**Inside This Issue**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of Contents</td>
<td>5</td>
</tr>
<tr>
<td>Sixth Judicial District Court</td>
<td>6</td>
</tr>
<tr>
<td>Judicial Appointment</td>
<td></td>
</tr>
<tr>
<td>Board of Bar Commissioners</td>
<td>7</td>
</tr>
<tr>
<td>Board Vacancy</td>
<td></td>
</tr>
<tr>
<td>State Bar Honors Mock Trial Winners</td>
<td>9</td>
</tr>
<tr>
<td>Bridge the Gap Mentorship Program</td>
<td>9</td>
</tr>
<tr>
<td>2012 Orientation</td>
<td></td>
</tr>
<tr>
<td>2012 State Bar of New Mexico Annual Award Recipients</td>
<td>10</td>
</tr>
<tr>
<td>New Mexico Courts E-Filing Update</td>
<td>11</td>
</tr>
<tr>
<td>Raising the Bar, the Promise of Civility in Our Profession</td>
<td></td>
</tr>
<tr>
<td>Civility in Practice: The Comprehensive Law Movement as a Natural Response, by Joseph Shaub</td>
<td>12</td>
</tr>
<tr>
<td>Rules/Orders</td>
<td></td>
</tr>
<tr>
<td>No. 33,526: In the Matter of the Suspension of Active and Inactive Members of the State Bar of New Mexico for Nonpayment of 2012 Annual Bar License Fee and for Noncompliance With Rules 24-102, 17-203, and 17A-003 NMRA</td>
<td>21</td>
</tr>
<tr>
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<tr>
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<td>22</td>
</tr>
<tr>
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<td>25</td>
</tr>
<tr>
<td>2012-NMCA-049, No. 30,384: State v. Chung</td>
<td>29</td>
</tr>
</tbody>
</table>
Dispute Resolution isn’t child’s play.

David Walther’s doing it better.

Walther Family Law:
Reinventing Family Law

Divorce & Settlement Facilitation
Learn more at waltherfamilylaw.com

6501 Americas Pkwy NE, #820
Albuquerque, NM 505.889.8240
1640 Old Pecos Trail, Suite C
Santa Fe, NM 505.984.0097
LIVE PROGRAMS  STATE BAR CENTER, ALBUQUERQUE

JUNE 22
Reaching for Collaborative Gold: Training for the Advanced Collaborative Practitioner
9:00 a.m.–4:30 p.m.
6.2 G
☐ Standard Fee $219  ☐ NMCPG Member $189

VIDEO REPLAYS  STATE BAR CENTER, ALBUQUERQUE

JUNE 19
Skeptically Determining the Limits of Expert Testimony and Evidence, Part 3
8:00 a.m.
4.7 G, 2.0 EP
☐ $199

JUNE 19
Basics of Real Estate Transactions
8:30 a.m.
4.6 G, 1.0 EP
☐ $189

JULY 3
Indian Law 101
8:00 a.m.
5.9 G
☐ $199

JULY 3
Medicine of Personal Injury
8:30 a.m.
6.0 G
☐ $199

JULY 17
9th Annual Spring Elder Law
9:00 a.m.
3.5 G
☐ $129

JULY 17
2012 Ethics Professionalism: The Disciplinary Process
1:00 p.m.
2.0 EP
☐ $79

NATIONAL SERIES  TELESEMINARS • 11 a.m. MDT

Must register for teleseminars online at www.nmbarcle.org

JUNE 12–13
Business Divorce: Planning for When Businesses Fall Apart, Parts 1 & 2
2.0 G CLE Credits
☐ $129

JUNE 14
Ethics in Beginning and Ending an Attorney-Client Relationship
1.0 G CLE Credit
☐ $67

JUNE 15
Employment Law Torts
1.0 G CLE Credit
☐ $67

JUNE 19-20
2012 Estate, Trust and Gift Tax Planning Update, Parts 1 & 2
2.0 G CLE Credits
☐ $129

JUNE 21-22
Sophisticated Choice of Entity, Parts 1 & 2
2.0 G CLE Credits
☐ $129

JUNE 26-27
Buying/Selling Real Estate, Parts 1 & 2
2.0 G CLE Credits
☐ $129
Sign up as a panel attorney with the Lawyer Referral for the Elderly Program

The New Mexico State Bar Foundation Lawyer Referral for the Elderly Program (LREP) provides legal information, advice, brief services, and referrals to all New Mexico residents 55 years of age and older.

A staff attorney will screen LREP clients and issue referrals on a variety of fee bases (pro bono, reduced fee, deferred fee, and full fee) to private practice attorneys who have signed up to become panel attorneys. You may accept or decline any referral. We will track your pro bono time for all LREP referrals.

**Panel Attorney Sign-up Form**

**Check all counties in which you want referrals**

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<td>Catron</td>
<td>De Baca</td>
<td>Harding</td>
<td>Luna</td>
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<td>Santa Fe</td>
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<td>Cibola</td>
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**Check all areas of law for which you want referrals**

**Administration**
- Adult SSI
- Child SSI
- IDT
- Medicaid
- Medicare
- Social Security
- SSD
- Unemp. Comp.

**Business**
- Contracts
- Corporations
- Securities
- Other Business

**Consumer**
- Garnishments
- Fraud/Misrep.
- Unfair Sales
- Other Consumer

**Employment**
- Contracts/Benefits
- Discrim-Harrassment
- Employee Side
- ERISA
- Labor Unions
- Wrongful Term.

**Estate Planning**
- POA (PRO BONO)
- AHCD/PRO BONO
- TODD
- Probate
- Wills
- Trusts

**Family**
- Adoption
- Divorce Personal
- Custody
- Separation
- Guardianship
- Name Change
- Grandparents Rts.

**Miscellaneous**
- Patents-Copyrights
- Taxes
- Slander/Libel
- Other

**Civil Rights**
- Elderly Expl.
- Mental Health

**Real Estate**
- Title
- Landlord/Tenant
- Foreclosure
- Real Property

**Personal Injury**
- Workers Comp State
- Workers Comp. Fed.

Name ___________________________________________________________________________ NM BAR No ________________
Mailing Address _____________________________________________________________________________________________
City/State/Zip _______________________________________________________________________________________________
Phone _______________________________ Fax _______________________________ Email _______________________________

Referrals for advance health care directives and powers of attorney are always made on a pro bono basis.

For more information, please contact LREP at 505.797.6005; outside of Albuquerque, 1.800.876.6657 or visit [www.nmbar.org/public/lrep.html](http://www.nmbar.org/public/lrep.html). You can also view and fill this form online.

Return this form to LREP
PO Box 92860, Albuquerque, NM 87199-2860
Fax 505.797.6074 or Email apena@nmbar.org
TABLE OF CONTENTS

Notices .......................................................................................................................... 6
State Bar Honors Mock Trial Winners........................................................................ 9
Bridge the Gap Mentorship Program: 2012 Orientation........................................... 9
2012 State Bar of New Mexico Annual Award Recipients.......................................... 10
New Mexico Courts E-Filing Update......................................................................... 11
Raising the Bar, the Promise of Civility in Our Profession
  Civility in Practice: The Comprehensive Law Movement as a Natural Response,
    by Joseph Shaub..................................................................................................... 12
Legal Education Calendar ......................................................................................... 14
Writs of Certiorari ....................................................................................................... 16
List of Court of Appeals’ Opinions............................................................................. 18
Recent Rule-Making Activity...................................................................................... 19
Rules/Orders
  No. 33,526: In the Matter of the Suspension of Active and Inactive Members
    of the State Bar of New Mexico for Nonpayment of 2012 Annual Bar License Fee
    and for Noncompliance With Rules 24-102, 17-203, and 17A-003 NMRA............. 21
Opinions

  From the New Mexico Court of Appeals

  2012-NMCA-047, No. 29,557: State v. Oscar Castro H.......................................... 22
  2012-NMCA-048, No. 30,861: Zuni Public School District, #89 v.
    New Mexico Public Education Department.......................................................... 25
  2012-NMCA-049, No. 30,384: State v. Chung......................................................... 29
Advertising .................................................................................................................. 31

MEETINGS

JUNE

6
Bankruptcy Law Section BOD, noon, USBC

6
Employment and Labor Law BOD,
  noon, State Bar Center

7
Real Property, Trust and Estate Section BOD,
  11 a.m., via teleconference

8
Commission on Professionalism,
  noon, State Bar Center

9
Ethics Advisory Committee,
  10 a.m., State Bar Center

11
Taxation Section BOD,
  noon, via teleconference

12
LPLI Committee, noon, State Bar Center

13
Children’s Law Section BOD,
  noon, Juvenile Justice Center

STATE BAR WORKSHOPS

JUNE

6
Divorce Options Workshop
  6–8 p.m., State Bar Center Albuquerque

7
Landlord/Tenant Workshop
  5:30–7:30 p.m., State Bar Center Albuquerque

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

28
Consumer Debt/Bankruptcy Workshop
  5:30 p.m., Law Office of Kenneth Egan,
    Las Cruces

JULY

11
Divorce Options Workshop
  6–8 p.m., State Bar Center Albuquerque

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

Cover Artist: The paintings of Ed Wyatt portray the dramatic and spiritual quality of the architecture, landscapes, and light of the Southwest (www.edwyatt.com.)
NOTICES

Court News
NM Supreme Court
Board of Legal Specialization
Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant’s qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Employment/Labor Law
Jeffrey L. Lowry

Address Changes
All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
E-mail: attorneyinfochange@nmcourts.gov
Fax: (505) 827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
E-mail: address@nmbar.org
Fax: (505) 797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

Professionalism Tip
With respect to parties, lawyers, jurors and witnesses:
I will be mindful of time schedules of lawyers, parties and witnesses.

Second Judicial District Court
Settlement Week 2012

The 2nd Judicial District Court’s 24th Annual Settlement Week is scheduled for Oct. 22–26. Settlement Week for Family Court has been suspended for 2012 pending revision of the program. Settlement Week for Civil Court is to proceed as usual.

• The deadline for requesting a referral of a civil case to Settlement Week 2012 is June 29.
• If you have been invited to serve as a facilitator during Settlement Week and wish to participate, submit your completed form to Court Alternatives by June 15.

For complete details regarding referral requests, refer to LR2-602, Section C, of the 2nd Judicial District Court’s Local Rules governing the Settlement Facilitation Program. Blank referral forms are available in the Clerk’s Office, Court Alternatives, and online at http://www.nmbar.org/seconddistrictcourt/calt2.html. Note: All referrals should be filled out completely and sent directly to the assigned judge in the case. Include names, addresses and contact numbers of all parties/attorneys involved (especially pro se parties) and any other individuals requiring notice of the settlement facilitation. For more information, call Court Alternatives, 505-841-7412.

Sixth Judicial District Court
Judicial Appointment

Governor Susana Martinez has appointed Jarod Hofacket of Deming as a judge for the 6th Judicial District Court. Hofacket practices law as a solo practitioner specializing in business law, estate planning and real estate transactions. During his time in private practice, Hofacket gained experience as a guardian ad litem in child abuse and neglect cases and as a prosecutor for the City of Deming. Hofacket earned his Bachelor of Business Administration in Economics from New Mexico State University and his law degree from Texas Tech University. He fills the seat that was left vacant by the retirement of Judge Gary M. Jeffreys.

Thirteenth Judicial District Court
Judicial Assignments

Effective May 29, Judge James Lawrence Sanchez has been assigned cases previously assigned to Judge Violette C. Otero, except for Judge Otero’s probate cases. Judge Otero will be assigned to cases previously assigned to Judge John W. Pope. Parties who have not previously exercised their right to challenge or excuse will have ten days from June 13 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

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. Counsel 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.

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<tr>
<th>Court</th>
<th>Exhibits/Tapes</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tbody>
<tr>
<td>1st Judicial District</td>
<td>Exhibits in civil, criminal, children’s court, domestic relations</td>
<td>1970–1998</td>
<td>July 2</td>
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<tr>
<td>County Court</td>
<td>guardianship and conservatorship, and probate cases</td>
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<tr>
<td>505-455-8275</td>
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<tr>
<td>10th Judicial District</td>
<td>Exhibits in domestic relations cases</td>
<td>1985–2011</td>
<td>July 2</td>
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<tr>
<td>County of Quay</td>
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<td>575-461-2764</td>
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STATE BAR NEWS

Attorney Support Group

• June 18, 7:30 a.m.
  Morning groups meet on the third Monday of the month.
• July 2, 5:30 p.m.
  Afternoon groups meet on the first Monday of the month.
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, 505-242-6845.

Support Group for Legal Professionals

• June 13, 5:30 p.m.
  The group meets regularly on the second Wednesday of the month at the Unitarian Universalist Church, 107 West Barcelona Rd., Santa Fe. For information, call Diego Zamora, 505-629-7343.

Board of Bar Commissioners

Board Vacancy

A vacancy exists in the 1st Bar Commissioner District, representing Bernalillo County. The Board will make the appointment at its July 12 meeting to fill the vacancy until the next regular election of commissioners in November. The term will run through Dec. 31, 2012, and applicants should plan to attend the remaining 2012 Board meetings scheduled for Sept. 21 in Albuquerque, a Board retreat in Cloudcroft in October or November, and Dec. 5 in Santa Fe. The unexpired term runs through Dec. 31, 2013, so the candidate will need to run in the 2013 election as well. Active status members with a principal place of practice located in the 1st Bar Commissioner District are eligible to apply. Submit a letter of interest and résumé by June 27 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860, fax to 505-828-3765 or e-mail jconte@nmbar.org.

Committee on Women and the Legal Profession

Accepting Nominations

Reminder: Nominations are now being accepted for the 2012 Justice Pamela B. Minzner Outstanding Advocacy for Women Award. The award recognizes attorneys who have distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. Submit a letter of nomination summarizing the work and efforts of the individual you are recommending to Jennifer Anderson, 201 Third St. NW, Suite 1950, Albuquerque, NM 87102-4388; fax to (505) 764-5486; or email jmandinson@lrlaw.com. The nomination deadline is July 6.

Recognizing Women Who Make a Difference

The Committee on Women and the Legal Profession is hosting a Saturday brunch to discuss and nominate female attorneys who have made a difference in the practice of law for women in New Mexico. The brunch will provide an informal setting to submit the name(s) of attorneys who have contributed to gender equality in the practice of law in New Mexico. The Committee seeks to identify individuals who ensure that equality, diversity and professionalism are the trademarks of the State Bar. The name of any attorney practicing in New Mexico is welcome regardless of the stage of their career or their employer. The Committee also welcomes the names of individuals who have gone against the grain and hired those first women attorneys in New Mexico, setting the bar for all law firms to recognize equality of employment. The Committee will produce an issue in the 2013 New Mexico Lawyer aimed at recognizing the personal sacrifice and commitment of these trail blazing attorneys and inspiring today’s attorneys to continue the work of those women and men. The brunch is from 9:30–11:30 a.m., June 23, at Flying Star, 732 Silver Ave. SW, Albuquerque. R.S.V.P. by June 20 to galindolawfirm@comcast.net.

If you are not able to attend the brunch but wish to submit a nomination, send the name, contact information, and reason for the nomination to Committee Co-chair Ann Washburn, awashburn@giddenslaw.com.

Paralegal Division

Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend Federal Civil Rights Law: An Update and Effect of Litigation Strategy (1.0 general CLE credit) presented by Brendan Egan. The program will be held from noon–1 p.m., June 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 Krista Gians, 505-222-9352. Webcasts:

Ethics Advisory Opinions

Visit the State Bar advisory opinion archive and topical index at http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html for assistance in interpreting the New Mexico Rules of Professional Conduct. Questions about one’s own conduct should be sent to the State Bar Ethics Advisory Committee through the State Bar’s general counsel, rspinello@nmbar.org, or contact the Ethics Helpline, 1-800-326-8155.

Young Lawyers Division

Serving Our Seniors

The Young Lawyers Division seeks volunteers for Serving Our Seniors, a program that 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 9 a.m.–2 p.m., June 23,
NOTICES

at the Moriarty Civic Center. 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. Contact Matt Page by June 18 at 505-401-3442 or mateopage@hotmail.com.

OTHER BARS

NM Criminal Defense Lawyers Association
June CLE
The recent US Supreme Court decisions on plea-bargains, Missouri v. Frye and Lafler v. Cooper, will be the featured ethics hour at the Annual Summer CLE for the New Mexico Criminal Defense Lawyers Association. The June 8 program, Search and Seizure: New Issues and Case Law (5.0 general and 1.0 ethics/professionalism CLE credits) includes a range of topics and such speakers as Matt Coyte, Shannon Kennedy and Marc Lowry, among others. The seminar is followed by a dinner gathering and auction for NMCDLA members and families. For more information, visit www.nmcdla.org or call 505-992-0050.

NM Defense Lawyers Association
Save the Date
The NMDLA will present Part IV of “Power Lessons for the Female Litigator” on Aug. 24. Registration details coming soon. Contact Program Chair Carolyn Ramos, scramos@btblaw.com or nmdefense@nmdla.org, for information.

NM Hispanic Bar Association
Address Change
Mailing Address:
NM Hispanic Bar Association
c/o State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860

Street Address:
5121 Masthead NE, Albuquerque 87109
Fax: Attn: NMHBA, (505) 828-3765
Email: nmhispanicbar@gmail.com

NM Women’s Bar Association
June CLE
The New Mexico Women’s Bar Association will present The Implications and Ethics of Social Media and Your Law Practice, 1:30–5 p.m., June 8, at the State Bar Center. Chief Disciplinary Counsel William Slease will discuss ethical implications and Samantha Hults, assistant city attorney for the City of Albuquerque, will discuss employer and employee rights with social media in the decision to hire, misuse, and monitor. The program is pending approval for 3.0 CLE credits (2.0 ethics/professionalism, 1.0 general). The cost is $80 for WBA members, $100 for non-members. Register online at www.nmbar.org.

UNM
Law Library Hours
To Aug. 19
Building & Circulation
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 8 a.m.–5 p.m.
Sunday noon–8 p.m.
Reference
Monday–Friday 9 a.m.–6 p.m.
Saturday–Sunday Closed
Independence Day, July 4 Closed

OTHER NEWS

NM Anti-Defamation League
CLE Seminar
The New Mexico Anti-Defamation League will present From Classroom to Courtroom...Bullying, Cyberbullying and the Law (3.6 general CLE credits) from 8 a.m.–noon, June 15, at the Marriott Pyramid Hotel, Albuquerque. The program will explore the legal issues and developing case law surrounding bullying and the emerging issue of cyberbullying, including free speech, privacy and liability. The program is co-sponsored by the Jeff Diamond Law Firm, Sutin Thayer and Browne and the Baker Law Firm. The ADL is a leader in developing anti-bullying training, curriculum and resources. For registration and further information access www.adl.org/nmbullying.

NM Legal Aid
Free Legal Clinics
Free legal clinics to qualified low-income New Mexico residents, 301 Gold Avenue SW, Albuquerque:
• Unemployment Insurance Compensation Clinic
  Once a month on Friday morning 9 a.m., June 22
Contact New Mexico Legal Aid to apply and schedule a date to attend one of the clinics. For further information, call 505-243-7871. Also contact the office with legal questions involving housing, consumer and public benefits. Victims of domestic violence or sexual assault can call the hotline, 505-243-4300 or 1-877-974-3400.

2012–2013
Bench & Bar Directory
Distribution begins the first week in June.
Watch the mail for your directory.
STATE BAR HONORS MOCK TRIAL WINNERS

State Bar President Hans Voss hosted attorneys, justices, members of the Board of Bar Commissioners and the Center for Civic Values, State Bar staff, and friends and family at a reception May 23 to honor New Mexico’s winning mock trial teams. Albuquerque Academy (1st place) and Volcano Vista High School (7th place and state champs) made history in the recent 2012 National High School Mock Trial Championship held May 4–5 in Albuquerque. Team members gathered on the patio at the State Bar Center for a taco dinner and speeches by Justice Patricio Serna and Justice Charles Daniels.

Volcano Vista Attorney-Coach David Berlin, Albuquerque Academy Coach Joaquin Sanchez, and Volcano Vista Teacher-Coach Douglas Goodfellow. Berlin commented on the fact that, while the teams became good friends, they look forward to many “combative” years to come.

Justice Patricio Serna called the mock trial teams the “Best of the Best.”

BRIDGE THE GAP MENTORSHIP PROGRAM: 2012 ORIENTATION

New lawyers and their mentors met at the State Bar Center May 23 for orientation in the Bridge the Gap Mentorship Program. With the help of their mentors, new lawyers will learn civility, professionalism, practical skills and work/life balance from an experienced colleague who has “been there.” Terrelene Massey (top), Yolanda Gauna (lower left), and Eddie Garcia (lower right) spend the lunch break with Tom Domme, one of the many veteran attorneys who have volunteered to pay it forward.

Volcano Vista’s Dawn Stewart and Albuquerque Academy’s Joe DeGrande cut the celebration cake.

Justice Charles Daniels said that students who participate in the mock trial program have a “special place in our hearts.” “I wish,” he said, “that Gene Franchini, who did so much for this program, could have been here to witness their outstanding accomplishment.”
CONGRATULATIONS
2012 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

Justice Pamela B. Minzner
Professionalism Award

Henry A. Kelly

Justice Seth D. Montgomery
Distinguished Judicial Service Award

Justice Patricio M. Serna

Robert H. LaFollette Pro Bono Award

Jared G. Kallunki

Distinguished Bar Service Award—Non-Lawyer

Sandra Bauman

Distinguished Bar Service Award—Lawyer

John D. Robb, Jr.

Outstanding Young Lawyer of the Year Award

Robert L. Lucero, Jr.

Outstanding Program Award

United South Broadway Corporation,
Foreclosure Defense Project

The awards will be presented at a special reception at 5 p.m., July 13, during the Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo, New Mexico.

For a detailed list of programs, events and a registration form, see the insert in the April 4 Bar Bulletin or register at http://www.nmbar.org/Attorneys/AM/am2012.html.
NEW MEXICO COURTS E-FILING UPDATE
FILE AND SERVE: NEW DEVELOPMENTS

- On May 17 the Judicial Information System Council of the State Judiciary approved the implementation of e-filing in the 4th and 7th Judicial District courts during August 2012. Preparation for adding these two districts has already started, and the AOC’s Judicial Information Division is now working with Tyler Technologies, the File and Serve provider, to schedule training for court staff and attorneys in the two court districts.

- Staff at the Judicial Information Division are now working with Tyler Technologies to pilot a new “proposed order” module of File and Serve in the 1st Judicial District Court. The existing proposed order process requires attorneys to submit proposed orders (including supporting documents) to judges through email. The current process is somewhat cumbersome, and one of the unintended consequences of using email for proposed orders is that the judiciary’s email system has become the repository for the orders and supporting documents, which isn’t the best use of an email application. The new proposed order module will allow for the orders to be submitted through the usual eFiling process, which will streamline the process and also provide a more transparent and complete record of proposed orders within the File and Serve system. The new proposed order module will be piloted in Santa Fe with three civil judges and a small group of law firms. Any application deficiencies discovered during the pilot will be corrected before the new proposed order process is fully implanted.

Helpful Links and Contacts

• Visit https://ofs.tylerhost.net/nm for Odyssey File and Serve support, training, and contact information.

• The Judicial Information Division (JID) support is available from 8 a.m.–5 p.m., Monday–Friday.
  - JID Help Desk 1-505-476-6911
  - JID Help Desk Email helpdesk@nmcourts.gov

• District Court Email Addresses for Submitting Proposed Documents are listed at:

—From the New Mexico Supreme Court

ETHICS ADVISORY OPINIONS

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

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

Have a quick question? Need a quick answer?
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Bar Bulletin - June 6, 2012 - Volume 51, No. 23
CIVILITY IN PRACTICE: THE COMPREHENSIVE LAW MOVEMENT AS A NATURAL RESPONSE


By Joseph Shaub

Starting around 1960, and continuing through the 1980s, the practice of law was marked by the ascendency of litigation as both the engine of economic growth in the profession and the prevailing ethic. Competent, smart, hard-working and, above all, tough—these were the values which permeated our professional world. Aggressive was good; results (measured in monetary terms) were paramount. Adversarial litigation exploded as a practice form, and with it came the concomitant rise in interpersonally destructive behavior. The oft-referenced rise in incivility among lawyers was both striking in its metastatic growth and often shocking in its brazenness. Isolated voices would express concern about the law’s shift from a “profession” to a “business” and its effect on the well-being of both the lawyers and the clients they served, but, during this time, they remained just that—isolated. But in the late 1980s and early 1990s, these voices coalesced into what law professor Susan Daicoff has called the “Comprehensive Law Movement.”

If there is one driving force behind this movement within our midst, it is the recognition that law should not be an instrument for inflicting avoidable personal (and interpersonal) damage in the service of reaching specific “legal” objectives. Indeed, one theme these approaches share is that when we lower the heat generated by adversarial conflict, we can arrive at more satisfying solutions for our clients. It is about the ascendency of civility in how we conduct our affairs—not just to be “nice” but to achieve effective results. The various “vectors” of this Comprehensive Law Movement include:

• **Collaborative Law**: 20 years ago, Stu Webb, a Minnesota family lawyer, conceived of Collaborative Law. The primary principle is that the last place to resolve disputes between wounded, divorcing individuals is an adversarial litigation process. In Collaborative Law, all professionals and the clients sign a contract abandoning litigated adjudication. Instead, they agree to use neutral professionals to support the individuals in managing their emotional challenges, making parenting decisions, and untangling their financial community.

• **Therapeutic Jurisprudence (TJ)**: In 1990, law professors David Wexler and Bruce Winnick wrote about the various psychologically destructive consequences of legal action. They explicitly joined the social sciences of law and psychology in an effort to enhance the therapeutic possibilities inherent in both legal process and result. Starting in the mental health courts, TJ (the subject of more than 600 articles and 18 books) has significantly impacted such diverse practice areas as workers’ compensation, sexual orientation law, and business negotiation.

• **Restorative Justice (RJ)**: More than 25 years old, RJ was founded in the criminal justice system. It is an avenue for healing between the criminal offender, the victim, and their community. It focuses not on adjudication of guilt and sentencing, but rather upon dialogue, future problem-solving and, critically, the offender’s acceptance of accountability for his/her conduct and the damage which has resulted. RJ seeks to heal the deep rift which arises from the commission of criminal acts.

• **Holistic Justice (HJ)**: About 20 years ago, attorney Bill van Zuyverden founded the now International Alliance of Holistic Lawyers. This seeks to “promote peaceful advocacy…encourage compassion, reconciliation, forgiveness and healing.” HJ emphasizes the spiritual elements of dispute resolution.

• **Humanizing Legal Education**: Among numerous law professors calling for change, Professor Lawrence Krieger authored an influential research report on the destructive impact of the law school environment on the well-being of law students in the early 2000s. He helped found the Section on Balance in Legal Education in the Association of American Law Schools, which seeks to encourage and support avenues for law students to strengthen their resources for dealing with stress and deepen their interpersonal skills.

Back in 1974, we used to talk about law school as training to become “high-speed legal tools.” This led to troubling blindness to a fundamental truth—we, lawyers, are people. Our clients are people, too, with dreams and troubles and a fundamental need for connection. During the last 20 years, our colleagues, by the thousands, have striven to sculpt a new and different profession which is wiser and more civil—not because it is nicer, but because it is a return to our roots as lawyers as counselors and supporters of our clients’ lives and endeavors.

**About the Author**

Joseph Shaub is a collaborative family lawyer, mediator, and licensed marriage and family therapist with offices in Seattle and Bellevue. He is a frequent speaker at the WSBA Family Law Midyear and has been an adjunct instructor at the University of Washington School of Law for more than 10 years. Readers invited to visit his website and blog for further discussions on lawyers’ well-being at www.josephshaub.com.
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<thead>
<tr>
<th>No.</th>
<th>Event Description</th>
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<th>Type</th>
<th>Location</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Arbitration: Basics and Procedure</td>
<td>2.0 G</td>
<td>Teleconference</td>
<td>TRT, Inc.</td>
<td>800-672-6253 <a href="http://trtcle.com">http://trtcle.com</a></td>
</tr>
<tr>
<td>5</td>
<td>2nd Annual Solo and Small Firm Institute</td>
<td>5.0 G, 2.0 EP Video Replay</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Basics of Family Law</td>
<td>6.0 G</td>
<td>Video Replay</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>5–6</td>
<td>2012 Ethics in Civil Litigation Parts 1 and 2</td>
<td>2.0 EP</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>Admissible Evidence: Computer Forensics Investigation</td>
<td>2.0 G</td>
<td>Teleconference</td>
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<td>8</td>
<td>The Implications and Ethics of Social Media and Your Law Practice</td>
<td>1.0 G, 2.0 E/P</td>
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<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>Mediation: Basics and Procedure</td>
<td>2.0 G</td>
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<td>12–13</td>
<td>Business Divorce: Planning for When Businesses Fall Apart, Parts 1 and 2</td>
<td>2.0 G</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>Compatibility of Legal and Judicial Ethics</td>
<td>2.0 EP</td>
<td>Teleconference</td>
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<tr>
<td>14</td>
<td>Ethics in Beginning and Ending an Attorney-Client Relationship</td>
<td>1.0 EP</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>Electronically Stored Information: What’s Under Lock and Key</td>
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<tr>
<td>15</td>
<td>Employment Law Torts</td>
<td>1.0 G</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
</tr>
<tr>
<td>15</td>
<td>From Classroom to Courtroom: Bullying, Cyberbullying and the Law</td>
<td>3.6 G</td>
<td>Albuquerque New Mexico Anti-Defamation League 505-823-2712</td>
<td><a href="http://www.adl.org/nmbullying">www.adl.org/nmbullying</a></td>
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<td>18</td>
<td>Bench and Bar Substance Abuse and Other Misjudgments</td>
<td>2.0 EP</td>
<td>Teleconference</td>
<td>TRT, Inc.</td>
<td>800-672-6253 <a href="http://trtcle.com">http://trtcle.com</a></td>
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<td>19</td>
<td>Skeptically Determining the Limits of Expert Testimony and Evidence, Part 3</td>
<td>4.7 G, 2.0 EP Video Replay</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>19–20</td>
<td>2012 Estate, Trust and Gift Tax Planning Update, Parts 1 and 2</td>
<td>2.0 G</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<tr>
<td>21–22</td>
<td>Sophisticated Choice of Entity, Parts 1 and 2</td>
<td>2.0 G</td>
<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
<td><a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<tr>
<td>22</td>
<td>Reaching for Collaborative Gold: Training for the Advanced Collaborative Practitioner</td>
<td>6.2 G</td>
<td>Albuquerque Center for Legal Education of NMSBF 505-797-6020</td>
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<td>26-27</td>
<td>Buying/Selling Real Estate, Parts 1 and 2</td>
<td>National Teleseminar</td>
<td>2.0 G</td>
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<td>29</td>
<td>Bench and Bar Substance Abuse and Other Misjudgments</td>
<td>Teleconference</td>
<td>2.0 EP</td>
<td>TRT, Inc. 800-672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>3</td>
<td>Indian Law 101</td>
<td>Video Replay</td>
<td>5.9 G</td>
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<td></td>
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<tr>
<td>3</td>
<td>Medicine of Personal Injury</td>
<td>Video Replay</td>
<td>6.0 G</td>
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<td>3</td>
<td>Planning for Your Client’s Biggest Assets: Personal Residences and Vacation Homes</td>
<td>National Teleseminar</td>
<td>1.0 G</td>
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<tr>
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<td>Fiduciary Standards in Business Transactions: Understanding Sources of Liability in Transaction Negotiations and Drafting</td>
<td>National Teleseminar</td>
<td>1.0 G</td>
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<td>12</td>
<td>Ethics and Dishonest Clients</td>
<td>National Teleseminar</td>
<td>1.0 EP</td>
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<td></td>
</tr>
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<td>12–14</td>
<td>2012 Annual Meeting–Bench and Bar Conference</td>
<td>Hyatt Regency Tamaya Resort and Spa Santa Ana Pueblo, New Mexico</td>
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<td>Mediation: Basics and Procedure</td>
<td>Teleconference</td>
<td>2.0 G</td>
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</tr>
<tr>
<td>17</td>
<td>9th Annual Spring Elder Law</td>
<td>Video Replay</td>
<td>3.5 G</td>
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<td></td>
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<tr>
<td>17</td>
<td>Practical Issues in Trust Administration</td>
<td>National Teleseminar</td>
<td>1.0 G</td>
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<td></td>
</tr>
<tr>
<td>17</td>
<td>The Relevance and Risks of Evidence and e-Discovery for Everyday Practice</td>
<td>Video Replay</td>
<td>4.7 G, 2.0 EP</td>
<td>Center for Legal Education of NMSBF 505-797-6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>Bench and Bar Substance Abuse and Other Misjudgments</td>
<td>Teleconference</td>
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<td>30</td>
<td>Electronically Stored Information: What’s Under Lock and Key</td>
<td>Teleconference</td>
<td>2.0 G</td>
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<td>33,624</td>
<td>State v. Aguirre</td>
<td>COA 30,460</td>
<td>05/16/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,536</td>
<td>Groh v. City of Aztec</td>
<td>COA 30,719</td>
<td>05/16/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,623</td>
<td>State v. Valencia</td>
<td>COA 30,625</td>
<td>05/15/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,621</td>
<td>Jacobs v. Nance</td>
<td>12-501</td>
<td>05/10/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,620</td>
<td>Derringer v. Derringer</td>
<td>COA 32,113</td>
<td>05/10/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,560</td>
<td>Rodriguez v. Rodriguez</td>
<td>COA 31,532</td>
<td>05/10/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,617</td>
<td>Thompson v. Hatch</td>
<td>12-501</td>
<td>05/09/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,616</td>
<td>State v. Cherie J.</td>
<td>COA 31,880</td>
<td>05/09/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,585</td>
<td>State v. Miller</td>
<td>12-501</td>
<td>05/09/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,564</td>
<td>State v. Rios</td>
<td>12-501</td>
<td>05/09/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,614</td>
<td>Carmello B. v. CYFD</td>
<td>COA 31,272</td>
<td>05/07/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,611</td>
<td>Bank of America v. Quintana</td>
<td>COA 30,354</td>
<td>05/07/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,615</td>
<td>State v. Martinez</td>
<td>COA 30,318</td>
<td>05/04/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,613</td>
<td>Dion v. Rieser</td>
<td>COA 30,699</td>
<td>05/04/12</td>
<td></td>
<td></td>
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<tr>
<td>33,608</td>
<td>Lopez v. Alvarado</td>
<td>COA 31,426</td>
<td>05/04/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,607</td>
<td>State v. Boudreaux</td>
<td>COA 31,838</td>
<td>05/03/12</td>
<td></td>
<td></td>
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<tr>
<td>33,559</td>
<td>State v. Steward</td>
<td>COA 30,534</td>
<td>05/02/12</td>
<td></td>
<td></td>
</tr>
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<td>33,555</td>
<td>State v. Carlos A.</td>
<td>COA 30,670</td>
<td>05/02/12</td>
<td></td>
<td></td>
</tr>
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<td>33,604</td>
<td>State v. Ramirez</td>
<td>COA 30,205</td>
<td>05/01/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,602</td>
<td>State v. Neal</td>
<td>COA 31,737</td>
<td>05/01/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,603</td>
<td>State v. Ramirez</td>
<td>COA 31,700</td>
<td>04/30/12</td>
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<td></td>
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<td>33,520</td>
<td>State v. Peabody</td>
<td>COA 29,874</td>
<td>04/30/12</td>
<td></td>
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<td>33,599</td>
<td>State v. Nesbit</td>
<td>COA 31,760</td>
<td>04/27/12</td>
<td></td>
<td></td>
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<tr>
<td>33,597</td>
<td>State v. Munoz</td>
<td>COA 31,744</td>
<td>04/27/12</td>
<td></td>
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<tr>
<td>33,596</td>
<td>State v. Perez-Velasco</td>
<td>COA 31,738</td>
<td>04/27/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,594</td>
<td>Fallick v. Montoya</td>
<td>COA 30,172</td>
<td>04/26/12</td>
<td></td>
<td></td>
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<td>33,589</td>
<td>Zhao v. Montoya</td>
<td>COA 30,172</td>
<td>04/26/12</td>
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<tr>
<td>33,592</td>
<td>State v. Montoya</td>
<td>COA 30,470</td>
<td>04/25/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,590</td>
<td>State v. Frayre</td>
<td>COA 30,662</td>
<td>04/25/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,587</td>
<td>State v. Hernandez</td>
<td>12-501</td>
<td>04/24/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,523</td>
<td>Salas v. State</td>
<td>12-501</td>
<td>04/24/12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,579</td>
<td>Avalos v.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,562</td>
<td>N.M. Counseling</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,551</td>
<td>State v. Muniz</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,454</td>
<td>Holly v. State</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>33,494</td>
<td>Trujillo v. Bravo</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Petitions for Writ of Certiorari Filed and Pending:

Certiorari Granted but not yet Submitted to the Court:

(Activities Preparing Briefs)
WRITS OF CERTIORARI

No. 33,384  Cimarron Health Plan v. Starko, Inc.  COA 29,016/27,922  03/30/12
No. 33,487  State v. Martinez  COA 30,580  04/13/12
No. 33,540  State v. Sanders  COA 30,671  05/02/12
No. 33,548  State v. Marquez  COA 30,565  05/02/12
No. 33,553  State v. Baca  COA 31,771  05/02/12
No. 33,565  State v. Ballard  COA 30,187  05/02/12
No. 33,571  State v. Miller  COA 29,244  05/11/12
No. 33,568  State v. Chung  COA 30,384  05/11/12
No. 33,567  State v. Leticia T.  COA 30,664  05/11/12
No. 33,566  State v. Leticia T.  COA 30,664  05/11/12

No. 32,800  State v. Spearman  COA 30,493  11/30/11
No. 33,011  Felts v. CLK Management, Inc.  COA 29,702/30,142  12/12/11
No. 33,013  Felts v. CLK Management, Inc.  COA 29,702/30,142  12/12/11
No. 32,968  Sunnyland Farms, Inc. v. Central N.M. Electric  COA 28,807  12/12/11
No. 32,985  Helena Chemical Co. v. Uribe  COA 29,567  12/13/11
No. 32,987  Helena Chemical Co. v. Uribe  COA 29,567  12/13/11
No. 32,937  SF Pacific Trust v. City of Albuquerque  COA 30,930  12/14/11
No. 32,876  Gonzales v. State  12-501  01/09/12
No. 32,860  State v. Stevens  COA 29,357  01/10/12
No. 32,939  United Nuclear Corp. v. Allstate Insurance Co.  COA 29,092  01/30/12
No. 33,070  Montoya v. City of Albuquerque  COA 29,838  01/30/12
No. 33,023  State v. Gurule  COA 29,734  01/30/12
No. 33,135  Horne v. Los Alamos National Security  COA 29,822  03/13/12
No. 32,943  State v. Hall  COA 29,138  03/26/12
No. 32,605  State v. Franco  COA 30,028  03/28/12
No. 33,083  Martinez v. Department of Transportation  COA 28,661  04/09/12
No. 32,976  State v. Olson  COA 29,010  04/09/12
No. 33,057  State v. Turrietta  COA 29,561  04/30/12
No. 33,166  Christus St. Vincent Reg. Med. Ctr. v. Duarte-Afara  COA 30,343  05/14/12
No. 33,331  Straussberg v. Laurel Healthcare  COA 29,238  05/14/12
No. 33,075  State v. Marchiondo  COA 30,029  05/15/12
No. 33,216  Flores v. Henderson  COA 31,295  05/15/12
No. 33,136  State v. Bent  COA 29,227  05/16/12
No. 33,077  State v. Gonzales  COA 28,700  05/16/11

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:
(Submission Date = date of oral argument or briefs-only submission)

No. 32,524  Republican Party v. Taxation and Revenue Dept.  COA 28,292  03/14/11
No. 32,534  Bustos v. Hyundai Motor Co.  COA 28,240  04/11/11
No. 32,695  Diamond v. Diamond  COA 30,009/30,135  05/10/11
No. 32,690  Joey P. v. Alderman-Cave Milling & Grain Co.  COA 29,120  05/11/11
No. 32,756  Lenscrafters, Inc. v. Kehoe  COA 28,145  07/18/11
No. 32,291  State v. Torres  COA 29,603  08/16/11
No. 32,589  State v. Ordunez  COA 28,297  08/31/11
No. 32,776  Sais v. N.M. Department of Corrections  COA 30,785  09/12/11
No. 32,707  Smith LLC v. Synergy Operating LLC  COA 28,248/28,263  09/12/11
No. 32,789  Chatterjee v. King  COA 29,823  09/12/11
No. 32,696  Herbison v. Chase Bank  COA 30,630  09/13/11
No. 32,483  State v. Jackson  COA 28,657  09/28/11
No. 32,697  State v. Amaya  COA 28,347  09/28/11
No. 32,868  Nunez v. Armstrong General Contractors  COA 29,522  10/11/11
No. 32,844  Gonzalez v. Performance Paint, Inc.  COA 29,629  10/11/11
No. 32,510  State v. Swick  COA 28,316  10/12/11
No. 32,713  Bounds v. D’Antonio  COA 28,860  10/13/11
No. 32,717  N.M. Farm and Livestock Bureau v. D’Antonio  COA 28,860  10/13/11
No. 32,942  Schuster v. Taxation and Revenue Dept.  COA 30,023  11/14/11
No. 32,704  Tri-State v. State Engineer  COA 27,802  11/14/11
No. 32,915  State v. Collier  COA 29,805  11/15/11
No. 32,944  Freedom C. v. Brian D.  COA 30,041  11/15/11
No. 32,430  State v. Muqqiddin  COA 28,474  11/16/11
No. 32,632  State v. Dominguez-Meraz  COA 30,382  11/16/11
No. 32,941  Titus v. City of Albuquerque  COA 29,461  11/16/11

PETITION FOR WRIT OF CERTIORARI DENIED:

No. 33,477  Lopez v. Ahlgrim  12-501  05/17/12
No. 33,288  Blake v. State  12-501  05/17/12
No. 33,593  State v. Natoni  COA 30,597  05/16/12
No. 33,546  State v. Daprano  COA 29,433  05/16/12
No. 33,588  State v. Yarbrough  COA 30,251  05/15/12
No. 33,586  State v. Guerra  COA 29,954  05/15/12
No. 33,584  State v. Carlows Battle  COA 31,783  05/15/12
No. 33,582  State v. Harrison  COA 31,681  05/15/12
No. 33,499  Parmentier v. Lopez  12-501  05/15/12
No. 33,581  State v. Pyler  COA 31,652  05/14/12
No. 33,580  State v. Gutierrez  COA 31,794  05/14/12
No. 33,578  State v. Windsor  COA 29,440  05/14/12
No. 33,503  State v. Blake  COA 29,755  05/14/12
## Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court</th>
<th>Case Description</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>31247</td>
<td>5th Jud Dist Eddy</td>
<td>CR-10-74, STATE v S ORQUIZ (affirm in part and remand)</td>
<td>5/21/2012</td>
</tr>
<tr>
<td>30281</td>
<td>9th Jud Dist Curry</td>
<td>CR-08-99, STATE v N TRUJILLO (reverse and remand)</td>
<td>5/24/2012</td>
</tr>
</tbody>
</table>

## Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court</th>
<th>Case Description</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>31799</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-09-1166, STATE v O REZA (affirm)</td>
<td>5/21/2012</td>
</tr>
<tr>
<td>31857</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-95-1311, STATE v K JUDD (affirm)</td>
<td>5/21/2012</td>
</tr>
<tr>
<td>31931</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-08-196, STATE v A READ (affirm)</td>
<td>5/21/2012</td>
</tr>
<tr>
<td>31981</td>
<td>11th Jud Dist San Juan</td>
<td>CR-11-49, STATE v T KNIGHT (dismiss)</td>
<td>5/21/2012</td>
</tr>
<tr>
<td>31375</td>
<td>2nd Jud Dist Bernalillo</td>
<td>DM-02-3342, M MANG v K LUCERO (affirm)</td>
<td>5/22/2012</td>
</tr>
<tr>
<td>31902</td>
<td>7th Jud Dist Sierra</td>
<td>CV-09-75, G LEE v CARAWAY DRILLING (affirm)</td>
<td>5/22/2012</td>
</tr>
<tr>
<td>31927</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-11-1386, M WELLINGTON v MORTGAGE ELECTRONIC (affirm)</td>
<td>5/22/2012</td>
</tr>
<tr>
<td>31939</td>
<td>1st Jud Dist Santa Fe</td>
<td>CV-10-3037, CENTURY BANK v ARDYARD (dismiss)</td>
<td>5/22/2012</td>
</tr>
<tr>
<td>30079</td>
<td>2nd Jud Dist Bernalillo</td>
<td>DM-07-3650, H SALAZAR v A SALAZAR (reverse and remand)</td>
<td>5/23/2012</td>
</tr>
<tr>
<td>31881</td>
<td>5th Jud Dist Lea</td>
<td>JQ-10-12, CYFD v JOE R (affirm)</td>
<td>5/23/2012</td>
</tr>
<tr>
<td>31424</td>
<td>1st Jud Dist Rio Arriba</td>
<td>CV-09-594, CV-11-20, VANDERBILT v P VALDEZ (affirm)</td>
<td>5/24/2012</td>
</tr>
</tbody>
</table>

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

http://coa.nmcourts.gov/documents/index.htm
RECENT RULE-MAKING ACTIVITY

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

EFFECTIVE JUNE 6, 2012

PENDING PROPOSED RULE CHANGES
OPEN FOR COMMENT:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>12-210</td>
<td>Calendar assignments</td>
<td>06/06/12</td>
</tr>
<tr>
<td>12-211</td>
<td>Transcript of proceedings</td>
<td>06/06/12</td>
</tr>
</tbody>
</table>

RECENTLY APPROVED RULE CHANGES
SINCE RELEASE OF 2012 NMRA:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>11-403</td>
<td>Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-404</td>
<td>Character evidence; crimes or other acts</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-405</td>
<td>Methods of proving character</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-406</td>
<td>Habit; routine practice</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-407</td>
<td>Subsequent remedial measures</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-408</td>
<td>Compromise offers and negotiations</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-409</td>
<td>Offers to pay medical and similar expenses</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-410</td>
<td>Pleas, plea discussions, and related statements</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-411</td>
<td>Liability insurance</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-412</td>
<td>Sex crimes; testimony; limitations; in camera hearing</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-413</td>
<td>Use of evidence obtained under immunity order precluded</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-601</td>
<td>Competency to testify in general</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-602</td>
<td>Need for personal knowledge</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-603</td>
<td>Oath or affirmation to testify truthfully</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-604</td>
<td>Interpreter</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-605</td>
<td>Judge’s competency as a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-606</td>
<td>Juror’s competency as a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-607</td>
<td>Who may impeach a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-608</td>
<td>A witness’s character for truthfulness or untruthfulness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-609</td>
<td>Impeachment by evidence of a criminal conviction</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-610</td>
<td>Religious beliefs or opinions</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-611</td>
<td>Mode or order of examining witnesses and presenting evidence</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-612</td>
<td>Writing used to refresh a witness’s memory</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-613</td>
<td>Witness’s prior statement</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-614</td>
<td>Court’s calling or examining a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-615</td>
<td>Excluding witnesses</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-701</td>
<td>Opinion testimony by law witnesses</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-702</td>
<td>Testimony by expert witnesses</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-703</td>
<td>Bases of an expert’s opinion testimony</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-704</td>
<td>Opinion on an ultimate issue</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-705</td>
<td>Disclosing the facts or data underlying an expert’s opinion</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-706</td>
<td>Court-appointed expert witnesses</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-707</td>
<td>Polygraph examinations</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-801</td>
<td>Definitions that apply to this article; exclusions from hearsay</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-802</td>
<td>The rule against hearsay</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-803</td>
<td>Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-804</td>
<td>Exceptions to the rule against hearsay—when the declarant is unavailable as a witness</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-805</td>
<td>Hearsay within hearsay</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-806</td>
<td>Attacking and supporting the declarant’s credibility</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-807</td>
<td>Residual exception</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-901</td>
<td>Requirement of authentication or identification</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-902</td>
<td>Evidence that is self-authenticating</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-903</td>
<td>Subscribing witness’ testimony</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-1001</td>
<td>Definitions that apply to this article</td>
<td>06/16/12</td>
</tr>
<tr>
<td>11-1002</td>
<td>Requirement of the original</td>
<td>06/16/12</td>
</tr>
</tbody>
</table>
RULE-MAKING ACTIVITY

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 MexicoCompilation Commission’s website at http://www.nmcompcomm.us.
RULES/ORDERS
From the New Mexico Supreme Court

No. 33,526

IN THE MATTER OF THE SUSPENSION OF ACTIVE AND INACTIVE MEMBERS OF THE STATE BAR OF NEW MEXICO FOR NONPAYMENT OF 2012 ANNUAL BAR LICENSE FEE AND FOR NONCOMPLIANCE WITH RULES 24-102, 17-203, AND 17A-003 NMRA

ORDER OF SUSPENSION

WHEREAS, this matter came on for consideration by the Court upon certificate filed by the Board of Commissioners of the State Bar of New Mexico that certain members of the State Bar of New Mexico are delinquent in the payment of annual bar license fees pursuant to Rule 24-102 NMRA, annual disciplinary fee assessment pursuant to Rule 17-203 NMRA, client protection fund fee pursuant to Rule 17A-003 NMRA, and/or the late penalty payment pursuant to Rule 24-102 NMRA for the year 2012;

WHEREAS, the Clerk of this Court, on April 26, 2012, issued an order to Show Cause having elapsed, and full payment of delinquent fees not having been tendered, and the Court being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Patricio M. Serna, Justice Richard C. Bosson, Justice Edward L. Chávez, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the following named attorneys ARE SUSPENDED FROM THE PRACTICE OF LAW in the courts of this state by reason of nonpayment of said annual assessment fees for the year 2012; and

IT IS FURTHER ORDERED that the Clerk of this Court shall change the official roll of attorneys to indicate the status of suspension for the attorneys listed below, and that notice thereof be given to each judge in the state of New Mexico and be published on the Judiciary’s web site (www.nmsupremecourt.nmcourts.gov) and in the Bar Bulletin.

Mario Alfaro, Jr.
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Or
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El Paso, TX 79901

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Or
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Erin Nicole Thompson
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Albuquerque, NM 87107-2977

Gregory Mark Wade
616 N. Washington Street
Alexandria, VA 22314-1914

Boaz AharonWeinstein
1285 Avenue of The Americas
New York, NY 10019-6031

IT IS SO ORDERED.

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 16th day of May, 2012.

__________________________________________________
Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico
OPINION

JONATHAN B. SUTIN, Judge

The issues primarily revolve around Rule 10-243(A) NMRA, which establishes a thirty-day time limit under the Children’s Court Rules within which an adjudicatory hearing must be commenced. Rule 10-243(A) lists nine events, of which the latest in time triggers the thirty-day time period. Of the nine possible triggering events, two are pertinent in the children’s court proceedings and in the appellate briefs. Those are:

1. The date the petition is served on the child [and]
2. If a notice of intent has been filed alleging the child is a “youthful offender”... the return of an indictment or the filing of a bind over order that does not include a “youthful offender” offense.

On March 16, 2009, the State filed a delinquency petition against Child, who was in detention at the time, alleging that Child had committed nine delinquent acts. Two of those delinquent acts fall within the category of “youthful offender” offenses and seven fall within the category of “delinquent offender” offenses. NMSA 1978, § 32A-2-3(I)(1)(j), (k) (2005) (amended 2009) (current version at Section 32A-2-3(I)(1)(j), (k)); § 32A-2-3(C). Child was also served with the petition on March 16, and this triggered the thirty-day time period within which to commence an adjudicatory hearing under Rule 10-243(A)(1).

On March 23, 2009, the State filed a notice of intent to seek adult sanctions, stating that it was “for the crimes alleged in [the delinquency petition] as those charges fall within the definition of a ‘youthful offender[,]’ pursuant to NMSA 1978, Section 32A-2-3(I)[] pursuant to NMSA 1978, Section 32A-2-3(I)[] requiring the State to proceed within fifteen days, on or before April 7, 2009, with either a preliminary hearing or a grand jury hearing. See Rule 10-213(B) NMRA (stating that “within fifteen . . . days after a notice of intent to invoke an adult sentence is filed, a preliminary hearing will be conducted by the court unless the case is presented to a grand jury”).

On April 3, 2009, the State presented all of the delinquent acts listed in the delinquency petition to a grand jury. The grand jury found no probable cause and returned a no-bill on all of the delinquent acts—that is, on the seven delinquent offender offenses, as well as on the two youthful offender offenses.

Following the no-bill, on April 13, 2009, the State moved pursuant to Rule 5-604(C) NMRA, a District Court Rule rather than the applicable Children’s Court...
Rule, for a ninety-day extension of time for commencement of trial. In its motion, the State explained that the time limit for the trial would expire on April 17, 2009, by which time the children’s court would be unable to accommodate a jury trial setting. By referring to an April 17, 2009, deadline, the trial the State was referring to was clearly the adjudicatory hearing and the time limit was clearly that in Rule 10-243(A). The motion did not mention the grand jury proceeding, did not mention any particular delinquent acts, and mistakenly relied on a District Court Rule instead of a Children’s Court Rule.

(7) In a responsive motion filed April 14, 2009, Child requested that the court deny the State’s motion for an extension of time, pointing to the State’s failure to provide any good cause basis for the extension and noting that the State’s request was erroneously made pursuant to a District Court Rule rather than the Children’s Court Rule that allows only a sixty-day extension. See Rule 10-243(D) (stating that “[f]or good cause shown, the time for commencement of an adjudicatory hearing may be extended by the children’s court judge provided that the aggregate of all extensions granted by the children’s court judge may not exceed sixty . . . days”). Child also calculated April 16, not April 17, to be the date on which “the case [was] set to expire[.]” In addition, Child noted other instances of mistakes or failures on the part of the State and the children’s court that occurred during the proceedings. Child’s response made no mention of the no-bill.

(8) The court did not hold the adjudicatory hearing on April 17, 2009, but instead entertained pending motions. At that motions hearing on April 17, Child’s counsel argued a litany of mistakes and failures on the part of the prosecutor that occurred during the proceedings in the children’s court. Unpersuaded by the State’s arguments and explanations, the court dismissed the delinquency petition with prejudice, stating: “This matter will be dismissed with prejudice. . . . The timeliness of activity that one must pursue to facilitate compliance with the Rules of Criminal Procedure need[s] to be applicable to everyone at all times[,] not selectively.” Presumably, the court’s ruling was based, at least in part, on a view based on defense counsel’s argument that the State failed to comply with the thirty-day time limit under Rule 10-243. Inexplicably, in the hearing, neither the lawyers nor the court discussed the no-bill, and the court did not mention the no-bill in its dismissal order.

(9) In the State’s appeal of the dismissal, the State represented in its brief in chief that the grand jury was only presented with the two youthful offender offenses and that the no-bill had no effect on the delinquent offender offenses. The State expressly asserted that the issue on appeal was whether Rule 10-243(A)(9)”provides for [restating] the time [limitation to hold the adjudicatory hearing] when the grand jury is presented only with the youthful offender offenses and, therefore, does not make any findings regarding the delinquent offender offenses alleged in the delinquency petition.”

(10) In its brief in chief, the State requested this Court to reverse the children’s court’s dismissal of the delinquency petition and to remand for an adjudicatory hearing on the delinquent offender offenses alleged in the petition. As to the youthful offender offenses, in a footnote the State indicated that “the children’s court attorney could file a new delinquency petition, a notice of intent to invoke an adult sentence, and proceed with a preliminary hearing on the youthful offender offenses[,]” citing State v. Isaac M., 2001-NMCA-088, ¶¶ 1, 8, 131 N.M. 235, 34 P.3d 624.

(11) Because the State’s Rule 10-243(A)(9) argument on appeal was based on only the two youthful offender offenses having been presented to, considered by, and no-billed by the grand jury, and because the documentary record presented to us by the parties did not show what delinquent acts were presented to, considered by, and no-billed by the grand jury, this Court obtained pertinent grand jury proceeding records from the district court clerk. The records revealed that the grand jury was, in fact, presented with all of the delinquent acts listed in the delinquency petition, which included the delinquent offender offenses and the two youthful offender offenses. Further, the records revealed that the grand jury returned a no-bill on all of the delinquent acts, which included the delinquent offender offenses and the youthful offender offenses. Thus, it appeared to this Court that the State’s argument on appeal may have been based on a mistake or misunderstanding as to what was presented to and determined by the grand jury.

(12) Accordingly, we issued an order for further briefing in which the parties were to show “why this Court should affirm or should not affirm the [children’s] court’s dismissal of the delinquency petition on the ground that the grand jury was presented with, addressed, and returned a no-bill on all of the charges alleged in the delinquency petition.” In its supplemental brief, after acknowledging that the grand jury was presented with and returned a no-bill on all of the offenses charged in the delinquency petition, the State asserted that the no-bill acted as a dismissal of all of the charges without prejudice and that the no-bill “prevent[ed] the State from proceeding further in the case.” The State requested that we “reverse the [children’s] court’s dismissal of the delinquency petition with prejudice under Rule 10-243(A) . . . , and order the court to enter dismissal without prejudice pursuant to the grand jury’s [no-bill].” Because the parties’ supplemental briefs did not, in our view, provide the analyses and answers we had hoped for, we held oral argument.

DISCUSSION

(13) We address (1) whether the grand jury’s no-bill on all of the charges in the petition acted as a dismissal of those charges without prejudice and, if so, (2) whether, following the return of a no-bill, the children’s court erred in dismissing the petition with prejudice based on its “timeliness of activity” ground. These issues are legal issues that we review de novo. State v. Garcia, 2005-NMCA-042, ¶ 10, 137 N.M. 315, 110 P.3d 531.

(14) Under Rule 10-243(A)(1), the thirty days within which to commence an adjudicatory hearing started to run on March 16, 2009, the date that Child was served with the delinquency petition. On April 3, 2009, well within the thirty-day time limit, the grand jury returned a no-bill on all of the charges in the delinquency petition. The State contends, and we agree, that the no-bill was tantamount to a dismissal of all of the charges without prejudice. See Isaac M., 2001-NMCA-088, ¶ 1 (holding that following a no-bill by the grand jury, the prosecution may proceed by information). Thus, the delinquency petition charges are to be considered as no longer pending against Child at the time of the April 17, 2009, hearing. The children’s court therefore lacked any procedural basis on which to dismiss the petition with prejudice based on Rule 10-243(A) or any other timeliness ground to which the court may have vaguely referred. There existed nothing further to try or to adjudicate in an adjudicatory hearing in the existing case. In the absence of pending charges, the Children’s Court Rules, including Rule 10-243, were no longer in play.

(15) We hold that the no-bill required dismissal without prejudice of all of the
charges in the delinquency petition effectively terminating the case within the thirty-day deadline in Rule 10-243(A)(1). The court lacked procedural authority to dismiss the petition with prejudice, and it erred in dismissing on the ground that the Rule 10-243(A) time deadline was violated.2

CONCLUSION

{16} We reverse and remand to the children’s court for entry of an order dismissing all of the charges in the delinquency petition without prejudice.

{17} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge
CYNTHIA A. FRY, Judge

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2 The children’s court should have been aware or at least made aware of the no-bill and should have addressed its effect on the court proceedings. Were it to have done so, it should have entered an order dismissing all of the charges in the petition without prejudice pursuant to the no-bill.
Certiorari Denied, April 12, 2012, No. 33,490

From the New Mexico Court of Appeals

Opinion Number: 2012-NMCA-048

Topic Index:
Appeal and Error: Standard of Review
Civil Procedure: Motion to Dismiss
Constitutional Law: Federalism; and States’ Rights
Government: Education and Schools; Public Funds; and Sovereign Immunity
Jurisdiction: Federal Jurisdiction
Remedies: Writ of Mandamus
Torts: Tort Claims Act

ZUNI PUBLIC SCHOOL DISTRICT, #89, Petitioner-Appellant,
versus
STATE OF NEW MEXICO PUBLIC EDUCATION DEPARTMENT and VERONICA GARcia, SECRETARY OF EDUCATION, Respondents-Appellants.
No. 30,861(filed February 6, 2012)

APPEAL FROM THE DISTRICT COURT OF McKinley COUNTY
ROBERT A. ARAGON, District Judge

C. BRYANT ROGERS
RONALD J. VANAMBERG
VANAMBERG, ROGERS,
YEPA, ABEITA & GOMEZ, L.L.P.
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Santa Fe, New Mexico

OPINION

CELIA FOY CASTILLO, CHIEF JUDGE

[1] The sole question before us is whether sovereign immunity bars Zuni Public School District #89 (Zuni) from bringing suit against the New Mexico Public Education Department and its secretary (State) for reimbursement of funds that Zuni claims were wrongfully deducted from its portion of state funding for public schools. Deciding that such cause of action does not violate the doctrine of sovereign immunity, we affirm the district court’s denial of the State’s motion to dismiss on that ground.

BACKGROUND

[2] Zuni, a New Mexico Public School District as defined in NMSA 1978, Section 22-1-2(R) (2010), filed a petition for writ of mandamus, declaratory relief, and injunctive relief in district court. The petition seeks to compel the State to reimburse Zuni for funds withheld by the State before the federal-equalization certification was issued by the federal government on April 26, 2010. The State filed a motion to dismiss Zuni’s complaint based on a claim of sovereign immunity and other grounds. The district court denied the motion but allowed for interlocutory appeal. This Court considered the State’s application for interlocutory appeal as one for writ of error and granted the application only on the issue of sovereign immunity. Before we begin our discussion of the question regarding sovereign immunity, we provide a brief explanation of the New Mexico public school funding formula.


[4] The implementation of the formula is guided by both state and federal statutes. Federal statute 20 U.S.C. § 7709 (2002) governs the provision of Federal Impact Aid to local school districts affected by federal activities that decrease the school districts’ tax base. Land, such as military bases and Indian reservations, are exempt from local property taxes—the taxes that serve as the main source of school funding. To address this potential shortfall in funding, Federal Impact Aid provides revenue to supplement the budgets of schools so affected. Id. However, that revenue may be offset by states when distributing state monies in order to equalize funding throughout the state and provide fairness to all local districts. 20 U.S.C. § 7709; § 22-8-25. States may offset federal revenue going to local districts as long as the state is granted certification to do so by the federal Department of Education (DOE). Id. This funding system, and New Mexico’s implementation of it, was endorsed by the United States Supreme Court in Zuni Public School District No. 89 v. Department of Education, 550 U.S. 81, 100 (2007). In effect, the State guarantees each school district the funds needed to meet its school operational funding scheme is the

[5] The Zuni school district receives Federal Impact Aid each year. However, 75 percent of that money is offset by a
matching reduction in state revenues to Zuni, provided that the DOE Secretary grants certification to the State before the end of the fiscal year, which is June 30. In this dispute, Zuni objects to the fact that the State implemented a pro-rated 75 percent reduction in state revenues in each monthly installment starting at the beginning of the fiscal year, in July 2009, despite the fact that the State did not receive federal certification until April 26, 2010. Zuni does not challenge the State’s ability to implement the 75 percent offset after receiving certification; Zuni instead argues that the State was prohibited from implementing the offset for those first ten months of the fiscal year before the April certification.

{6} The State’s position is that certification may be granted at any time before the end of the fiscal year on June 30; that monthly allocations are merely estimates throughout the fiscal year; and that funding figures are not final until after certification is granted and the school districts modify their budgets. Thus, according to the State, everything even out by the end of the fiscal year, and no district receives less money than it needs to operate. In fiscal year 2009-10, the year in question, Zuni had an operating budget of $10.5 million and was calculated to receive $6.2 million in Federal Impact Aid. The State, though, offset that latter amount by 75 percent, or $4.6 million in withheld state funding. Zuni challenges the offset and argues that it should be able to pursue its suit in New Mexico district court.

{7} On appeal, the State essentially makes two arguments. First, it contends that Zuni’s claim is based on a federal statute and that, therefore, the State retains constitutional sovereign immunity from suit in its own state courts. Second, the State argues that Zuni’s action for money damages is barred by the State’s common law sovereign immunity. We address each argument below.

**DISCUSSION**

**A. Standard of Review**

{8} “We issue writs of error to review immunity from suit cases because we consider them collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial.” *Campos de Suenos, Ltd. v. Cnty. of Bernalillo, 2001-NMCA-043, ¶ 15, 130 N.M. 563, 28 P.3d 1104 (alteration in original) (internal quotation marks and citation omitted). “We review de novo the validity of a claim of sovereign immunity.” *State ex rel. San Miguel BCC v. Williams, 2007-NMCA-036, ¶ 20, 141 N.M. 356, 155 P.3d 761. “Mandamus is appropriate to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy[,] and adequate remedy in the ordinary course of law.” *West v. San Jon Bd. of Educ., 2003-NMCA-130, ¶ 9, 134 N.M. 498, 79 P.3d 842 (internal quotation marks and citation omitted). A motion to dismiss pursuant to Rule 1-012(B)(6) NMRA tests the legal sufficiency of the complaint. *Howse v. Roswell Indep. Sch. Dist., 2008-NMCA-095, ¶ 14, 144 N.M. 502, 188 P.3d 1253. The review of an order granting or denying a motion to dismiss is a question of law that we review de novo. *Garcia v. Dorsey, 2006-NMSC-052, ¶ 13, 140 N.M. 746, 149 P.3d 62.

**B. State vs. Federal Claim**

{9} Zuni asserts that its petition is based on the state funding statute. The State, on the other hand, contends that Zuni’s petition is grounded in the Federal Impact Aid statute. The distinction is key to resolving whether the State is shielded from this action by sovereign immunity.


**I. State’s Argument**

The State argues that the Constitution would not strip the States of sovereign immunity. (*Cockrell v. Bd. of Regents of N.M. State Univ., 2002-NMSC-009, ¶ 7, 132 N.M. 156, 45 P.3d 876. Thus, if this action is based on 20 U.S.C. § 7709, as the State claims, it would be barred under the doctrine of constitutional sovereign immunity.

{11} As United States Supreme Court Justice Cardozo said: “Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit.” *Gully v. First Nat’l Bank, 299 U.S. 109, 115 (1936). An action brought under state statutes will not implicate original federal jurisdiction “unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is ‘really’ one of federal law.” *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for So. Cal., 463 U.S. 1, 13 (1983). A complaint otherwise based on state law might still “arise under” federal law “if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.” *Id. An action is not converted into a federal claim merely by the exercise of a federal law defense. *See Vaden v. Discover Bank, 556 U.S. 49, 60, 129 S. Ct. 1262, 1272 (2009); *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672-73 (1950).

{12} Even if a plaintiff, in its complaint, anticipates a federal defense, that is not enough to hand jurisdiction to the federal courts under the assertion that the suit arises under the laws of the United States. *See Louisville & Nashville R.R. Co. v. Motley, 211 U.S. 149, 152 (1908). For example, when consumers brought suit against a pharmaceutical company alleging that its drug caused birth defects, basing the complaint in part on an alleged violation of the federal Food, Drug, and Cosmetic Act, the United States Supreme Court concluded that no federal question was present. *Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 804-05 (1986). The Court endorsed the rule of the “well-pleaded complaint” and determined that the action in question arose under state law. *Id. at 808. The Court in *Merrell Dow relied on this earlier determination:

**II. Federal’s Argument**

The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the federal district court has jurisdiction under this provision.
state statute or a federal statute. The Court in *Merrell Dow* thus concluded: “This case does not pose a federal question of the first kind; [plaintiffs] do not allege that federal law creates any of the causes of action that they have asserted.” 478 U.S. at 809.

{13} It is helpful to draw parallels to the facts in the present case and those in *Franchise Tax Board*. In *Franchise Tax Board*, the California Tax Board filed suit against a welfare benefit trust in an effort to collect unpaid personal income taxes. The action raised the question of whether the federal Employee Retirement Income Security Act (ERISA) preempted the state’s authority to impose taxes on those funds held in trust. *Franchise Tax Bd.*, 463 U.S. at 3-4. The United States Supreme Court held that the suit was grounded in state law and was not removable to a federal venue. California law, the Court reasoned, “establishes[d] a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law[.]” Id. at 13. The court declared that

a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, or that a federal defense the defendant may raise is not sufficient to defeat the claim[.]” Id. at 10 (citations omitted). Thus, in *Franchise Tax Board*, the state’s right to enforce its tax levies was not “of central concern” to the ERISA statute, id. at 2, 25-26, and ERISA did not provide a cause of action that would have allowed the state to enforce that right. See id. at 14. Against this backdrop, we now analyze whether Zuni’s claim is primarily based upon a state statute or a federal statute.

{14} In the case before us, we disagree with the State that Zuni’s right to relief depends on the Federal Impact Aid statute. And we disagree that resolution of this case involves a substantial question of federal law. Zuni is asking the district court to compel the State to issue Zuni its “full share” of state equalization guarantee (SEG) funds without reducing the amount to offset federal aid. Zuni acknowledges the Federal Impact Aid statute, which allows states to reduce state aid to school districts receiving federal aid and provides parameters by which states may do so. The language, however, mainly speaks to the certification process by which DOE gives its imprimatur for states to attempt to equalize funding among its own school districts, essentially making sure that states do not dilute the intent of the federal law. And while the Federal Impact Aid statute provides administrative remedies for local school districts to challenge a state if the state shortchanges a school district or does so before getting federal certification, 20 U.S.C. § 7709(a) and (d) (2), the federal statute provides no cause of action for a school district wishing to challenge the state’s funding formula itself. Zuni has no dispute with DOE; in fact the school district received its Federal Impact Aid funding. Zuni, instead, takes issue with the State for withholding state funds that were to be distributed according to state statute.

{15} As Zuni pointed out in its original petition for writ of mandamus, declaratory relief, and injunctive relief, it is through the SEG formula that New Mexico aims to equalize funding between school districts that receive federal funding and those that do not. While Congress established the Federal Impact Aid program and set guidelines for states to receive federal equalization certification, New Mexico law sets out the method for SEG distributions and establishes the formula for calculating the amount to be distributed to school districts. Section 22-8-25. The state statute begins succinctly: “The state equalization guarantee distribution is that amount of money distributed to each school district to ensure that its operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district’s program cost.” Section 22-8-25(A). The statute allows for a 75 percent reduction in state distributions to offset federal funds categorized as “impact aid.” Section 22-8-25(C) (2). The statute also sets out a precise formula for calculating the SEG distribution: “To determine the amount of the state equalization guarantee distribution, the department shall . . . .” followed by eight scenarios, two of which involve taking into account federal funds received by a school district. Section 22-8-25(D)(5) and (6) (emphasis added).

{16} Zuni’s complaint challenges the actions of the state under Section 22-8-25. It focuses on Section 22-8-25(A)’s general outline of SEG distribution and Section 22-8-25(D)’s eight-part formula that the state is required to follow. Zuni grounds its main argument—that offsets for Federal Impact Aid are not allowed unless autho-
reasons.” Torrance Cnty. Mental Health Program, Inc. v. N.M. Health & Env’t Dep’t, 113 N.M. 593, 597, 830 P.2d 145, 149 (1992). This understanding was re-enforced recently by our Supreme Court in a discussion of Hicks: “Although that case specifically challenged the state’s common-law immunity from actions in tort, no one should doubt the broader scope of what this Court has previously described as Hicks’s sweeping abolition of sovereign immunity.” Hanosh, 2009-NMSC-047, ¶ 10 (internal quotation marks and citation omitted). Thus, it is up to the Legislature to specify instances in which sovereign immunity may be invoked by the State. The State argues that the Tort Claims Act bars this suit. We disagree. In response to Hicks, our Legislature enacted the Tort Claims Act which reinstated sovereign immunity for certain tort actions committed by governmental entities and employees, while waiving such immunity for other tortious conduct. NMSA 1978, §§ 41-4-1 through 28 (1976, as amended through 2009). Further, the Legislature has specifically not waived sovereign immunity for contract matters that do not involve valid written contracts, NMSA 1978, § 37-1-23 (1976), but has done so for causes of action brought under the Human Rights Act. NMSA 1978, § 28-1-13(D) (2005). Along this line, we observe that the Legislature has not explicitly asserted or waived sovereign immunity for causes of action brought under the Public Schools Finance Act. Further, no New Mexico case has explicitly provided that the State waives sovereign immunity in a suit for money damages against the Public Education Department. Given our Supreme Court’s ruling in Hanosh, coupled with the Legislature’s failure to assert sovereign immunity with respect to money damages, we conclude that an action involving a public accounting of funds owed by the State to another entity is permitted in New Mexico.

CONCLUSION

{21} We conclude that this action is grounded in state law and there is no statute or case law barring a suit for money damages under the facts contained in the pleadings. Therefore the State is not protected by sovereign immunity. Accordingly, we affirm the district court’s denial of the State’s motion to dismiss the action on those grounds. We remand the case to the district court for proceedings in accordance with this opinion.

{22} IT IS SO ORDERED.

CELIA FOY CASTILLO, Chief Judge

WE CONCUR:
LINDA M. VANZI, Judge
TIMOTHY L. GARCIA, Judge
OPINION

MICHAEL E. VIGIL, JUDGE

[1] The memorandum opinion filed in this case on January 24, 2012, is hereby withdrawn, and this opinion is substituted in its place.

[2] Defendant was convicted of one count of distribution of marijuana. NMSA 1978, § 30-31-22(A) (2006) (amended 2011). Defendant appeals, contending that he was denied his constitutional right to confront a critical witness against him. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”); N.M. Const. art. II, § 14 (“In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him.”). We reverse.

DISCUSSION

[3] Trial was held in Aztec, New Mexico. Prior to trial, the State filed a motion to allow its witness from the New Mexico Scientific Laboratories Division to testify by video conference. The witness was necessary to prove an essential element of the charge, that the substance transferred was marijuana. The grounds stated in the motion were:

(1) A Crime Lab Analyst with the New Mexico Scientific Laboratories Division has been subpoenaed [sic] to testify in the above matter . . . ;

(2) The Scientific Laboratories Division is located in Santa Fe, New Mexico;

(3) The Crime Lab Analyst is a necessary witness;

(4) For judicial economy the Crime Lab Analyst should be allowed to appear via video-conferencing;

(5) An appearance of a witness by video-testimony does not run afoul of . . . Defendant’s right to confront the witnesses against him. Unlike telephonic appearance, video-conferencing permits the jury, . . . Defendant, the Court, and Counsel for both parties to not only hear the testimony, but to also visually observe the witness’ demeanor and candor. It also permits the witness to see . . . Defendant and Counsel. Because of this, the members of the jury can independently form opinions as to the veracity of the witness and the weight to give the witness’ testimony.

[4] The motion also states that Defendant opposed the motion. Under the Rules of Criminal Procedure, Defendant therefore had a right to file a response within fifteen days. Rule 5-120(C) NMRA (stating that the moving party shall determine if the motion is opposed, and if it is not opposed, an order initialed by opposing counsel shall accompany the motion); Rule 5-120(E) (“Unless otherwise specifically provided in these rules, a written response shall be filed within fifteen (15) days after service of the motion.”). Defendant also had the right to file a response under the district court’s own local rules. LR11-104(B) (“The responding party shall have fifteen (15) days after service of the motion to answer by written brief.”). However, without affording Defendant an opportunity to respond, or otherwise be heard, the district court entered its order the day after the State filed its motion, and granted the motion. In its totality, the “Order Allowing Testimony Via Video Conferencing” states:

THIS MATTER having come before the Court this 9th day of March, 2010 on the written motion of the State and good cause appearing therefore,

IT IS HEREBY ORDERED that the Crime Lab Analyst may appear via video conferencing.

[5] At trial, the analyst was allowed to testify by video conference over Defendant’s objection that it violated his constitutional right to confront the witness against him. After the analyst testified, a hearing was held outside the presence of the jury in which the analyst stated that while he was testifying, he could see the prosecutor, and sometimes defense counsel, but not Defendant, the judge, or the jury. This was contrary to the representation made in the State’s motion. Defendant then moved to strike the analyst’s testimony.

[6] Two days after the trial was completed, the district court filed a formal order, which denied Defendant’s objection to allowing the analyst to testify by video conference, and his motion to strike the analyst’s testimony. The order states that Defendant’s constitutional right to confront the witness against him was not
compromised by the video conference testimony because the jury was able to observe and hear the analyst’s testimony “in the same manner they would have if the [a]nalyst had personally appeared at trial.” Moreover, the order continues, “If the [a]nalyst was required to appear and testify in person, he would have been required to drive a total of six hours to and from the courthouse to testify,” and that “The State of New Mexico is presently experiencing a financial crisis and the appearance of the [a]nalyst by video conferencing equipment saved money.”

{7} The order was entered after the district court had already decided to allow the testimony by video conference, and after the analyst had already testified. Moreover, the finding relating to a “financial crisis” has no evidentiary support. And, even if the district court could take judicial notice of the state’s general financial condition, the finding sheds no light on the budget resources available to the Scientific Laboratories Division for travel at the time of the trial.

No Opportunity To Be Heard

{8} The State’s motion raised the issue of whether, and under what circumstances, the State may present evidence crucial to its case by video conference without violating a defendant’s constitutional right to confront witnesses against him. The State’s motion cited no legal authority and only made an assertion of convenience for the witness.

{9} The district court granted the motion without affording Defendant his right to respond, as provided in the Rules of Criminal Procedure and the district court’s own rules. Further, the motion was granted without hearing or considering any evidence, without considering or applying applicable case law and standards, and without making pertinent findings of fact and conclusions of law. Granting the motion in the absence of these circumstances was error. State v. Shaw, 90 N.M. 540, 541, 565 P.2d 1057, 1058 (Ct. App. 1977).

Legal Error


{11} In State v. Almanza, 2007-NMCA-073, ¶ 1, 141 N.M. 751, 160 P.3d 932, we considered whether a chemist from the New Mexico State Crime Lab was allowed to give testimony by telephone in the absence of a compelling need or reason for such testimony, and concluded he could not. We pointed out that United States Supreme Court authority has held that face-to-face confrontation is an element of the Sixth Amendment right of confrontation, and that any exceptions to the general rule providing for face-to-face confrontation are “narrowly tailored” and include “only those situations where the exception is necessary to further an important public policy.” Id. ¶ 8 (internal quotation marks and citation omitted).

“Thus, there must be both an important public policy and a required necessity.” Id. After considering other authorities, we concluded:

[1]t is apparent that the chemist’s busy schedule and the inconvenience that would be caused by either requiring his testimony or postponing the trial until he was able to testify are just the sort of considerations that do not satisfy the exceptions to the Confrontation Clause. Where there are requirements of important public policy and showing of necessity, mere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation.

{12} The State’s motion cited to nothing more than “judicial economy” arising from allowing the analyst to testify by video conference because the analyst was located in Santa Fe, and the trial was being held in Aztec. This was merely an assertion that it would be more convenient for the witness, which Almanza unambiguously holds is not sufficient. On the basis of Almanza alone, it was error to grant the State’s motion.

CONCLUSION

{13} The conviction is reversed.

{14} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge
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Program Schedule

8:30 a.m. Check-in/Registration

9:00 a.m. Current State of the Evidence Rules - Update on Substantive Rule Changes
Lisa K. Curtis, Esq.
(30 Minutes - 0.5 Credit)

9:30 a.m. The Spectrum – Visual Aid to Demonstrative Evidence – Exploring the Rules, Customs & Procedures That Do and Should Govern Pre-Trial Disclosure, Use in Opening, and Admission at Trial
Allegra Carpenter, Esq.
(45 Minutes - 0.7 Credit)

10:15 a.m. Break

10:30 a.m. Taking & Using Video Depositions in Trial
Geoffrey R. Romero, Esq.
(45 Minutes - 0.7 Credit)

11:15 a.m. Lunch on Your Own

1:00 p.m. Using Voir Dire to Defuse & Raise Evidentiary Issues
D. Diego Zamora, Esq.
(45 Minutes – 0.7 Credit)

1:45 p.m. Preserving the Record for Appeal & When to Confer With Appellate Counsel on Motions, Jury Instructions, Etc.
Jane B. Yohalem, Esq.
(45 Minutes – 0.7 Credit)

2:30 p.m. Break

2:45 p.m. Impeaching Witnesses
Ray M. Vargas, II, Esq.
(45 Minutes – 0.7 Credit)

3:30 p.m. Using Your Paralegal for Trial Readiness & During Trial
Jennifer Foote, Esq. and Renee Fletcher
(45 Minutes – 0.7 Credit)

4:15 p.m. Adjourn

Dusti Harvey and Randy Knudson, Program Co-Chairs

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