’s Republic of China. He is in the collections of President and Mrs. George W. Bush, President and Mrs. George H.W. Bush, Mayor and Mrs. Rudolph Giuliani, Mrs. Lyndon Johnson, and Prince Rainier of Monaco among many others.
**NOTICES**

**COURT NEWS**

**NM Supreme Court**

**NM Compilation Commission Meeting**

The New Mexico Compilation Commission will meet at 9 a.m., July 6, in the Supreme Court Building, Room 208. The commission will immediately be called into executive session to discuss pricing and development.

**District Court Judicial Vacancies**

Judicial vacancies exist in the courts listed below. Inquiries regarding the details or assignments of these vacancies should be directed to the chief judge or the administrator of the court. Kevin K. Washburn, chair of the Judicial Nominating Commissions, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website at http://lawschool.unm.edu/judsel/application.php, or via email by calling Nancy Huffstutler, (505) 277-0028. Applications received after the stated deadlines will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Commissions on the judicial nominating process are open to the public.

**Court News**

**NM Supreme Court**

**NM Compilation Commission Meeting**

The New Mexico Compilation Commission will meet at 9 a.m., July 6, in the Supreme Court Building, Room 208. The commission will immediately be called into executive session to discuss pricing and development.

**District Court Judicial Vacancies**

Judicial vacancies exist in the courts listed below. Inquiries regarding the details or assignments of these vacancies should be directed to the chief judge or the administrator of the court. Kevin K. Washburn, chair of the Judicial Nominating Commissions, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website at http://lawschool.unm.edu/judsel/application.php, or via email by calling Nancy Huffstutler, (505) 277-0028. Applications received after the stated deadlines will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Commissions on the judicial nominating process are open to the public.

**Fifth Judicial District Court**

A vacancy exists on the 5th Judicial District Court, Division IX, Eddy County, due to the retirement of the Honorable Thomas A. Rutledge, effective July 15. The deadline for applications is 5 p.m., June 30. The District Court Judicial Nominating Commission will meet at 9 a.m., July 25, at the District Courthouse, Carlsbad, to interview applicants.

**Ninth Judicial District Court**

A vacancy exists on the 9th Judicial District Court due to the death of the Honorable Robert S. Orlit. The deadline for applications is 5 p.m., July 8. The District Court Judicial Nominating Commission will meet at 9 a.m., July 21, at the Curry County Courthouse, Clovis, to interview applicants.

**STATE BAR NEWS**

**Attorney Support Group**

- July 18, 7:30 a.m.--Morning groups meet regularly on the third Monday of the month.
- July 11, 5:30 p.m.--Afternoon groups meet regularly on the first Monday of the month (change due to July 4 holiday).

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

**Judicial Performance Evaluation Commission Service on Commission**

The president of the State Bar of New Mexico is required by order to submit the names of three nominees from which the Supreme Court shall select one member to serve on the Judicial Performance Evaluation Commission for a six-year term. Members interested in serving on JPEC should send a letter of interest and brief resume by July 13 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or email jconte@nmbar.org.

**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/Tapes</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District</td>
<td>Criminal, civil domestic relations, adoption, and children’s cases</td>
<td>1991–1996</td>
<td>July 18</td>
</tr>
<tr>
<td>Court (505) 455-8275</td>
<td>Tapes in all criminal cases</td>
<td>2001–July 2005</td>
<td>August 19</td>
</tr>
<tr>
<td>10th Judicial District</td>
<td>Tapes in incompetency, mental health and competency,</td>
<td>2002–July 2005</td>
<td>August 19</td>
</tr>
<tr>
<td>Court (575) 461-2764</td>
<td>guardianships/conservatorships, abuse/neglect, juvenile, adoption, and</td>
<td>2004</td>
<td>August 19</td>
</tr>
<tr>
<td></td>
<td>probate cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tapes in grand jury cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tapes in criminal preliminary cases</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Paralegal Division
Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend Law Office Management of the Criminal Practice (1.0 general CLE credit) presented by Mark Keller. The program will be held from noon to 1 p.m., July 13, at the State Bar Center (registration fee for attorneys--$16, members of the Paralegal Division--$10, non-members--$15). 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. This CLE will be webcast to two locations:

- Santa Fe at the offices of Montgomery & Andrews, 325 Paseo de Peralta, Santa Fe. Contact Donna Ormerod, (505) 986-2520, for more information.
- Roswell at Hinkle, Hensley, Shanor & Martin LLP, 400 N. Pennsylvania, Ste 700. Contact Dora Paz, (575) 622-6510, for more information.

Young Lawyers Division
Volunteers Needed

The Young Lawyers Division seeks volunteers for “Serving Our Seniors,” this year’s public service project for the American Bar Association Young Lawyers Division. The program provides low-income seniors with pro bono legal services in the form of simple wills, powers of attorney, and advanced healthcare directives. The next event will take place from noon–4 p.m., July 14, at the Mary Esther Gonzales Senior Center, 1121 Alto Street, Santa Fe, during the State Bar’s Annual Meeting–Bench and Bar Conference at the Buffalo Thunder Resort. Volunteers will need to bring their own laptops, but all other materials will be provided. No prior experience with wills or estate planning is needed. For more information or to volunteer, contact Roxanna Chacon, lglrmc@zi.net, by July 5.

Other Bars
Albuquerque Bar Association
Member Luncheon

The Albuquerque Bar Association’s Member Luncheon will be held at noon, July 12, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The luncheon speakers are Albuquerque Bar past presidents Jim Ritchie, Chuck Wellborn, Judge Alan Torgerson, Jerry Dixon and Ruth Schifani. The CLE (2.0 general CLE credits) will immediately follow the luncheon from 1:15–3:15 p.m. Judge Leslie Smith will present The First Thousand Mediations: ADR Experiences from an Old Mediator.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $85 members/$115 non-members with reservations; CLE only: $60 members/$80 non-members. Register for lunch by noon, July 8. To register:
1. log onto www.abqbar.org;
2. e-mail abqbar@abqbar.org;
3. call (505) 842-1151 or (505) 243-2615;
4. fax to (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.

NM Black Lawyers Association
Election of Officers and Next Event

The New Mexico Black Lawyers Association has elected new officers: Sonia Gipson Rankin, president; Shammara Henderson, vice president; Raymond Hamilton, treasurer; and Aja Brooks, secretary. The organization’s next event will be Raymond Hamilton’s retirement celebration from 5–9 p.m. July 30. The 2011 CLE, E-filing, Electronic Demonstrative Devices and Effective Uses of Case Management Applications, will be Sept. 2. More details will follow. To contact NMBLA, email nmblacklawyers@gmail.com or call (505) 552-2074.

New Mexico Delegation to Cuba

Under the leadership of State Bar President Jessica Pérez and President-elect Hans Voss, the State Bar will send a delegation of New Mexico lawyers to Cuba for an interactive, educational professional exchange program to learn about the Cuban legal system and share New Mexico information with Cuban lawyers. The trip is scheduled for Oct. 1–8. The cost is approximately $4,200 per person based on double occupancy and includes air from Miami, hotel accommodations, meals, transportation, etc. The cost does not cover the flight from New Mexico to Miami. Non-attorney guests are welcome. A once-in-a-lifetime opportunity. Contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.
VOLUNTEER ATTORNEYS AND JUDGES NEEDED STATEWIDE FOR CONSTITUTION DAY, SEPT. 12–16

Constitution Day, an event designed to teach 5th graders about the Constitution, is taking shape across the country. During the week of Sept. 12–16, volunteer attorneys will be partnered with 5th grade teachers in their areas to co-teach lessons on the Constitution. Suggested course materials will be provided as well as pocket-size Constitutions to give each student. Each presentation should last 1–1½ hours. Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place. Visit http://www.nmbar.org/Public/educationalprograms.html to sign up.

For additional information, contact Marilyn Kelley, mkelley@nmbar.org.

NEW ATTORNEYS
Pursuant to 24-110 NMRA, newly admitted attorneys have 30 days after admission to the State Bar to either submit a new attorney application or file for exemption/deferment.

POTENTIAL MENTORS
Sign up to mentor a new attorney in the practical aspects of law. Mentors and new lawyers discuss the practice of law and work on activities they choose from a mentoring plan. Both participants receive CLE credits.

Information and details are available at http://www.nmbar.org/Attorneys/Mentorship/mentorship.html.

For additional information, contact Marilyn Kelley, mkelley@nmbar.org.

BRIDGE THE GAP MENTORSHIP PROGRAM

New Attorneys
Pursuant to 24-110 NMRA, newly admitted attorneys have 30 days after admission to the State Bar to either submit a new attorney application or file for exemption/deferment.

Potential Mentors
Sign up to mentor a new attorney in the practical aspects of law. Mentors and new lawyers discuss the practice of law and work on activities they choose from a mentoring plan. Both participants receive CLE credits.

Information and details are available at http://www.nmbar.org/Attorneys/Mentorship/mentorship.html.

For additional information, contact Marilyn Kelley, mkelley@nmbar.org.

NM CRIMINAL DEFENSE LAWYERS ASSOCIATION

APPELLATE ADVOCATE RECEIVES CHARLES DRISCOLL AWARD

By Cathy Ansheles

Trace Rabern, a private practice attorney and long-time activist with the New Mexico Criminal Defense Lawyers Association, received the 2011 Charles Driscoll Award during NMCDLA’s annual meeting June 10. Throughout her career, Rabern has worked to improve the administration of justice. She participated in the reform of the Children’s Code and was a critical component of the repeal of New Mexico’s death penalty. She also has worked tirelessly to help create an independent commission to administer the Public Defender Department. As Rabern testified before the Courts and Corrections Committee of the New Mexico Legislature, “Being a public defender is more than a job—it’s a calling. We cannot let politics interfere with the right to counsel and the attorney-client privilege. These are bedrock rights that must be assured to everyone, especially the poor and the infamous.” Rabern is one of the state’s most respected appellate advocates with more than 50 published cases to her credit.

“I’ve called Trace at ten o’clock at night with a legal question about a trial the next day,” said NMCDLA incoming President Ousama Rasheed. “Not only does she give me excellent legal advice, she gives me the encouragement I need to do my best, even when the odds of winning are slim.” Rabern has handled countless high profile cases, often for little or no compensation, to ensure that even her most unpopular clients receive a fair trial. She is a recognized expert in mental health and legal competency issues as well as constitutional issues involving unfair search and seizure, prosecutorial misconduct, and the imposition of illegal sentences. Rabern is also recognized as a fierce advocate on behalf of children charged with crimes. She is best known for her work on behalf of an innocent 12-year-old girl who was accused of murder and lived under a cloud of suspicion for nearly five years while Rabern worked zealously to get the case dismissed.

Rabern graduated with honors from the UNM School of Law in 1996. She spent eight years in the Appellate Division of the Public Defender Department and then opened a solo practice specializing in state and federal appeals. Rabern is also an adjunct professor at the UNM School of Law, where she teaches an appellate law and practice course.

“Trace is not just a great lawyer,” one of her former students noted. “She is a great teacher, mentor and role model. Her dedication to her clients and her students is inspirational. It was an honor to be one of her students.”

The Driscoll Award is given annually to an outstanding member of the criminal defense bar who has shown extraordinary courage and determination in protecting the rights of people charged with crimes. The award commemorates Charles Driscoll, a long time criminal defense lawyer who later became a Catholic priest and whose passion and zeal to improve criminal defense in New Mexico has served as an example to generations of attorneys.

STATE BAR FOUNDATION THROUGH YOUR DONATIONS TO THE NM STATE BAR FOUNDATION...

You protect children with your gift.

When young Wei witnessed his father murder his mother and then commit suicide, the Asian Family Center stepped in to help. This traumatizing event causes Wei to act out so aggressively that his grandmother can no longer care for him appropriately. The lawyer for the Asian Family Center is helping both sets of grandparents get Wei the counseling and school support that he needs.
To reserve your ad space please contact: Marcia Ulibarri
505.797.6058 | mulibarri@nmbar.org

Features:
• 12 page supplement to the Bar Bulletin
  • Full color publication
  • Published 4 times a year
  • Falls centerfold in Bar Bulletin
  • Cover notification
LEGAL EDUCATION

JUNE

30  Equity and Incentive Interests in LLCs
    1.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

JULY

5  An Attorney’s Guide to Dealing with Stress in Tough Economic Times
    2.0 E, 1.0 P
    Video Replay
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

5  Improving the Human Resource Professional/Attorney Relationship
    5.0 G, 1.0 E
    Video Replay
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

14  Attorney Ethics in Advertising in a Digital Age
    1.0 E
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

14–16 2011 Annual Meeting
    9.0 G, 2.0 E, 1.0 P
    Buffalo Thunder Resort, Santa Fe
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

19  Accounting for Lawyers
    6.0 G
    Video Replay
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

19  How to Do Your First Personal Injury Case and a Defense Perspective
    4.0 G, 1.0 E, 1.0 P
    Video Replay
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

19–20 Estate Planning for Real Estate, Parts 1 and 2
    2.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

26  Ethics of Using “Metadata” in Law Practice and Litigation
    1.0 E
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

26  Tax Planning Issues in Divorce
    1.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

7–8  MD and DDS Practice Update, Parts 1 and 2
    2.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

12  Employment and Labor Issues for Nonprofits
    1.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

19  Estate Planning for Real Estate, Parts 1 and 2
    2.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org

12  Employment and Labor Issues for Nonprofits
    1.0 G
    Teleseminar
    Center for Legal Education of NMSBF
    (505) 797-6020
    www.nmbarcle.org
<table>
<thead>
<tr>
<th>No. 33,070</th>
<th>Montoya v. City of Albuquerque</th>
<th>Date Petition Filed</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>(COA 29,838)</td>
<td>6/17/11</td>
<td>(COA 29,798)</td>
<td>6/2/10</td>
</tr>
</tbody>
</table>

| No. 33,068 | State v. Stevens | (COA 29,423) | 6/16/11 | No. 32,360 | State v. Figueroa | (COA 28,747) | 6/2/10 |

| No. 33,064 | State v. Begay | (COA 31,076) | 6/13/11 | No. 32,430 | State v. Muqqddin | (COA 28,474) | 8/2/10 |

| No. 33,063 | Duran v. Jaramillo | (12-501) | 6/10/11 | No. 32,483 | State v. Jackson | (COA 28,657) | 8/19/10 |


| No. 33,061 | Herrera v. Franco | (12-501) | 6/10/11 | No. 32,548 | State v. Robles | (COA 30,118) | 9/27/10 |

| No. 33,057 | State v. Turrietta | (COA 29,561) | 6/9/11 | No. 32,602 | State v. Marez | (COA 30,233) | 10/18/10 |

| No. 33,060 | State v. Otuafi | (COA 30,332) | 6/8/11 | No. 32,603 | Holguin v. Fulco Oil | (COA 29,149) | 10/18/10 |

| No. 33,059 | State v. Chavez | (COA 30,997) | 6/8/11 | No. 32,605 | State v. Franco | (COA 30,028) | 10/18/10 |


| No. 33,053 | State v. Coleman | (COA 29,143) | 6/6/11 | No. 32,632 | State v. Domínguez-Meraz | (COA 30,382) | 11/5/10 |

| No. 33,047 | State v. Cipriano | (COA 29,105) | 6/1/11 | No. 32,696 | Herbison v. Chase Bank | (COA 30,630) | 12/3/10 |

| No. 33,046 | State v. Munoz | (COA 30,837) | 6/1/11 | No. 32,697 | State v. Amaya | (COA 28,347) | 12/3/10 |

| No. 33,045 | State v. Brito | (COA 30,947) | 6/1/11 | No. 32,713 | Bounds v. D’Antonio | (COA 28,860) | 1/27/11 |

| No. 33,044 | State v. Portillo | (COA 29,564) | 5/31/11 | No. 32,717 | NM Farm and Livestock Bureau v. D’Antonio | (COA 28,860) | 1/27/11 |


| No. 33,031 | State v. Torres | (COA 27,900) | 5/25/11 | No. 32,915 | State v. Collier | (COA 29,805) | 4/7/11 |


| Response filed 6/14/11 | No. 32,942 | Schuster v. Taxation & Revenue Dept. | (COA 30,023) | 5/3/11 |


| No. 32,976 | State v. Olson | (COA 29,010) | 5/24/11 | No. 32,985 | Helena Chemical Co. v. Uribe | (COA 29,567) | 6/8/11 |
**WRITS OF CERTIORARI**

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>DOCKET NUMBER</th>
<th>Submission Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>32,987</td>
<td>Helena Chemical Co. v. Uribe</td>
<td>(COA 29,567)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,001</td>
<td>State v. Rudy B.</td>
<td>(COA 27,589)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,008</td>
<td>State v. Lasky</td>
<td>(COA 28,782)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,011</td>
<td>Felts v. CLK Management, Inc.</td>
<td>(COA 29,702/30,142)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,013</td>
<td>Felts v. CLK Management, Inc.</td>
<td>(COA 29,702/30,142)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,014</td>
<td>State v. Crane</td>
<td>(COA 29,470)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,023</td>
<td>State v. Gurule</td>
<td>(COA 29,734)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>32,987</td>
<td>City of Albuquerque v. Montoya</td>
<td>(COA 28,846)</td>
<td>4/11/11</td>
</tr>
<tr>
<td>32,695</td>
<td>Diamond v. Diamond</td>
<td>(COA 30,009/30,135)</td>
<td>5/10/11</td>
</tr>
<tr>
<td>32,690</td>
<td>Joey P. V. Alderman-Cave Milling &amp; Grain Co.</td>
<td>(COA 29,120)</td>
<td>5/11/11</td>
</tr>
<tr>
<td>32,756</td>
<td>Lenscrafters, Inc. v. Kehoe</td>
<td>(COA 28,145)</td>
<td>7/18/11</td>
</tr>
<tr>
<td>32,388</td>
<td>State v. Harper</td>
<td>(COA 27,830)</td>
<td>7/27/11</td>
</tr>
<tr>
<td>32,402</td>
<td>State v. Harper</td>
<td>(COA 27,830)</td>
<td>7/27/11</td>
</tr>
<tr>
<td>32,577</td>
<td>May v. DCP Midstream LP</td>
<td>(COA 29,331/29,490)</td>
<td>8/15/11</td>
</tr>
<tr>
<td>32,291</td>
<td>State v. Torres</td>
<td>(COA 29,603)</td>
<td>8/16/11</td>
</tr>
<tr>
<td>32,677</td>
<td>State v. Rivera</td>
<td>(COA 29,317)</td>
<td>8/16/11</td>
</tr>
<tr>
<td>32,436</td>
<td>Estate of Gutierrez v. Meteor Monument</td>
<td>(COA 28,799)</td>
<td>8/17/11</td>
</tr>
<tr>
<td>32,716</td>
<td>Derizotis, Inc. v. Tomada</td>
<td>(COA 30,679)</td>
<td>8/31/11</td>
</tr>
<tr>
<td>32,589</td>
<td>State v. Ordonez</td>
<td>(COA 28,297)</td>
<td>8/31/11</td>
</tr>
<tr>
<td>32,776</td>
<td>Sais v. NM Department of Corrections</td>
<td>(COA 30,785)</td>
<td>9/12/11</td>
</tr>
<tr>
<td>32,707</td>
<td>Smith LLC v. Synergy Operating LLC</td>
<td>(COA 28,248/28,263)</td>
<td>9/12/11</td>
</tr>
<tr>
<td>32,704</td>
<td>Tri-State v. State Engineer</td>
<td>(COA 27,802)</td>
<td>9/26/11</td>
</tr>
<tr>
<td>32,702</td>
<td>Stone v. County of Quay</td>
<td>(COA 30,426)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>32,734</td>
<td>State v. Flores</td>
<td>(COA 29,018)</td>
<td>6/14/11</td>
</tr>
<tr>
<td>32,736</td>
<td>State v. Powell</td>
<td>(COA 29,232)</td>
<td>6/14/11</td>
</tr>
<tr>
<td>32,781</td>
<td>State v. Puliti</td>
<td>(COA 29,509)</td>
<td>6/14/11</td>
</tr>
</tbody>
</table>

**CERTIORARI GRANTED AND SUBMITTED TO THE COURT:**

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>DOCKET NUMBER</th>
<th>Submission Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,100</td>
<td>Allen v. LeMaster</td>
<td>(12-501)</td>
<td>2/15/10</td>
</tr>
<tr>
<td>32,099</td>
<td>Wachcki v. Bernalillo Co. Sheriff’s Dept.</td>
<td>(COA 27,761)</td>
<td>7/19/10</td>
</tr>
<tr>
<td>32,131</td>
<td>Wachcki v. Bernalillo Co. Sheriff’s Dept.</td>
<td>(COA 27,761)</td>
<td>7/19/10</td>
</tr>
<tr>
<td>32,149</td>
<td>State v. Sandoval</td>
<td>(COA 28,437)</td>
<td>8/30/10</td>
</tr>
<tr>
<td>32,137</td>
<td>State v. Skippings</td>
<td>(COA 28,324)</td>
<td>10/13/10</td>
</tr>
<tr>
<td>32,130</td>
<td>State v. Cruz</td>
<td>(COA 27,292)</td>
<td>10/14/10</td>
</tr>
<tr>
<td>32,311</td>
<td>Rodriguez v. Permian Drilling Corp.</td>
<td>(COA 29,435)</td>
<td>11/15/10</td>
</tr>
<tr>
<td>32,170</td>
<td>State v. Ketelson</td>
<td>(COA 29,876)</td>
<td>11/16/10</td>
</tr>
<tr>
<td>32,344</td>
<td>Provencio v. Wenrich</td>
<td>(COA 28,882)</td>
<td>11/16/10</td>
</tr>
<tr>
<td>32,447</td>
<td>Mendoza v. Tamaya Enterprises</td>
<td>(COA 28,809)</td>
<td>1/10/11</td>
</tr>
<tr>
<td>32,486</td>
<td>City of Rio Rancho v. Amrep</td>
<td>(COA 28,709)</td>
<td>1/11/11</td>
</tr>
<tr>
<td>32,489</td>
<td>City of Rio Rancho v. Cloudview Estates</td>
<td>(COA 29,510)</td>
<td>1/11/11</td>
</tr>
<tr>
<td>32,340</td>
<td>Rivera v. American General</td>
<td>(COA 28,691)</td>
<td>1/12/11</td>
</tr>
<tr>
<td>32,234</td>
<td>State v. Trujillo</td>
<td>(COA 29,870)</td>
<td>2/23/11</td>
</tr>
<tr>
<td>32,524</td>
<td>Republican Party v. Tax &amp; Revenue Dept.</td>
<td>(COA 28,292)</td>
<td>3/14/11</td>
</tr>
<tr>
<td>32,594</td>
<td>Smith v. Durden</td>
<td>(COA 28,896)</td>
<td>3/15/11</td>
</tr>
<tr>
<td>32,505</td>
<td>Charley v. Franklin Corporation</td>
<td>(COA 28,876)</td>
<td>3/22/11</td>
</tr>
<tr>
<td>32,542</td>
<td>Quintero v. Department of Transportation</td>
<td>(COA 28,875)</td>
<td>3/22/11</td>
</tr>
<tr>
<td>32,545</td>
<td>State ex rel. CYFD v. Octavio F.</td>
<td>(COA 29,469)</td>
<td>3/23/11</td>
</tr>
<tr>
<td>32,604</td>
<td>Cox v. NM Dept of Public Safety</td>
<td>(COA 28,658)</td>
<td>4/11/11</td>
</tr>
<tr>
<td>32,570</td>
<td>Richards v. Developmental Disabilities Planning</td>
<td>(COA 30,968)</td>
<td>6/7/11</td>
</tr>
<tr>
<td>33,022</td>
<td>Zia Trust v. Aragon</td>
<td>(COA 29,160)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,048</td>
<td>Gonzalez v. Bravo</td>
<td>(12-501)</td>
<td>6/8/11</td>
</tr>
<tr>
<td>33,026</td>
<td>State v. Herrera</td>
<td>(COA 28,864/28,865)</td>
<td>6/14/11</td>
</tr>
<tr>
<td>33,027</td>
<td>State v. Loya</td>
<td>(COA 29,343)</td>
<td>6/14/11</td>
</tr>
<tr>
<td>33,036</td>
<td>Martinez v. St. Vincent Hospital</td>
<td>(COA 30,455)</td>
<td>6/14/11</td>
</tr>
<tr>
<td>33,005</td>
<td>Robles v. State</td>
<td>(12-501)</td>
<td>6/17/11</td>
</tr>
<tr>
<td>33,006</td>
<td>Robles v. State</td>
<td>(12-501)</td>
<td>6/17/11</td>
</tr>
<tr>
<td>33,051</td>
<td>Martinez v. State</td>
<td>(12-501)</td>
<td>6/17/11</td>
</tr>
</tbody>
</table>

**PETITION FOR WRIT OF CERTIORARI DENIED:**

**WRIT OF CERTIORARI QUASHED:**

No. 32,702 | Stone v. County of Quay | (COA 30,426) | 6/8/11 |
| 32,734 | State v. Flores | (COA 29,018) | 6/14/11 |
| 32,736 | State v. Powell | (COA 29,232) | 6/14/11 |
| 32,781 | State v. Puliti | (COA 29,509) | 6/14/11 |
## Published Opinions

<table>
<thead>
<tr>
<th>Case No.</th>
<th>District</th>
<th>Case</th>
<th>Party</th>
<th>filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>29412</td>
<td>6th Jud Dist Grant</td>
<td>CV-08-37, H BOUNDS v R HAMLET</td>
<td>(affirm)</td>
<td>6/13/2011</td>
</tr>
<tr>
<td>29975</td>
<td>WCA-06-678, D MARTINEZ v POJOAQUE GAMING</td>
<td>(affirm in part, reverse in part and remand)</td>
<td>6/14/2011</td>
<td></td>
</tr>
<tr>
<td>29733</td>
<td>8th Jud Dist Colfax</td>
<td>CV-09-158, R GLASER v J LEBUS</td>
<td>(other)</td>
<td>6/16/2011</td>
</tr>
</tbody>
</table>

## Unpublished Opinions

<table>
<thead>
<tr>
<th>Case No.</th>
<th>District</th>
<th>Case</th>
<th>Party</th>
<th>filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>29957</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-08-51, STATE v R CRUZ</td>
<td>(affirm)</td>
<td>6/13/2011</td>
</tr>
<tr>
<td>30529</td>
<td>3rd Jud Dist Dona Ana</td>
<td>Cr-94-1092, HSD v G MYLES</td>
<td>(affirm)</td>
<td>6/13/2011</td>
</tr>
<tr>
<td>29187</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-07-106, STATE v G RODRIGUEZ</td>
<td>(affirm)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>29429</td>
<td>12th Jud Dist Lincoln</td>
<td>CV-07-349, DYER-ROSSI v C HALL</td>
<td>(affirm)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>30974</td>
<td>2nd Jud Dist Bernalillo</td>
<td>DM-05-2846, K FEINBERG v R FEINBERG</td>
<td>(dismiss)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>31029</td>
<td>6th Jud Dist Grant</td>
<td>DM-05-168, P FLITCRAFT v W COX</td>
<td>(affirm)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>31084</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-09-8702, L STEWART-BRUNELLE v WALMART</td>
<td>(affirm)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>31110</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-08-72, STATE v G LOPEZ</td>
<td>(affirm)</td>
<td>6/14/2011</td>
</tr>
<tr>
<td>31122</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-08-6058, STATE v L PEREA</td>
<td>(affirm)</td>
<td>6/15/2011</td>
</tr>
<tr>
<td>30736</td>
<td>2nd Jud Dist Bernalillo</td>
<td>JQ-08-137, CYFD v VERONICA L</td>
<td>(affirm)</td>
<td>6/16/2011</td>
</tr>
<tr>
<td>30911</td>
<td>11th Jud Dist San Juan</td>
<td>CR-09-310, STATE v M ROBINSON</td>
<td>(affirm)</td>
<td>6/16/2011</td>
</tr>
<tr>
<td>31127</td>
<td>WCA-04-52219, S RICO v J MONTOYA</td>
<td>(reverse and remand)</td>
<td>6/16/2011</td>
<td></td>
</tr>
<tr>
<td>29901</td>
<td>10th Jud Dist Quay</td>
<td>CR-08-64, STATE v K MILLS</td>
<td>(affirm in part and remand)</td>
<td>6/17/2011</td>
</tr>
<tr>
<td>30895</td>
<td>12th Jud Dist Otero</td>
<td>CR-09-173, STATE v I LOERA</td>
<td>(affirm)</td>
<td>6/17/2011</td>
</tr>
<tr>
<td>31059</td>
<td>5th Jud Dist Chaves</td>
<td>JQ-08-47, CYFD v DIANA M</td>
<td>(affirm)</td>
<td>6/17/2011</td>
</tr>
</tbody>
</table>

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

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

From the New Mexico Supreme Court

Clerk's Certificate Dated June 6, 2011

Name, Address, and/or Telephone Changes

Diane D. Allen
Office of County Public Defender
620 W. Jackson, Suite 4015
Phoenix, AZ 85003
602-506-7711
dallenatty@yahoo.com

Jose Dino Almendral
North Wind Group
1425 Higham Street
Idaho Falls, ID 83402
208-557-7830
dalmendral@northwindgrp.com

Sarah Marcel Armstrong
Collins & Collins PC
PO Box 506
Albuquerque, NM 87103-0506
505-242-5958
505-242-5968 (fax)

William R. Babington, Jr.
Office of the City Attorney
PO Box 20000
Las Cruces, NM 88004-9002
575-541-2128
575-541-2017 (fax)
rbabington@las-cruces.org

Kathleen Baca
505-228-0803
kate_baca@msn.com

Deena B. Beard
Collins & Collins PC
PO Box 506
Albuquerque, NM 87103-0506
505-242-5958
505-242-5968 (fax)

Jason Collins Bousliman
Lewis & Roca LLP
201 Third Street, NW,
Suite 1950
Albuquerque, NM 87102-4388
505-764-5410
505-764-5485 (fax)
JBousliman@lrlaw.com

Bonnie P. Bowles
The Bowles Law Firm LLC
6901 S. Pierce Street,
Suite 370
Littleton, CO 80128
303-881-3609
888-863-7661 (fax)
bowleslawfirm.com

Ashley R. Brott
506 Galisteo Street
Santa Fe, NM 87505
505-795-0316
abrott@gmail.com

Julia Diane Catron
1134 Vassar Drive, NE
Albuquerque, NM 87106
505-699-7092
juliadcatron@gmail.com

Denise M. Chanez
Rodey, Dickason, Sloan, Akin & Robb PA
PO Box 1888
201 Third Street, NW,
Suite 2200 (87102)
Albuquerque, NM 87103-1888
505-765-5900
505-768-7395 (fax)
dchanez@rodey.com

Emilio Jacob Chavez
Office of the District Attorney
105 Albright Street, Suite L
Taos, NM 87571
575-758-8683
575-758-7802 (fax)
EChavez2@da.state.nm.us

Alysan Boone Collins
Collins & Collins PC
PO Box 506
Albuquerque, NM 87103-0506
505-242-5958
505-242-5968 (fax)

J. Douglas Compton
Guebert Bruckner PC
PO Box 93880
6801 Jefferson Street, NE
(87109)
Albuquerque, NM 87199-3880
505-823-2300
505-823-9600 (fax)
dcompton@guebertlaw.com

Zachary Cormier
Modrall, Sperling, Roehl, Harris & Sisk PA
PO Box 2168
500 Fourth Street, NW,
Suite 1000 (87102)
Albuquerque, NM 87103-2168
505-848-1864
505-449-2064 (fax)
zrc@modrall.com

Rebekah Anne Scott Courvoisier
Yarbro & Associates PA
PO Box 480
109 James Canyon Highway,
Suite A
Cloudcroft, NM 88317-0480
575-682-3614
575-682-3642 (fax)
becky@yarbrolaw.com

Stephen P. Curtis
Stephen P. Curtis, Attorney at Law PC
6747 Academy Road, NE,
Suite D
Albuquerque, NM 87109
505-884-9999
505-884-1404 (fax)
abcurtis@juno.com

Rebekah Anne Scott Courvoisier
Yarbro & Associates PA
PO Box 480
109 James Canyon Highway,
Suite A
Cloudcroft, NM 88317-0480
575-682-3614
575-682-3642 (fax)
becky@yarbrolaw.com

Daymon B. Ely
Law Office of Daymon B. Ely
1128 Central Avenue, SW
Albuquerque, NM 87102
505-248-0370
505-248-0261 (fax)

James K. Gilman
Gilman Law Offices LLC
12231 Academy Road, NE,
#257
Albuquerque, NM 87111
505-875-0700
505-878-9414 (fax)

Lindsay K. Griffel
Rammellkamp, Muehlenweg & Cordova PA
316 Osuna Road, NE,
Unit 201
Albuquerque, NM 87107
505-247-8860
505-247-8881 (fax)
lkg@rmlawyers.com

Desiree D. Gurule
The Brown Law Firm
2901 Juan Tabo, Suite 208
Albuquerque, NM 87112
505-292-9677
505-292-9680 (fax)
desgurule@gmail.com

Diana J. Harris
N.M. Department of Corrections
PO Box 27116
Santa Fe, NM 87502-0116
505-827-8531
505-827-8685 (fax)
diana.duys@state.nm.us

Jason T. Hoggard
2721 Royal Street
Las Vegas, NV 89030
323-830-8834
taylornatl@aol.com

Tyson R. Hummell
Guebert Bruckner PC
PO Box 93880
6801 Jefferson Street, NE
(87109)
Albuquerque, NM 87199-3880
505-823-2300
505-823-9600 (fax)
thummell@guebertlaw.com
Clerk’s Certificates

Megan Jahner
Yenson, Lynn, Allen & Wosick PC
4908 Alameda Blvd., NE
Albuquerque, NM 87113-1736
505-266-3995
505-268-6694 (fax)
mjahner@ylawfirm.com

Tiffany Mercado
Santa Fe Animal Shelter & Humane Society
100 Caja del Rio Road
Santa Fe, NM 87507
505-983-4309 Ext. 128
tmercado@sfhumanesociety.org

Mekko Mangas Miller
11821 Caribili Avenue, NE
Albuquerque, NM 87111
505-577-6327
mekkomiller@gmail.com

Felicia Ann Norvell
Craddock Davis & Krause LLP
3100 Monticello Avenue, Suite 550
Dallas, TX 75205-3466
214-750-3550 (fax)
fnorvell@cdklawfirm.com

Matthew E. Ortiz
The Ortiz Law Firm PC
PO Box 6078
2011 Botulph Road, Suite 200
Santa Fe, NM 87502-6078
505-986-2881 (fax)
mortizlaw@msn.com

Barbara Ann Patterson
Law Firm PC
PO Box 4461
500 N Main Street, Suite 802
Roswell, NM 88202-4461
575-622-0068
575-622-0063 (fax)
bpatterson@bapatterson.com

Lucy Salsbury Payne
N.M. Department of Workforce Solutions
401 Broadway Blvd., NE
Albuquerque, NM 87102
505-841-8434
505-841-9024 (fax)
lucys.payne@state.nm.us

Marcelino Prelo, Jr.
7912 Woodridge Drive, NE
Albuquerque, NM 87109

Catherine Quinones
N.M. Human Services Department
Child Support
Enforcement Division
653 Utah Avenue
Las Cruces, NM 88001
575-524-6118 Ext. 6026
575-524-6539 (fax)
catherine.quinones@state.nm.us

Ricardo Rios
The Law Offices of Michael J. Gopin
1043 N. Zaragosa
El Paso, TX 79907
915-838-1111 (fax)
rickrios@sbcglobal.net

Daniel L. Romero
Office of the District Attorney
105 Albright Street, Suite L
Taos, NM 87571
575-758-8683
575-758-7802 (fax)
dromero@da.state.nm.us

Margaret Yvonne Romero
Guebert Bruckner PC
6801 Jefferson Street, NE
(87109)
Albuquerque, NM 87199-3880
505-823-2300
505-823-9600 (fax)
mromero@guebertlaw.com

David Ray Rosales
Rugge, Rosales & Associates PC
901 Rio Grande, NW,
Suite G-250
Albuquerque, NM 87104
505-243-3900
505-243-8678 (fax)
mromero@da.state.nm.us

Greer E. Rose
Office of the District Attorney
520 Lomas Blvd., NW
Albuquerque, NM 87102
505-841-7064
505-222-4353 (fax)
GRose@da.state.nm.us

Alexander K. Russell
Russell Law Firm PC
4801 Lang Avenue, Suite 100
Albuquerque, NM 87109
505-933-1480
505-933-6363 (fax)
akhir@russelldefense.com

Jeffrey D. Johnson
5612 Comet Court, NE
Albuquerque, NM 87111-1410
505-884-7670
505-828-0133 (fax)
jeff@jeffreydjohnson.com

Kimberly Ardis Jorgensen
Office of the District Attorney
310 K Street, Suite 520
Anchorage, AK 99501
907-269-6378
kimberly.jorgensen@alaska.gov

## Recently Approved Rule Changes
### Since Release of 2011 NMRA

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-071.1</td>
<td>Statutory stream system adjudication suits; service and joinder of water rights claimants; responses</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.2</td>
<td>Statutory stream system adjudication suits; stream system issue and expedited inter se proceedings</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.3</td>
<td>Statutory stream system adjudication suits; annual joint working session</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.4</td>
<td>Statutory stream system adjudication suits; ex parte contacts; general problems of administration</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.5</td>
<td>Statutory stream system adjudication suits; excusal or recusal of a water judge</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-077</td>
<td>Appeals pursuant to Unemployment Compensation Law</td>
<td>04/18/11</td>
</tr>
<tr>
<td>1-079</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>2-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>3-105</td>
<td>Assignment and designation of judges</td>
<td>05/27/11</td>
</tr>
<tr>
<td>3-701</td>
<td>Appeal from metropolitan court on the record</td>
<td>05/27/11</td>
</tr>
<tr>
<td>3-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>4-831</td>
<td>Petition for writ of certiorari in appeal pursuant to Unemployment Compensation Law</td>
<td>04/18/11</td>
</tr>
<tr>
<td>4-832</td>
<td>Writ of certiorari in appeal pursuant to Unemployment Compensation Law</td>
<td>04/18/11</td>
</tr>
<tr>
<td>4-222</td>
<td>Application for free process and affidavit of indigency</td>
<td>02/09/11</td>
</tr>
<tr>
<td>4-223</td>
<td>Order for free process</td>
<td>02/09/11</td>
</tr>
<tr>
<td>4-224</td>
<td>Attorney’s certificate supporting indigency and free process</td>
<td>02/09/11</td>
</tr>
<tr>
<td>5-123</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>5-805</td>
<td>Probation violation</td>
<td>01/31/11</td>
</tr>
<tr>
<td>5-604</td>
<td>Time of commencement of trial for cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court</td>
<td>03/23/11</td>
</tr>
<tr>
<td>6-701</td>
<td>Judgment</td>
<td>03/25/11</td>
</tr>
<tr>
<td>6-114</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>7-701</td>
<td>Judgment</td>
<td>03/25/11</td>
</tr>
<tr>
<td>7-113</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>8-701</td>
<td>Judgment</td>
<td>03/25/11</td>
</tr>
<tr>
<td>8-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>10-166</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>10-409</td>
<td>Affidavit for Arrest Warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-410</td>
<td>Arrest Warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-412A</td>
<td>Bench warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-137</td>
<td>Continuing duty to disclose; failure to comply</td>
<td>01/31/11</td>
</tr>
<tr>
<td>10-312</td>
<td>Filing of petition; amendment of petition; appointment of guardian ad litem or attorney</td>
<td>01/31/11</td>
</tr>
<tr>
<td>11-804</td>
<td>Hearsay exceptions; declarant unavailability</td>
<td>01/31/11</td>
</tr>
<tr>
<td>12-215</td>
<td>Brief of an amicus curiae</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-306</td>
<td>Number of copies of papers</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-302</td>
<td>Appearance, withdrawal or substitution of attorneys</td>
<td>05/16/11</td>
</tr>
</tbody>
</table>

## Rules of Civil Procedure for the Magistrate Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>6-701</td>
<td>Judgment</td>
<td>03/25/11</td>
</tr>
<tr>
<td>6-114</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
</tbody>
</table>

## Rules of Civil Procedure for the Metropolitan Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>3-105</td>
<td>Assignment and designation of judges</td>
<td>05/27/11</td>
</tr>
<tr>
<td>3-701</td>
<td>Appeal from metropolitan court on the record</td>
<td>05/27/11</td>
</tr>
<tr>
<td>3-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
</tbody>
</table>

## Rules of Civil Procedure for the District Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>6-503</td>
<td>Disposition without hearing</td>
<td>07/20/11</td>
</tr>
<tr>
<td>7-503</td>
<td>Disposition without hearing</td>
<td>07/20/11</td>
</tr>
<tr>
<td>8-503</td>
<td>Disposition without hearing</td>
<td>07/20/11</td>
</tr>
<tr>
<td>9-104B</td>
<td>Appearance, plea and waiver</td>
<td>07/20/11</td>
</tr>
<tr>
<td>6-105</td>
<td>Assignment and designation of judges</td>
<td>07/20/11</td>
</tr>
<tr>
<td>6-507</td>
<td>Insanity or incompetency; transfer to district court</td>
<td>07/20/11</td>
</tr>
<tr>
<td>6-802</td>
<td>Return of the probation violator</td>
<td>07/20/11</td>
</tr>
<tr>
<td>8-507</td>
<td>Insanity or incompetency; transfer to district court</td>
<td>07/20/11</td>
</tr>
<tr>
<td>8-802</td>
<td>Return of the probation violator</td>
<td>07/20/11</td>
</tr>
<tr>
<td>9-212C</td>
<td>Bench warrant</td>
<td>07/20/11</td>
</tr>
<tr>
<td>7-201</td>
<td>Commencement of action</td>
<td>06/29/11</td>
</tr>
<tr>
<td>1-071.1</td>
<td>Statutory stream system adjudication suits; service and joinder of water rights claimants; responses</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.2</td>
<td>Statutory stream system adjudication suits; stream system issue and expedited inter se proceedings</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.3</td>
<td>Statutory stream system adjudication suits; annual joint working session</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.4</td>
<td>Statutory stream system adjudication suits; ex parte contacts; general problems of administration</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-071.5</td>
<td>Statutory stream system adjudication suits; excusal or recusal of a water judge</td>
<td>06/08/11</td>
</tr>
<tr>
<td>1-023</td>
<td>Class actions</td>
<td>05/11/11</td>
</tr>
<tr>
<td>1-077</td>
<td>Appeals pursuant to Unemployment Compensation Law</td>
<td>04/18/11</td>
</tr>
<tr>
<td>1-079</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
</tbody>
</table>

## Rules of Civil Procedure for the Municipal Courts

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>8-701</td>
<td>Judgment</td>
<td>03/25/11</td>
</tr>
<tr>
<td>8-112</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
</tbody>
</table>

## Children’s Court Rules and Forms

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>10-166</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>10-409</td>
<td>Affidavit for Arrest Warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-410</td>
<td>Arrest Warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-412A</td>
<td>Bench warrant</td>
<td>02/14/11</td>
</tr>
<tr>
<td>10-137</td>
<td>Continuing duty to disclose; failure to comply</td>
<td>01/31/11</td>
</tr>
<tr>
<td>10-312</td>
<td>Filing of petition; amendment of petition; appointment of guardian ad litem or attorney</td>
<td>01/31/11</td>
</tr>
</tbody>
</table>

## Rules of Evidence

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>11-804</td>
<td>Hearsay exceptions; declarant unavailability</td>
<td>01/31/11</td>
</tr>
</tbody>
</table>

## Rules of Appellate Procedure

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>12-215</td>
<td>Brief of an amicus curiae</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-306</td>
<td>Number of copies of papers</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-302</td>
<td>Appearance, withdrawal or substitution of attorneys</td>
<td>05/16/11</td>
</tr>
</tbody>
</table>
To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court’s website at http://nmsupremecourt.nmcourts.gov.

To view recently approved rule changes, visit the New Mexico Compilation Commission’s website at http://www.nmcompcomm.us.
CLE AT-A-GLANCE
Continuing Legal Education Guide

Celebrating 125 Years
2011
Annual Meeting
Bench and Bar Conference

Buffalo Thunder Resort, Santa Fe, NM • July 14–16, 2011

State Bar of New Mexico
Center for Legal Education

On the cutting edge of technology and relevant legal education content

www.nmbarcle.org • 505.797.6020
22ND ANNUAL APPELLATE PRACTICE INSTITUTE

Friday, September 9, 2011 • State Bar Center, Albuquerque

- Standard Fee $229
- Appellate Practice Section Member, Government, Legal Services Attorney, Paralegal $199

Co-Sponsor: Appellate Practice Section

8:00 a.m. Registration
8:15 a.m. Introductory Remarks
Anastasia S. Stevens, Esq., Keleher & McLeod, P.A.
Chair, Appellate Practice Section
8:30 a.m. Administrative Appeals: Anticipating and Addressing Issues That Arise
Hon. Sarah M. Singleton, First Judicial District Court
Mark A. Basham, Esq., Basham & Basham, P.C.
9:30 a.m. Break
9:45 a.m. Point Made: How to Write Like the Nation’s Top Advocates (Cont.)
Ross Guberman, Esq., Legal Writing Pro
11:45 a.m. Lunch/Annual Appellate Practice Section Meeting
1:00 p.m. Point Made: How to Write Like the Nation’s Top Advocates (Cont.)
Ross Guberman, Esq., Legal Writing Pro

2:15 p.m. Recent Developments in Appellate Practice
Sue A. Herrmann, Esq.
Bruce R. Rogoff, Esq.
2:45 p.m. Break
3:00 p.m. Finality for Purposes of Taking an Appeal: Figuring It Out
Alice Tomlinson Lorenz, Esq., Lorenz Law
4:00 p.m. Chief Clerk’s Views: Passing Words of Wisdom
Gina M. Maestas, Chief Clerk of the New Mexico Court of Appeals
4:30 p.m. Judicial Panel: Issues of Interest to Appellate Practitioners
Hon. Richard C. Bosson, New Mexico Supreme Court
Hon. Roderick T. Kennedy, New Mexico Court of Appeals
5:00 p.m. Adjourn

EVERYDAY ETHICS IN YOUR PRACTICE

Thursday, September 15, 2011 • State Bar Center, Albuquerque

- Standard Fee $109

Presenter: Chris Stiegemeyer, Esq., The Bar Plan, St Louis

8:30 a.m. Registration
9:00 a.m. The Quiz
Exploring recent developments and emerging trends and highlighting and exploring current legal, ethical and malpractice issues. The attendee with the most correct answers wins a prize!
10:00 a.m. Break
10:10 a.m. The New Client
Risks to the lawyer when considering whether to take that new client and how to avoid them.
11:10 a.m. Break
11:20 a.m. The Old Client
Risks to the lawyer in ending the representation and how to avoid them
12:20 p.m. Adjourn and Lunch (provided at the State Bar Center)

STATE BAR VIDEO REPLAYS

State Bar Center • Albuquerque

July 5
An Attorney’s Guide to Dealing with Stress in Tough Economic Times
8:30 a.m. – 11:30 a.m.
1P, 2E
$109

Improving the Human Resource Professional/Attorney Relationship
8:30 a.m. – 2:45 p.m.
5G, 1E
$199

July 19
How to Do Your First Personal Injury Case & a Defense Perspective
9:00 a.m. – 3:30 p.m.
4G, 1E, 1P
$199

Accounting for Lawyers
8:45 a.m. – 3:15 p.m.
6G
$199

UPCOMING FALL PROGRAMS

SEPTEMBER
16 Animal Law
16-22 CLE in the Wine Country

22 Probate Institute
23 Tax Symposium

OCTOBER
6 Health Law Symposium
7 Employment and Labor Law Institute
14-15 Family Law Institute
21 Procurement Code Institute
28 Fall Elder Law

www.nmbarcle.org
JULY
7–8  Business Law, Health Care, Tax
MD & DDS Practice Update, Parts 1 & 2
Physician and dental practices and groups are complex business enterprises governed by a wide variety of federal and state statutory regimes. This program will provide you with an update of major regulatory, tax and organizational developments impacting these practices and groups, including major rules changes under the new health care reform law.
2.0 General CLE Credits $129

12  Employment and Labor Issues for Nonprofits
This program will review the ways in which generally applicable employment and labor laws apply with special emphasis in the context of nonprofits. Among other areas, the program will cover the use of volunteers, areas of increased regulatory enforcement, the classification of employees as exempt or non-exempt, retirement plans issues, and much more.
1.0 General CLE Credit $67

14  Ethics
Attorney Ethics in Advertising in a Digital Age
In a world in which seemingly every communication is electronic and preserved forever on the Internet, it is easy for attorneys to inadvertently breach attorney advertising rules. Is a LinkedIn profile attorney advertising? Is boasting of a victory or posting a deposition online advertising? Is email advertising? These and many other issues will be discussed in this review of attorney ethics rules governing advertising apply the use by attorneys of digital media.

1.0 Ethics CLE Credit $67

19–20  Estate Planning, Real Estate
Estate Planning for Real Estate, Parts 1 & 2
Real estate is a common asset class but one which poses special challenges for the estate and trust planner, including the major issue of illiquidity. Among other topics, this program will discuss choice of entity for real estate, asset structuring for estate planning, lifetime transfers, valuation issues and reducing value through retained interests, and much more.

2.0 General CLE Credits $129

26  Ethics, Civil Litigation
Ethics of Using “Metadata” in Law Practice and Litigation
Metadata is the “hidden” information in files generated on your computer - word processing documents, email, spreadsheets and more. This metadata contains information about how, when and by whom files were created or changed - and can be quite damaging in litigation. This program will discuss the ethical rules governing the discovery and use of metadata in litigation and law practice generally.

1.0 Ethics CLE Credit $67

28  Family Law, Tax
Tax Planning Issues in Divorce
The process of obtaining a divorce and negotiating the division of property and debts gives rise to substantial tax and estate planning issues. Many questions vex practitioners advising clients on the practical financial and estate planning aspects of dissolving their marriages. This program will provide you with a practical guide to the tax and estate planning implications of divorce, including the division of IRAs, 401(k)s and other retirement assets.

1.0 General CLE Credit $67

AUGUST
2  Ethics
Conflicts of Interest in Law Practice: A Practical Guide
Beyond competence, perhaps the most important requirement of an attorney is to avoid direct or indirect conflicts of interest among themselves, current clients, and former clients. Some conflicts may be waived following a specific procedure; other conflicts may never be waived. Although frequently referenced, conflicts analysis involves a set of complex rules with fine distinctions. This program will provide you with a real-world guide to effective conflicts analysis.

1.0 Ethics CLE Credit $67

9–10  Business Law, Litigation
Business Torts, Parts 1 & 2
This program will provide transactional counsel with a guide to the most common business torts that arise in middle market businesses. The program will focus on two categories of torts – those committed by a departing employee against the company and those that arise between the company, its partners, lenders, and vendors. Among other torts, the program will discuss misappropriation of company trade secrets and interference with a business expectancy.

2.0 General CLE Credits $129

16–17  Real Estate, Litigation
Eminent Domain Practice, Parts 1 & 2
The taking by the government of a piece of private property is a substantial legal and controversial action that raises issues of purpose, fair value, and procedure. This program will provide you with a practical guide to the fundamentals and practical developments in eminent domain practice.

2.0 General CLE Credits $129

23  Employment Law
Drafting Employee Handbooks
Employee handbooks are often the most important document defining the operational and legal relationship between employees and their employer. Properly conceived, drafted, and reviewed with employees, it can provide a stable framework for the efficient resolution of disputes in the workplace and limit an employer’s liability. This program will provide you with a real-world guide to the most important aspects of employee handbooks and practical tips on drafting.

1.0 General CLE Credit $67

30  Business Law, Tax
Buying, Selling & Exchanging LLC and Partnership Interests
LLCs and partnerships are often the default choice of entity for businesses. The reflexive choice of these pass-through entities often masks the complexity that arises when interests in them are transferred. This program will discuss the transactional, economic, governance and tax issues that arise when LLC or partnership interests are sold or exchanged.

1.0 General CLE Credit $67
TWO WAYS TO REGISTER:
INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, 24 hour access
Please Note: For all WEBCASTS and TELESEMINARS, you must register online at www.nmbarcle.org

Name______________________________________________________________________________ NMBar# _____________
Street _______________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________
Phone ______________________________________________ Fax ______________________________________________
E-mail ____________________________________________________________________________________________________
Seminar _______________________________________________________________ Date of Seminar __________________

CLE Materials: ☐ FLASH Drive   ☐ Printed
☐ VISA   ☐ MC   ☐ American Express   ☐ Discover

CreditCard# ___________________________________________ Billing Zip Code _____________________ CVV# ___________

Authorized Signature __________________________________________________________

REGISTER EARLY! Advance registration is recommended as it guarantees admittance and course materials. If space and materials are available, paid registrations will be accepted at the door.

PAYING BY CHECK/PURCHASE ORDER: If you will be paying by check or government issued Purchase Order, please complete this registration form and present it at the registration desk with your check/purchase order on the day of the seminar.

CANCELLATIONS & REFUNDS: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.

MCLE CREDIT INFORMATION: Courses have been approved by the New Mexico MCLE Board. CLE of SBNM will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

ATTENTION PERSONS WITH DISABILITIES: Our meetings are held at facilities which are fully accessible to persons with mobility disabilities. If you plan to attend our program and will need an auxiliary aid or service, please contact the CLE of SBNM office one week prior to the program.

PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given.

TAPE RECORDING OF PROGRAMS IS NOT PERMITTED.

CLE AUDIT POLICY: Members of the State Bar of New Mexico (to include attorneys and paralegals) and other legal staff (legal staff being defined as legal assistants and staff of members of the State Bar of New Mexico) may audit State Bar CLE courses at a cost of $10, space permitting. Course materials, breaks and/or lunch, if applicable, may be purchased at an additional cost of $29. Auditors should contact the CLE office in advance and notify staff of their intent to audit. “Walk-in” auditors will also be permitted on a space available basis. Auditors will not receive CLE credits for the audit fee. If an auditor chooses to receive CLE credit for attending the course, the request and payment must be made to CLE staff on the day of the program. Attendees who request CLE credit prior to the program will not be allowed to change to audit. No exceptions will apply. This policy applies to live seminars only and excludes special events.

SCHOLARSHIPS: Please note, scholarships are available on an ‘as needed’ basis for up to 10% of any given seminar. The amount of the scholarship is equivalent to a 50% reduction of the standard fee for each seminar. To qualify, recipients are required to sign a financial assistance form available from the CLE department. For further information, please call (505) 797-6020.

NOTE: Programs subject to change without notice.
PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS, RULES OF PROCEDURE FOR THE MUNICIPAL COURTS, AND CRIMINAL FORMS

The Rules for Courts of Limited Jurisdiction Committee has recommended proposed amendments to the Rules of Criminal Procedure for the Magistrate Courts, Rules of Procedure for the Municipal Courts, and Criminal Forms for the Supreme Court’s consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to:

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

Your comments must be received on or before July 20, 2011, 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.

6-105. Assignment and designation of judges.
   A. Assignment. In those courts with two or more judges, the cases shall be assigned randomly among the judges of the court pursuant to a selection system administered by the Supreme Court, unless the presiding judge orders otherwise for good cause shown. Once a judge is assigned to hear a case that judge shall have sole responsibility for the case and no other judge may take any action on the case except:
      (1) at arraignment or first appearance;
      (2) in cases where the judge has been reassigned because the assigned judge has been excused, is excused, is sick or otherwise unavailable and another judge has been assigned; or
      (3) with the approval of the assigned judge and all of the parties.
   B. Reassignment.
      (1) Courts with two or more judges. In magistrate courts with two or more judges, upon receipt of a notice of excusal or upon recusal, the magistrate or clerk of the magistrate court shall give written notice to the parties to the action.
         (a) Recusal. Upon recusal, the selection system administered by the Supreme Court shall randomly assign another magistrate judge first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district to preside over the case and this agreement shall be contained in the notice of excusal.
         (c) Reassignment. If the parties fail to agree on a judge, the selection system administered by the Supreme Court shall, within ten (10) days, randomly reassign the case first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district, unless the presiding judge determines that there is justifiable reason to assign a case to a particular judge and the reason is included in the notice of reassignment.
      (d) Certification to district court. In magistrate courts with two or more judges in the magistrate district have been excused or have recused themselves, within ten (10) days after service of the last notice of excusal or recusal, the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused or recused magistrate and to the designated magistrate.
      (2) Other courts. In magistrate courts with only one magistrate, upon receipt of a notice of excusal or upon recusal, the magistrate shall give written notice to the parties to the action.
         (a) Recusal. Upon recusal, another magistrate judge of the magistrate district shall be randomly assigned to preside over the case by the selection system administered by the Supreme Court.
         (b) Excusal. Upon the filing of the notice of excusal, the parties or their counsel may agree to another judge of the magistrate district to preside over the case and this agreement shall be contained in the notice of excusal.
   C. Assignment out-of-district. If a criminal proceeding is filed against a judge or an employee of the magistrate district in which a criminal proceeding is pending, no judge of the magistrate district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter, the clerk shall request the district court to designate a judge. The district court shall send notice of its designation to the parties or their counsel and to the magistrate court.
   D. Assignment of direct criminal contempt cases. Cases of direct criminal contempt shall be assigned to the judge before whom the contempt occurred.
   E. Reassignment to multiple cases. The district judge may designate a magistrate from another magistrate district to sit in
actions arising in a particular magistrate district for a specific period of time.

F. **Subsequent proceedings.** All proceedings shall be conducted in the original magistrate court, except that with the consent of all parties and the assigned judge, proceedings may be held in another magistrate court in the same judicial district in which the original magistrate court is located. The clerk of the original magistrate court shall continue to be responsible for the court file and shall perform such further duties as may be required. Within five (5) business days after assignment or designation of a new judge, the clerk shall make a copy of the court file for the designated judge and forward it to the judge. Within ten (10) business days of adjudication of the case, the original documents of the adjudication shall be forwarded to the clerk of the original magistrate court for filing.

G. **Unavailability of judge.** At any time during the pendency of the proceedings if the assigned judge is unavailable, the assigned judge may designate another judge of the magistrate district to hear any matter that is not dispositive of the case or the parties may agree on another judge to hear any matter, including the merits of the case. The agreement is subject to the approval of the assigned judge and the judge agreed upon by the parties. If another judge is agreed upon to hear the merits of the case, the case shall be reassigned to that judge.

[As amended, effective September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008; by Supreme Court Order No. 10-8300-016, effective May 14, 2010; as amended by Supreme Court Order _______________, effective _______________.]

**Committee commentary.** Sub-subparagraph (a) of Paragraph B was amended to provide for a joint recusal process for magistrates in those limited circumstances where it may be appropriate, such as, when a current employee or employee’s family member is a defendant or litigant in magistrate court.

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

6-507. **Insanity or incompetency; transfer to district court.**

If the defendant pleads “not guilty by reason of insanity” or if an issue is raised as to the mental competency of the defendant to stand trial, the action shall be transferred to the district court for further proceedings pursuant to the Rules of Criminal Procedure for the District Courts. The magistrate court shall retain jurisdiction over the defendant and conditions of release until the action is filed in district court.

[As amended by Supreme Court Order _______________, effective _______________.]

6-802. **Return of the probation violator.**

A. **Probation.** The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral.

B. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation:

1. the court may issue a warrant or bench warrant for the arrest of a probationer for violation of any of the conditions of probation. The warrant shall order the probationer to the custody of the court or to any suitable detention facility;

2. the court may issue a notice to appear to answer a charge of violation.

C. **Hearing.** On notice to the probationer, the court shall hold a hearing on the violation charged. If the violation is established, the court may continue the original probation, revoke the probation and either order a new probation or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed, but credit shall be given for time served on probation, unless such credit is specifically prohibited by statute.

D. **Appeals.** The decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be the propriety of the revocation of probation. The district court shall not modify the sentence of the magistrate court.

[As amended, effective September 1, 1989; May 1, 2002; as amended by Supreme Court Order _______________, effective _______________.]
9-212C. Bench warrant.
[For use with Magistrate Court Rule 6-207 NMRA and Municipal Court Rule 8-206 NMRA]

STATE OF NEW MEXICO
[COUNTY OF ___________________
[CITY OF _______________________
__________________ COURT
[No. ____________]
[STATE OF NEW MEXICO]
[COUNTY OF ___________________
[CITY OF _______________________
No. ____________
__________________________________________, Defendant.
DOB: ______________________
Address: ______________________
S.S.#: ______________________
Charging Police Department
Charges

BENCH WARRANT
THE (STATE OF NEW MEXICO) (MUNICIPALITY OF _____________________) TO ANY OFFICER AUTHORIZED TO EXECUTE THIS WARRANT:
YOU ARE HEREBY COMMANDED to arrest the above-named defendant and bring the defendant before this court to answer the following charges checked below unless released as indicated in the return:
(check applicable box and describe facts below)
[ ] failure to appear as ordered by this court on __________________;
[ ] failure to appear as required by a subpoena issued by this court for __________________;
[ ] failure to appear in accordance with the conditions of release imposed by this court for __________________;
[ ] conditions of release previously imposed should be revoked or reviewed;
[ ] contempt of court for __________________;
[ ] failure to pay fines or costs previously imposed by order entered __________________ (date);
[ ] failure to comply with conditions of probation as set forth in an order entered __________________ (date);
[ ] failure to appear at first offender program on __________________;
[ ] other ________________________ (set forth any additional essential facts underlying issuance of this warrant).
(check and complete, if applicable)
[ ] 1. BOND: The defendant may be released on bond in the amount of $ __________. The bench warrant fee will be collected upon appearance.
OR
[ ] 2. PAYMENT: The defendant failed to appear either on a traffic citation (other than a citation issued for a violation listed in Section 66-8-122 or 66-8-125 NMSA 1978, or similar municipal ordinance) or a citation issued by an official authorized by law and may be released on a plea of guilty and payment of $ __________ plus a $100 bench warrant fee1.
OR
[ ] 3. PAYMENT: The defendant failed to pay fines and costs as ordered by the court and defendant may be released upon payment of the outstanding fine and court costs in the amount of $ __________ plus a $100 bench warrant fee1.
IT IS HEREBY ORDERED THAT UPON SERVICE OF OR SURRENDER PURSUANT TO THIS WARRANT, DEFENDANT IS TO PAY THE $100 BENCH WARRANT FEE, as reflected above.

THIS WARRANT MAY BE EXECUTED:
[ ] in any jurisdiction;
[ ] anywhere in this state;
[ ] anywhere in this county;
[ ] anywhere in this city.
The clerk of this court shall cause this warrant to be entered into a law enforcement information system2:
[ ] maintained by the state police.
[ ] _____ (identify other law enforcement information system).
__________________ _____________________________
Date Judge
RETURN
The defendant was arrested and taken into custody on the day of ______________, ____________.
[ ] The defendant was released on bond in the amount set forth above.
[ ] The defendant was released upon receipt of the fine and court costs set forth above.
I have caused this warrant to be removed from the law enforcement information system identified in this warrant.
________________________________
Signature
________________________________
Title

[USE NOTES] USE NOTE
1. A $100 bench warrant fee is assessed in the magistrate court pursuant to Section 35-6-5 NMSA 1978. Municipal courts not authorized to assess the bench warrant fee must modify this form accordingly.
2. All magistrate court felony, misdemeanor, and driving while under the influence of intoxicating liquor or drugs warrants must be entered into a law enforcement information system.
3. The warrant may be executed in “any jurisdiction” only if it is a felony warrant.
4. If the court checks alternative 2, it must also check alternative 1. [If the court checks alternative 3, it may but is not required to check alternative 1.]
[Approved by Supreme Court Order 07-8300-34, effective January 22, 2008, as amended by Supreme Court Order No. __________, effective __________.]

[Approved by Supreme Court Order 07-8300-34, effective January 22, 2008, as amended by Supreme Court Order No. __________, effective __________.]

The Rules for Courts of Limited Jurisdiction Committee has recommended proposed amendments to the Rules of Criminal Procedure for the Magistrate Courts and Rules of Procedure for the Municipal Courts. Additionally, the Metropolitan Courts Rules Committee has recommended proposed amendments to the Rules of Criminal Procedure for the Metropolitan Courts. Finally, the above committees have recommended proposed amendments to the Criminal Forms.

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/](http://nmsupremecourt.nmcourts.gov/) or sending your written comments to:

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

Your comments must be received on or before July 20, 2011, 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.

6-503. Disposition without hearing.

A. General. [The court may establish, by rule, procedures governing disposition of cases within magistrate court trial jurisdiction without a hearing. Any such rule shall specify the offenses to which the rule applies.] This rule establishes procedures governing disposition of cases within magistrate court trial jurisdiction without a hearing. These procedures do not apply to charges of driving while under the influence of intoxicating liquor or drugs, reckless driving, driving while license suspended or revoked, domestic violence, any offense for which a period of incarceration is mandatory, or any offense for which the court imposes a sentence of incarceration. This procedure applies only to penalty assessment misdemeanors for which the monetary penalty is specified by statute, unless the court, by written order, sets forth a schedule of additional offenses for which this procedure may be used together with the monetary penalty ordered by the court for each offense.

B. Procedure. An offense shall not be disposed of without a hearing unless the person charged signs an appearance, enters a plea of no contest or guilty and [waiver of] waives trial. Prior to signing the document, the person charged shall be informed of the right to trial, the right to appear personally before the judge, the right to present witnesses, and the right to hire a lawyer. The court shall set forth a schedule of additional offenses to which this procedure may be used together with the monetary penalty ordered by the court for each offense.

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted.

7-503. Disposition without hearing.

A. General. [The metropolitan court may establish, by rule, procedures governing disposition of cases within metropolitan court trial jurisdiction without a hearing. Any such rule shall specify the offenses to which the rule applies.] This rule establishes procedures governing disposition of cases within metropolitan court trial jurisdiction without a hearing. These procedures do not apply to charges of driving while under the influence of intoxicating liquor or drugs, reckless driving, driving while license suspended or revoked, domestic violence, any offense for which a period of incarceration is mandatory, or any offense for which the court imposes a sentence of incarceration. This procedure applies only to penalty assessment misdemeanors for which the monetary penalty is specified by statute, unless the court, by written order, sets forth a schedule of additional offenses for which this procedure may be used together with the monetary penalty ordered by the court for each offense.

B. Procedure. An offense shall not be disposed of without a hearing unless the person charged signs an appearance, enters a plea of no contest or guilty and [waiver of] waives trial. Prior to signing the document, the person charged shall be informed of the right to trial, the right to appear personally before the judge, the right to present witnesses, and the right to hire a lawyer. The court shall set forth a schedule of additional offenses to which this procedure may be used together with the monetary penalty ordered by the court for each offense.

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted. The court may specify which methods of payment will be accepted. The court may specify which methods of payment will be accepted.

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted.
8-503. Disposition without hearing.

A. General. [The municipal court may establish, by rule, procedures governing disposition of cases without a hearing. Any such rule shall specify the offenses to which the rule applies. Such rule shall not apply to any offense amounting to a breach of the peace or to any other class of offenses specifically excluded from operation of the rule by the court.]

This rule establishes procedures governing disposition of cases within municipal trial court jurisdiction without a hearing. These procedures do not apply to charges of driving while under the influence of intoxicating liquor or drugs, reckless driving, driving while license suspended or revoked, domestic violence, any offense for which a period of incarceration is mandatory, or any offense for which the court imposes a sentence of incarceration.

This procedure applies only to penalty assessment misdemeanors for which the monetary penalty is specified by ordinance, unless the court, by written order, sets forth a schedule of additional offenses for which this procedure may be used together with the monetary penalty ordered by the court for each offense.

B. Procedure. An offense shall not be disposed of without a hearing unless the person charged signs an appearance and [waiver of] waives trial. Prior to signing the document, the person charged shall be informed of the right to trial, the right to appear personally before the judge, the right to present witnesses, and the right to hire a lawyer, [and that signing will constitute a plea of no contest and will have the effect of a judgment of guilty by the court.]

Provision may be made for the person charged to enter an appearance by mail, fax, or e-mail, and, if pleading guilty or no contest, to remit to the court the penalty specified by ordinance or by the court. A remittance to the court of the specified penalty without a signed appearance, plea and waiver form, shall constitute a guilty plea. [Plea no contest and remit the appropriate scheduled penalty to the court by mail. If such provision is made, the charging law enforcement officer will deliver the warnings required under this paragraph, provide a form to the person charged for an entry of appearance and plea of no contest, inform the person charged of the scheduled penalty and provide a business reply envelope addressed to the municipal court.]

C. Definition. As used in this rule, the term "breach of the peace" includes but is not limited to each of the following:

(1) operation of a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
(2) reckless driving;
(3) leaving the scene of an accident;
(4) operating a motor vehicle while under suspension, revocation or cancellation of a driver's license; and
(5) any offense or violation of rules or orders of court for which an arrest or bench warrant has been issued.

[As amended by Supreme Court Order No. ________________, effective _________________.]

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted.

[Adopted by Supreme Court Order No. ________________, effective _________________.]

9-104B. [Waiver of appearance and entry of a plea penalty assessment misdemeanor.]

APPEARANCE, PLEA AND WAIVER

[For use with Magistrate Court Rule 6-109 NMRA, Metropolitan Court Rule 7-109 NMRA and Municipal Court Rule 8-109 NMRA]

STATE OF NEW MEXICO

COUNTY OF ___________________

CITY OF _______________________

IN THE ________________________ COURT

[STATE OF NEW MEXICO]

CITY OF _______________________

Plea of no contest, to remit to the court the penalty specified by ordinance, or by the court. A remittance to the court of the specified penalty without a signed appearance, plea and waiver form, shall constitute a guilty plea. [Plea no contest and remit the appropriate scheduled penalty to the court by mail. If such provision is made, the charging law enforcement officer will deliver the warnings required under this paragraph, provide a form to the person charged for an entry of appearance and plea of no contest, inform the person charged of the scheduled penalty and provide a business reply envelope addressed to the municipal court.]

Permission to waive appearance is:

[ ] granted under the following conditions ________________________________

[ ] denied:

Judge

I acknowledge that I have been charged with the following offense(s) with maximum fines as follows:

(List offenses and maximum fines.)
I further confirm that I have received a copy of the complaint or citation(s), and I have read and understand the crime(s) charged. I have been informed of my rights, as follows:

1. The right to personally appear before the court at every stage of these proceedings;
2. The right to a trial before the judge;
3. The right to present witnesses on my behalf and to confront and cross-examine witnesses;
4. The right to remain silent and that any statement made by me may be used against me;
5. The right to hire a lawyer.

I further understand that there is a penalty, as reflected above, provided by law for the offense or offenses for which I am charged. In addition, I must pay court fees of $________. I understand I may also have points assessed against my driver’s license.

If I plead guilty or no contest, I will be required to pay the fine and fees as set by state law or local rule. If I plead not guilty, a trial will be set for a later date. If I plead not guilty, the Judge is not allowed to discuss the case until the time of the hearing or trial.

I understand that if I plead guilty or no contest, I may discharge my obligations to the court in this matter by returning this signed document and remitting $________ payable to the court.

After reading and understanding the above, I hereby give up my right to personally appear before the court for an arraignment, and voluntarily enter my plea of:

[ ] Not Guilty to one or more charges (Trial will be set.)
[ ] Guilty to all charges
[ ] No Contest to all charges (A plea of No Contest means that you neither admit nor deny the charge or charges, but that you are not contesting the charge or charges and do not want a trial.)

Date
 Defendant signature

Date of Birth   Social Security No.   Name (print)

Mailing Address (print)   Physical Address (print)

City, State and Zip Code (print)   City, State and Zip Code (print)

Daytime Phone   Cell Phone

RETURN BY ________________ TO:
(Insert court name and address.)

[USE NOTE: This form may only be used to enter a plea of guilty within thirty (30) days after issuance of a penalty assessment misdemeanor citation. Do not use this form if the person cited failed to appear as required or failed to pay the fine, fees and any costs within the time required by law or order of the court. For any other plea of guilty, Form 9-104A may be used to request an audio or audio-visual appearance.]

[Approved, effective May 15, 2001; as amended by Supreme Court Order _______________, effective _______________.]

________________________________
From the New Mexico Supreme Court

Opinion Number: 2011-NMSC-019

Topic Index:
Appeal and Error: Appellate Review; and Appellate Rules and Procedure
Judges: Code of Judicial Conduct; Disqualification;
Excusal or Recusal; Judicial Authority and Propriety of Conduct
Judgments: Costs

INQUIRY CONCERNING A JUDGE
NO. 2009-081

IN THE MATTER OF ROBERT MERLE SCHWARTZ,
District Court Judge, Bernalillo County, New Mexico
No. 32,422 (filed: May 31, 2011)

RANDALL D. ROYBAL
Albuquerque, New Mexico
for Judicial Standards Commission

PAUL JOHN KENNEDY
KENNEDY & HAN, P.C.
Albuquerque, New Mexico
for Respondent

OPINION

PER CURIAM

{1} This case comes before us on a petition for discipline filed by the Judicial Standards Commission (Commission). After briefing and at the conclusion of oral argument, we announced our decision from the bench to adopt the Commission’s recommendations that Judge Robert M. Schwartz receive a formal public reprimand for committing willful judicial misconduct in violation of our Code of Judicial Conduct, complete a course regarding sexual harassment, and take appropriate leave from work during all future medical transitions. We rejected the Commission’s recommendation that Judge Schwartz be suspended for sixty days without pay and announced that Judge Schwartz would be required to pay a fine of $6,000. We subsequently entered an order memorializing our decision, and we now issue this Opinion to further explain our decision and provide guidance for future cases.

BACKGROUND

{2} The willful judicial misconduct at issue in this case arose by Judge Schwartz’s untimely recusal after initiating a romantic relationship with an assistant public defender who had cases pending before him and making dishonest statements from the bench concerning his reasons for recusing. We adopt the following findings of fact made by the Commission. Judge Schwartz was appointed to the bench in the Second Judicial District in March 2008. He was subsequently elected to the position in a contested election in the same year, and he serves in the Criminal Division where he routinely handles a caseload of over 1,000 criminal cases. Before being elected to the court, Judge Schwartz held several prominent positions, including District Attorney for the Second Judicial District, legal correspondent for television news, newspaper columnist, Commissioner for the Public Utility Commission, and Senior Criminal Justice Policy Advisor to former Governor Richardson. In addition, Judge Schwartz performed stand-up comedy and hosted various charity banquets and dinners.

{3} Judge Schwartz has had a collegial relationship with attorneys who have practiced before him, and after completing business for the day he often engaged in brief friendly conversations, which sometimes included jokes. In the spring of 2009, Judge Schwartz changed medications for a serious medical condition, which resulted in a difficult time in his life. He testified, however, that he was physically and mentally capable of performing his judicial duties. During this period, a female assistant public defender, who was relatively new to the practice of law, regularly appeared in his courtroom. Judge Schwartz thought this assistant public defender had a quick wit, and he believed she shared his interest in comedy and humor. This assistant public defender was not employed or supervised by Judge Schwartz, but as a judge, he was in a position of authority over her in his courtroom and decided if she won or lost cases. On Thursday, July 9, 2009, Judge Schwartz invited her to lunch the following day.

{4} On Friday, July 10, 2009, Judge Schwartz drove the assistant public defender to a local take-out restaurant and they ate lunch together in a public park across the street. Judge Schwartz did not believe he had to recuse in the assistant public defender’s cases before having lunch with her because, as long as they did not discuss cases, judges and lawyers may have lunch together. Judge Schwartz did not extend a lunch invitation to any other attorney scheduled to appear before him the next week. Furthermore, the lunch with the assistant public defender was not a professional lunch. Although Judge Schwartz doubted that a romantic relationship would develop, given the difference in their ages, he was open to the possibility. Judge Schwartz testified that they “just clicked” and had made each other laugh.

{5} At some point during the lunch Judge Schwartz gave the assistant public defender a gift of a pair of purple latex gloves and a book written by an author with the same name as Judge Schwartz, entitled, “The One Hour Orgasm.” The gift was intended by Judge Schwartz and understood by the assistant public defender to be a self-deprecating joke because the author and Judge Schwartz shared the same name. Before he became a judge, Judge Schwartz had given this book to others, whose common reaction was to burst out laughing. When the assistant public defender returned to work, she showed her supervisor the joke gift. During the afternoon following the lunch, Judge Schwartz and the assistant public defender spoke on the phone, and Judge Schwartz obtained the assistant public defender’s personal phone number so he could contact her outside the office. He did not, however, recuse from her cases, even though he had the opportunity to do so.
The following day, a Saturday, the assistant public defender called Judge Schwartz and offered to cook a meal for him at his house. Judge Schwartz suggested that they instead attend a concert in Santa Fe. At the concert, the assistant public defender drank two glasses of wine; Judge Schwartz did not drink any alcoholic beverages. During the drive back to Albuquerque, the assistant public defender asked Judge Schwartz if he thought he could be fair and impartial in her cases, and he replied that he did not think he could be and would recuse from her cases. Believing that Judge Schwartz would recuse on all her cases, the assistant public defender then called her supervisor, leaving a phone message regarding the Judge’s planned recusal from her cases. Upon returning to Albuquerque, they stopped at the Albuquerque Press Club. They then drove to the assistant public defender’s apartment, where Judge Schwartz parked his car before they walked to a local bar. After spending about an hour and a half at the bar, an acquaintance of Judge Schwartz gave them a ride back to the assistant public defender’s apartment. With her permission, Judge Schwartz kissed the assistant public defender goodnight and left. He admitted that he had begun a personal relationship with the assistant public defender, although he was not sure of its future. Judge Schwartz spoke to her the following day about the time they had spent together on Friday and Saturday.

On Monday, July 13, 2009, Judge Schwartz called his office to report that he was sick and asked his administrative assistant to move his cases scheduled for that day to the following day. He could not remember which of the assistant public defender’s cases were scheduled for that day. He did not, however, tell his assistant that he would be recusing from the assistant public defender’s cases or ask his assistant to prepare notices of recusal. In the evening, he met with the assistant public defender at a nearby park, told her he intended to recuse from her cases, and they discussed the effects of recusal on her work, including her reassignment to a different trial team.

When Judge Schwartz returned to work the next day, Tuesday, July 14, 2009, the assistant public defender remained listed as counsel for two of the rescheduled cases on his docket, and he again failed to recuse from those cases prior to the docket call. In one of those cases, the assistant public defender’s supervisor substituted for her. During the hearing on the matter argued by the supervisor, Judge Schwartz announced, without providing reasons, that he would be recusing from that case and the other case in which the assistant public defender was involved.

After Judge Schwartz announced that he would recuse in these two cases, however, he provided dishonest reasons for his recusal and entered rulings in both cases. In the case in which the assistant public defender was still representing the defendant, Judge Schwartz said he was uncertain that his initial denial of a defense motion to dismiss was correct, and he announced that he was going to withdraw his order. In the other case, when the attorneys persisted in arguing an issue to him, he stated that he wanted another judge to make a ruling on a technical, legal issue and would “like to hear some guidance” from the Court of Appeals. He then granted an uncontested motion to release the defendant on his own recognizance. He did not mention his relationship with the assistant public defender as grounds for recusing in either case although he later admitted to the Judicial Standards Commission that his primary reason for recusing was that relationship, and that the assistant public defender and others in her office knew the true reason for the recusal.

There is no evidence of any adverse impact on these cases from the recusals. Both cases from which Judge Schwartz recused were resolved in a timely manner. The relationship with the assistant public defender ended, and following a trial that ended in August, Judge Schwartz took voluntary medical leave while the Commission obtained an independent medical examination of his condition. The chief judge of the Second Judicial District testified that, apart from this one incident that took place over several days, he had received no complaints about Judge Schwartz’s conduct, and said that he considered him “a very valuable member of the court.” The Commission also found that although his reasons for recusal were not credible, Judge Schwartz had been forthcoming and candid with the Commission, apologized for his conduct, and expressed a desire and willingness to learn from his mistakes.

Based on these facts, the Commission concluded that Judge Schwartz violated the following rules: Rule 21-100 NMRA (upholding the integrity and independence of the judiciary); Rule 21-200(A) NMRA (requiring that a Judge shall “act in a manner that promotes public confidence in the integrity and impartiality of the judiciary”); Rule 21-400(A)(1) NMRA (requiring disqualification where impartiality might reasonably be questioned); and Rule 21-500(A)(1)-(4) NMRA (requiring a judge to conduct extra-judicial activities to minimize conflict with judicial obligations). The Commission also concluded that Judge Schwartz committed willful misconduct in office. The Commission recommended that Judge Schwartz be suspended for sixty days without pay, receive this formal reprimand, complete a course regarding sexual harassment, take leave during any future transitions in medication, and pay the Commission’s recoverable costs and expenses. After hearing oral argument, this Court adopted the findings and conclusions of the Commission, but modified the recommended discipline, imposing a fine in place of suspension.

DISCUSSION

Article VI, Section 32 of the New Mexico Constitution provides that judges may be disciplined only for “willful misconduct in office.” “[W]illful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly, and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence.” In re Locatelli, 2007-NMSC-029, ¶ 8, 141 N.M. 755, 161 P.3d 252 (per curiam) (internal quotation marks and citation omitted).

Thus, while violations of the Code of Judicial Conduct “furnish some proof of what constitutes appropriate judicial conduct,” in order to warrant discipline, those violations must be willful. In re Martinez, 99 N.M. 198, 204, 656 P.2d 861, 867 (1982).

STANDARD OF REVIEW

When called on to discipline a judge, we undertake an independent evaluation of the record to determine whether clear and convincing evidence supports the Commission’s recommendation, but in so doing “we may give weight to the evidentiary findings of those who were able to judge credibility.” In re Castellano, 119 N.M. 140, 149-50, 889 P.2d 175, 184-85 (1995) (per curiam). Clear and convincing evidence is evidence that “instantly tilts[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” State ex rel. Children, Youth & Families Dep’t v. Joseph M., 2006-NMCA-029, ¶ 15, 139 N.M. 137, 130 P.3d 198 (internal quotation marks and citation omitted). “There need not be clear and convincing evidence to support each and every one of the Commission’s evidentiary findings. Rather, we must be satisfied by clear and convinc-
ing evidence that there is willful judicial misconduct which merits discipline. “In re Castellano, 119 N.M. at 149, 889 P.2d at 184. We review conclusions of law and recommendations for discipline de novo. In re Griego, 2008-NMSC-020, ¶ 7, 143 N.M. 698, 181 P.3d 690 (per curiam).

**FINDINGS AND CONCLUSIONS**

**Judge Schwartz does not indicate which of the Commission’s findings to which he specifically objects, but states only generally that he objects to findings inconsistent with his own proposed findings. In general, this Court presumes the fact finder is correct, and the burden is on appellant to point out clearly how the fact finder allegedly erred.** 

Farmers, Inc. v. Dal Mach. & Fabricating, Inc., 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990); see also In re Griego, 2008-NMSC-020, ¶ 7 (citing Stueber v. Pickard, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991) (unchallenged findings are binding on the parties on appeal)). Our review of the record in this matter, however, shows that the findings relevant to our decision are supported by clear and convincing evidence. We agree with the Commission that the evidence supports the Commission’s conclusions that Judge Schwartz violated Rule 21-100 (upholding the integrity and independence of the judiciary), Rule 21-200(A) (requiring that a Judge shall “act in a manner that promotes public confidence in the integrity and impartiality of the judiciary”), Rule 21-400(A)(1) (requiring disqualification when a judge’s impartiality might reasonably be questioned), and Rule 21-500(A)(1)-(4) (requiring a judge to conduct extra-judicial activities to minimize conflict with judicial obligations), and that he committed willful misconduct in office.

Specifically, we agree that the evidence supports a conclusion that Judge Schwartz violated Rule 21-400(A)(1), which states that a judge should recuse from a case if his impartiality might be reasonably questioned. The evidence in this case revealed that, by Saturday evening, on July 11, 2009, after Judge Schwartz and the assistant public defender had attended a concert in Santa Fe, had drinks in Albuquerque together, and had kissed, Judge Schwartz “thought the relationship was progressing to a point where there was a possibility of a romantic connection.” The evidence also revealed that on Saturday evening he told the assistant public defender that he “decided to enter a blanket recusal.”

In State v. Riordan we held that, under Rule 21-400(A), “[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned[,]” 2009-NMSC-022, ¶ 8, 146 N.M. 281, 209 P.3d 773 (per curiam) (alterations in original) (internal quotation marks and citation omitted). Failure to recuse under such circumstances results in actual impropriety or an appearance of impropriety, which, in turn, violates Rule 21-200. In the context of personal relationships, recusal is specifically required under Rule 21-400(A)(5)(b) of our Code of Judicial Conduct when “the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is acting as a lawyer in the proceeding.” Under such circumstances the judge’s impartiality “might reasonably be questioned.” Rule 21-400(A).

The list of instances provided in the rule when recusal is required is not exclusive, and the rationale for requiring recusal in cases involving family members also applies when a close or intimate relationship exists because, under such circumstances, the judge’s impartiality is questionable. See Rule 21-400(A); see, e.g., In re McBee, 2006-NMSC-024, ¶ 13, 139 N.M. 482, 134 P.3d 769 (per curiam) (stating that continuing to preside over a case in which the judge had a personal relationship with the defendant’s attorney, who was the defendant’s boyfriend, fostered an appearance of impropriety). The gift of a book with a sexual title suggests a level of intimacy in the relationship, at least in the mind of the donor, which, at the very least, raises questions about whether Judge Schwartz could be impartial in proceedings involving the assistant public defender who received the gift, even if the gift was perceived as a joke. Moreover, it is reasonable to infer from Judge Schwartz’s desire to obtain the assistant public defender’s personal phone number so that he could contact her outside the office, that he was looking for more than a casual social relationship, something the Judge appears to confirm in this instance. We are not suggesting that a judge is prohibited from becoming romantically involved with an attorney, but before initiating such a relationship the judge must terminate any professional relationship by recusing from any cases in which an attorney is or has been involved.

We agree that a judge’s impartiality will not normally be questioned merely because a judge has a social relationship with an attorney. See, e.g., Demoulas v. Demoulas Super Markets, Inc., 703 N.E.2d 1141, 1147 (Mass. 1998) (stating that not every public social discussion between a judge and a lawyer requires an evidentiary hearing to determine whether the judge’s impartiality can be questioned). When, however, that relationship becomes something more than casual social interaction, and involves sexual jokes and the desire for a romantic relationship, then it raises reasonable questions about the judge’s ability to be impartial. Judges are not barred from associating with attorneys, but as we have stated in In re Romero, “[t]he conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials.” 100 N.M. 180, 183, 668 P.2d 296, 299 (1983). In this case, Judge Schwartz acknowledged that recusal was required but failed to do so in a timely manner. Accordingly, we determine that the facts as found by the Commission support the conclusion that Judge Schwartz failed to recuse in a timely manner and violated Rule 21-400(A)(1).

Not only did Judge Schwartz fail to recuse in a timely manner, he also made rulings in some cases after announcing his intention to recuse. In one of the cases, he claimed that he had concerns about the correctness of an earlier ruling and announced that he was withdrawing his earlier ruling. In a second case, Judge Schwartz entered a ruling on a motion for pretrial release. As the Commission pointed out, a judge has no authority to take action in a case after announcing recusal. Once Judge Schwartz acknowledged that he was disqualified from hearing the two cases he could not reinsert himself into the proceedings. See In re McBee, 2006-NMSC-024, ¶ 14 (pointing out that a judge’s reinserting himself into proceedings after announcing an intent to recuse displayed “an ignorance of, or indifference to, basic judicial responsibilities embodied in our Code of Judicial Conduct”).

In addition, Judge Schwartz’s failure to recuse in a timely manner led to further problems. Had he recused in the afternoon on Friday, July 10, or even on Monday, July 13, he could have done so simply—issuing straightforward notices of recusal that contained no reasons for the action. See Gerety v. Demers, 92 N.M. 396, 400, 589 P.2d 180, 184 (1978) (observing that reasons for recusal may be personal and a judge need not state them). Instead, when he took the bench on Tuesday and had two of the assistant public defender’s cases on his docket, he justified his recusals by stating that he was concerned that his rulings in the cases were incorrect, and that he wanted a different judge to review the issues.
The Commission found these are not credible reasons to recuse. We agree. A judge has a duty under Rule 21-300(B)(1) NMRA “to hear and decide matters assigned to the judge except those in which disqualification is required.” See Gerey, 92 N.M. at 400, 589 P.2d at 184 (“[A] judge has a duty to perform the judicial role mandated by the statutes, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for so doing.”). Uncertainty about the correctness of a ruling is not one of the reasons listed in Rule 21-400. If a judge believes he or she has committed an error in a case, as Judge Schwartz claimed he may have done, recusal is not the remedy. A judge may reconsider an earlier ruling but must rule, as errors committed in the district court may be corrected on appeal. See generally Rules 12-101 to -608 NMRA. Judge Schwartz’s stated reasons were not the real reason for his recusal, and in so doing his actions were disingenuous at the very least.

Judge Schwartz initiated a relationship with an attorney who had cases pending in his court and gave her gifts which were inappropriate in that situation. Rule 21-500(A) requires that a judge be aware of his or her privileged position as a judge at all times. See In re Romero, 100 N.M. at 183, 668 P.2d at 299. Specifically, Rule 21-500(A) requires a judge to conduct extra-judicial activities so as not to raise questions about the judge’s impartiality or reflect badly on the office. Moreover, extra-judicial activities must not interfere with the judge’s judicial duties or obligation to uphold the law. Rule 21-500(A)(3), (4). We agree with the Commission that this conduct violated Rule 21-500(A). Judge Schwartz’s conduct reflected badly on the judicial office and cast doubt on his capacity to act impartially.

We therefore agree with the Commission that Judge Schwartz violated Rule 21-100 and Rule 21-200, which contain the overarching and interrelated principles that inform our Code of Judicial Conduct and ensure the rule of law. Rule 21-100 provides that “[a] judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.” Similarly, Rule 21-200(A) requires judges to avoid impropriety and the appearance of impropriety, to “promote public confidence in the integrity and impartiality of the judiciary.” Even though the gift of the book was given and received as a joke, because of its sexual nature it was an inappropriate gift for a judge to give to an attorney who practiced before him. We recognize that no allegations of sexual harassment were made in this case and that Judge Schwartz was not the assistant public defender’s supervisor. However, Judge Schwartz was in a position of considerable authority, having power to rule in cases the assistant public defender argued before him. By giving a gift that was inappropriate for a judge to give an attorney practicing before him, by then failing to recuse in a timely manner, making rulings after having recused, and stating dishonest reasons for recusal, Judge Schwartz damaged the public’s confidence in the integrity and impartiality of the judiciary.

We also agree with the Commission that Judge Schwartz’s actions were not simply negligent. Judge Schwartz acknowledged that he knew he was required to recuse from the assistant public defender’s cases, but he had failed to do so in a timely manner and provided dishonest reasons for his recusal. He was also aware that he should not rule in cases from which he had recused. Judge Schwartz’s actions constituted willful misconduct in office that warrant discipline. See In re Locateili, 2007-NMSC-029, ¶ 8 (defining willful misconduct in office as official actions “done intentionally, knowingly, and, generally, in bad faith”).

RECOMMENDATIONS FOR DISCIPLINE

In imposing discipline on judges, this Court looks “at such factors as the nature of the misconduct and patterns of behavior.” In re Garza, 2007-NMSC-028, ¶ 26, 141 N.M. 831, 161 P.3d 876 (per curiam). We have applied the standard recommended in the ABA Model Code of Judicial Conduct (2007) (Model Code) that, when imposing discipline on judges, courts should consider “factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.” Model Code scope ¶ 6. See, e.g., In re Griego, 2008-NMSC-020, ¶ 13.

Judge Schwartz’s conduct reflects poorly on the integrity of the judiciary. It is essential that judges “respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.” Model Code pmbl. ¶ 1. The violations of the Model Code, therefore, are serious. However, there is no evidence of a pattern of misconduct suggesting Judge Schwartz is a danger to the public: the misconduct addressed in this case occurred over several days, but then ended. Neither the State nor the defendants in the affected cases were prejudiced by the conduct, and no other complaints have been made against this judge. Moreover, while Judge Schwartz may have created fictitious reasons to explain his need to recuse, the Commission found that his testimony before the Commission was “forthcoming and candid,” and he has acknowledged and apologized for his conduct. Cf. In re Rodella, 2008-NMSC-050, ¶ 36, 144 N.M. 617, 190 P.3d 338 (per curiam) (emphasizing that “when a judge denies making mistakes, he or she cannot learn from the mistakes, and there is little that can be done to correct the behavior”).

Under these circumstances, we adopt the Commission’s recommendation that Judge Schwartz receive this formal reprimand. We also adopt the recommendations that he take appropriate leave during any future transitions in medical treatment, and that he receive training on the nature of sexual harassment. We reject, however, the Commission’s recommendation that Judge Schwartz be suspended without pay and, instead, order him to pay a $6,000 fine. That fine shall be paid within sixty days of the date this Opinion is filed.

COSTS

The Commission has submitted a request for the cost of depositions used at trial and for the cost of the transcripts. We will address the costs in a separate order. See In re Rodella, 2008-NMSC-050, ¶¶ 37-40 (explaining which of the Commission’s costs are recoverable).

CONCLUSION

For the foregoing reasons, we conclude that Judge Schwartz committed willful judicial misconduct and order the discipline as set forth in this Opinion. Judge Schwartz is ordered to pay the $6,000 fine within sixty days of the date this Opinion is filed, and the costs as determined by separate Order to be issued by this Court.

IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
From the New Mexico Supreme Court

Opinion Number: 2011-NMSC-020

Topic Index:
Constitutional Law: New Mexico Constitution, General; and Right to Vote
Government: Officers; and Public Office
Jurisdiction: Supreme Court
Public Officers
Remedies: Extraordinary Writs

STATE OF NEW MEXICO, ex rel.,
GARY K. KING, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,
Petitioner,
versus
CAROL K. SLOAN, COMMISSIONER,
NEW MEXICO PUBLIC REGULATION COMMISSION,
Respondent.
No. 32,411 (filed: June 1, 2011)

ORIGINAL PROCEEDING

GARY K. KING
Attorney General
DAVID TOUREK
Assistant Attorney General
GLORIA I. LUCERO
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

JOEL A. DAVIS
LAW OFFICE OF JOEL A. DAVIS
Albuquerque, New Mexico
for Respondent

OPINION

PER CURIAM

[1] Carol Sloan, a New Mexico Public Regulation Commission (PRC) Commissioner, was convicted and subsequently sentenced for the felony offenses of aggravated battery and aggravated burglary. That same day, the Attorney General filed a petition for a writ of quo warranto asking that this Court remove Ms. Sloan from office because of her felony convictions. We set the matter for oral argument.

[2] The qualifications for holding elective public office are set forth in Article VII, Section 2(A) of the New Mexico Constitution, which provides that “[e]very citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.” Of relevance to this case is who is considered “a qualified elector” under our state constitution, or, more specifically, who is not.

[3] If Ms. Sloan is not a qualified elector, she is not qualified to hold the office of PRC Commissioner. Article VII, Section 1 provides that anyone “convicted of a felony or infamous crime” is not a qualified elector “unless restored to political rights.” Our legislature has recognized this constitutional restriction on the right to hold public office. See, e.g., NMSA 1978, § 10-1-2 (1953) (providing that a person convicted of a felony is not qualified to be elected to a public office); NMSA 1978, § 31-13-1(E) (2005) (providing that a person convicted of a felony “shall not be permitted to hold an office of public trust for the state”). In light of the foregoing constitutional and statutory provisions, Ms. Sloan was convicted of two felony offenses, we issued a writ of quo warranto to remove her from office.

[4] In her written response to the petition and subsequent oral argument before this Court, Ms. Sloan raises two basic arguments in opposition to the issuance of a writ of quo warranto. First, she contends that her felony convictions did not disqualify her from continuing to hold a public office to which she was lawfully elected. And second, even if her felony convictions disqualified her from continuing to hold public office, she contends that only the Legislature could remove her from office through the impeachment process. For the reasons that follow, we reject both arguments.

Felony Convictions Occurring During the Term of an Elective Office Disqualify the Elected Official from Continuing to Hold That Office

[5] Although Ms. Sloan does not dispute that she was convicted and sentenced for two felony offenses, she nonetheless maintains that those convictions do not disqualify her from continuing to hold public office until the expiration of the term for which she was elected. Ms. Sloan emphasizes that at the time she was elected she was qualified to held office. In this regard, there is no dispute between the parties. Though Ms. Sloan appears to recognize that her felony convictions could preclude her from holding elective office in the future, she maintains that her felony convictions do not disqualify her from serving the remainder of her elected term of office. Instead, Ms. Sloan suggests that a writ of quo warranto is only properly used to remove someone who is not qualified to hold office at the outset. While it is true that the writ of quo warranto can be used to remove someone who from the very beginning was not qualified to hold office, see, e.g., State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975), we disagree with Ms. Sloan’s contention that the writ is an inappropriate means for removing someone who was qualified at the time of taking office but later becomes disqualified.

[6] Quo warranto is an appropriate procedure for removing someone who has
committed an act that forfeits the office he or she once lawfully held. See NMSA 1978, § 44-3-4(B) (1953) (authorizing an action for a writ of quo warranto “when any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office”); see also State ex rel. Repay v. Fodemam, 300 A.2d 729 (Conn. Super. Ct. 1972) (approving the use of a writ of quo warranto to remove a public official who became disqualified from continuing to hold office by changing residency to a different town). In this regard, it is generally recognized that eligibility to public office is of a continuing nature and must exist at the commencement of the term and during the occupancy of the office. The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold the office, if during the continuance of his or her incumbency he or she ceases to be qualified. State ex rel. Graddick v. Rampey, 407 So.2d 823, 826 (Ala. 1981) (internal quotation marks and citation omitted).

[7] As noted above, our state constitution provides that “to hold any elective public office” one must be “a qualified elector.” N.M. Const. art. VII, § 2(A). One cannot be a qualified elector if convicted of committing a felony offense. See N.M. Const. art. VII, § 1. Ms. Sloan would have us construe the phrase “to hold any elective public office” as a discrete act that only refers to the time when one is elected to office. But as noted above, to hold public office is an ongoing endeavor. As such, it requires the officeholder to maintain the status of a qualified elector. Because Ms. Sloan is a convicted felon she is no longer a qualified elector and cannot continue to hold public office.

**Impeachment Does Not Preempt Quo Warranto as the Exclusive Means for Removing a Felon from Public Office.** [8] Sloan also argues that, even if her felony conviction disqualifies her from continuing to hold office, she cannot be removed by this Court through a writ of quo warranto. Ms. Sloan argues instead that impeachment by the Legislature is the exclusive means for removing her from office. See N.M. Const. art. IV, § 36 (“All state officers and judges of the district court shall be liable to impeachment for crimes, misdemeanors and malfeasance in office . . . .”); see also N.M. Const. art. IV, § 35 (vesting the impeachment power solely with the House of Representatives and requiring all impeachments to be tried by the Senate). We reject her attempt to place that limitation on the constitutionally sanctioned power of quo warranto.

[9] Our state constitution vests this Court with “original jurisdiction in quo warranto and mandamus against all state officers.” N.M. Const. art. VI, § 3. “One of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims,” Anaya, 88 N.M. at 247, 539 P.2d at 1009, and “the court will go no further under its common law powers than to oust the wrongful possessor of the office,” De Vigil v. Stroup, 15 N.M. 544, 552-53, 110 P. 830, 832 (1910) (internal quotation marks and citation omitted). Notwithstanding our power to issue writs of quo warranto, Ms. Sloan suggests that a writ of quo warranto is inapplicable in this case because the Legislature has the exclusive prerogative to act through its impeachment powers.

[10] While this Court has generally recognized that quo warranto may be used to remove someone who has forfeited the right to a local public office upon conviction for a felony offense, see State ex rel. Martinez v. Padilla, 94 N.M. 431, 433-34, 612 P.2d 223, 225-26 (1980), until now, we have not been called upon to address whether impeachment is the exclusive means for removing someone considered a state officer within the meaning of Article IV, Section 35. Relying on State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926), Ms. Sloan maintains that impeachment is the exclusive method for removing a state officer convicted of a felony. However, she reads Ulrick much too broadly.

[11] In Ulrick, this Court was simply asked to determine whether gubernatorial appointees, who were appointed with the consent of the Senate, could be removed through the Governor’s constitutional power of removal or whether such appointees could only be removed through the impeachment process. Id. at 268-69, 255 P. at 1078. Ultimately, this Court determined that gubernatorial appointees could be removed by the Governor and intimated, but did not definitively decide, that such appointees were not state officers within the meaning of the impeachment provisions in our state constitution. Id. at 291, 255 P. at 1089. But in so ruling, this Court never suggested that the impeachment process would be the exclusive method for removing a state officer convicted of a felony. 

[12] In an attempt to cast impeachment as the sole method for removing a state officer convicted of a felony, Ms. Sloan also refers to this Court’s opinion in Cooper v. Albuquerque City Commission, 85 N.M. 786, 518 P.2d 275 (1974). In that case, we recognized a general principle of constitutional construction, which provides that “where a power is expressly given by the Constitution, and the means by which, or the manner in which it is to be exercised, is prescribed, such means or manner is exclusive of all others.” Id. at 793, 518 P.2d at 282 (internal quotation marks and citation omitted). We applied that principle in Cooper to conclude that a legislatively created method for recalling municipal court judges was unenforceable in light of separate, explicit methods for removing judges under our state constitution. Id. But what Ms. Sloan fails to recognize is that in Cooper we were faced with a legislatively created mechanism that was a purported alternative to constitutionally sanctioned methods for removing a judge. Id. By contrast, in this case, the alternative to impeachment, namely quo warranto, is itself a constitutionally authorized remedy. As such, the related constitutional powers of legislative impeachment and judicial quo warranto can co-exist as part of a harmonious, constitutional whole in the same way that this Court implicitly recognized in Cooper that the Legislature’s constitutional power of impeachment could co-exist with this Court’s power of superintending control over its municipal judges. See also Denish v. Johnson, 1996-NMSC-005, ¶ 32, 121 N.M. 280, 910 P.2d 914 (“We presume the drafters of the Constitution intended to construct a synchronous and stable foundation for the State’s legal system. It is generally possible to construe the State Constitution as an integrated whole rather than as groupings of isolated and discordant rules.”). Other states also recognize that impeachment is not the sole method for removing a convicted felon from public office but is complemented by the remedy of quo warranto. See, e.g., Graddick, 407 So.2d at 825; State ex rel. De Concini v. Sullivan, 188 P.2d 592, 596 (Ariz. 1948). Accordingly, notwithstanding the Legislature’s power to impeach, this Court also has the constitutional power of quo warranto to remove Ms. Sloan from office because her felony convictions result in the forfeiture of her right to hold the office of Commissioner of the PRC. We must now determine when the forfeiture of her office became effective.
The Forfeiture of Ms. Sloan’s Office as a Public Regulation Commissioner Became Effective upon the Entry of Her Judgment of Conviction.

Although we issued our writ of quo warranto at the conclusion of oral argument to remove Ms. Sloan from office, we directed the parties to submit supplemental briefs to address the effective date of Ms. Sloan’s removal from office. While the Attorney General submitted a supplemental brief, Ms. Sloan did not. Nonetheless, for the reasons that follow, we conclude that her removal became effective upon the entry of the district court’s judgment of conviction.

As discussed above, Ms. Sloan’s status as a qualified elector under our state constitution ceased when she was convicted of a felony. See N.M. Const. art. VII, § 1. Her eligibility to hold public office ceased when her status as a qualified elector ceased. See N.M. Const. art. VII, § 2(A). While this Court has the power of quo warranto, this Court has no discretion to decide whether Ms. Sloan’s felony conviction should result in the forfeiture of her office. The Constitution demands it. Accordingly, the forfeiture of her office was automatic, and this Court’s writ of quo warranto simply operated to enforce that which had already occurred. For that reason, we are persuaded that the date this Court issued its writ of quo warranto was not the date that Ms. Sloan ceased to be a Commissioner of the PRC.

IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice
In this case, we consider whether Defendant’s requested involuntary manslaughter instruction was properly denied by the district court. First, we evaluate the State’s claim that insufficient evidence was adduced at trial to support giving the instruction. Second, finding that the evidence was sufficient, we proceed to analyze whether Defendant’s theory that the killing was accidental precludes giving the instruction. Because these two theories of the killing implicate inconsistent mental states, the State contends that it would have been improper for the district court to furnish the involuntary manslaughter instruction. We also reject the State’s contention that Defendant failed to preserve the instruction issue at trial, finding that the district court was abundantly alerted to Defendant’s desired instruction and his underlying argument. Accordingly, we affirm the Court of Appeals, which found that the district court improperly denied the instruction. State v. Skippings, No. 28,324, slip op. at 2 (N.M. Ct. App. Nov. 25, 2009).

1. RELEVANT FACTS AND PROCEDURAL HISTORY

Defendant was convicted in a jury trial of voluntary manslaughter, contrary to NMSA 1978, Section 30-2-3(A) (1994). Defendant’s conviction arose from a series of interactions with Christy Rogers (Victim) that ultimately culminated in her death. We recount only the facts relevant to the issues before us. Additional facts are incorporated into the body of the Opinion where appropriate.

According to Defendant’s testimony, Defendant and Victim had been involved in a long-term romantic relationship that included extended periods of cohabitation prior to Victim’s death on March 7, 2007. On March 5, 2007, Victim had been released from jail after being incarcerated for a little more than a month for drug-related offenses. Defendant testified that upon her release, Victim and Defendant reunited, spending the night of March 5 together in a Hobbs motel. The next day, Defendant took Victim shopping to purchase new clothes and cosmetics, and the two discussed Victim abstaining from future drug use. That evening, Defendant dropped Victim off at her father’s home to spend the night.

On March 7, Defendant suspected that Victim was visiting Dunn Street, an area in Hobbs associated with the illicit drug trade. According to his testimony, he twice returned to that area that day and found Victim present. On the second occasion, upon observing Victim, Defendant believed that Victim had been “getting high.” Defendant confronted Victim and insisted that she return with him to her father’s residence.

Victim apparently resisted his overtures and the two engaged in a loud argument that spilled into the street and quickly escalated into a physical confrontation. One witness characterized the two as “fighting, hitting each other.” At one point, Victim and Defendant became entangled, with Victim straddling Defendant. Defendant sought to extricate himself from Victim and forced her off of him, resulting in her landing on the asphalt roadway and cracking her skull. Defendant summoned assistance from a bystander and transported Victim to a hospital, where she died from her injuries.

At Defendant’s trial, the jury was instructed regarding second degree murder and voluntary manslaughter. The district court denied Defendant’s requested involuntary manslaughter instruction. The jury returned a conviction on the voluntary manslaughter charge.

On appeal, the Court of Appeals concluded that the involuntary manslaughter instruction was improperly denied, prompting reversal of the district court. Skippings, No. 28,324, slip op. at 2. The Court found that there was sufficient evidence adduced at trial for the jury to conclude that Defendant’s deadly altercation with Victim was the result of a misdemeanor battery. Id. at 4. The Court explained that this view of the evidence constitutes “unlawful act” involuntary manslaughter under Section 30-2-3(B) (“[i]nvoluntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony”). Skippings, No. 28,324, slip op. at 4. Because a defendant is entitled to an “instruction on a lesser-included offense, [when] there [is] evidence tending to establish the lesser offense,” the Court concluded that Defendant was entitled to the involuntary manslaughter instruction. Id. at 3-4.
the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.


A key distinction between the two battery statutes is the mens rea requirement. See State v. Gammill, 102 N.M. 652, 656, 699 P.2d 125, 129 (Ct. App. 1985). Under the aggravated battery statute, it must be established that the perpetrator possessed the specific “intent to injure that person or another.” See also § 30-3-5(A); State v. Wynn, 2001-NMCA-020, ¶ 4, 130 N.M. 381, 24 P.3d 816 (“Aggravated battery is a specific intent crime.”). In contrast, the simple battery statute only requires that the perpetrator possess general criminal intent to touch or apply force “to the person of another, when done in a rude, insolent or angry manner.” Section 30-3-4.

In these proceedings, reasonable minds can differ regarding whether Defendant’s actions during the scuffle with Victim constitute simple battery. At trial, witness testimony was presented supporting the conclusion that Defendant intentionally applied force to Victim in a “rude, insolent or angry manner.” Defendant himself conceded that he and Victim engaged in a verbal dispute that escalated into a physical altercation, he was “mad,” and he ultimately pushed her “real hard.” However, Defendant also testified that he lacked the intent to injure Victim, asserting that he “didn’t mean to hurt her in any kind of way” and that he “wasn’t thinking” when he pushed Victim. Two additional witnesses also testified to
witnessing the scuffle between Defendant and Victim. One contended that he saw Defendant “lifting [Victim] and throwing her back to the ground.” The second testified that Defendant was mad, the two were “fighting with each other, and . . . she was on him . . . [and] he threw her down and fell.” The second witness also testified that Victim jumped on Defendant and she hit the ground due to his efforts to “get her off” him.

{16} The testimony of the two eyewitnesses, coupled with Defendant’s explanation of the fatal confrontation with Victim, were adequate to enable “reasonable minds to differ” regarding whether Defendant committed simple battery versus aggravated battery. In particular, Defendant’s testimony provided evidence that he lacked the “intent to injure” Victim, a statutory element of aggravated battery. Section 30-3-5(A).

Although the State presents a view of the evidence that supports its theory of an aggravated battery, the testimony of Defendant and the eyewitnesses lends sufficient evidentiary support to Defendant’s theory of a simple battery. Such competing strands of evidence are for the jury to consider and resolve. State v. Gallegos, 2001-NMCA-021, ¶ 15, 130 N.M. 221, 22 P.3d 689; State v. Garcia, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057. Only if we were to conclude that Defendant’s actions constituted aggravated battery as a matter of law could we foreclose Defendant’s theory that he committed simple battery. See State v. Allen, 2000-NMCA-002, ¶ 88, 128 N.M. 482, 994 P.2d 728. Merely because Defendant engaged in a scuffle with Victim that possibly escalated into a physical fight of some sort does not preclude a finding of simple battery. See State v. Hill, 2001-NMCA-094, ¶ 18-19, 131 N.M. 195, 34 P.3d 139 (in applying analogous battery against a peace officer statute, court concluded that a “possible view[] of the evidence” was that defendant who struck and kicked officer committed an “intentional touching or application of force in a rude, insolent, or angry manner” (internal quotation marks and citation omitted)); see also State v. Seul, 76 N.M. 461, 463, 415 P.2d 845, 846 (1966) (court found ample evidence for a battery conviction where the defendant “grabbed his wife, pushed or slammed her against a parked car, held her there, then after she broke away, followed her to [another] car where he proceeded to talk to her for at least an hour, while she cried and screamed for him to let her go” (internal quotation marks omitted)). Because there is sufficient evidence to support Defendant’s theory, we conclude that sufficient evidence of an “unlawful act not amounting to [a] felony” is present to support an involuntary manslaughter instruction. Section 30-2-3(B).

2. Reasonable minds could differ regarding whether Defendant (1) acted with willful disregard for Victim’s safety and (2) was subjectively aware of the danger or risk his actions posed to Victim, so he thereby acted with criminal negligence.

{17} The State argues that the evidence adduced at trial “reveals no act ascribed to Defendant that would allow any rational jury to conclude that the most culpable mens rea Defendant possessed was criminal negligence.” According to the State, the evidence supports only two conclusions regarding Defendant’s mental state: (1) that Defendant killed Victim intentionally, or (2) that Victim’s death was an accident. As the State points out, neither of these conclusions comports with a mind-set of criminal negligence. However, our review indicates that sufficient evidence was presented to the jury to allow reasonable minds to differ regarding whether Defendant possessed the required criminal negligence to support giving an involuntary manslaughter instruction.

{18} In New Mexico, “the State must show at least criminal negligence to convict a criminal defendant of involuntary manslaughter.” Yarborough, 1996-NMSC-068, ¶ 20. Because involuntary manslaughter is an unintentional killing, we only attach felony liability where the actor has behaved with the requisite mens rea. Id. ¶¶ 19-20. This Court has made clear that the criminal negligence standard applies to all three categories of involuntary manslaughter. State v. Salazar, 1997-NMSC-044, ¶ 54, 123 N.M. 778, 945 P.2d 996 (“[I]nvoluntary manslaughter, whether premised upon a lawful or unlawful act, requires a showing of criminal negligence.”). Criminal negligence exists where the defendant “act[s] with willful disregard of the rights or safety of others and in a manner which endanger[s] any person or property.” Henley, 2010-NMSC-039, ¶ 16 (internal quotation marks and citation omitted). We also require that the defendant must possess subjective knowledge “of the danger or risk to others posed by his or her actions.” Henley, 2010-NMSC-039, ¶ 17.

{19} Reasonable minds could differ regarding whether Defendant’s scuffle with Victim was a criminally negligent act. As we have discussed, Defendant and Victim engaged in a verbal quarrel that escalated into a physical confrontation in which Defendant’s actions caused Victim’s fall and subsequent death. Ample evidence was provided to support the view that Defendant engaged in the dispute and behaved in a fashion that exposed Victim to danger without intending her death. Based on this evidence, the jury could reasonably have concluded that Defendant demonstrated a willful disregard of Victim’s safety. In addition, Defendant’s subjective knowledge of the danger posed by his conduct could be inferred by a rational jury from the evidence presented. See State v. McCrary, 100 N.M. 671, 673-74, 675 P.2d 120, 122-23 (1984). Even though Defendant contended at trial that he was unaware of the danger posed by his actions, a jury could infer from the circumstances that Defendant possessed the required subjective knowledge. As the State suggested at trial, a jury could conclude that Defendant was aware “of the danger or risk to others posed by his . . . actions” when he caused Victim to fall on the hard asphalt, a commonly understood peril. See Henley, 2010-NMSC-039, ¶ 17.

{20} The State’s contention that “no act ascribed to Defendant” would enable “any rational jury” to conclude that he committed an act of criminal negligence once again disregards the standard applicable to the review of denied jury instructions. The State’s view of the evidence that Defendant “tracked [the Victim] down, roused her from her hiding place, knocked her to the ground and, when she tried to get up, forcefully threw her head-first into the asphalt” is better suited to argue a sufficiency of the evidence challenge where we view the evidence in a light most favorable to a conviction. State v. Romero, 2005-NMCA-060, ¶ 18, 137 N.M. 456, 112 P.3d 1113. However, as we have explained, when considering the propriety of a denied jury instruction, “we view the evidence in the light most favorable to the giving of the requested instruction[s].” Boyett, 2008-NMSC-030, ¶ 12 (internal quotation marks and citation omitted).

{21} For the foregoing reasons, we determine that sufficient evidence has been presented to allow reasonable minds to differ regarding whether Defendant acted with criminal negligence during his scuffle with Victim. Rudolfo, 2008-NMSC-036, ¶ 27.

3. Defendant’s accident theory does not preclude an involuntary manslaughter instruction because sufficient evidence was presented at trial to support both theories.

{22} We also reject the State’s related argument that Defendant’s accident theory precludes giving an involuntary manslaughter
instruction because the two theories denote inconsistent mental states. The State suggests that our decision in Henley supports its view that a theory of accident is incompatible with an involuntary manslaughter instruction. 2010-NMSC-039, ¶ 19. The State cites Henley for the proposition that “the mens rea of accident and involuntary manslaughter are irreconcilably distinct, and the evidence of one does not support instructing the jury on the other.” However, Henley does not address instances when evidence of the mens rea of both accident and involuntary manslaughter is presented to the jury. Under these circumstances, the two theories of accident and involuntary manslaughter can properly be placed before the jury. See id.; Lucero, 2010-NMSC-011, ¶ 18. In fact, when a defendant’s theory in a homicide case is an accidental killing, the committee commentary for the excusable homicide uniform jury instruction envisioning that the “defendant will undoubtedly . . . bring out the absence of the elements of involuntary manslaughter.” UJI 14-5140 NMRA, Committee Commentary. This recognition of the potential juxtaposition of the two theories clarifies that accident and involuntary manslaughter are compatible, although competing, explanations of the same event. See Stevenson v. United States, 162 U.S. 313, 322-23 (1896) (jury instructions on inconsistent theories are not improper if supported by the evidence).

C. Preservation

Finally, we dispose of the State’s claim that Defendant failed to preserve the jury instruction issue because he failed to provide the court with a “correct written instruction” pursuant to Rule 5-608(D) NMRA. The State asserts that to uphold the Court of Appeals finding that Defendant preserved the instruction issue would degrade our “adversarial system of justice” and introduce “a modified inquisitorial system in which judges litigate against the prosecution.” We disagree.

Rule 5-608(B) mandates that “[a]t the close of the defendant’s case, or earlier if ordered by the court, the parties shall tender requested instructions in writing.” To preserve an error for “failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed.” Rule 5-608(D). The rule’s purpose is to “alert the trial court to the defendant’s argument,” State v. Jernigan, 2006-NMSC-003, ¶ 10, 139 N.M. 1, 127 P.3d 537, and enable a “well-informed ruling” by the court, State v. Griffin, 2002-NMCA-051, ¶ 6, 132 N.M. 195, 46 P.3d 102. Therefore, while it is true that a defendant must “[g]enerally tender a legally correct instruction to preserve the issue on appeal, Rule 5-608 is subject to flexible enforcement that is consistent with its underlying rationale. See Jernigan, 2006-NMSC-003, ¶ 10 (emphasis added); see also Hill, 2001-NMCA-094, ¶ 7 (“The State overlooks the purpose of the rule requiring the tender of a correct instruction, which is to alert the trial court to the defendant’s argument.”). Accordingly, “if the record reflects that the judge clearly understood the type of instruction the Defendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review.” Jernigan, 2006-NMSC-003, ¶ 10.

In this case, it is abundantly clear that the district judge was on notice that Defendant wanted an involuntary manslaughter instruction. Defendant proffered a clearly written involuntary manslaughter instruction. The proposed instruction begins with the unmistakable language “[f]or you to find the defendant guilty of involuntary manslaughter . . . .” The instruction then proceeds to enumerate all five elements contained in the corresponding uniform jury instruction, UJI 14-231 NMRA. The State contends that the first element, which requires a description of Defendant’s lawful or unlawful act, provides only a “narrative” of the scuffle with Victim but fails to identify “any wrongful act.” Id. The proffered instruction provided that “[D]efendant and [Victim] were engaged in an argument that escalated into a physical fight and [Victim] fell to the ground, struck her head and died as a result of her injuries.” While the first element may be an imprecise articulation of Defendant’s unlawful act, the use of the term “physical fight” alerted the district court to Defendant’s theory that the “unlawful act not amounting to [a] felony” was a battery. Section 30-2-3(B). We do not demand exact precision in the wording of an instruction to preserve the issue for appeal. See Jernigan, 2006-NMSC-003, ¶ 14 (despite failure to define the elements of “attempted voluntary manslaughter,” court deemed the failure to instruct preserved because the district court understood which instruction defendant sought).

In addition to the written instruction, counsel and the district court engaged in an extensive colloquy where both sides made arguments regarding the propriety of Defendant’s proposed instruction, again alerting the court to Defendant’s theory and the relevant law. This exchange resulted in the district court explicitly addressing Defendant’s request in which the judge rejected the instruction because “the involuntary is present, essentially, to the exclusion of [all] others.” Far from signaling that the district court was unaware of Defendant’s requested instruction, this testimony suggests that the judge may have actually believed that such an instruction was appropriate. Finally, when court reconvened the following morning, defense counsel reiterated its position, clarifying Defendant’s theory that the evidence supported a finding that Defendant battered Victim, therefore providing the basis for an unlawful act involuntary manslaughter instruction. As a result of these interactions, the district court (1) was aware of Defendant’s request and the underlying argument, (2) was presented with a written instruction, (3) allowed opposing counsel to respond, (4) provided an informed ruling on the subject, and (5) was in a position to correct any misstatements of the law contained in the proffered instruction. These events satisfy the rationale underlying the preservation requirement and are consistent with what New Mexico courts have required for preservation of a failure to instruct claim. See, e.g., Jernigan, 2006-NMSC-003, ¶¶ 10-15; Griffin, 2002-NMCA-051, ¶¶ 6-7. Therefore, the State’s preservation argument fails.

III. CONCLUSION

Based on our foregoing analysis and finding the issue preserved, we conclude that Defendant was entitled to an involuntary manslaughter instruction. We affirm the Court of Appeals and remand to the district court for proceedings consistent with this Opinion.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
Certiiorari Denied, January 3, 2011, No. 32,730

From the New Mexico Court of Appeals

Opinion Number: 2011-NMCA-057

Topic Index:
Appeal and Error: Substantial or Sufficient Evidence; and Standard of Review
Civil Procedure: Jury Verdict; and Statute of Limitations
Civil Rights: Employment Discrimination; Human Rights Act; and Sex Discrimination
Employment Law: Discrimination; Retaliatory Discharge; and Termination of Employment

WENDY CHARLES, Plaintiff-Appellee, versus
THE REGENTS OF NEW MEXICO STATE UNIVERSITY, f/k/a NEW MEXICO COLLEGE OF AGRICULTURE AND MECHANIC ARTS, Defendant-Appellant.
No. 28,825 (filed: November 4, 2010)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
ROBERT E. ROBLES, District Judge

MIKE MILLIGAN
El Paso, Texas
for Appellant
CHARLOTTE LAMONT
MILLER STRATVERT P.A.
Albuquerque, New Mexico
for Appellant

OPINION
JAMES J. WECHSLER, JUDGE

{1} Defendant, New Mexico State University (NMSU), appeals from a jury verdict awarding Plaintiff Wendy Charles $124,653.93 on her claims of retaliation and constructive discharge. On appeal, we address Defendant’s arguments that (1) the statute of limitations provided in the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -14 (1969, as amended through 2007), bars acts outside the limitations period from being considered, and (2) there is insufficient evidence, as a matter of law, to support the jury’s verdict. We hold that Plaintiff’s retaliation claim can be considered under the continuing violation doctrine, allowing facts and evidence prior to the NMHRA statute of limitations cut-off to be considered. We further hold that there is sufficient evidence to support the jury’s determination that a constructive discharge occurred. Accordingly, we affirm.

BACKGROUND

{2} Plaintiff began working as a teaching assistant in the Facilities Maintenance Program at NMSU’s Doña Ana Branch Community College on January 19, 2001, and she worked there until her resignation on January 31, 2005. Plaintiff was a Technician IV-Lab Tech and assisted instructor James Thompson with his courses. Juan Reyes was also a lab technician and worked part-time assisting Thompson. Thompson was-appointed supervisor from January 2001 until July 2003. Following a university reorganization, in July 2003, Terry Mount became Plaintiff’s supervisor. Mount acted as Plaintiff’s supervisor until Plaintiff’s resignation in January 2005.

{3} Plaintiff testified that shortly after she began working at the university, Reyes commented to Plaintiff that he did not like it when Plaintiff held her blouse closed as she bent over to pick something up. Plaintiff testified that she informed Reyes that such statements were inappropriate. Reyes made this statement or similar statements on three separate occasions. The first statement occurred on January 23, 2001, four days after Plaintiff began working for Defendant. The other statements occurred on January 24, and August 8, 2001. Plaintiff testified that, a few days after she first informed Reyes that his comment was inappropriate, Reyes told Plaintiff to “shut-up” and that she did not “know what [she was] talking about” at a meeting in front of both faculty and students. During Plaintiff’s employment, Reyes also called Plaintiff names, yelled at Plaintiff, made sarcastic comments about Plaintiff’s abilities and the amount of work she did, slammed or hit tables or equipment in Plaintiff’s presence, and refused to give Plaintiff receipts or promptly return Plaintiff’s credit card when he purchased items using the university credit card issued in Plaintiff’s name. Some of these acts occurred in front of students.

{4} In March 2001, Plaintiff complained to Thompson about her difficulties in sharing use of the university credit card with Reyes. In August 2001, Plaintiff complained to Thompson again about Reyes’s behavior, informing Thompson that Reyes had made inappropriate comments about Plaintiff holding her blouse closed when she bent over. Thompson talked to Reyes on more than one occasion and told Plaintiff that they all needed to “try harder to get along.” In February 2003, Plaintiff complained to Thompson in writing about Reyes’s behavior, and a personnel meeting was held. The dean attended the meeting and an agreement was reached between Plaintiff and Reyes to treat each other more professionally.

{5} Plaintiff contends that, beginning in August 2002, Thompson began retaliating against her by unfairly criticizing her attendance and work performance. According to Plaintiff, Thompson also became more angry, rude, and demeaning toward Plaintiff after the personnel meeting. Thompson began accusing Plaintiff of being late, of not getting the correct supplies, and of not completing her job duties. Thompson also cancelled training Plaintiff had requested and lowered Plaintiff’s performance evaluation in the area of “work relations.” Plaintiff testified that Thompson yelled at her in front of students and threw a cigarette butt at her. When Plaintiff returned to the dean of the university in September 2003 to complain about this conduct, the dean referred Plaintiff to her new supervisor, Mount. Plaintiff had multiple meetings with Mount regarding her concerns.

{6} In June 2004, Plaintiff filed an informal grievance with NMSU’s Equal Employment Opportunity (EEO) office. On September 27, 2004, the EEO of-
vice issued a letter stating that it did not find Plaintiff’s complaints to amount to discrimination and referred the case to the Assistant Director of Employee Relations for NMSU, Mack Adams. Adams instituted a mediation process that began on October 28, 2004. The mediation concluded, and a mediation agreement circulated in mid-December 2004. The agreement provided Plaintiff with a flexible work schedule; provided Plaintiff training if budgetary constraints allowed; established bi-weekly meetings between Mount, Plaintiff, Thompson, and Reyes; and stated that Plaintiff would bring any inappropriate conduct by Reyes to Thompson’s or Mount’s attention. Following suggestions by Mount and Thompson, the mediation agreement was amended in early January 2005 to provide for bi-weekly meetings between Plaintiff and Mount, rather than including all parties. The amended mediation agreement also provided that Plaintiff should attempt to resolve any complaints she had that Reyes was not treating her correctly first with Reyes, then with Thompson, and lastly with Mount. The agreement provided, however, that Plaintiff could go directly to Thompson if she did not feel she could discuss her concern with Reyes. On January 14, 2005, Plaintiff submitted her notice of resignation. Plaintiff’s last day of employment was January 31, 2005.

Plaintiff filed complaints with the Equal Employment Opportunity Commission (EEOC) and the New Mexico Human Rights Division. In October 2006, Plaintiff filed this civil suit alleging sexual harassment, retaliation, and constructive discharge. Prior to trial, Defendant filed a motion for summary judgment, asserting that the evidence did not support a constructive discharge. After considering the conflicting evidence presented, the district court denied the motion. At the close of Plaintiff’s evidence at trial, Defendant made an oral motion for directed verdict, asserting again that the evidence was insufficient to support a constructive discharge, and the district court denied the motion. The jury entered a verdict in favor of Plaintiff on the retaliation claim, but it found in Defendant’s favor on the sexual harassment claim. The jury further found that “Plaintiff was constructively discharged from her employment.” The jury awarded Plaintiff $94,653.93 in lost wages and $30,000 for emotional distress. After the jury returned its verdict, Defendant filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial, arguing a third time that the evidence was insufficient to support a constructive discharge. The district court denied this motion as well. Defendant appeals.

RE蒂ALATION CLAIM

[8] The NMHRA provides that it is an unlawful discriminatory practice for any person or employer to “engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the [NMHRA].” Section 28-1-7(I)(2). In order to establish a claim of retaliation under the NMHRA, a plaintiff must demonstrate that “(1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between these two events.” Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 33, 135 N.M. 539, 91 P.3d 58. “An adverse employment action occurs when an employer imposes a tangible, significant, harmful change in the conditions of employment.” Ulibarri v. State of N.M. Corr. Acad., 2006-NMSC-009, ¶ 16, 139 N.M. 193, 131 P.3d 43. Plaintiff claims that the adverse employment action she suffered was a constructive discharge.

[9] On appeal, Defendant argues that (1) the applicable statute of limitations bars Plaintiff from including in her retaliation claim acts that occurred more than 180 days prior to Plaintiff filing her complaint with the EEOC, and (2) Plaintiff presented insufficient evidence to establish either that she was constructively discharged or that her constructive discharge was causally connected to a protected activity. We address each argument below.

Statute of Limitations

[10] Defendant contends that Plaintiff filed her complaint with the EEOC on April 12, 2005. Defendant therefore claims that any acts occurring prior to November 2004 should not be considered in support of Plaintiff’s retaliation claim. Plaintiff contends that her EEOC complaint was filed when the EEOC received her intake questionnaire, which, according to Plaintiff, was on March 27, 2005. Regardless, Plaintiff substantively advocates that all of the conduct that occurred during her employment be considered pursuant to the continuing violation doctrine. We note that neither party argues that the new 300-day limitation period created by the 2005 amendment to Section 28-1-10 applies. See Ulibarri, 2006-NMSC-009, ¶ 8.

[11] “[T]he continuing violation doctrine [is] an equitable doctrine permitting a plaintiff to bring an otherwise untimely claim.” Id. ¶ 9. The continuing violation doctrine distinguishes between “[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire[, which] are easy to identify,” and hostile environment cases. Id. ¶¶ 9-10 (internal quotation marks and citation omitted). The basis for this distinction is that discrete acts generally “constitute separate, actionable unlawful employment practices” and “take place at an identifiable time,” id. ¶ 9, while hostile environment cases “involve repeated conduct over days or years” and “can be said to have ‘occurred’ at the time of any act contributing to the hostile environment.” Id. ¶ 10. Thus, while “a charge covering . . . discrete acts must be filed within the appropriate time period,” id. ¶ 9, “if one act contributing to a hostile environment claim occurred within the filing period, all acts creating the hostile environment may be considered.” Id. ¶ 10.

[12] Although our Supreme Court adopted the continuing violation doctrine for hostile work environment cases in Ulibarri, it did not address whether the doctrine applies to retaliation claims. Nevertheless, like hostile environment cases, cases involving retaliation resulting in constructive discharge may “involve repeated conduct over days or years and individual acts of [retaliation] may not be separately actionable.” Id.; see also Gonzales v. New Mexico Dep’t of Health, 2000-NMSC-029, ¶¶ 23, 25, 129 N.M. 586, 11 P.3d 550 (holding that a jury could reasonably conclude that the evidence supported the plaintiff’s claim of retaliation based on evidence that the plaintiff was criticized, called a trouble-maker, transferred to a more remote building, not informed of, and denied access to, a posting in which she was interested, and discussing the plaintiff’s claim that “the acts of discrimination and retaliation occurred in [a] six-year period”). Therefore, a claim of retaliation resulting in constructive discharge may be based on a series of acts over time. See, e.g., Littell v. Allstate Ins. Co., 2008-NMCA-012, ¶¶ 16-32, 41-44, 51, 143 N.M. 506, 177 P.3d 1080 (affirming a jury verdict for retaliation resulting in constructive discharge based on a series of acts by the supervisor and not on one distinct act). We see no reason to exclude Plaintiff’s retaliation claim from the continuing violation doctrine. Consequently, “if one act contributing to a [retaliation] claim [based on a series of actions and not a single, discrete act]
occurred within the filing period, all acts creating the [retaliation claim] may be considered.” *Ulibarri*, 2006-NMSC-009, ¶ 10. {13} We must therefore consider whether Plaintiff’s retaliation claim is based on a discrete act or on a cumulative series of acts. See id. ¶ 11. “The NMHRA makes it unlawful for any person or employer to retaliate against anyone who has opposed any unlawful discriminatory practice.” *Ocana*, 2004-NMSC-018, ¶ 35 (internal quotation marks and citation omitted); Section 28-1-7(I)(2). Retaliation can include threats, reprisals, or discrimination. See *Gonzales*, 2000-NMSC-029, ¶ 19. In this case, Plaintiff asserts that she complained several times, and after each complaint, she experienced retaliation from Reyes, Thompson, and Mount. According to Plaintiff, the retaliation took the form of harassment, threatening behavior discrimination, and reprisals. Plaintiff’s claim of retaliation is, therefore, based on a cumulative series of acts, not a “discrete discriminatory act.” *Contra Ulibarri*, 2006-NMSC-009, ¶ 11. Consequently, we agree with Plaintiff that all of the conduct that occurred during her employment could have been considered by the jury for her claim, pursuant to the continuing violation doctrine.

**Sufficiency of the Evidence**

{14} Defendant argues that Plaintiff presented insufficient evidence to support either a claim of constructive discharge or that there was a causal connection between the constructive discharge and a protected activity. The sufficiency of the evidence is assessed in the context of the jury instructions. *Littell*, 2008-NMCA-012, ¶ 41. To establish her claim for constructive discharge, the jury was instructed that Plaintiff had the burden of proving that “Defendant . . . made [Plaintiff’s] working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign; essentially, that she had no other choice but to quit.” The instruction correctly sets forth the elements of a constructive discharge under New Mexico law. *Gormley v. Coca-Cola Enters.* (*Gormley II*), 2005-NMSC-003, ¶ 10, 137 N.M. 192, 109 P.3d 280 (stating that a claim for constructive discharge requires an employee to show “that the employer made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign”); *see also Littell*, 2008-NMCA-012, ¶ 41 (providing the jury with a constructive discharge elements instruction stating that, in order to consider the plaintiff constructively discharged, the jury must “find that [the defendant . . . made] her working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign, and she had no other choice but to quit”). Our Supreme Court has noted that “[t]he bar is quite high for proving constructive discharge.” *Gormley II*, 2005-NMSC-003, ¶ 10 (internal quotation marks and citation omitted).

{15} Our standard of review in assessing whether the verdict of the jury is supported by the evidence is well settled:

In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregard[s] any inferences and evidence to the contrary. We defer to the jury’s determination regarding the credibility of witnesses and the reconciliation of inconsistent or contradictory evidence. We simply review the evidence to determine whether there is evidence that a reasonable mind would find adequate to support a conclusion.

*Littell*, 2008-NMCA-012, ¶ 13 (alteration in original) (internal quotation marks and citations omitted). Our courts have looked to federal decisions for guidance to determine the elements of a constructive discharge under New Mexico law. See *Gormley II*, 2005-NMSC-003, ¶ 10. However, we have not adopted, wholesale, federal decisions, particularly when assessing whether the evidence is sufficient to prove a constructive discharge. *Littell*, 2008-NMCA-012, ¶ 13 (“We reject [Defendant’s] contention that the ‘clearly erroneous’ standard of review, which is employed by the federal courts, applies in this state court action.”). Our standard of review does not change because we are tasked with assessing the sufficiency of the evidence for a constructive discharge. That is, we view the evidence as described in *Littell* to determine if the essential elements of a constructive discharge, as set forth in the elements instruction, were proven.

{16} In determining whether a plaintiff has satisfied this burden, “[t]he specific facts of the employment condition, and the severity of its impact upon the employee, are pivotal.” *Id.* ¶ 12. “In many cases, the circumstances surrounding resignation are not egregious enough to support a claim.” *Id.* Our appellate courts have declined to establish bright-line rules for determining whether a constructive discharge exists and have instead chosen to consider a number of factors in assessing the specific circumstances of each case. See *id.* ¶ 21; *Littell*, 2008-NMCA-012, ¶ 48. Some of the factors that our appellate courts have identified in constructive discharge cases include whether an employer has threatened termination, suggested that the employee resign or retire, demoted the employee, or reduced the employee’s pay, see *Gormley II*, 2005-NMSC-003, ¶¶ 11, 16; whether the employee has been subjected to unreasonable criticism or discipline, *id.*; see *Littell*, 2008-NMCA-012, ¶ 42; whether an employee remained on the job after the onset of the intolerable working conditions and for what length of time, see *Ulibarri*, 2006-NMSC-009, ¶ 14; *Gormley II*, 2005-NMSC-003, ¶¶ 19-20; whether an employee gave notice prior to quitting, *Gormley II*, 2005-NMSC-003, ¶¶ 20-21; whether the employee was subjected to conduct such as aggressive, physically intimidating behavior or public humiliation, see *Littell*, 2008-NMCA-012, ¶ 42; and whether an employer had an opportunity to or attempted to resolve the problem, *Gormley I*, 2004-NMCA-021, ¶¶ 14, 17; *see Littell*, 2008-NMCA-012, ¶ 43.

{17} In line with *Gormley II*, the question for the jury under the elements instruction in this case was not whether the working conditions were merely difficult or unpleasant, but whether Defendant made Plaintiff’s working conditions “so intolerable, when viewed objectively, that a reasonable person would be compelled to resign; essentially, that she had no other choice but to quit.” See 2005-NMSC-003, ¶ 10. The jury also received an instruction that Defendant denied Plaintiff’s retaliation claim and contended that “she was not subjected to any objectively materially adverse employment action and that the alleged acts of retaliation were normal supervisory acts done in the regular course of business.” In addition, the jury received an instruction that Defendant also denied that Plaintiff was constructively discharged and asserted that “the acts complained of were average supervisory conduct, and that Plaintiff . . . voluntarily resigned.” In accordance with UJI 13-304 NMRA, the Jury was instructed that, in evaluating the competing claims of Plaintiff and Defendant,

A party seeking recovery or a party relying upon a defense has the burden of proving every essential element of the claim or
defense by the greater weight of the evidence.

To prove by a greater weight of the evidence means to establish that something is more likely true than not true. When I say in these instructions that the party has the burden of proof on sexual and retaliatory harassment and constructive discharge, I mean that you must be persuaded that what is sought to be proved is more probably true than not true. Evenly balanced evidence is not sufficient.

The jury received accurate, complete instructions on the applicable law and its duties in evaluating the evidence and contentions of the parties.

{18} Plaintiff presented testimony that, during her four years of employment with Defendant, her co-worker Reyes yelled at her; told her to “shut-up”; said she did not do anything; and called her “telele” (Spanish for “dummy”), “Miss know-it-all,” and, on one occasion, a “stupid bitch.” Plaintiff also testified that, on at least one occasion, Reyes subjected her to aggressive and intimidating conduct by yelling at her while standing with his face only inches from her own, and on another occasion told Plaintiff that if she held her blouse closed while bending over he would “kick [her] right up the ass.” Some of this conduct occurred in front of students. Plaintiff also presented evidence that Reyes slammed drawers and cabinets, refused to give her receipts for purchases he had made using a university credit card that was issued in Plaintiff’s name, and laughed at Plaintiff and made fun of her. Similarly, Plaintiff presented evidence that her supervisor, Thompson, yelled at Plaintiff and criticized her in front of students, and on one occasion, picked up a cigarette butt off the floor and threw it at Plaintiff’s chest accusing Plaintiff of having left it on the floor.

{19} Plaintiff also claims she was subjected to unfair criticism of her work performance. Plaintiff presented evidence that Thompson accused her of being late and of not following the class syllabus, complained that student grades were missing, complained that the program website contained misspelled words and had not been updated, and complained that Plaintiff had not completed other job duties, such as inventory, in a timely fashion. Further, Plaintiff presented evidence that Thompson came into her office and threw folders on the floor looking for something he had misplaced in his own office, began changing his mind about due dates for projects and about supplies he had requested Plaintiff to purchase, and had decreased Plaintiff’s performance rating on her evaluation under “working relations.”

{20} The jury concluded, based on the evidence, that Plaintiff was constructively discharged. The jury apparently concluded that Plaintiff’s evidence was more credible than Defendant’s, and our task is not to second guess its factual findings. Littell, 2008-NMCA-012, ¶¶ 38, 45, 48 (stating that we review for substantial evidence to support the result reached, that the trier of fact resolves conflicts in testimony, and that we do not reweigh evidence or substitute our judgment for that of the jury). In Littell, we rejected the defendant’s sufficiency of the evidence argument that in effect asked us to reweigh the evidence. Id. ¶ 48. We stated that “[i]t is not our role to reweigh the evidence or substitute our judgment for that of the jury.” Id. We therefore concluded that “the evidence, when considered in its totality, could have reasonably supported the jury’s conclusion that [the d]efendant made [the p]laintiff’s working conditions so intolerable that a reasonable person in her position would have been compelled to resign.” Id. As in Littell, the evidence set forth by Plaintiff is sufficient to sustain the jury verdict.

{21} We note that Defendant attempts to distinguish this case from Littell. We are not persuaded. In Littell, this Court held that a constructive discharge existed when, among other factors, the plaintiff had been subjected to criticism that was “inaccurate and outrageous” in that the plaintiff testified the criticism was without any factual basis, and the plaintiff had presented testimony from other people that she worked with closely that she was a competent employee who did excellent work. Id. ¶ 42. In contrast to Littell, Defendant argues that Plaintiff was never formally disciplined, that her work space was not altered, and that she was not denied a leave of absence. Defendant further argues that Plaintiff did not offer testimony from people who could attest to “unusual interactions between [Plaintiff] and Thompson”; she was not subjected to any formal discipline; and she was not ever threatened with termination, demoted, asked to resign, or subjected to a reduction in pay. Defendant additionally points out that Plaintiff remained on the job for quite some time, had not been threatened with termination, and Plaintiff gave notice prior to her resignation.

{22} However, we do not review evidence to determine if it supports an opposite result, but we determine whether the evidence is sufficient to support the result reached. Id. ¶ 38. As discussed above, the evidence presented to the jury was sufficient to support the jury’s findings. Although Defendant attempts to resolve the issues raised by Plaintiff by undercutting Plaintiff’s argument that a reasonable person would have felt she had no other choice but to quit at the time Plaintiff submitted her resignation, we do not reweigh evidence or “substitute our judgment for that of the jury.” Id. ¶ 48.

{23} Defendant additionally makes similar arguments, pursuant to Gormley I, that (1) Plaintiff had been looking for another job during the last months of her employment and intended to quit once she had secured one, see 2004-NMCA-021, ¶ 17 (relying, in part, on the fact that the plaintiff waited over a year after a reduction in pay during which he investigated his social security benefits and decided to take early retirement prior to resigning and concluding that the plaintiff was not constructively discharged); and (2) Plaintiff tolerated the conduct she complains of for a significant period of time. However, our Supreme Court declined to stipulate “a time within which an employee must leave to complain of constructive discharge.” Gormley II, 2005-NMSC-003, ¶ 21 (further stating that “the circumstances surrounding how long the employee remains on the job and continues to suffer from onerous conditions” is only one factor that we must consider in looking at the specific circumstances of a case to determine if a constructive discharge occurred). Moreover, a plaintiff remaining in a position and tolerating inappropriate behavior for a significant period of time is not fatal to a constructive discharge. See Littell, 2008-NMCA-012, ¶¶ 17, 24, 30, 42 (upholding the jury’s determination that a constructive discharge had occurred when the plaintiff tolerated sexually harassing behavior for more than three years and physical intimidation, pretextual discipline, and sabotage by her supervisor for at least a year).

CONCLUSION

{24} For the foregoing reasons, we affirm.

{25} IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
CELIA FOY CASTILLO, Judge
MICHAEL E. VIGIL, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2011-NMCA-058

Topic Index:
Administrative Law and Procedure: Exhaustion of Administrative Remedies; and Standard of Review
Appeal and Error: Stay Pending Appeal
Civil Procedure: Stay of Proceedings; and Stipulation
Government: State Engineer
Judgment: Declaratory Judgment
Natural Resources: Water Law

No. 28,695 (filed: April 19, 2011)

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY
MATTHEW G. REYNOLDS, District Judge

THOMAS G. FITCH
FITCH & TAUSCH, L.L.C.
Socorro, New Mexico

J. BRIAN SMITH
JONES & SMITH, L.L.C.
Albuquerque, New Mexico

for Appellant

DL SANDERS
Chief Counsel
NEW MEXICO OFFICE OF THE STATE ENGINEER
JONATHAN E. SPERBER
Special Assistant Attorney General
Santa Fe, New Mexico

for Appellees

Opinion

RODERICK T. KENNEDY, Judge

{1} Appellant Charles Headen (Headen) filed an application with Appellees Office of the State Engineer and State Engineer John D’Antonio (collectively OSE) to change the point of diversion and place and purpose of use of water rights he claims to possess in Socorro County, New Mexico. Prior to the administrative hearing, Headen filed a declaratory judgment action in district court to establish the validity of his water rights, and the court dismissed his claim. Citing Smith v. City of Santa Fe, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300, the court concluded that Headen failed to exhaust his administrative remedies and that an action for declaratory judgment was premature. We hold that Lion’s Gate Water v. D’Antonio, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622, together with Smith, require us to affirm the district court.

BACKGROUND

{2} Headen owns two tracts of land in Socorro County and claims to possess corresponding appurtenant water rights in the amount of 82.83 acre feet. On February 7, 2006, he filed with OSE an “[a] pplication to change the point of diversion and place and purpose of use” of his water rights. OSE denied Headen’s application in a letter dated October 13, 2006, which informed Headen he possessed no valid water rights to transfer. OSE stated that Headen was free to appeal the determination within thirty days to an administrative hearing officer, which he did.

{3} Headen requested an administrative hearing. Prior to the administrative hearing, Headen filed a petition in district court seeking a declaratory judgment to establish “the existence and validity” of his water rights. He also filed a motion to stay the administrative proceedings before OSE. The court held a hearing on the motion and, on December 21, 2006, the parties stipulated that administrative proceedings should be stayed pending the outcome of the declaratory judgment action. That stipulation provides, “[OSE] shall take no further action in the foregoing administrative proceeding until the [p] etition herein filed has been heard and determined by the [c]ourt.” Throughout the proceedings in the district court, Headen argued the validity of his water rights and provided a variety of factual evidence to support his claim.

{4} OSE filed a motion to dismiss Headen’s declaratory judgment action on the basis that he failed to exhaust his administrative remedies pursuant to NMSA 1978, Section 72-2-16 (1973). The district court initially denied OSE’s motion to dismiss. OSE asked for reconsideration of the court’s order based on its belief that the court ruled the Declaratory Judgment Act does not prohibit a court from hearing a claim “simply because a petitioner who initially chose to follow an administrative process later decides to proceed in district court.” The district court changed its position. Citing Smith, the court dismissed Headen’s declaratory judgment claim and allowed him to “proceed with his appeal before [OSE].” Under Smith, the court noted that when a party invokes an administrative remedy before an agency, the party must “follow that path all the way through.” Only then may the party appeal to the district court.

{5} Headen contends that the district court improperly dismissed his declaratory judgment claim for the following reasons: first, because under the Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975), the court possessed jurisdiction to determine the validity of his water rights; second, because under Smith, he was not required to exhaust his administrative remedies; and third, because OSE waived the exhaustion requirement when it stipulated to a stay of administrative proceedings. We consider each contention in turn.

DISCUSSION

A. Standard of Review

{6} The district court is “vested with broad discretion to grant or refuse claims for declaratory relief.” State ex rel. Stratton v. Roswell Indep. Schs., 111 N.M. 495, 508, 806 P.2d 1085, 1098 (Ct. App. 1991) (internal quotation marks and citation omitted). We analyze a district court’s dismissal of a declaratory judgment action for abuse of discretion. “An abuse of
discretion occurs when the district court’s ruling is clearly against logic and effect of the facts and circumstances” before it.  

Id. “We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” State v. Rojo, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

B. Lion’s Gate

{7} Lion’s Gate was decided after the briefs in the present appeal were filed. It is directly applicable to the administrative proceeding issues in the present case. Lion’s Gate involved a state engineer’s threshold determination as to water availability and indicated that a state engineer can “efficiently dispose of applications without a hearing whenever he or she determines [as a threshold matter] that water is unavailable to appropriate.” Id. ¶ 25. It held that a state engineer is required to reject an application without reaching the merits of the application if there is a “pre-hearing . . . determination that water is unavailable to appropriate.” Id. ¶¶ 26-27. The “aggrieved applicant may request a post-decision hearing” on the issue of whether water is unavailable to appropriate. Id. ¶ 25. The State Engineer must hold the hearing if requested by the aggrieved party, since Lion’s Gate indicates that no appeal can be made to the district court “until the [S]tate [E]ngineer has held a hearing and entered his decision in the hearing.” Id. (internal quotation marks and citation omitted). Lion’s Gate refused “to equate a de novo review scope of appellate review with a district court’s original jurisdiction” and, thereby, “create a short circuit in the administrative process.”] Id. ¶¶ 28, 30.

{8} Lion’s Gate’s “approach conforms with [its] recent holding in Smith, 2007-NMSC-055, ¶ 15 in which [the Supreme Court] cautioned against actions that would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, or disregard an exclusive statutory scheme for the review of administrative decisions.” Id. ¶ 34 (alterations omitted) (internal quotation marks omitted).

{9} In regard to the necessity for an applicant to exhaust the administrative process, we see no significant difference between the subject of the threshold issue of water availability in Lion’s Gate and the issue of forfeiting a water right in the present case. Applying Lion’s Gate, Headen had to proceed with an administrative hearing if he wanted to pursue appellate review. He in fact requested the hearing, which makes the requirement that he proceed with the appeal even more compelling, even though that fact is not essential to our determination in this case. Thus, for Headen to overcome the pre-hearing determination of forfeiture based on the Supreme Court’s holding in Lion’s Gate, Headen had to continue with the administrative process and then force the State Engineer in a statutory de novo hearing in the district court to prove the forfeiture and persuade the court to extinguish the water right.

{10} We reject Headen’s contention that either the State Engineer must immediately go into court to extinguish the water right based on forfeiture after the pre-hearing determination, or Headen had the right to seek relief in a declaratory judgment action. As to the first alternative, Headen is mistaken. The State Engineer was not required to seek court relief extinguishing the water rights before an administrative hearing occurred and Headen thereafter sought judicial relief. As to the second alternative, although Lion’s Gate controls our determination in this case, Smith, which involves a declaratory judgment action, provides added support for our determination.

C. Smith

{11} The conflict between declaratory judgment actions and administrative remedies was analyzed in Smith. Smith is a municipal water code case and not a water code case. It involves Rule 1-075, not a water code statutory or Article XVI, Section 5 appeal, and it involves a procedural history different than that in the present case with different facts and issues than those in the present case. Nevertheless, it is instructive in determining when a party may pursue a declaratory judgment instead of first exhausting remedies before an administrative body.

{12} In Smith, two separate plaintiffs, the Smiths and the Stillmans, challenged the City of Santa Fe’s authority to deny permits under a city ordinance concerning the drilling of private water wells within city limits. 2007-NMSC-055, ¶¶ 1, 5. The Smiths’ permit application was denied because their proposed well did not conform to the ordinance’s requirements. Id. ¶ 4. They appealed in accordance with the city’s established administrative process, to the city manager, the public utilities committee, and finally the city council without success. Id. Under the administrative appeals process, the Smiths would next have appealed for judicial review pursuant to Rule 1-075 NMRA (governing district court review of administrative decisions), but they chose instead to file a declaratory judgment action almost four months later in which they argued that the city was without authority to deny their permit. Smith, 2007-NMSC-055, ¶¶ 5, 11. The Stillmans never applied for a permit, fearing their application would be denied if they did so, but joined the declaratory judgment action. Id. ¶ 4. The district court concluded it had jurisdiction to hear the matter, that neither plaintiff was required to exhaust administrative remedies, and that the city was without authority to prohibit the drilling of wells within the city’s limits. Id. ¶ 5. This Court reversed on other grounds and refused to consider the jurisdictional question. Id. ¶ 6.

{13} Our Supreme Court took up the jurisdictional question and held that the Smiths, having sought administrative review, were required to exhaust administrative remedies and to comply with applicable time frames prior to proceeding to the district court, while the Stillmans remained free to pursue a declaratory judgment action. Id. ¶¶ 17, 23-25, 27. In reaching that conclusion, the Court compared the Declaratory Judgment Act with the doctrine of exhaustion of remedies. Id. ¶ 26. As the Court observed, the New Mexico Constitution empowers district courts with “original jurisdiction in all matters and causes not excepted in [the] Constitution, . . . such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts.” Id. ¶ 12 (alteration in original) (internal quotation marks and citation omitted). As such, “[t]he Declaratory Judgment Act [is] intended to be liberally construed and administered as a remedial measure.” Id. ¶ 13 (alteration in original) (internal quotation marks and citation omitted). It “is a special proceeding that grants the district courts the power to declare rights, status and other legal relations whether or not further relief . . . could be claimed.” Id. (internal quotation marks and citation omitted). It does not, however, increase district courts’ jurisdiction “over subject matter and parties.” Id. In contrast, under the doctrine of exhaustion of remedies, “where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts;
and until that recourse is exhausted, suit is premature and must be dismissed.” *Id.* ¶ 26 (alteration omitted) (internal quotation marks and citation omitted). The doctrine rests upon the principle that “the interests of justice are best served by permitting the agency to resolve factual issues within its peculiar expertise” prior to allowing the party to proceed to the courts. *Id.* (internal quotation marks and citation omitted). As the Court observed, the exhaustion doctrine applies where an administrative agency alone has authority to pass on every question raised by the one resorting to judicial relief, but does not apply in relation to a question which, even if properly determinable by an administrative tribunal, involves a question of law, rather than one of fact. *Id.* ¶ 27 (internal quotation marks and citation omitted).

{14} In *Smith*, the Court held that “a declaratory judgment action [may] provide an alternative means of challenging an administrative entity’s authority,” as long as such action is not used to “circumvent established procedures for seeking judicial review of a municipality’s administrative decisions.” 2007-NMSC-055, ¶¶ 1, 11-15. In this context, declaratory judgment actions “should be limited to purely legal issues that do not require fact-finding by the administrative entity.” *Id.* ¶ 16. Furthermore, even when a case involves a purely legal question, if the party has invoked the administrative process, he must “comply with the applicable time frames that would otherwise govern judicial review of the administrative decision . . . . To hold otherwise would invite chaos and preclude certainty in the finality of administrative decisions that might otherwise be subject to multiple avenues of judicial review at unpredictable times.” *Id.* ¶ 23; see *Baca*, 2008-NMSC-047, ¶ 22. The Supreme Court caution[ed] against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.

*Smith*, 2007-NMSC-055, ¶ 15; see also State of N.M. ex rel. Hanosh v. N.M. Envtl. Improvement Bd., 2008-NMCA-156, ¶ 6, 145 N.M. 269, 196 P.3d 970 (stating that a party may not seek a declaratory judgment when additional fact-finding or agency expertise is necessary). Thus, despite the fact that both the Smiths and the Stillmans presented identical and purely legal questions, the Smiths were required to comply with the administrative process they started, while the Stillmans remained free to seek a declaratory judgment. *Smith*, 2007-NMSC-055, ¶¶ 17, 23-25, 27. In *Smith*, the question of law was limited to whether the agency “had [the] right to even make a decision.” *Id.* ¶ 17; see *Baca*, 2008-NMSC-047, ¶ 21 (stating that the validity of a contract presents a purely legal question); *Stennis v. City of Santa Fe*, 2008-NMSC-008, ¶ 14, 143 N.M. 320, 176 P.3d 309 (holding that whether a city has the authority to enact a particular statutory scheme is a purely legal question). In declaratory judgment actions, arguments that an agency made the wrong decision are improper. *Cf. Smith*, 2007-NMSC-055, ¶ 17 (recognizing that the plaintiffs “did not argue that the [c]ity made the wrong decision; they argue[d] that the [c]ity had no right to even make a decision” and noting that “such a challenge is precisely the type of question appropriately considered by a declaratory judgment action”).

{15} In sum, *Lion’s Gate with Smith* require a determination that the State Engineer had authority to make the forfeiture determination and Headen was required to proceed through the administrative process, including the statutory de novo appeal procedure, to pursue relief from that forfeiture determination. We reject Headen’s arguments to the contrary. We are unpersuaded by Headen’s attempt to construct a viable argument under *Smith* to allow his declaratory judgment action to proceed.

**D. Effect of OSE’s Stipulation to Stay Administrative Proceedings**

{16} Even presuming he was prohibited from seeking a declaratory judgment under *Smith*, Headen argues that OSE waived the exhaustion requirement when it stipulated to stay administrative proceedings pending the outcome of his claim in district court. We disagree. Each of the authorities Headen cites is readily distinguishable from the facts in this case, and the most reasonable interpretation of the stipulation’s plain language demonstrates OSE’s intent to retain jurisdiction after a determination of the declaratory judgment action.

{17} In *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976), the Supreme Court determined the availability of judicial review under a specific statutory scheme requiring the exhaustion of remedies. In holding that the agency had waived the exhaustion requirement, the Court relied on the agency’s statement that “no further review [was] warranted.” *Id.* at 330. Similarly, in *Mathews v. Diaz*, 426 U.S. 67, 76 (1976), the Supreme Court concluded that the agency waived the exhaustion requirement when it stipulated that no remaining facts were in dispute and that the matter was “ripe for disposition by summary judgment.” Likewise, in *Aghazali v. Sec’y of Health & Human Servs.* , 867 F.2d 921, 923 (6th Cir. 1989), the agency stipulated that administrative proceedings were complete. In the instant case, however, the district court was not considering a specific statutory scheme requiring the exhaustion of remedies, nor did OSE stipulate that administrative proceedings were completed or unnecessary.

{18} The stipulated order provides, “the following administrative proceeding, which is presently pending before [OSE], is hereby stayed . . . . [OSE] shall take no further action in the foregoing administrative proceeding until the [p]etition herein filed has been heard and determined by the [c]ourt.” This language does not preclude OSE’s successful motion to dismiss the declaratory judgment, nor does it dismiss the matter before the agency. It merely stays it pending resolution of the declaratory judgment action, which was dismissed. We will not concern ourselves with what might have happened had the district court declared Headen’s water rights to be valid, and we therefore hold that the stipulated order did not constitute a waiver of exhaustion of remedies. The district court dismissed Headen’s claim, and the matter now properly returns to the agency for adjudication.

**CONCLUSION**

{19} For the foregoing reasons, we affirm the order of the district court dismissing Headen’s declaratory judgment claim for failure to exhaust administrative remedies.

{20} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge
In this appeal, we must determine the legal and equitable remedies available to performing and contributing coguarantors against a principal debtor who has defaulted on a loan. Adopting the approach of the Restatement (Third) of Suretyship and Guaranty, we hold that a coguarantor who has fulfilled a duty of contribution to a performing coguarantor is entitled to recourse against a principal debtor as though the contributing coguarantor had performed the guaranty to the same extent as his or her contribution. Restatement (Third) of Suretyship & Guaranty § 58 (1996). A contributing coguarantor has the right to seek reimbursement, restitution, or subrogation against a defaulting principal debtor to the extent of his or her contribution. Id. cmts. b, c, d, at 248-50. We further conclude that performing coguarantor’s claim against a principal debtor is reduced to the extent that he/she receives contribution from another coguarantor. Id. cmt. e, at 250. Applying this holding to the facts of this case, we reverse the district court’s grant of summary judgment in favor of Defendant KCB, LLC (KCB or “performing coguarantor”) and remand with instructions.

**BACKGROUND**

This case arose out of a $500,000 loan issued by Compass Bank to New Mexico Motor Speedway, Inc. (Speedway) in October 2000. The loan was secured through the execution of personal guaranties by four shareholders of Speedway—Steven Kadner, Richard Chaves, and Jerome Beckes, who are the individual members of Defendant KCB, and Plaintiff Eve Randles—and by Michael Jones, Speedway’s president at the time.

Two days after the promissory note for the loan was executed, the parties entered into two written agreements that are relevant to the present dispute. The first agreement (Memorandum Agreement) was executed between all five guarantors and essentially allocated liability among the guarantors in the event of a default by Speedway. In this agreement, the guarantors acknowledged that they were “jointly and severally liable for all unpaid amounts” and, therefore, if Speedway defaulted, the agreement provided that each guarantor would be responsible for paying “one-fifth (1/5) of all amounts owed” within twenty days of the date of any written demand by the bank for payment.

The second agreement (Compensation Agreement) was executed between Speedway and all five guarantors. This agreement memorialized an earlier offer from Speedway to pay “each guarantor $1.00 for each dollar guaranteed” as compensation for the “significant risk” each guarantor had taken in personally guaranteeing the loan. Accordingly, the agreement provided that Speedway would pay approximately $500,000 to the guarantors as compensation for their guaranties and that this amount would be distributed in equal percentages among the five guarantors.

**A. Speedway’s Default and Subsequent Bankruptcy**

In 2003, Speedway defaulted on the loan, and the bank demanded payment from the guarantors. Randles and Speedway’s president, Jones, refused to pay, and the remaining three guarantors ultimately paid the entire $500,000 plus interest due on the note. These three individuals, as performing guarantors, then formed KCB and assigned their rights under the written agreements to KCB. Shortly thereafter, KCB sued Randles and Jones to recover their pro-rata shares of the amount KCB had paid to the bank. In that action, KCB obtained a judgment against Randles for her pro-rata share of the principal in the amount of $113,406, plus attorney fees, which Randles paid to KCB in June 2005.

KCB also sought reimbursement from Speedway for its default. This effort stalled in June 2005 when Speedway filed for Chapter 11 bankruptcy. During the bankruptcy proceedings, KCB filed two claims against Speedway totaling one million dollars. The first claim was for $500,000—the amount KCB

**OPINION**

CYNTHIA A. FRY, JUDGE

[1] In this appeal, we must determine the legal and equitable remedies available to performing and contributing coguarantors against a principal debtor who has defaulted on a loan. Adopting the approach of the Restatement (Third) of Suretyship and Guaranty, we hold that a coguarantor who has fulfilled a duty of contribution to a performing coguarantor is entitled to recourse against a principal debtor as though the contributing coguarantor had performed the guaranty to the same extent as his or her contribution. Restatement (Third) of Suretyship & Guaranty § 58 (1996). A contributing coguarantor has the right to seek reimbursement, restitution, or subrogation against a defaulting principal debtor to the extent of his or her contribu-
claimed it had paid to the bank upon Speedway’s default (which we refer to as the “principal amount” or “underlying obligation”). The second claim was for an additional $500,000—the compensation KCB claimed it was due under the terms of the Compensation Agreement (“premium amount”). Subsequently, as part of its Chapter 11 reorganization efforts, Speedway agreed to pay KCB’s claims and proposed a payment of one million dollars to cover both the principal and the premium amounts. At this point, Randles filed a conditional objection in bankruptcy court for $200,000 of Speedway’s proposed payout to KCB, arguing that she was entitled to this amount because half ($100,000) represented her pro-rata share of the principal she had previously paid to KCB in the earlier judgment and the other half ($100,000) was her portion of the premium. Without addressing the merits of this dispute and in order to allow the bankruptcy proceedings to conclude, the parties agreed to a stipulated order that the disputed $200,000 would be placed in the trust account for KCB’s attorney, Defendant Allegra Hanson, pending resolution of the parties’ dispute as to the amount. The bankruptcy court’s order disbursed the remaining $800,000 directly to KCB and stated that Speedway was deemed to have fulfilled its obligations to Randles and KCB regardless of the outcome of their dispute as to the $200,000. The parties then asked the bankruptcy court to decide the merits of their dispute as to the $200,000, but the court determined that it no longer had subject matter jurisdiction to do so. That set the stage for the current lawsuit.

B. Present Dispute

[7] In the proceedings below, which gave rise to this appeal, Randles filed an action in district court against KCB, arguing that she was entitled to the $200,000. She argued that half of this sum represented reimbursement from Speedway for her payment of the judgment to KCB for her pro-rata share of the principal and that the other half was her share of the premium. The parties filed cross-motions for summary judgment, with each party arguing that it was entitled to the $200,000 as a matter of law and equity. After a hearing on both motions, the district court denied Randles’ motion and granted KCB’s cross-motion for summary judgment. The court concluded that Randles was not entitled to the $100,000 principal or the $100,000 premium amounts as a matter of both law and equity. This appeal followed.

DISCUSSION

[8] On appeal, Randles argues that the district court erroneously denied her motion for summary judgment as to both the principal and the premium amounts. We address the parties’ arguments with respect to each amount in turn.

A. Standard of Review

[9] “On appeal from the grant of summary judgment, we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute.” City of Albuquerque v. BPLW Architects & Eng’rs, Inc., 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. “However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment.” Id.

In addition, “[w]here cross-motions for summary judgment are presented on the basis of a common legal issue, this Court may reverse both the grant of one party’s motion and the denial of the opposing party’s cross-motion and award judgment on the cross-motion.” Grisham v. Allstate Ins. Co., 1999-NMCA-153, ¶ 2, 128 N.M. 340, 992 P.2d 891.

B. Whether Randles is Entitled to the $100,000 Principal

[10] With regard to the $100,000 principal amount, Randles argues that her previous payment of the judgment to KCB for her pro-rata share of the principal entitled her to seek recourse from Speedway for that payment. Specifically, Randles contends that her contribution to KCB placed her in the position “as if she had participated with them originally in paying Compass Bank” and, therefore, she became entitled to recover the $100,000 principal from Speedway under three different theories: assignment, subrogation, and what she terms as general “equitable principles . . . of unjust enrichment and double recovery.” In response, KCB argues that Randles is precluded from any recovery because she breached the Memorandum Agreement by refusing to pay when the bank demanded payment following Speedway’s default. KCB further claims that the theories of assignment and subrogation are inapplicable under the facts of this case and that the doctrine of unclean hands precludes any recovery on equitable grounds.

[11] On this issue, the parties contend that there are no material facts in dispute. The parties agree that Randles breached the Memorandum Agreement by not paying her share of the principal within twenty days of Speedway’s default; that KCB then sued Randles for her share of the principal after it had paid the entire loan principal to the bank; and that Randles paid $113,406, plus attorney fees, to KCB in satisfaction of the ensuing judgment KCB obtained against her.

[12] We diverge briefly to clarify that although the previous lawsuit filed by KCB against Randles was termed a “complaint for collection of debt” without using the term “contribution,” we consider that lawsuit essentially to be an action for contribution. See Black’s Law Dictionary 378 (9th ed. 2009) (defining “contribution” as “[t]he right that gives one of several persons who are liable on a common debt the ability to recover proportionately from each of the others when that one person discharges the debt for the benefit

---

1Although only a few cases in New Mexico have touched on the right of contribution between coguarantors, see FDIC v. Hiatt, 117 N.M. 461, 469, 872 P.2d 879, 887 (1994) (Montgomery, C.J., dissenting); First Nat’l Bank in Albuquerque v. Energy Equities Inc., 91 N.M. 11, 17, 569 P.2d 421, 427 (Ct. App. 1977), the principle is well-established in other jurisdictions. See, e.g., Lestorti v. DeLeo, 4 A.3d 269, 275-77 (Conn. 2010); Hills Bank & Trust Co. v. Converse, 772 N.W.2d 764, 772-73 (Iowa 2009); Rodehorst v. Gartner, 669 N.W.2d 679, 686-87 (Neb. 2003); Albrecht v. Walter, 1997 ND 238, ¶ 10, 572 N.W.2d 809, 812; Katz v. Prete, 459 A.2d 81, 85 (R.I. 1983); Gardner v. Bean, 677 P.2d 1116, 1118 (Utah 1984). Additionally, the Restatement (Third) of Suretyship and Guaranty has recognized the right of one cosurety to seek contribution from another cosurety. See § 55(2), at 236 (1996); see also Peter A. Alces, The Law of Suretyship & Guaranty § 5.03[2], at 5-13 (1996) (describing the Restatement’s approach on contribution by stating that “when one cosurety has paid the obligee more than that cosurety’s proportionate share of the underlying obligation, the cosurety who has overpaid will have a claim against the other cosurety(ies) to recover the amount he paid in excess of his proportionate share. The idea is that each cosurety should ultimately be out of pocket only in the amount to which he agreed.”).
of all”). We think that Randles’ payment of the judgment is economically equivalent to the result that would be obtained in an action for contribution against her. For reasons that become apparent in our discussion later, we therefore re-cast the facts mentioned above in the context of an action for contribution as follows. After KCB paid Speedway’s obligation to the bank, it had a right to seek contribution from Randles for her pro-rata share of the principal. Subsequently, when Randles paid the $113,406 judgment to KCB, we consider her to have fulfilled a duty of contribution to KCB.

{13} Based on our review of the record, we agree with the parties’ contention that there are no disputed material facts on this issue. Thus, resolution of the parties’ dispute over the $100,000 principal depends solely on determining whether Randles was entitled to the $100,000 principal amount paid by Speedway by virtue of her prior contribution to KCB. Stated differently, we must decide whether a contributing co-guarantor—i.e., a guarantor who has paid its pro-rata share of the underlying obligation through an action for contribution brought by a fellow co-guarantor—is entitled to seek recovery from the principal debtor to the extent of its contribution. We apply de novo review to this legal question.

{14} This is a novel issue in New Mexico as we have not found any New Mexico case to have addressed this precise issue, nor have the parties directed us to any such authority. In the absence of any relevant New Mexico authority, we turn to the Restatement (Third) of Suretyship and Guaranty for guidance. This Court has previously stated that we look to the Restatement for “authoritative guidance on the common law” of guaranties. Venaglia v. Kropinak, 1998-NMCA-043, ¶ 12, 125 N.M. 25, 956 P.2d 824.

{15} For purposes of clarity, we begin our analysis by setting forth the relationship between the parties in terms of the Restatement because these terms differ from those employed by the parties in their briefing. The Restatement avoids the use of the term “guarantor” and instead refers to a guarantor as a “secondary obligor,” who is liable to the “obligee” (or creditor) for the underlying obligation in the event of a default by the principal obligor (or principal debtor). See Restatement (Third) of Suretyship & Guaranty § 1 cmt. d, at 7 (1996). The obligation of a secondary obligor to pay the underlying obligation is considered the secondary obligation.

{16} Applying these terms to the parties in this case, Randles and KCB were secondary obligors with joint and several liability to Compass Bank, the obligee, for the $500,000 underlying obligation in the event of a default by Speedway, the principal obligor. Also, Randles and KCB were cosureties because they expressly agreed in the Memorandum Agreement to be jointly and severally liable for the underlying obligation. See id. § 55 cmt. a, at 236 (stating that individuals are cosureties when “the relationship between them is such that they should share the cost of performance of their secondary obligations”). Moreover, based on the procedural history of this case, KCB is considered a performing cosurety because it performed under the guaranty when the principal obligor defaulted while Randles is a contributing cosurety because she acted only through the previous action for contribution. See id. § 55 cmts. a-e, at 236-38 (describing performing cosurety’s role and right to seek contribution); § 58 cmts. a-b, e, at 248-50 (describing contributing cosurety).

{17} Based on our review of the Restatement, we conclude that one section in particular is on point for resolving the issue before this Court because it covers the rights of a contributing cosurety with respect to a principal obligor who has defaulted. Section 58 of the Restatement provides two general rules directly applicable here that govern the rights of performing and contributing cosureties in seeking recovery against a principal obligor in the event of a default. First, the section provides that “[a] cosurety that satisfies a duty of contribution owed to another cosurety . . . is entitled to recoup against the principal obligor as though that cosurety had performed its secondary obligation to the same extent.” Id. § 58(1), at 248. Second, it provides that “[t] he claim against the principal obligor of a cosurety who performs its secondary obligation . . . is reduced to the extent that the cosurety receives contribution from another cosurety.” Id. § 58(2), at 248; see id. cmt. e, at 250 (“When a cosurety performs its secondary obligation, the magnitude of its claim against the principal obligor is determined by the magnitude of its performance pursuant to the secondary obligation. If the performing cosurety later recovers from another cosurety under a right of contribution, however, the performing cosurety no longer requires the original remedy against the principal obligor in order to be made whole.”). A leading treatise on suretyship and guaranty offers an illustration of these rules in operation together that is directly on point:

If S1, S2, and S3 are each liable for $2,500 of a $7,500 obligation of P to O, when S1 pays O the full $7,500, S1 may recover that amount from P. Once S1 recovers $2,500 in contribution from S2, S2 will be able to recover that amount, $2,500, from P. Upon that payment by S2 to S1, S1’s claim against P is reduced by $2,500.

Acles, supra, § 5.03[2], at 5-14.

{18} The general rationale underlying Section 58 is to place the contributing cosurety in the same position as the performing cosurety when it comes to seeking recovery from the principal obligor. Restatement (Third) of Suretyship & Guaranty § 58 cmt. a, at 248 (“When one cosurety performs beyond its contributive share and receives contribution from another cosurety, the cosureties are in the same position as if the contributing cosurety had performed the secondary obligation to the same extent as its contribution to the performing cosurety.”); id. cmt. d, at 249 (“If [a] cosurety fulfills a duty of contribution to the [performing] cosurety, the result is economically equivalent to a situation in which the two cosureties, by each performing to the extent of their contributive shares, discharge the underlying obligation.”).

{19} We adopt the approach of Section 58 of the Restatement for determining the rights of contributing and performing cosureties against a principal obligor who has defaulted on a loan. Thus, we describe the theories of recovery provided in Section 58 by which a contributing cosurety can seek recovery against a principal obligor: (1) reimbursement, which is based on “notions of an implied contract on the part of the principal obligor to make [a contributing] secondary obligor whole for the costs of its performance”; (2) restitution, which is based on the principle of unjust enrichment; and (3) subrogation. See id. cmts. b, c, d, at 248-50. The Restatement defines reimbursement as the duty of a principal obligor who is charged with no-
tice of a cosurety’s secondary obligation to “reimburse [a] secondary obligor for [the] cost of fulfilling its duty of contribution.” Id. cmt. b, at 249. Restitution differs from reimbursement in that it covers situations where the principal obligor is not charged with notice of the secondary obligation. Id. cmt. c, at 249. Finally, subrogation is essentially an equitable assignment of the obligee’s rights to the guarantor when it comes to seeking recourse against a principal obligor. See Dan B. Dobbs, Law of Remedies § 4.3(4), at 404 (2d ed. 1993) (“Having paid the defendant’s creditor, the plaintiff stands in the creditor’s shoes, becomes the real party in interest, and is entitled to exercise all the remedies which the creditor possessed against the defendant.”) (footnote omitted) (internal quotation marks and citation omitted)). In this context, once a cosurety has fulfilled a duty of contribution, the Restatement provides that the cosurety “is subrogated to the rights of the obligee against the principal obligor to the same extent as if that cosurety had paid the same funds to the obligee.” Restatement (Third) of Suretyship & Guaranty § 58 cmt. d, at 249-50. Under any of these three theories, a contributing cosurety is entitled to recourse from the principal obligor to the extent of his contribution. Id. § 58, illus. 1-4, at 249-50.

[20] Applying the Restatement’s approach to the facts presented in this case, we reverse the district court’s ruling as to the principal amount. We hold that Randles, as a contributing cosurety, was entitled to recourse from Speedway for the principal to the extent of her earlier contribution to KCB. That is, following Randles’ contribution, Randles and KCB were in the same position and had the same rights in seeking recourse from Speedway for their respective payments under the guaranty either through initial performance (by KCB) or contribution (by Randles). Thus, when Speedway agreed to pay $500,000 to cover the principal during bankruptcy proceedings, KCB’s claim to the $500,000 should have been reduced by $100,000 based on Randles’ contribution, and Randles should then have been allowed to claim the $100,000 based on her contribution. Under the Restatement, Randles correctly asserted a right to the $100,000 principal in the bankruptcy proceedings under theories of reimbursement or subrogation. Speedway had a duty to reimburse Randles to the extent of her contribution or, alternatively, Randles became subrogated to the rights of the bank against Speedway to the extent of her contribution. Although Randles also made arguments based on restitution in her briefing, we follow the Restatement’s approach and conclude that restitution is not available to her because Speedway, as principal obligor, has always had notice of the personal guaranties. See Restatement (Third) of Suretyship & Guaranty § 58 cmt. e, at 249. This result would prevent any double recovery on the part of KCB and would also make both KCB and Randles whole for their respective actions as a result of Speedway’s default.

[21] Having determined that Randles is entitled to the principal amount under the approach of the Restatement, we turn to examine whether KCB’s arguments preclude her recovery. KCB’s arguments regarding the principal amount do not change our holding. Based on our above reasoning, we disagree with KCB’s first argument that subrogation is inapplicable to the facts of this case. This leaves only KCB’s second argument on appeal, which is that the doctrine of unclean hands precludes Randles from seeking any portion of the principal amount paid by Speedway to KCB in the bankruptcy proceedings. The doctrine of unclean hands generally prevents a complainant from recovering where he or she has been guilty of fraudulent, illegal or inequitable conduct in the matter with relation to which he [or she] seeks relief.” Magnolia Mountain Ltd. v. P’ship v. Ski Rio Partners, Ltd., 2006-NMCA-027, ¶ 36, 139 N.M. 288, 131 P.3d 675 (alteration in original) (internal quotation marks and citation omitted). The doctrine is invoked in circumstances where the complainant has “dirtied [his or her hands] in acquiring the right he [or she] now asserts.” Romero v. Bank of the Sw., 2003-NMCA-124, ¶ 38, 135 N.M. 1, 83 P.3d 288 (internal quotation marks and citation omitted). Here, KCB contends that the doctrine applies because Randles engaged in inequitable conduct by “not shar[ing] the burden [of Speedway’s default] with the other guarantors” and by letting “the entire onus of responding to Compass Bank fall on KCB.” In support, KCB relies on Lampont v. Staebler, 67 S.W.2d 473 (Ky. Ct. App. 1934), a case that involved the right of contribution between cosureties and which held that a performing cosurety’s inequitable conduct can lead to a forfeiture of his or her right to seek contribution. Id. at 478.

[22] We do not consider Lampont to be applicable to the facts of this case. Here, we are not faced with a claim for contribution between cosureties or the right of a performing cosurety to seek contribution; rather, we are concerned with the rights of cosureties in post-contribution circumstances. In this lawsuit, which concerns a determination of the legal and equitable remedies available to KCB and Randles against a third party, Speedway, we remain unconvinced that Randles engaged in conduct during the bankruptcy proceedings or in district court that would merit application of the unclean hands doctrine. See Gen. Electric Co. v. Klein, 129 A.2d 250, 252 (Del. Ch. 1956) (“The repentant sinner, especially where he has been duly punished, is not unwelcome in equity.”); Hall v. White, 2006 SD 47, ¶ 18, 715 N.W.2d 577, 585 (“If a person guilty of unconscionable or wrongful conduct purges himself or herself by adequate and effective renunciation and repudiation, the right to relief will be restored.”) (alteration omitted) (internal quotation marks and citation omitted). Additionally, whatever inequitable conduct Randles engaged in after Speedway’s default was remedied by the judgment KCB obtained against her. Once KCB received the judgment, which included attorney fees and costs, it was made whole with respect to the portion of the principal that it had paid to the bank on Randles’ behalf.

[23] Therefore, we reverse the grant of summary judgment in favor of KCB and remand with instructions to enter summary judgment in favor of Randles as to the $100,000 principal.

C. Whether Randles is Entitled to the $100,000 Premium

[24] Randles argues that she became entitled to the $100,000 premium as soon as she executed the promissory note as a guarantor. She contends that the terms of the Compensation Agreement did not require the guarantors to actually perform the guaranty in order to receive compensation. KCB interprets the terms of the Compensation Agreement differently, arguing that it should be construed together with the Memorandum Agreement based on this Court’s holding in Master Builders, Inc. v. Cabbell, 95 N.M. 371, 373, 622 P.2d 276, 278 (Ct. App. 1980) (“[I]n the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together[.]”) (internal quotation marks and citation omitted). Construing the two written agreements together, KCB
contends that performance of the guaranty was required in order to receive compensation and, therefore, Randles’ breach of the Memorandum Agreement precludes her from being entitled to a premium payment under the Compensation Agreement. Alternatively, KCB argues that even if the Compensation Agreement is considered in isolation, Randles breached that agreement because she did not provide a guaranty as contemplated by the agreement based on the word’s usual and customary meaning.

{25} The parties contend that resolution of this issue on appeal is a question of contract interpretation requiring us to determine whether the Compensation Agreement is ambiguous as to what constitutes performance—that is, we must decide whether the terms of the Compensation Agreement provide that Randles and KCB earned the premium upon execution of the promissory note or upon performance of the guaranty in the event of a default. On a somewhat related ground, we understand the parties to also argue that we must decide whether the Compensation Agreement and the Memorandum Agreement should be construed together as one instrument for purposes of determining the respective rights of the parties to the disputed $100,000 premium. This requires us to consider the rule from Master Builders that two or more writings should be construed together if they are part of the same transaction, which Randles refers to as the “joint construction” principle on appeal and which was referred to as “incorporation by reference” in the record below.

{26} We begin our analysis by setting forth the applicable law governing ambiguity in contractual agreements in the context of motions for summary judgment. It is well established that “[w]hether a contractual provision is ambiguous is a question of law, which we review de novo.” McNeill v. Rice Eng’g & Operating, Inc., 2003-NMCA-078, ¶ 13, 133 N.M. 804, 70 P.3d 794 (internal quotation marks and citation omitted). We utilize the following approach in determining whether a contract term is ambiguous:

The standard to be applied in determining whether a contract is subject to equally logical but conflicting interpretations is the same standard applied in a motion for summary judgment. If the evidence presented is so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law, and summary judgment would be proper. On the other hand, if the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists, and summary judgment would not be proper. Rather, the jury must resolve any factual issues presented by the ambiguity. In resolving ambiguity, extrinsic evidence may be admitted to aid the jury in interpreting the intent of the parties. The jury must then decide if the evidence presented supports one interpretation rather than the other.

Id. (alteration omitted) (internal quotation marks and citations omitted). As our Supreme Court held in Mark V, Inc. v. Mellekas, a district court may consider extrinsic evidence in making its preliminary finding of whether a contractual provision is ambiguous. 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). In other words, a district court “may consider the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance in making its threshold determination of whether the contract terms are ambiguous.” McNeill, 2003-NMCA-078, ¶ 14.

{27} In this case, the provision of the Compensation Agreement at issue is the language concerning payment of the premium:

II. COMPENSATION IN EXCHANGE FOR GUARANTY OF NOTE

A. Amount of Compensation Paid to Guarantors. In exchange for the guaranty of the obligations of Speedway under the Note, Speedway agrees to pay the Guarantors the total sum of FOUR HUNDRED NINETY-FIVE THOUSAND AND 00/100 DOLLARS ($495,000), plus all accrued interest under the Note until the Note is paid in full.

{28} On appeal, the parties’ disagreement as to whether the district court actually found the Compensation Agreement ambiguous and specifically the above language that Speedway would pay the premium “in exchange for the guaranty of the obligations of Speedway under the Note.” Although the district court did not enter a specific finding that this language was ambiguous, our review of the hearing indicates that the court considered the parties’ various arguments regarding interpretation of the Compensation Agreement and that the court appeared to agree with KCB’s interpretation that the two agreements should be construed together. The court stated that “under the Compensation Agreement, there was no entitlement to any recovery of those funds because in equity there was a failure to perform under the Memorandum Agreement.” Randles contends that the district court must have found ambiguity in the Compensation Agreement in order to reach the conclusion that a guarantor must have performed the guaranty in order to earn the premium payment. KCB counters that the district court did not need to address ambiguity of the Compensation Agreement because performance was a requirement under the Memorandum Agreement and “all writings that are part of the same transaction are interpreted together.”

{29} Both Randles and KCB assert on appeal that the language of the Compensation Agreement is unambiguous and supports their respective interpretations. We must determine, therefore, whether the Compensation Agreement is reasonably susceptible to the two interpretations argued by the parties; if we determine that it is, then the district court erred in granting summary judgment and we must remand for a fact finder to resolve the ambiguity. See C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991) (“[I]f the court finds ambiguity, the jury (or court as the fact finder in the absence of a jury) resolves the ambiguity as an issue of ultimate fact[].”)

{30} We first consider Randles’ interpretation of the Compensation Agreement. Randles construes the language of the agreement to mean that upon execution of the guaranty on the promissory note alone, the guarantors became automatically entitled to the premium payment. She argues that the text of the agreement contains no express language requiring performance under the Memorandum Agreement as a prerequisite to earning the premium under the Compensation Agreement. Instead, in her view, the guarantors receive the premium regardless of whether there was a default by Speedway. In other words, even if Speedway did not default and the guarantors were thus never required to perform the guaranty under the Memorandum Agreement, Speedway would nevertheless be required to make the premium payment to the guarantors. To support her interpretation, Randles points to extrinsic evidence
in the form of an offer letter from Speedway that pre-dates the Compensation Agreement and provides that the “compensation [i.e., the premium] will be paid at Phase I funding.” Randles appears to argue that the fact compensation would occur at Phase I funding indicates that Speedway would pay the premium even in a no-default scenario where the guaranty was not performed.

{31} KCB counters by arguing that the terms of the Compensation Agreement require performance of the guaranty in two primary ways. First, KCB contends that the Memorandum Agreement was “incorporated” into the Compensation Agreement under the holding of Master Builders. KCB claims that the two writings were part of a single transaction, concern the same subject matter and were executed on the same date and, therefore, they should be read and construed together as a single contract. If the agreements are construed together, KCB contends that performance of the guaranty under the terms of the Memorandum Agreement was necessary before Randles had any legal right to enforce the terms of the Compensation Agreement. KCB further argues that even if there was no explicit requirement of performance in the Compensation Agreement, there was an implicit requirement that each guarantor had a duty to actually honor the guaranty based on the usual and customary meaning of the word “guaranty.” In its view, the only reasonable interpretation of the agreement is “that the guarantors who in fact bore the risk upon Speedway’s default and performed when needed would correspondingly be entitled to recover a proportionate share of any compensation Speedway paid as the reward for that performance.”

{32} Although we recognize that “[t]he mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity,” we conclude that the contractual language at issue here is fairly and reasonably susceptible to the two different constructions put forth by the parties, thereby creating an ambiguity. Levenson v. Mobley, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987); see Mark V, Inc., 114 N.M. at 781, 845 P.2d at 1235 (“If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists.”). We determine that the Compensation Agreement is ambiguous as to what event triggers payment of the premium and susceptible to conflicting interpretations in this regard. On the one hand, the agreement is vague and does not explicitly state under what circumstances, the premium payment would be made. The agreement does not define the word “guaranty” and it is silent as to the means and manner of payment of the premium. Additionally, the agreement contains an integration clause stating that it is the “entire agreement of the parties with respect to the subject matter hereof,” and Speedway’s offer letter may support Randles’ interpretation. On the other hand, it would not be unreasonable to conclude that the two contracts are incorporated and should be construed together because they were signed on the same date by all five guarantors and Speedway and arguably involve the same subject matter and transaction. Moreover, we conclude that several material issues of fact exist regarding the parties’ intent and the circumstances surrounding execution of the two written agreements. Did the parties expect payment of the premium in a no-default scenario or only if there was a default? Under what circumstances did the guarantors sign the agreements? What was Speedway’s intent in obtaining the guaranties? All of these questions remain unresolved on appeal and subject to multiple conflicting inferences, none of which are fully resolved by the evidentiary record. We note that “[a]lthough a written contract need not detail every term, essential terms must be expressly provided or necessarily implied by construction for a court to find the contract unambiguous on its face.” McNeill, 2003-NMCA-078, ¶ 27.

{33} Based on the foregoing, we hold that it was improper for the district court to grant summary judgment at this stage. Rather, the meaning to be assigned to the ambiguous language of the Compensation Agreement and the parties’ intent are questions of fact that should be decided by a fact finder. Therefore, we reverse and remand to the district court for further proceedings on the premium amount.

CONCLUSION

{34} For the reasons set forth above, we reverse the district court’s grant of summary judgment to Defendants KCB and Hanson and the denial of summary judgment to Randles under the Memorandum Agreement. We hold that Randles is entitled to the $100,000 principal under that agreement, and we therefore instruct the district court on remand to enter summary judgment in favor of Randles as to that amount. With respect to the $100,000 premium amount under the Compensation Agreement, we remand for further proceedings consistent with this opinion.

{35} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
TIMOTHY L. GARCIA, Judge
HENNIGHAUSEN & OLSSEN, L.L.P.

is pleased to announce

JEFF GRANDJEAN

has joined the firm

604 North Richardson
P. O. Box 1415
Roswell, New Mexico 88202-1415
Phone 575-624-2463
Fax 575-624-2878
Web site at www.h2olawyers.com

Fred H. Hennighausen** A. J. Olsen* Alvin F. Jones
Robert J. McCrea Ken Wilson

Continuing our dedication to represent businesses and individuals in:
Water Law, Commercial Transactions, Civil Litigation, Contracts,
Real Estate, Family Law, Personal Injury, Wills and Probate,
Agricultural Law, White Collar Crime, Criminal Law,
Employment Defense, Mediation and Arbitration, Adoptions, Guardianships

*Board Recognized New Mexico Water Law Specialist
** of Counsel

WORKERS’ COMPENSATION

Jarner Law Office
is gratefully accepting
Workers’ Compensation Cases

Los Lunas
865-1200
&
Albuquerque
842-0096

Mark D. Jarner

Mark D. Jarner is a Board Recognized Specialist in Workers’ Compensation.

HEIGHTEN YOUR EXPECTATIONS™
Quality Staffing for the Legal Community.

HIGH DESERT LEGAL STAFFING
(505) 881-3449
www.highdesertstaffing.com
Email: info@highdesertstaffing.com

JANE YOHALEM
Appeals Specialist
(505) 988-2826

LINDA S. BLOOM P.A.
BANKRUPTCY LAW
505.764.9600 • lbloom@spinn.net

Manzano Day School
Joy in Learning® Since 1938

Accepting Applications for the 2011-2012 school year
Beginning August 1, 2011 applications will be accepted for the 2012-13 school year
Independent, non-profit pre-kindergarten through grade five
Bus service available from the Westside & NE Heights

1801 Central Avenue NW  |  505-243-6659
www.manzanodayschool.org

Now accepting referrals and consultations in the areas of:
Securities Law
Corporate Law
Real Estate Law
Complex business solutions and reorganizations

Robert Simon: 505-246-8136 • rsimon7@aol.com

Former corporate counsel for
Pier1 Imports, Inc. and Westland Development Co., Inc.
Current Chairman of the Business Law Section - State Bar of New Mexico
THE RIGHT WRITER... can make all the difference.

Jamison Barkley, former New Mexico Supreme Court Law Clerk, is now available for research and writing. Trial briefs, research memoranda, and appellate pleadings.

Call: 505.795.4356
Email: jamisonbarkley@gmail.com

Walter M. Drew
Construction Defects Expert
40 years of experience

Construction-quality disputes between owners/contractors/architects, slip and fall, building inspections, code compliance, cost to repair, standard of care

(505) 982-9797
waltermdrew@gmail.com

No need for another associate
Bespoke lawyering for a new millennium

THE BEZPALKO LAW FIRM
Legal Research and Writing
(505) 341-9353
www.bezpalkolawfirm.com

Criminal Appeals, Motions, Memos
A Writer for the Defense

Todd Hotchkiss
Frechette & Associates, P.C.
Toll Free 1-877-247-8558

The Company You Keep®
www.newyorklife.com

Anthony Gallegos, J.D. LUTCF
Financial Services Professional

Agent - New York Life Insurance Company
805 American Parkway NE, Suite 503
880-2082

MD Independent Review
Christopher Miera MD
AAFP,ABFP,AADEP

IMEs • Record Reviews • Impairment
Disability • Workers Comp.

4263 Montgomery NE #I – 120
Albuquerque, NM 87109
(505) 881-2429 Office
(505)340-5901 Cell

AMAZING PROPERTIES
that are priced right!

High Desert Patio Home
2 beds/2 baths • Best in its Class • $267,000

Downtown ABQ Townhouse
3 beds/2¼ baths • LOW Price-Walk to Courthouses • $219,000

7-Bar/Cibola HS Brick Home
5 beds/2½ baths • Gardner's Dream-RV Pad for Toys • $249,500

www.homes4lawyers.com

Susan C. Dougherty, Associate Broker, Licensed Realtor
(505) 401-5093 • web: www.homes4lawyers.com • email: chefrealtor@me.com

Criminal Appeals, Motions, Memos
A Writer for the Defense

Todd Hotchkiss
Frechette & Associates, P.C.
Toll Free 1-877-247-8558

The Company You Keep®
www.newyorklife.com

Anthony Gallegos, J.D. LUTCF
Financial Services Professional

Agent - New York Life Insurance Company
805 American Parkway NE, Suite 503
880-2082

All advertising must be submitted via e-mail by 4:00 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Wednesday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.

For more advertising information, contact:
Marcia C. Ulibarri at 505.797.6058
or e-mail ads@nmbar.org

No need for another associate
Bespoke lawyering for a new millennium

THE BEZPALKO LAW FIRM
Legal Research and Writing
(505) 341-9353
www.bezpalkolawfirm.com

Anthony Gallegos, J.D. LUTCF
Financial Services Professional

Agent - New York Life Insurance Company
805 American Parkway NE, Suite 503
880-2082

No need for another associate
Bespoke lawyering for a new millennium

THE BEZPALKO LAW FIRM
Legal Research and Writing
(505) 341-9353
www.bezpalkolawfirm.com

Criminal Appeals, Motions, Memos
A Writer for the Defense

Todd Hotchkiss
Frechette & Associates, P.C.
Toll Free 1-877-247-8558

The Company You Keep®
www.newyorklife.com

Anthony Gallegos, J.D. LUTCF
Financial Services Professional

Agent - New York Life Insurance Company
805 American Parkway NE, Suite 503
880-2082

All advertising must be submitted via e-mail by 4:00 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Wednesday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.

For more advertising information, contact:
Marcia C. Ulibarri at 505.797.6058
or e-mail ads@nmbar.org
STOP FORECLOSURE • STOP TAX HARASSMENT
FREE INITIAL CONSULTATION

• CREDITOR AND DEBTOR RIGHTS
• COMMERCIAL LITIGATION
• CHAPTER 7, 11, 12 & 13
• CORPORATE RE-ORGANIZATIONS
• TAX MATTERS
• CREDIT CARD HASSLES

WILLIAM F. DAVIS & ASSOC., P.C.

William F. Davis is a Board Recognized Specialist in Bankruptcy Business Law by the NM Board of Legal Specialization

(505) 243-6129
(1-800-675-6129)
www.nmbankruptcy.com

*Licensed in New Mexico, Texas, Colorado
6709 Academy NE, Ste A, Albuquerque, NM 87109

"William F. Davis & Assoc., P.C. is a debt relief agency helping people file for bankruptcy relief under the bankruptcy code."

The Law Office of

GEORGE (DAVE) GIDDENS, P.C.

Dave Giddens
Patricia A. Bradley
Denise J. Trujillo
Christopher M. Gatton
Ann H. Washburn

Real Estate Transactions, Commercial Litigation,
Bankruptcy Creditors/Debtors, Business Planning
Estate Planning, Probate, Guardianships

Tel: 505.271.1053   Fax: 505.271.4848
www.giddenslaw.com

10400 Academy N.E., Suite 350, Albuquerque, New Mexico 87111

Classified Positions

Notice of Request For Proposals
By Second Judicial District Attorney for Special Prosecutor
Release Date: June 22, 2011

The Second Judicial District Attorney invites written proposals in response to RFP# SAG # 1, from licensed New Mexico attorneys and firms interested in acting as special prosecutor, appointed as a Special Assistant District Attorney pursuant to NMSA 1978 Section 36-1-23.1 (1984), in a currently pending felony criminal case in New Mexico District Court, Second Judicial District. The initial budget for services under this RFP is expected to be $200,000.00. For copies of the RFP with more information and instructions, fax a request to (505) 841-7015, (505) 841-7100, or write: Second Judicial District Attorney, Administrative Services Division, Attn: Jeff Peters, 520 Lomas Blvd., NW, Albuquerque, NM 87102. Responses to this RFP must be received by the DAO by 4:00 p.m. on Wednesday July 13, 2011.

Attorney Positions -
1st Judicial District Attorney

The First Judicial District Attorney’s Office has an immediate position for an experienced prosecutor to handle child sex abuse cases. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to Doug Couleur, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM 87504, or via e-mail to dcouleur@da.state.nm.us.

Associate Attorney Position

Hoffman Kelley, insurance defense firm with emphasis on Workers’ Compensation is seeking an attorney for an entry level position. Applicant must be a graduate of an accredited law school and licensed in NM. Ideal candidate will be a highly motivated self-starter that possesses excellent oral and written communication skills, strong analytical ability and can work independently. In state travel is required. Benefits available including health, dental and 401(k). Email resume to michelle@hoffmankelley.com or fax to Hiring Partner at 800-787-9748.

Assistant District Attorney

Assistant District Attorney wanted for immediate employment with the Ninth Judicial District Attorney’s Office, located in Curry and Roosevelt Counties. Qualifications and salary are pursuant to the New Mexico District Attorneys’ Personnel and Compensation Plan. Please send resume to Kevin Spears - 417 Gidding, Ste 200, Clovis, NM 88101.
Executive Director
New Mexico Legal Aid (NMLA) is seeking an Executive Director to lead this high-quality nonprofit legal services organization which seeks to secure justice for the low income, migrant and Native American populations throughout New Mexico. The successful candidate will demonstrate a passionate commitment to the mission of NMLA, and be an experienced leader, manager, and lawyer advocate. To learn more about NMLA, this position, and how to apply, visit www.nmlegalaid.org, or contact Patricia Pap, consultant to the search, ppap@m-i-e.org. NMLA is an equal opportunity employer and encourages candidates with disabilities, women, persons of color and others who represent distinct linguistic or cultural communities to apply.

Attorney
The civil litigation firm of Atkinson, Thal & Baker, P.C. seeks an attorney with strong academic credentials and 2-10 years experience 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.

Assistant District Attorney
The Fifth Judicial District Attorney’s Office has an immediate position open in our Roswell office to a new or experienced attorney. 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 Attorne ($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.

Attorney Positions - 1st Judicial District Attorney
The First Judicial District Attorney’s Office has an immediate position for a DWI and/or domestic violence prosecutor in Magistrate Court, and an immediate position for an experienced attorney to handle habeas litigation and general felonies. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to Doug Couleur, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM 87504, or via e-mail to dcouleur@da.state.nm.us.

Associate Attorney
Silva & Gonzales, P.C., an AV rated litigation firm, seeks an attorney with three to six years experience, interested in working in a congenial atmosphere on complex civil, employment, personal injury, white collar and wrongful death cases. Strong academic credentials and excellent research and legal writing skills required. All inquiries confidential. Excellent salary and benefits. Please mail resume to Tamara C. Silva at PO Box 100, Albuquerque, New Mexico 87103-0100 or email tcsilva@silvalaw-firm.com. Position available immediately.

Litigation Attorney
Small litigation firm seeks motivated attorney with 5 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.

Special Projects Coordinator (Attorney)
The Border Violence Division of the Attorney General’s Office, an EEO employer, has an opening for an “exempt” (not classified) Special Projects Coordinator term position in the Santa Fe office. The Office is seeking an attorney with the skill to manage administrative and operational elements of the New Mexico Anti-Money Laundering Alliance Initiative. The attorney will assist with project case proceedings. The attorney will ensure program measures are met, collecting timely statistical data for project reporting, presenting progress and success to the project director and the executive board, and having programmatic and supervisory responsibility over the project and its members. The person hired will be required to travel statewide and work extended hours. The employee will conduct training for law enforcement and prosecutors regarding money laundering. A resume and three professional references must be received by 5:00 p.m., July 1, 2011, at the Attorney General’s Office, Attn.: Dennis Martinez, PO Drawer 1508, Santa Fe, NM 87504-1508.

Assistant Attorney General
The Children, Youth and Families Department is seeking to fill a vacant Children’s Court Attorney Senior Position. Salary range is $38,676-86 K annually, depending on experience and qualifications. The attorney will represent the Department in abuse/neglect and termination proceedings and related matters. The ideal candidate will have experience in the practice of law totaling at least four years and New Mexico licensure is required. The position will be housed in Clovis, New Mexico. Benefits include medical, dental, vision, paid vacation, and a retirement package. This position closes on July 15, 2011. For information on submitting applications, please contact Debbie Houston, Legal Administrator, at (575) 742-3923 or deborrha.houston@state.nm.us. To apply for this position go to www.state.nm.us/spo/. The State of New Mexico is an EOE.

Legal Assistant
Bach & Garcia LLC is seeking a part-time experienced legal assistant/secretary. Please send a cover letter and resume via email to george@bachandgarcia.com, or via fax to 505-899-1051. No phone calls please.

Legal Assistant FT
Law firm specializing in residential foreclosure seeks person with minimum one year of legal experience, title knowledge helpful. Fax resume, salary history & requirements to 254-4706 or mail to PO Box 3509, Alb 87190.
Paralegal/Certified Legal Assistant
Seeking highly skilled paralegal/certified legal assistant with 5+ years of experience in civil litigation. Paper intensive complex cases require excellent computer skills, documentation management, and organizational skills. Experience with computerized database software such as Filemaker a plus. Attention to detail and accuracy a must. Fax resume and references to Shapiro Bettinger Chase LLP at 505-888-6465. No phone calls please.

Paralegal / Legal Assistant
Busy and growing Rio Rancho law firm seeks paralegal / legal assistant for corporate, real estate & trial practice. Experience in real estate preferred. Send Resume to P. O. Box 15698, Rio Rancho, NM 87174 or email your Resume to cpe@lsplegal.com. All replies kept confidential.

Legal Secretary
Downtown Albuquerque criminal defense law firm of Billy R. Blackburn is seeking a full time experienced legal secretary. Please send a cover letter and resume via email to Paul@BBBlackburnLaw.com or via fax to 505-243-6279. No phone calls please.

Positions Wanted

Experienced Trial Lawyer
Experienced Trial Lawyer seeks association with established ABQ/SF firm. 31 Yrs experience in civil, criminal and matrimonial litigation. Former prosecutor & criminal defense counsel. Certified matrimonial mediator. Admitted NM & NJ bars. Resume, references & writing sample available. Peter Bruso, 2885 Hwy.14, Madrid, NM 87010; (505) 471-5134; peterbruso@aol.com.

Services

Le Rose Enterprises
(505) 271-2760 Full Charge Bookkeeping Service including payroll; bonded

Cardiology Expert
Board certified, author, editor, med school teaching awards. Long successful experience cardiac cases: malpractice (defense and plaintiff), worker’s comp (State and Federal). NM legal references. mdheartnlegal@yahoo.com

Freelance Paralegal
Paralegal with 20+ years experience in all aspects of civil litigation. Excellent references. (505) 503-6322. Email civilpara@yahoo.com.

Office Space

Law Office For Rent
Law office for rent, share office space with two other attorneys. 8010 Menaul NE. Call Hal Simmons, 299-8999.

Offices for Sale/Lse

For Sale
Las Cruces office building, 4800 square feet, potentially with established law practice. (575) 526-3337.

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

Location Location Location
Must see, perfect for professional law office, 2500 square feet, (8) individual rooms with great reception area, 3 bathrooms, full kitchen/break room, newly renovated within walking distance of all court buildings, on-site parking included. Call now for appointment 362-9711

Miscellaneous

Contribute to the Arts
Award winning playwright, director, producer, and co-owner of Ebeline Films is seeking your tax deductible contribution in launching the seriously funny play; “Your Aura Is Throbbing”. Santa Fe Performing Arts, a 5013C, a non-profit theater will co-produce with Ebeline Films. Please call or email, Eb Lottimer at 505-310-0871/ebalinefilms@aol.com.

Will Search
Searching for will executed by Lynn Anaya after 1994 to 2011. Contact Sarah with any information at 719-821-9379

Let us host your next Video Conference

• $35 per hour
• Reduce travel expenses – Save valuable time

For more information contact Tony Horvat at 505.797.6033 or email thorvat@nmbar.org

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, designed to teach 5th graders about the Constitution, is an event taking shape across the country.

During the week of September 12–16, volunteer attorneys will be partnered with 5th grade teachers in their areas to co-teach lessons on the Constitution. Suggested course materials will be provided as well as pocket-size Constitutions. Each presentation should last 1–1.5 hours.

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. ($30 donation to cover classroom materials is requested.)

☐ I am unable to volunteer my time, but I would like to make a donation. ($___________)

Name____________________________________________________ StateBarID________
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
WE’VE COME A LONG WAY
125 Years of Service to the Profession

2011
Annual Meeting
Bench and Bar Conference
Buffalo Thunder Resort • Santa Fe, New Mexico
July 14–16, 2011

• Developing Documents Using Collaborative Tools
  Andy Adkins

• Mind Mapping
  Britt Lorish

• Android Basics
  Andy Adkins and Britt Lorish

• Google Apps/The Google-Powered Law Office
  Mark Rosch and Carole Levitt

To register visit www.nmbar.org/Attorneys/AM/AM11Registration.html