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2016-2017
Bench & Bar Directory

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Advertising space reservation deadline: March 25, 2016
February

10
Animal Law Section BOD,
Noon, State Bar Center

10
Children’s Law Section BOD,
Noon, Juvenile Justice Center

10
Taxation Section BOD,
11 a.m., teleconference

11
Business Law Section BOD,
4 p.m., teleconference

11
Public Law Section BOD,
Noon, Montgomery & Andrews, Santa Fe

12
Prosecutors Section BOD,
Noon, State Bar Center

16
Solo and Small Firm Section BOD,
11 a.m., State Bar Center

19
Family Law Section BOD,
9 a.m., teleconference

19
Trial Practice Section BOD,
Noon, State Bar Center

23
Intellectual Property Law Section BOD,
Noon, teleconference

State Bar Workshops

February

17
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

24
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

March

2
Divorce Options Workshop:
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

8
Legal Clinic for Veterans:
8:30–11 a.m., New Mexico Veterans Memorial, Albuquerque, 505-265-1711, ext. 3434

16
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

23
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

Cover Artist: Barry Schwartz photographs what he sees in daily life to bring out the unusual beauty of usual things. He especially likes shooting older buildings and businesses, salvage yards, ghost towns and cemeteries to preserve the beauty and ruggedness of the past. He uses angles, colors, lighting, shapes and shadows to bring out the uniqueness and beauty. Schwartz is a member of the Albuquerque Enchanted Lens Camera Club, which has been a great help with his photography. A summary of his photography is available at www.flickr.com/photos/barryabq.
Animal Law Section
Judges Needed for National Animal Law Appellate Moot Court

UNM School of Law Professor Marsha Baum is coaching two teams participating in the National Animal Law Appellate Moot Court Competition. The Animal Law Section is looking for volunteers to serve as judges for the students’ practice sessions, held on Tuesdays (7–9 p.m.), Thursdays (7–9 p.m.) and Sundays (5–7 p.m.) through Feb. 17. To volunteer, contact Gwenellen Janov at gjanov@janovlaw.com or 505-842-8302. Materials and bench briefs will be provided.

Rescue Adoption Contracts
Animal Talk

Guy Dicharry will present “Animal Rescue Adoption Contracts and the Uniform Commercial Code” at the next Animal Talk at noon on Feb. 24 at the State Bar Center. Cookies and drinks will be provided. R.S.V.P. to Evann Kleinschmidt, ekleinschmidt@nmbar.org.

Board of Bar Commissioners
Third Bar Commissioner District Vacancy

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 26 meeting to fill the vacancy, with a term ending Dec. 31, 2016, until the next regular election of Commissioners. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for May 6, Aug. 18 (in conjunction with the State Bar of New Mexico Annual Meeting at Buffalo Thunder Resort), Sept. 30 and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 7199-2860; fax to 828-3765; or email to jconte@nmbar.org by Feb. 12.

Entrepreneurs in Community Lawyering
Announcement of New Program

The New Mexico State Bar Foundation announces its new legal incubator initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation will begin accepting applications from qualified practitioners on March 1. To view the program description, www.nmbar.org/ECL.

Public Law Section
Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 29. Visit www.nmbar.org > About Us > Sections > Public Lawyer Award to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 10. Send nominations to Sean Cunniff at scunniff@nmag.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Solo and Small Firm Section
‘Verbal Alchemy of a Trial Lawyer’ with Randi McGinn

New Mexico trial lawyer Randi McGinn will present “The Verbal Alchemy of a Trial Lawyer: Challenges, Mistakes and Funny Stories from 36 years in the Courtroom” at noon, Feb. 16, at the State Bar Center in Albuquerque. The luncheon is free and open to all members of the bench and bar. Lunch is provided to those who R.S.V.P. to Evann Kleinschmidt at ekleinschmidt@nmbar.org.
First Judicial District Court Bar Association

Ski Day in Santa Fe

Join the First Judicial District Bar Association at Ski Santa Fe on Feb. 27. Families are welcome. Enjoy discounted half- and full-day lift tickets (half-day: $35, full-day: $45, beginner’s chairlift: $20). To purchase tickets, contact Erin McSherry at erin.mcsherry@state.nm.us. Payment for all guests is due by Feb. 25. Discounted tickets may not be purchased through Ski Santa Fe.

New Mexico Defense Lawyers Association
Seeking New Members for Board of Directors

The New Mexico Defense Lawyers Association seeks interested civil defense lawyers to serve on its board of directors. Board terms are five years with quarterly meetings. Board members are expected to take an active role in the organization by chairing a committee, chairing or participating in a CLE program, contributing to Defense News or engaging in other duties and responsibilities as designated by the board. Those who want to be considered for a board position should send a letter of interest to NMDLA Board President, Sean Garrett at sg@conklinfirm.com by Feb. 12.

New Mexico Chapter of the Federal Bar Association

CLE and Movie

The New Mexico Chapter of the Federal Bar Association will present its annual CLE and movie at 1 p.m., Feb. 11, at the Regal Theaters in Albuquerque. The movie will be *CitizenFour* followed by a panel discussion including Dana Gold from the Government Accountability Project and local practitioners. *CitizenFour* is the story of filmmaker Laura Poitras and journalist Glenn Greenwald’s encounters with Edward Snowden as he hands over classified documents providing evidence of mass indiscriminate and illegal invasions of privacy by the National Security Agency. MCLE approval is pending. For more information, contact Kiernan Holliday at kiernanholliday@mac.com.

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Attorneys/Law Students
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Judges
888-502-1289

www.nmbar.org > for Members > Lawyers/Judges Assistance
## February

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<th>Date</th>
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<tr>
<td>10</td>
<td>BYOD (Bring Your Own Device to Work) and Social Media—Employment Law Issues in the Workplace</td>
<td>Teleseminar</td>
<td>1.0 EP</td>
<td>Center for Legal Education of NMSBF</td>
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<tr>
<td>11</td>
<td>Advocating for Justice: Family Law in the Pro Bono Context</td>
<td>Live Seminar</td>
<td>3.0 G</td>
<td>Volunteer Attorney Program, Albuquerque, 505-797-6040</td>
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<td>11</td>
<td>Management and Voting Agreements in Business</td>
<td>Teleseminar</td>
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<td>12</td>
<td>26th Annual Appellate Practice Institute</td>
<td>Live Replay</td>
<td>5.0 G, 2.0 EP</td>
<td>Center for Legal Education of NMSBF</td>
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<td>Hot Topics in Real Property Issues (2015 Real Property Institute)</td>
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<td>18</td>
<td>Special Issues in Small Trusts</td>
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<td>Estate Planning and Ethical Considerations for Probate Lawyers (2015 Probate Institute)</td>
<td>Live Replay</td>
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<td>Center for Legal Education of NMSBF</td>
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<td>19</td>
<td>Intellectual Property and Entrepreneurship (Representing Technology Start-ups in New Mexico 2015)</td>
<td>Live Replay</td>
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<td>19</td>
<td>Civil Rights and Diversity: Ethics Issues</td>
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<td>20</td>
<td>Tenth Circuit Winter Meeting &amp; Social Security Disability Practice Update</td>
<td>Live Seminar and Webcast</td>
<td>5.0 G, 1.0 EP</td>
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<td>22</td>
<td>Drafting Promissory Notes to Enhance Enforceability</td>
<td>Teleseminar</td>
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<td>25</td>
<td>Introduction to the Practice of Law in New Mexico</td>
<td>Live Seminar</td>
<td>4.5 G, 2.5 EP</td>
<td>Center for Legal Education of NMSBF</td>
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## March

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<td>4</td>
<td>How Ethics Still Apply When Lawyer’s Act as Non-Lawyers</td>
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<td>Estate and Gift Tax Audits</td>
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<td>11</td>
<td>The Future of Cross-commissioning: What Every Tribal, State and County Lawyer Should Consider post Loya v. Gutierrez</td>
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<td>18</td>
<td>The Trial Variety: Juries, Experts and Litigation (2015)</td>
<td>Live</td>
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<td>18</td>
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<td>23</td>
<td>Avoiding Family Feuds in Trusts</td>
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<td>29</td>
<td>Drafting Demand Letters</td>
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Opinions
As Updated by the Clerk of the New Mexico Court of Appeals
Mark Reynolds, Chief Clerk
New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925
Effective January 29, 2016

Published Opinions
No. 33425 3rd Jud Dist Dona Ana CR-12-39, STATE v L GARCIA (affirm) 1/25/2016

Unpublished Opinions
No. 34690 3rd Jud Dist Dona Ana CR-14-489, STATE v J MEYERS (affirm) 1/25/2016
No. 33962 11th Jud Dist San Juan JR-13-193, STATE v DAMON C (affirm) 1/25/2016
No. 34641 13th Jud Dist Sandoval CR-14-31, STATE v D CASTILLO (affirm) 1/25/2016
No. 34698 2nd Jud Dist Bernalillo LR-13-94, STATE v A GALLEGOS (affirm) 1/25/2016
No. 34601 13th Jud Dist Valencia CR-09-103, STATE v E HUMPHREY (affirm) 1/26/2016
No. 34490 12th Jud Dist Otero JR-13-66, STATE v DANIEL R (affirm) 1/27/2016
No. 34152 12th Jud Dist Otero CV-13-738, G GAFFNEY v ROBIN HOOD WATER (dismiss) 1/27/2016
No. 34982 13th Jud Dist Sandoval CV-13-1730, PENNYMAC v P SALAZAR (affirm) 1/27/2016
No. 34974 11th Jud Dist San Juan LR-14-130, STATE v D WISNER (affirm) 1/28/2016
No. 33723 8th Jud Dist Taos CR-12-149, STATE v J SIMPSON (affirm) 1/28/2016
No. 34391 2nd Jud Dist Bernalillo PB-12-318, L ALDOFF v D BEAL (affirm) 1/28/2016
No. 34593 2nd Jud Dist Bernalillo JQ-11-53, CYFD v MONICA L (affirm) 1/28/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm
Charles J. Piechota

Piechota has practiced law at the firm since 2007 and has been a firm shareholder since 2014. He belongs to the firm’s commercial group, practicing primarily in corporate and securities law, business transactions and public finance. He earned his Bachelor of Arts and law degree from the University of New Mexico. Piechota has practiced law at the firm since 2007 and has been a firm shareholder since 2014. He belongs to the firm’s commercial group, practicing primarily in mergers and acquisitions, estate planning and probate, state and federal taxation, intellectual property and liquor licensing. He earned his Bachelor of Science in microbiology (honors scholar) from Colorado State University and a law degree from the University of Colorado Law School.

Hearsay

Holly Agajanian and Luke Salganek were elected shareholders with the Miller Stratvert Law Firm. Agajanian joined the firm in 2014 as of counsel in the Santa Fe office. She attended the University of California (B.A., 1997) and the American University, Washington College of Law (J.D., 2002, cum laude). She practices in the areas of civil rights and public sector law, employment and human relations law, insurance coverage and bad faith law, liquor liability defense law and civil litigation. Salganek joined the firm as an associate in 2010 in the Santa Fe office. He attended Fort Lewis College in Durango, Colo. (B.A., 2001, cum laude) and the University of New Mexico (J.D., 2009). He practices in the areas of administrative law, appellate law, civil rights and public sector law, employment and human relations law.

Tim Atler has formed Atler Law Firm, PC, an individual law practice focusing primarily on appellate work. Atler serves on the board of directors of the State Bar Appellate Practice Section and is the newest member of the New Mexico Supreme Court’s Appellate Rules Committee. He is rated AV Preeminent by Martindale-Hubbell and is a Southwest Super Lawyers “Rising Star” for 2016.

Stefan R. Chacón has become a shareholder at Montgomery & Andrews, PA. Chacón’s practice will concentrate on health law and civil litigation. Chacón earned his Bachelor of Science in economics from the University of La Verne and his law degree from the George Washington University Law School in 2009. He is licensed to practice law in California and New Mexico.

Sutin, Thayer & Browne law firm shareholders Eduardo A. Duffy and Charles J. Piechota recently were elected to serve on the firm’s board of directors, starting Jan. 1. Duffy has practiced law at the firm since 2011 (also, previously from 2000-2003) and has been a firm shareholder since 2014. He belongs to the firm’s commercial group, practicing primarily in corporate and securities law, business transactions and public finance. He earned his Bachelor of Arts and law degree from the University of New Mexico. Piechota has practiced law at the firm since 2007 and has been a firm shareholder since 2014. He belongs to the firm’s commercial group, practicing primarily in mergers and acquisitions, estate planning and probate, state and federal taxation, intellectual property and liquor licensing. He earned his Bachelor of Science in microbiology (honors scholar) from Colorado State University and a law degree from the University of Colorado Law School.

The Supreme Court of New Mexico has appointed Sutin, Thayer & Browne law firm shareholder Christopher A. Holland to the Rules of Civil Procedure for the District Courts Committee. Holland practices law in the firm’s Albuquerque office, primarily in business litigation, Indian law, employment law, education law, civil litigation, regulatory and administrative law and appeals. He attended Eastern New Mexico University and the University of New Mexico School of Law. He has been with the firm since 1996.

Denise M. Chanez has become a fellow of the American Bar Foundation. Chanez is a director in the Albuquerque office of the Rodey Law Firm. She practices in the litigation department with an emphasis on health law and medical malpractice. Chanez also has experience in the areas of employment, civil rights, education, personal injury and media law.

The Supreme Court of New Mexico has appointed Lynn Mostoller to the Code of Judicial Conduct Committee. Mostoller practices law in Albuquerque and Santa Fe, primarily in commercial litigation, regulatory and administrative law, employment law and appeals. She has been with Sutin, Thayer & Browne since 2010 and was elected a shareholder in 2014. She earned her law degree from University of New Mexico School of Law, graduating summa cum laude in 2004 with the highest GPA on record at that time.

Editor’s Note: The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send announcements to notices@nmbar.org.
Edna Frances Sprague has joined the law firm of Atkinson & Kelsey, PA, as a family lawyer. Sprague joins the team with 14 years as a practicing attorney. She holds a bachelor's degree in American and Women's Studies from University of New Mexico and a law degree from West Virginia University College of Law. Sprague's experience working as the deputy district attorney for the Second Judicial District Attorney's Office makes her a perfect addition to the Atkinson & Kelsey team.

Christopher J. Tebo has joined the City of Albuquerque as an assistant city attorney focusing on real estate, land use and zoning issues and has relocated to Albuquerque. Previously, he was a partner at Hatcher & Tebo, PA. A former Presidential appointee at the U.S. Department of State and legislative director in the U.S. House of Representatives, Tebo received his law degree from the University of Wisconsin Law School, and holds an master's degree from Johns Hopkins and a bachelor's degree from the California State University.

Jennifer Stone, loving wife, mother, grandmother, dear friend to many, brilliant, hard-working and talented professional and dedicated member of her community, died on Monday, Jan. 18. Stone was diagnosed with ovarian cancer in 2013. She was born in Los Alamos on Nov. 1, 1965, to Peggy and Sid Pinkston. Always a brilliant student, she enrolled in the University of New Mexico in 1983, where she met her future husband, Chip Stone. She had an impressive, varied legal career that began and culminated at the Rodey Law Firm where she was a director and shareholder. Her powerful intellect, professionalism and passion served many New Mexicans throughout her career. Jennifer and Chip were married on May 30, 1987, and have two children, Jordan, 25, and Caitlin, 22, New Mexico Institute of Mining and Technology. Stone is especially remembered for her spirit of generosity, her deep empathy for people and animals, her knack for gracefully solving problems, her modesty about her many professional recognitions, her loyalty and her infectious sense of humor. She was also a world-class knitter, making beautiful creations for family and friends. Jennifer and Chip shared a passion for live music and the great outdoors. In recent years, Stone and her husband have been avidly involved in outdoor rock climbing, gym climbing, and camping throughout the Southwest. While undergoing cancer treatments in June 2014, Stone participated in the HERA Women's Cancer Foundation's Climb4Life in Boulder, Colorado, to raise funds for research to eliminate ovarian cancer. She was the only participant who climbed outdoors in Boulder Canyon despite active cancer treatment. In her professional life Stone was devoted to the practice of law at Rodey Law, and in her personal life she was ardently devoted to her family. Stone is survived by her husband, Chip; children, Jordan and Caitlin Stone; granddaughter Catarina; Caitlin's partner Jason Martinez; mother Peggy Pinkston; a brother and two sisters, in-laws, aunts, uncles, nieces and nephews. Stone's family and countless friends will celebrate her life and remember her with love and affection.

Milton C. Colia died unexpectedly on Dec. 1, 2015, in El Paso, Texas. He was born Jan. 28, 1954, in Shreveport, La., to Col. Ned I. Colia and Ursula Waldenhaus, both of whom preceded him in death. He obtained Bachelor of Business Administration from Texas Christian University in 1975, and a law degree from Texas Tech School of Law in 1977. Colia served as a judge advocate general in the U.S. Air Force for four years before continuing his legal career at Griffis, Colia, Motl & Junell in San Angelo, Texas. He moved to El Paso in 1991, where he joined the ScottHulse law firm. In 1996, Colia continued his legal career at Kemp Smith Law as a partner in the litigation department. He was board certified in civil trial law and personal injury trial law by the Texas Board of Legal Specialization. He was a fellow in the American College of Trial Lawyers and a member of the American Board of Trial Advocates. At the time of his death Colia was serving as president of the Texas Association of Defense Counsel. He was also a Fellow of the Texas Bar Foundation and a member of the El Paso Bar Association the State Bar of Texas, State Bar of New Mexico and Colorado Bar Association. Colia was listed in Best Lawyers in America in the area of commercial litigation and in the 2008–2015 editions listed in the areas of commercial litigation and personal injury litigation. In 2012 he was named commercial litigator of the year for El Paso. In 2013, he was named personal injury litigator: defendants, litigator of the year for El Paso. In the 2003–2014 editions he was recognized as a Texas Super Lawyer. In 2014, he was named a Top 50 Lawyer in the Central and West Texas Region. In 2005, Colia received the William Duncan-George McAlmon Civility Award for professionalism and civility in the practice of trial law from the American Board of Trial Advocates. Colia is survived by his wife of 40 years, Margaret Ann; son, Andrew, wife Hilary and grandson William Watson Colia, and his son, Matthew, all of Fort Worth, Texas. He is also survived by his brothers, Clifton Colia (Nancy) of Glenwood Springs, Colo., and Kenton Colia (Ginny) of Destin, Fla.; and numerous family members and friends. Colia was a man of his word, respected by all and loved by many. He will be remembered for his integrity, his tenacity and his loyalty to family and friends.
**Writs of Certiorari**

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

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

**Effective January 29, 2016**

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<th>Petitions for Writ of Certiorari Filed and Pending:</th>
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<th>Petitioner</th>
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No. 33,867 Roche v. Janecka 12-501 09/28/12
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No. 33,877 State v. Alvarez COA 31,987 12/06/12
No. 33,930 State v. Rodriguez COA 30,938 01/18/13
No. 34,363 Pieltau v. State Farm COA 31,899 11/15/13
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No. 34,522 Hobson v. Hatch 12-501 03/28/14
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No. 35,255 State v. Tufts COA 33,419 06/19/15

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission) Submission Date
No. 33,059 Safeway, Inc. v. Rootco 2000 Plumbing COA 30,196 08/28/13
No. 33,884 Acosta v. Shell Western Exploration and Production, Inc. COA 29,502 10/28/13
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No. 34,997 T.H. McElvain Oil & Gas v. Benson COA 32,666 08/24/15
No. 34,993 T.H. McElvain Oil & Gas v. Benson COA 32,666 08/24/15
No. 34,726 Deutsche Bank v. Johnston COA 31,503 08/24/15
No. 34,826 State v. Trammel COA 31,097 08/26/15
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<td>35,628</td>
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Clerk’s Certificates
From 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

Dated Jan. 20, 2016

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TELEPHONE CHANGES

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Cloudcroft, NM 88317

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Bar Bulletin - February 10, 2015 - Volume 55, No. 6
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**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 February 10, 2016**

<table>
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<th>Pending Proposed Rule Changes</th>
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None to report at this time.

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court’s website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission’s website at http://www.nmcompcomm.us.
The Public Regulation Commission (PRC) granted Southwestern Public Service Company’s (SPS) application to (1) include a prepaid pension asset in its rate base in order for SPS to earn a return on this asset, and (2) obtain a renewable energy cost rider to recover approximately $22 million of renewable energy procurement costs from those customers who do not have a legislatively imposed limit on their renewable energy costs (non-capped customers). The Attorney General appeals the PRC’s final order granting SPS’s application, arguing that the approved rates are unjust and unreasonable because the inclusion of the entire prepaid asset in the rate base is not supported by substantial evidence, and the PRC acted contrary to law in allowing SPS to recover the aforementioned renewable energy costs from non-capped customers. We affirm the PRC because (1) SPS is entitled to earn a reasonable rate of return on the investor-funded prepaid pension asset, and (2) SPS may recover its renewable energy costs in excess of the large customer cap from non-capped customers because such a recovery mechanism is the only viable method of cost recovery that is consistent with the purposes of the Renewable Energy Act, NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2011).

I. THE INCLUSION OF SPS’S PREPARED PENSION ASSET IN THE RATE BASE

[2] SPS applied to the PRC to include a prepaid pension asset in its rate base to allow its shareholders, who funded the asset, to receive a corresponding return on their investment. By including this prepaid pension asset in the rate base, the asset is treated as a capital investment, allowing SPS to recover the asset as an expense, thereby increasing SPS’s revenue requirement. See Joseph P. Tomain, Symposium Article, “Steel in the Ground”: Greening the Grid with the iUtility, 39 Envtl. L. 931, 945-46 (2009) (providing and discussing the rate making formula, which sets the amount of money utilities may receive for their investments and expenses). Importantly, inclusion of an investment asset in the rate base does not enable investors to recover the value of their investment, but instead only allows investors to earn a return on the asset. See id. (noting that utilities generally recover the value of an investment by treating the depreciation of the asset as an operating expense).

[3] The parties agree that a prepaid pension asset is the amount by which investor contributions to a pension trust and earnings on these contributions exceed pension expenses. S. Co. Servs., Inc., 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5 (FERC 2008) (order on tariff filing), order clarified by 128 FERC ¶ 61,276, 2009 WL 3043950 (slip copy) (FERC 2009); In re Delmarva Power & Light Co., 2014 WL 3964914, slip copy at 18, 315 P. U.R. 4th 10 (Del. P.S.C. 2014) (“A prepaid pension asset occurs when the accumulated contributions and
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After the Supreme Court Decision: 
Same-sex Marriages 
Still Need Protections

By Dorene A. Kuffer

On June 26, 2015, the U.S. Supreme Court ruled in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), that states must both permit same-sex couples to marry in their states and recognize same-sex marriages that were formed in other states. So, “marriage is marriage,” right? Not necessarily. In some areas, the law is unclear, while in others, additional protections are necessary to protect same-sex couples and their families.

FAMILY CREATION

Prenuptial and Postnuptial Agreements
With some same-sex couples, the decision to draft a prenuptial agreement is critical. Because same-sex couples did not have the right to marry while they were living together as committed couples, some combined finances, assets and debts. For the purposes of inheritance and divorce, New Mexico law recognizes that a marriage begins as of the date of the legal marriage, not when the couple combined finances as a household. Yet, many of these couples have had five, 10, 20, even 30 years of commingling finances and life before they could marry. It is imperative that assets and debts obtained during these years be “brought into the community” and that is done through a prenuptial or postnuptial agreement.

Children Born of the Marriage
The Uniform Parentage Act in New Mexico, NMSA 1978, §§ 40-11A-101 to 903, presumes that a child born of a marriage is a child of both parties to that marriage. However, not all jurisdictions abide by that presumption, or other presumptions in the Uniform Parentage Act, and some may refuse to recognize the co-parent as a legal parent unless there is a formal adoption decree naming the co-parent as a parent of the child. This applies to heterosexual couples as well. The circumstances vary from state to state.

Because not everyone agrees with the Obergefell decision, states that previously did not recognize same-sex marriage may fail to recognize the legal parent presumption with same-sex couples. Hence, co-parent adoption is important to protect the child’s relationship with the non-biological parent.

Post-Obergefell, several states have refused to recognize the presumption of parentage. For instance, a New York court stated that the presumption could be defeated by showing that another person is the child’s biological father. Matter of Paczkowski v. Paczkowski, 128 A.D.3d 968, 10 N.Y.S.3d 270 (2015). Here’s a look at other states’ approaches to parentage:

- In November 2015, the Illinois Supreme Court upheld a trial court’s finding of non-existence of a parent-child relationship of a presumed father who had signed a voluntary acknowledgment of paternity. In re A.A., a Minor, No. 118605 (Ill. Nov. 19, 2015). Even though the presumed father had raised the child since birth, the court held that the trial court was correct in establishing a parent-child relationship with a biological parent and erasing the parent-child relationship of the presumed parent. The court cited to an earlier case in which a biological father successfully challenged the parentage of a woman’s husband – to rebut the marital presumption – based on biology alone. The effect of the ruling in In re A.A. was to allow the parents of the biological father to gain custody of the child and sever the relationship the child had since birth with the presumed father. It is clear that the Illinois courts will be open to disallowing a marital presumption in a same-sex marriage since they have done so in an opposite-sex marriage.

- In September 2015, the Alabama Supreme Court ruled that it will not recognize a same-sex adoption granted in Georgia and declared the Georgia adoption “void.” Ex parte E.L., No. 1140595 (Ala. Sept. 18, 2015) (not yet reported in the Southeastern Reporter). This decision raises interesting questions regarding the Full Faith and Credit Clause and its application to orders of adoption. The adoptive mother has asked the U.S. Supreme Court to review the decision. The U.S. Supreme Court has issued a stay of the decision pending its decision on the petition for writ of certiorari. If the Alabama Supreme Court decision is allowed to stand, it is possible that couples will not be able to legitimize their relationships with their children. Moreover, the decision will provide an avenue for states that do not wish to recognize same-sex relationships to harm families. Alabama was one of a handful of states that refused to abide by federal district court rulings that...
invalidated prohibitions on same-sex marriage when its Supreme Court ordered Alabama officials to deny marriage licenses to same-sex couples.

The law in this area is developing and decisions are being issued by states every week. It is important to inform your same-sex clients that it is still necessary to adopt their children, even if there are presumptions of parentage that apply. You must also draft appropriate estate planning and guardianship documents to ensure your clients’ children will not go to other family members should the biological or primary-adopting spouse die.

Also, advise your clients that a birth certificate does not prove parentage. That is true for heterosexual people as well. A birth certificate is only evidence. The key to parentage lies in the statutes, and a court order is the best “proof” of parentage. An order of parentage is second to an adoption order, especially if the order of parentage relies upon the presumptions in the Uniform Parentage Act.

FAMILY MAINTENANCE

If a couple was married in a recognition state and then moved to a non-recognition state, it is possible for purposes of estates, taxes, Social Security and other benefits that post-\textit{Obergefell}, their marriage will be recognized back to the original date of marriage. That is because \textit{Obergefell} found bans on same-sex marriage to be unconstitutional and therefore void \textit{ab initio}.

The U.S. Department of the Treasury and the Internal Revenue Service announced proposed regulations in October 2015 providing that a marriage of two individuals, whether of the same sex or the opposite sex, will be recognized for federal tax purposes if that marriage is recognized by any state, possession or territory of the U.S. (80 FR 64378). The proposed regulations would also interpret the terms “husband” and “wife” to include same-sex spouses and opposite-sex spouses.

The Social Security Administration announced in August 2015 it would apply the \textit{Obergefell} ruling retroactively and process pending spousal benefits claims for same-sex couples that lived in non-recognition states. All post-\textit{Obergefell} claims will be processed and recognized.

In December 2015 the IRS issued guidance on the application of \textit{Obergefell} to qualified retirement plans under Section 401(a) of the Tax Code and health and welfare plans, including Section 124 cafeteria plans. Notice 2015-86. Even though most same-sex marriages had been recognized for federal tax law purposes after \textit{United States v. Windsor}, 570 U.S. \_, 133 S.Ct. 2675 (2013), the IRS issued this guidance to assist plan sponsors and to answer additional questions.

FAMILY DISSOLUTION

Post-\textit{Obergefell}, divorce is divorce. In New Mexico, property will be divided according to the community property rules. The proposed regulations will apply to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit.

The proposed regulations would not treat registered domestic partnerships, civil unions, or similar relationships not denominated as marriage under state law as marriage for federal tax purposes. This rule protects individuals who have specifically chosen to enter into a state law registered domestic partnership, civil union, or similar relationship rather than a marriage, because they can retain their status as single for federal tax purposes.

In New Mexico, property will be divided according to the community property rules.
the couple will have a bifurcated divorce proceeding, meaning:

• Assets/debts acquired during the marriage will be allocated pursuant to the domestic relations laws.

• Assets/debts acquired before the marriage will be divided using basic contract law, under which assets and debts are divided based on whose name is on the title or the debt and what contribution each party made toward acquiring the asset. This process may serve a great injustice to the party who financially contributed less because that person may have contributed to the household in other than financial means (which has some value to the parties) or they could have been “promised” equal shares of the assets at divorce or break-up by the other party. However, the court will have no choice but to apply the law and divide the assets according to financial contribution only.

If one of the parties dies and there is no pre-nuptial agreement, the treatment of the assets will also be bifurcated:

• Assets acquired during marriage will be automatically transferred to the surviving spouse.

• Assets acquired before marriage will be treated differently and may be transferred to the deceased’s family members rather than the surviving spouse.

CONCLUSION

While the Obergefell Court held that all marriages are to be recognized by all states, it did not erase all the issues for same-sex couples contemplating marriage. The Obergefell decision has resolved the big issues of same-sex marriage, but many questions are unresolved for families of same-sex couples. Be mindful of the ever-changing legal environment in this area and advise your clients of the pitfalls that still exist.

Dorene A. Kuffer is a New Mexico board-certified family law specialist practicing at the Law Office of Dorene A. Kuffer, PC, in Albuquerque.
Perhaps it’s a function of my age (early 50s) and the number of years I’ve been practicing law (approaching 30), but I am encountering more divorces in which parties with physical and/or mental impairment play a significant role in negotiating a fair and practical settlement or in having to litigate property division, child custody and financial support. As both a lawyer and a gerontologist, many of my clients are getting divorced in the golden years (age 60 and up) or are grandparents raising grandchildren. Frequently one, and sometimes both, parties are dealing with their own physical disabilities, chronic and sometimes terminal illnesses and/or mental health issues, ranging from severe depression to bipolar disorder to varying degrees of actual dementia.

I also see more cases in which PTSD is a factor—for a parent returning from active-duty military service or for one spouse struggling with long-term abusive behavior by the other spouse. Chronic substance abuse, particularly inappropriate use of prescription opioid drugs, is another growing problem. Sometimes one spouse/parent accuses the other (or each other) of drug or alcohol abuse or claims that the physical impairment of a party renders him or her unfit to parent (at least without supervision) or incapable of providing adequate financial support for him- or herself or the children. When one spouse already has a court-ordered guardian and conservator, sometimes the adult children interject themselves in the divorce proceedings, to try to preserve their anticipated inheritance. Then the divorce turns into a pre-probate fight. This article poses questions the attorney should consider when representing or opposing a party who is disabled or incapacitated.

**Varying Levels of Impairment**

I see three categories of persons with an impairment:

- **Permanent physical disability**, with a clear mind and legal mental capacity is not an issue. The disability may be “static” such as permanent blindness, paralysis or amputation, or “progressive” such as Multiple Sclerosis, ALS (Lou Gehrig’s disease), or congenital heart failure.

- **Mental impairment rising to the level of legal incapacity** necessitating the appointment of a legal guardian and conservator.

- The gray area in between where a person’s physical or mental impairment is intermittent or progressive that has not reached the level where a guardian is required but the person’s judgment or ability to function is questionable on a given day or for periods of time.

Such impairments impact how an attorney deals with parties when they are your own client or opposing party, and how a judge assesses the situation before making a ruling. Impairments are crucial in determining how one addresses issues such as co-parenting abilities and the safety of minor children, an impaired person’s ability to provide financial support for the children and for him- or herself or the ex-spouse (alimony), and what constitutes a reasonable division of property and debts.
given the medical treatment needs of an impaired party.

**Legal Capacity**

To form a valid, binding contract, such as a divorce settlement agreement or parenting plan, the law requires both parties to have the mental capacity to understand the terms of the agreement, to voluntarily enter into it, and to be able to abide by the terms. To participate in an evidentiary hearing or trial, a party must understand the nature of the proceedings and be able to work with his or her attorney to provide effective assistance of counsel. Lawyers are simply not qualified to make a medical or mental health diagnosis of our clients or opposing parties. When there are signs a party may have a serious physical or mental health condition that calls into question legal capacity, the appropriate medical and mental health professionals should be brought in to assess the situation. If necessary, obtain a court order for the evaluation. Otherwise, the settlement agreement may be void or the party’s participation in the trial may be overturned on appeal if he or she is later determined to have lacked capacity at the time the contract was signed or trial held.

**Community Property Division**

Because New Mexico is a community property state, property and debt allocation is supposed to be straightforward once you properly identify and characterize the community or separate nature of the assets and liabilities. In theory, both spouses should receive approximately equal net assets. However, the court is charged with making an “equitable” division, which doesn’t always mean “one-half”. Consideration must be given to the following:

- Can the party manage the assets?
- Is there a trust to manage the assets or does one need to be created?
- Is the disabled person receiving SSDI, Veteran’s Disability, or other government benefits?
- Are the minor children receiving dependent benefits from the disabled parent?
- Will the award of property make the party ineligible for government benefits?

**Impairments are crucial in determining how one addresses issues...**

- Does the incapacitated person need more than half of the assets to maintain a reasonable standard of living post-divorce?
- What is “equitable” under the circumstances?

**Alimony and Child Support**

The harder component is figuring out alimony in a sufficient amount and duration to enable the impaired spouse to receive proper treatment. This is especially true when the paying spouse objects to financially supporting an ex-spouse she thinks caused his or her own impairment, as in the case of drug/alcohol abuse or volunteering to serve in the military. Until alimony is addressed, a lawyer cannot determine the gross income figures to use in calculating child support. The Child Support Guidelines look at both parents’ gross incomes, adjusted for alimony, to determine base support for children. Also, New Mexico law allows for the imputation of income for voluntarily unemployed or under-employed parents. Frequently the paying parent complains that the impaired parent just needs to “get his or her act together” and get a well-paying job, not recognizing or accepting the reality that a mentally impaired parent cannot obtain or maintain regular employment unless and until the impairment is addressed, if possible. A proper medical and mental health diagnosis is key to the alimony issue. Key considerations include:

- Is the person’s condition treatable?
- What does treatment entail logistically? At what cost?
- How much is the health insurance premium for the disabled parent post-divorce?
- How realistic is it for the spouse to find employment and keep the job long-term?
- How will working impact medical treatment?

**Co-Parenting after Divorce**

Coming up with an appropriate visitation plan when a parent is impaired or ill is quite challenging. Children need to be safe, but they also need to have meaningful time with both parents, particularly if one parent is dying. If both parents can put aside their own anger and fears, they should be able to come up with a plan that enables them to co-parent after the divorce. Working with a good family therapist can help the adults see the needs of the children from the children’s perspective. Otherwise, an expert child custody evaluator or a Guardian ad Litem may need to be appointed to investigate how the parent’s disability or capacity issues impact the ability to parent and to co-parent, and to make recommendations to the judge on what arrangement serves the best interests of the children—both in the near future and in the long-term.

**Overlap of Divorce and Guardianship Proceedings**

A person who has been declared legally incapacitated can be divorced. Most frequently, it is the non-incapacitated spouse who seeks to end the marriage, but the court-appointed guardian and conservator can file the divorce petition on behalf of the incapacitated adult.

If the spouse is already under a guardianship, then a guardian and conservator needs to be appointed in the guardianship proceedings. Usually, the same guardian and conservator appointed under the probate code in the PQ case seeks to be appointed to the same role in the divorce (DM case).  

continued on page 14
A boy we’ll call Robby D was adopted as a one year old, but by the time he was 13, things were a mess. Everything had been tried to help him, but he was only getting worse. Robby D continued to be a source of imminent danger and harm to his parents and younger brother. He had been in and out of treatment facilities, worked with numerous therapists, tried multiple medications and experienced many treatment foster placements—at this point there were no other treatment options. Yet he continued to threaten his family, hiding weapons of attack and intimidating them with graphic images of graffiti depicting the “bloody demise” of his mother. He physically assaulted a younger sibling routinely.

Robby D was placed in treatment foster care, at which point he was eligible for Medicaid. However, if he were to be discharged from treatment foster care and returned home to the family, he would lose his eligibility for Medicaid. That meant he would lose services he needed, because the cost of the high level of services he required was more than what the family could afford. With the discharge of Robby D looming, the parents became afraid of what would happen to them and their younger son once he came home.

Sometimes parents may need to relinquish their parental rights. These are extreme circumstances, and reasons vary from the parents simply being unable to control their children to a question of the safety of the family. Many of these situations are not the result of abuse, abandonment, or fault of the adoptive parents. In these circumstances, a voluntary relinquishment of parental rights may be in order. Under very specific circumstances these relinquishments can be obtained in New Mexico.

For the safety of the younger sibling, the safety of the parents, and to enable Robby D to have the treatment he needed, the parents decided to seek a voluntary relinquishment of their parental rights under NMSA 1978, Section 32A-5-24 (2009), which, in relevant part, permits relinquishment to the Children, Youth and Families Department: 32A-5-24. Relinquishments to the department.

A. When a parent elects to relinquish parental rights to the department, a petition to accept the relinquishment shall be filed ( . . . )

B. In all hearings regarding relinquishment of parental rights to the department, the child shall be represented by a guardian ad litem ( . . . )

C. If a proposed relinquishment of parental rights is not in contemplation of adoption, the court shall not allow the relinquishment of parental rights unless it finds that good cause exists, that the department has made reasonable efforts to preserve the family and that relinquishment of parental rights is in the child’s best interest. Whenever a parent relinquishes the parent’s rights pursuant to this subsection, the parent shall remain financially responsible for the child. The court may order the parent to pay the reasonable costs of support and maintenance of the child.

The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a...
D. When a parent relinquishes the parent’s rights under this section, the parent shall be notified that no contact will be enforced by the court ( . . . )

Pursuant to Section 32A-5-24, the parents were able to obtain their desired relief. While the case of Robby D was one where the child was originally adopted by the parents, a relinquishment of parental rights pursuant to Section 32A-5-24 can be granted regarding both naturally born and adopted children alike. In cases where there is no active abuse and neglect proceeding and where there is no contemplation of adoption, a relinquishment of parental rights to CYFD can be granted when good cause is shown to exist to accept the relinquishment of parental rights. Specifically, pursuant to Section 32A-5-24 (C), along with a good cause showing for the relinquishment, the court must be satisfied that CYFD had made reasonable efforts to preserve the family, and that relinquishment of parental rights was in the child’s best interests. During the proceeding, the child is required to be represented by a guardian ad litem. See § 32A-5-24 (B). The parents may be required to remain financially responsible for the child post relinquishment, but aside from potential payment of financial support, a no-contact order completely prohibiting any contact between the child and the parents will be enforced, See § 32A-5-24 (C) & (D).

In the case of Robby D, no other viable options presented for protecting the parents and the younger child, nor for providing Robby D the care he needed to address his mental illness and his emotional issues. The decision to relinquish parental rights was a difficult one for the parents. However, because the family had dedicated itself to pursuing every avenue possible to prevent the relinquishment from becoming necessary, and due to strict understanding and adherence to the relevant statute providing this option for relief, they were successful. Obtaining the relinquishment became a cooperative and smooth process between the parents as former legal custodians and CYFD, which ultimately assumed the role of legal custodian.

Parenting is for life. No child is perfect. No parent is perfect. Raising children is never easy. It is one of the most challenging, most frustrating, and most rewarding experiences that an individual will ever experience. All parents find themselves in situations from time to time where they are at the very limits of their patience, wondering how in the world their child was able to push their buttons to the brink of frustration, but then coming down from that frustration as part of the normal cycle of understanding and patience that goes hand in hand with raising a child. The voluntary relinquishment of parental rights is not the remedy for the parent who is “tired of being a parent.” Rather, it is extraordinary relief – the concept of the relinquishment of parental rights may seem difficult and perhaps impossible – and the statute provides relief to families in extreme situations. The process exists for the family that believes wholeheartedly that parenting is for life, yet understands that sometimes, parenting requires the wisdom and understanding of knowing when to let go.

Tamara Hoffstatter is an attorney with the Law Office of Dorene A. Kuffer, PC. Her practice is limited to family law, adoption and guardianship.

The voluntary relinquishment of parental rights is not the remedy for the parent who is “tired of being a parent.”
We often ask children whose parents are divorcing, “If you had three wishes, what would they be?” The two of us have interviewed hundreds of children over the years. Many children will say they want to go to Disney World, or ask for a superpower like the ability to fly through space. Some children will say they want piles of money or peace on earth. But about 90 percent of them will simply say, “I wish Mom and Dad would quit fighting. And I wish I could see them both.”

You can help your clients sort out the best options for setting up a parenting plan after a divorce or relationship breakup—included among those are voluntary agreements, family court services, parenting coordinators, a guardian ad litem, an 11-706 ruling or a trial on the merits.

Children are the civilian casualties of divorce. While they did not cause the divorce, the way the parents handle post-divorce parenting can have lifelong consequences. It’s not divorce that causes the greatest harm to children, but the conflict between their divorcing parents. Emotions run high, routines are disrupted and conflict is high when parents split up. That’s confusing and terrifying for children. If parents cannot resolve their differences peacefully, they risk serious emotional harm to their children.

It’s important to know that children of different ages and temperaments react differently. Some withdraw, while some act out at school. Young children may regress by losing language or toilet training skills. Children of all ages may become aggressive or clingy or quickly learn to manipulate their parents when they know that the parents are not working together as a team to raise them. None of these scenarios is good for them.

Yet the good news is that none of these outcomes is inevitable. If the parents find constructive and peaceful ways to settle their differences regarding the children, they can provide for the mutual care of their children through a parenting plan without causing additional harm.

Voluntary Agreement

The best option, by far, is having the parents reach a voluntary agreement that takes into account the needs of their children. Many parents can do this. Sometimes they can meet privately. Sometimes, if both counsel agree to the overall non-confrontational strategy, the parties and counsel can create a parenting plan with the assistance of a mediator or settlement facilitator. The agreement memorializes the current status quo for the children with respect to their school, activities, religion, medical care and residence, and provides a plan for daily and holiday time with both parents. Supreme Court forms found at www.nmcourts.gov/legi/pros_lib/index.htm provide a basic format that parents can follow.
Consultation, which is conducted when further assistance such as a Priority Clinic Referral Order. If the mediation filing a motion and obtaining a Court order to be referred to the Court Clinic, which can be done by stipulation or by court-appointed neutral third party who facilitates an open discussion of the custody issues involved. The neutral party can make suggestions consistent with the child’s developmental needs; however, the neutral party cannot tell the parties how to resolve the issues. Mediation is not an evaluation process and, therefore, recommendations typically are not made to the court as a result of this process. However, in some districts, temporary recommendations may be made if the neutral party has serious concerns about the safety or well being of the children based on information presented in mediation.

For example, in Bernalillo County the Second Judicial District Court Clinic consists of trained staff who specialize in child development and understand age-appropriate parenting schedules based on the children's needs. Parties must have an order to be referred to the Court Clinic, which can be done by stipulation or by filing a motion and obtaining a Court Clinic Referral Order. If the mediation is not successful, the parties may request further assistance such as a Priority Consultation, which is conducted when a critical issue has come to the court’s attention or an advisory consultation, which is considered a form of custody evaluation.

The First Judicial District (Santa Fe, Rio Arriba, and Los Alamos counties) has a similar division called Family Court Services, while the Third Judicial District (Dona Ana County) has a mediation division for domestic matters. In both jurisdictions, parties are automatically ordered to attend a mediation session when a divorce petition involving children is filed.

Parenting Coordinator

A Parenting Coordinator is an increasingly popular option for divorcing parents. The PC is a neutral third party who can help parents as a sort of coach and “traffic cop” as they make difficult decisions about their children.

The PC is a legal or mental health professional with special expertise in family dynamics and family law. This person works with high-conflict parents on an ongoing basis to resolve parenting disputes as they arise. The PC may be given arbitration authority to make decisions when the parents cannot agree. Most PCs use a combination of mediation techniques, family therapy, and individual and joint meetings with parents (and sometimes children) to help them reach agreement on discrete issues. Some families use a PC for years after their divorce so they can stay out of the court system.

A court order of appointment should be entered so there is no question as to the PC’s authority or scope of work. The court order may contain the scope of work, or it can reference the scope of work, which can be contained in a separate document. The scope of work agreement defines the parameters for confidentiality, whether the PC will testify in court, how the PC will be paid, whether the PC will attend court sessions, how decisions will be memorialized (letter, court order, email, etc.), what the contact with counsel will be, what level of access the PC will have with the children and how matters that are not within the PCs powers should be spelled out.

Typical problems that PCs address include specifying holiday, vacation or regular parenting time; developing uniform rules for homework, discipline and bedtimes at both homes; helping parents agree on how they will contact each other and try to resolve problems themselves; specifying how to object to a PC’s decision; and interpreting or implementing provisions of the parenting plan.

The major benefits of this approach are:

• It is faster than litigation.
• It costs less than litigation.
• It fosters better co-parenting relationships through collaboration.

Detailed information about Parenting Coordination can be found at the Association of Family and Conciliation Courts’ website, www.afccnet.org, under publications (see Guidelines for Parenting Coordination, 2005, Association of Family and Conciliation Courts).

Guardian Ad Litem

In any proceeding when custody of a minor child is contested, the court may appoint a guardian ad litem or the parties can stipulate a specific individual to serve as a GAL.

A GAL’s role is to advocate zealously for his or her clients, which in this case are the children. A GAL appointed under Rule 1-053 NMSA is a “best interests attorney” who provides independent services to protect the child’s best interests without being bound by the child’s or either party’s directive or objectives. The GAL makes findings and recommendations to the court.
The GAL serves as an investigative tool for the court and investigates the situation by interviewing the child face-to-face outside the presence of both parents and counsel; interviewing both parents; conducting home visits; and speaking with health care providers, teachers, coaches, counselors and others familiar with the child. Because the GAL is an arm of the court, the court generally adopts the GAL's recommendations. Typically, a GAL requires a retainer of $3,500 or higher, which is usually equally divided between the parties. This process basically takes most of the parenting decisions away from the parents when the parents cannot agree.

Custody Evaluation/ Rule 11-706 Evaluators

A custody evaluation is the last resort for resolving parenting disputes. Parents are candidates for custody evaluations when all other available means have failed or been refused, when one or both parents has a mental disorder, where there are serious allegations of abuse against one parent or where the parents are in such high conflict that they will not agree to any reasonable parenting plan. Custody evaluations can be helpful when a child has special needs and the parents do not agree how to fulfill these needs.

A custody evaluation can be expensive—as much as $2,000 for each adult or child in the family, plus additional costs for contacting secondary sources such as stepparents or close relatives residing in the home and sometimes additional charges for court testimony. The approved protocol for custody evaluations requires clinical interviews of parents and children, psychological testing, home visits, parent-child observations and contact with collateral sources such as teachers, coaches, therapists, babysitters and childcare providers and family friends.

A custody evaluation can take months to complete, depending upon the cooperativeness of the parties, availability of collateral sources and the evaluator’s availability. Custody evaluations are contentious, and the number of licensed psychologists willing to undertake this work is steadily shrinking, causing more delay in getting the final report and recommendations. In the meantime, practitioners need to think about what is happening to the children of the parties and the parties as the process moves forward very slowly.

Seek a psychologist who is trained and licensed to do the sometimes-extensive testing that goes into an evaluation. The American Psychological Association has published custody evaluation guidelines, available at www.apa.org. In New Mexico, judicial districts refer parties for evaluation by a number of different mental health professionals, including master’s-level therapists. However helpful these referrals may be, they do not constitute a true custody evaluation unless a licensed psychologist does them.

Most courts in New Mexico prefer to have the custody evaluation psychologist function under New Mexico Rule of Evidence 11-706, making the psychologist the "court’s expert." Not only does this save considerable money, but it also bestows upon the psychologist the duty of neutrality. The order of appointment of the custody evaluator should clearly state that he is functioning as "an arm of the court" in performance of his or her duties.

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Quit Fighting: Get a Parenting Plan
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If the results of the custody evaluation are not to the client’s liking, most courts permit objections to be filed within ten days of receiving the report, and a hearing will be held on the objections. As a practical matter, objections are seldom granted. The standard for overturning the evaluator’s objections is high.

Occasionally, a parent will seek a second opinion from a different psychologist. APA Guidelines on second opinions state that the second-opinion psychologist (who is not appointed as a Rule 11-706 expert) does not retest the parties. Instead, the second opinion is a review of the process and scoring followed by the 11-706 expert to see if national standards were followed. Again, the likelihood of overturning an 11-706 evaluation is slim.

A custody evaluation is the “nuclear option” for divorcing parents. Whether the results are good or bad, the process of having had a custody evaluation often causes irreparable damage to the parents’ ability to co-parent in the future. While they can be helpful, custody evaluations should be used with caution.

Trial on the Merits

If a case doesn’t settle, it goes to trial. That is, if the court does not have a court program, if mediation fails, if a party does not like the recommendations of a GAL or custody evaluator and if objections are filed, the matter will proceed to a trial on the merits. This could entail taking depositions; serving discovery; preparing exhibits, testimony and arguments; and subpoenaing teachers, doctors and family members to testify at the trial. If a case proceeds to this point, it can be expected that the parties are in an expensive high-conflict situation and that children are being negatively affected.

Conclusion

Parents have various options for resolving custody issues. If parties are unable to come to an agreement regarding the terms of a parenting plan, they need to be prepared for a long, contentious, invasive and emotionally stressful ride. The reality is that it’s in the parents’ and children’s best interests if parties can make a good faith effort to work with one another without the intervention of a GAL, custody evaluator, or the court. There is no better way to be good parents then to retain control of the co-parent decision-making and to spend money on the children instead of litigation costs.

Attorneys and parents have a whole toolbox of options for determining how the parents will co-parent after a divorce or separation. The voluntary, client-guided options concerning their children are usually most effective and long lasting among the choices available. Attorneys should be sure that they are aware of all options available to them. Parenting decisions and processes are not “one size fits all” matters.

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Divorce with Incapacitated or Disabled Parties
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If a spouse’s mental capacity becomes highly questionable after the divorce proceedings commence, the divorce may need to be put on hold until that spouse is properly evaluated. Such evaluation may take place prior to, or in conjunction with, a separate guardianship case.

Before a court can strip an adult of the right to make decisions about his or her property or how to raise children, the judge must find the person “legally incapacitated”. This involves the opinion of a Qualified Health Professional, a “Home Visitor”, and Guardian ad Litem appointed to represent the alleged incapacitated adult – all indicating the person cannot make sound decisions for him- or herself any longer. The person seeking to be appointed guardian and conservator usually has his or her own attorney. The guardian and conservator need not be the same person. Sometimes trust companies and special agencies are appointed if no immediate family members step up to be appointed to look out for the incapacitated adult’s interests. The soon-to-be-ex-spouse cannot serve as a guardian or conservator because of the inherent conflict of interest in the divorce.

For more information, refer to the Handbook for Guardians and Conservators: A Practical Guide to New Mexico Law, published by the Office of the Attorney General and revised by the New Mexico Guardianship Association, Inc. The guide covers the protected persons’ rights, as well as the powers and duties of a guardian or conservator. It also includes appendices of relevant resources and forms. The bottom line is the overlap of divorce and guardianship proceedings makes the process longer and costs more money, but it is necessary if the divorcing party truly cannot look out for himself.

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growth in the pension plan exceed the accumulated expenses associated with the pension obligations"). For example, SPS’s expert stated that if the annual pension contribution over a five-year period is $100 and the annual pension expense over the same period is only $90, at the end of the five-year period, the prepaid pension asset would be $50 ($100 x 5 - $90 x 5), plus any return on the $50 prepaid pension asset. Conversely, when [accrued expenses exceed] contributions to [a] fund, a prepaid pension liability accrues. See In re Sw. Pub. Serv. Co., 2008 WL 4226018 n.256, slip copy at 114 (NMPRC) (final order partially adopting recommended decision), order clarifying final order sub nom. See Ind. Office of Util. Consumer Counselor v. Ind. Mich. Power Co., 7 N.E.3d 1025, 2014 WL 934350, at *12 (Ind. Ct. App. 2014) (memorandum decision) (non-precedential). The following hypothetical offered by SPS’s testifying expert illustrates the indirect benefit SPS customers receive.

[5] Suppose that in a given year the utility had a revenue requirement of $300, and that it expected to earn a 6% return on the pension fund. The $3.00 return on [a hypothetical] $50 prepaid pension asset ($0.06 x $50) would be credited against the revenue requirement, so that the utility could only collect $297 from its customers through [the] rates. Thus, the revenue requirement is reduced by $3.00 as a result of the prepaid pension asset. SPS customers therefore would benefit from rate reductions generated by the prepaid pension asset, but SPS would not earn a return on the prepaid pension asset if the asset is not included in SPS’s rate base.

[6] In this case, the New Mexico jurisdictional share of SPS’s prepaid pension asset is approximately $36.9 million. According to SPS, this asset resulted in $1.7 million in earnings in 2008 that effectively reduced SPS’s pension expense by $1.7 million, which reduced SPS’s revenue requirement by the same amount. SPS sought “to include the net amount of its prepaid pension asset of approximately $22 million” in the rate base to earn a return on its $22 million (the $36.9 million asset minus a $14.9 million tax deferred asset).

[7] In a recommended decision, the PRC hearing examiner concluded that because the prepaid pension asset reduced the pension expense by $1.7 million, that $1.7 million should be included in the rate base for recovery. The PRC hearing examiner did not recommend that the $22 million net prepaid pension asset amount be included in the rate base. SPS disagreed with this recommendation, contending that the examiner’s proposal would enable “SPS [to] earn a return only on the amount of the reduction in the cost of service rather than on the amount of the asset that resulted in the reduction.” (8) The PRC also disagreed with the hearing examiner. In its final order, the PRC authorized the inclusion of the net amount of the prepaid asset in SPS’s rat base because doing so “recognizes that ratepayers benefit from the prepaid pension asset and that the utility should earn a return on the prepaid pension asset in order for the utility to recover its full cost of service.” The Attorney General appeals, arguing that substantial evidence does not support the inclusion of the entire prepaid pension asset within the rate base.

A. Standard of Review

(9) In determining whether a PRC final order is supported by substantial evidence, we review the whole record, “view[ing] the evidence in the light most favorable to the decision made by the [PRC].” PNM Gas Servs. v. N.M. Pub. Util. Comm’n (In re PNM Gas Servs.), 2000-NMSC-012, ¶ 4, 129 N.M. 1, 1 P.3d 383 (internal quotation marks and citation omitted). “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Rinker v. State Corp. Comm’n, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783. “The supreme court shall have no power to modify the action or order appealed from [in this case, a PRC final order], but shall either affirm or annul and vacate the same.” NMSA 1978, § 62-11-5 (1982). “The [PRC] is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable.” Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 616 P.2d 1116. A party challenging a PRC final order has the burden of establishing that the order is “arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency’s authority, or otherwise inconsistent with law.” N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted).

B. The Prepaid Pension Asset

(10) The Attorney General contends that only the earnings generated by the

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1Companies must follow Financial Accounting Standards Board codified accounting standards to comply with generally accepted accounting principles.

2SPS operates in other states besides New Mexico. For the relevant time period, SPS’s total prepaid pension asset, on a total company basis, was approximately $179.7 million. The amount of this asset attributable to New Mexico is approximately $36.9 million.
prepaid pension asset should be included in the rate base because this is the amount by which the ratepayers have benefited, or the amount by which the utility's revenue requirement is reduced. The Attorney General argues that only $1.7 million should be included in the rate base, whereas the PRC's final order enables SPS to include $22 million in the rate base, which is the net amount of its prepaid pension asset. In resolving this issue, we explain the rationale for electric utility regulation.

[11] Electric utilities are regulated because their industry has natural monopoly characteristics. Joseph P. Tomain, The Persistence of Natural Monopoly, 16 Nat. Resources & Env't. 242, 242 (2002). In natural monopoly settings, both the benefits and the possibility of competition are limited. Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982). If the electric industry was a competitive free-for-all, different companies would attempt to build separate electric grids and sign up customers as quickly as possible to reduce their average costs of business more rapidly than their rivals. See id. This competitive process would last until a single company was left standing "because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs." Id. Thus, until a single company wins, competition within the electric industry would produce wasteful duplicate grids that would needlessly raise average costs for consumers. See id.; Tomain, The Persistence of Natural Monopoly, supra, at 242 ("A specific service area needs only one set of electric . . . wires—the investment in any other set of wires is wasteful."). To avoid wasteful duplication, a government may choose to give one firm a monopoly within a service area "in exchange [for] a commitment to provide reasonable service at reasonable rates." Omega Satellite Prods. Co., 694 F.2d at 126.

[12] Electric utility regulation consequently reflects a compact between utilities and the public. See Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n (FERC), 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring). A utility is given a monopoly over a service area, and in exchange accepts government regulation of its business, including price regulation. Id. Under this arrangement, utility investors obtain a stability in earnings that would be unlikely to be attainable in less regulated industries, while "ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits." Id. [13] Regulators attempt to set prices that mimic market conditions and ensure that utilities are "profitable enough to attract capital investment." Tomain, Steel in the Ground, supra, at 945. The following rate making formula traditionally determines utility revenues to be received from ratepayers: \[ R = O + (V - d)r \]

where \( R \) represents the utility's revenue requirement—that is, the amount of money the utility needs to stay in business. \( O \) represents the utility's prudently incurred expenses. In short, ratepayers reimburse the utility for its expenditures dollar for dollar. The utility's rate base is represented by \( (V - d) \), which stands for the value of a utility's capital investment minus depreciation, which is returned to the utility as expenses. Finally, \( r \) represents the rate of return on the rate base.

Id. at 945-46.

[14] The utility's rate base—the total amount of investment made by a utility to provide its service—is determined by adding the utility's investment in physical properties to its working capital. Cent. La. Elec. Co. v. La. Pub. Serv. Comm'n, 373 So. 2d 123, 129 (La. 1979). Thus, a utility can include physical properties such as a power plant, see, e.g., Hobbs Gas Co., 1980-NMSC-005, ¶ 6, and working capital—operating funds essential to pay for current obligations—in its rate base. Gov't of Guam v. Fed. Mar. Comm'n, 329 F.2d 251, 256 (D.C. Cir. 1964); Ariz. Pub. Serv. Co., 5 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5. For example, in the context of prepaid pension assets, income earned on the pension fund is reported under generally accepted accounting principles as a reduction to the utility's pension expense. Id. "If that reduction in pension expense is used in determining a utility's rates, there will be a corresponding reduction in the amounts collected from ratepayers." Id. Under these circumstances, the utility must finance the reduction because it cannot use the income from the pension trust to pay other current obligations; as a result, the utility is allowed to recover the costs of financing the reduction by including the pension income in the rate base. See id. The Attorney General's position is that the utility can only recover the costs of financing the reduction of the utility's revenue requirement, i.e., the utility can only earn a return from the pension income generated by the prepaid pension asset.

[15] In the context of utility regulation, working capital does not include the total liquid funds with which the business is conducted. It is not the property which the business has; that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an allowance for the sum which the company needs to supply from its own funds for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently. Gov't of Guam, 329 F.2d at 256 (internal quotation marks and citation omitted). As a result, only utility contributions, not ratepayer contributions, can be properly included in the rate base as working capital. For example, if a utility were to prepay for natural gas with investor funds, the utility should expect to receive a reasonable return on its investment. Zia Nat. Gas Co. v. N.M. Pub. Util. Comm'n (In re Zia Nat. Gas Co.), 2000-NMSC-011, ¶ 22, 128 N.M. 728, 998 P.2d 564. Conversely, if ratepayers have paid in advance for the natural gas, the utility would have no expectation of a return because its capital was not used to buy the natural gas. Id.

[16] A utility can include prepayments for pension expenses in its rate base "because the utility is out-of-pocket for such costs until they are recovered from ratepayers and is therefore entitled to recover its cost of financing such prepaid expenses." S. Co. Servs., Inc., 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5. For example, in the context of prepaid pension assets, income earned on the pension fund is reported under generally accepted accounting principles as a reduction to the utility's pension expense. Id. "If that reduction in pension expense is used in determining a utility's rates, there will be a corresponding reduction in the amounts collected from ratepayers." Id. Under these circumstances, the utility must finance the reduction because it cannot use the income from the pension trust to pay other current obligations; as a result, the utility is allowed to recover the costs of financing the reduction by including the pension income in the rate base. See id. The Attorney General's position is that the utility can only recover the costs of financing the reduction of the utility's revenue requirement, i.e., the utility can only earn a return from the pension income generated by the prepaid pension asset.

[17] However, a utility may not only be out-of-pocket for reductions in its revenue requirement resulting from pension fund earnings. A utility may also be out-of-pocket for investor-funded contributions that are in excess of pension expenses. Basically, when a utility supplies working capital to fund contributions in excess of pension expenses to create an income-producing prepaid pension asset, the utility finances the cost of the entire prepaid pension asset. See, e.g., In re Rocky Mountain Power, 2014 WL 7526282, at *14 ¶¶ 52, 53, ¶ 36 (Wyo. P.S.C. 2014) (noting that a "prepaid pension asset represents
Other jurisdictions have allowed utilities to recover the financing costs of the net prepaid pension asset by including the asset in the rate base as a component of working capital. See, e.g., Ind. Office of Util. Consumer Counselor, 7 N.E.3d 1025, 2014 WL 934350, at *12 (upholding a regulatory determination that a prepaid pension asset be included in the rate base because the “asset amounted to working capital that benefited the ratepayers by reducing the total pension costs needed in [the utility’s] revenue requirement”); In re Rocky Mountain Power, 2014 WL 7526282, at *14, *36 (finding persuasive a utility’s argument that it should recover the financing costs of its prepaid pension asset by including the asset in the rate base to enable the utility to earn a return on that asset). But see In re Pub. Util. Comm’n of Or., 2015 WL 4710466, at *7 (Or. P.U.C. 2015) (affirming a “long-standing policy of allowing a utility to recover its pension contributions [only as an] expense and reject[ing] the . . . Utilities’ proposal to include their current prepaid pension assets in rate base”).

On appeal, the Attorney General does not argue as a matter of law that the prepaid pension asset cannot be included in the rate base. The Attorney General’s only evidentiary challenge is that inclusion of the net prepaid pension asset will result in ratepayers paying more to SPS than the benefit ratepayers have enjoyed from the pension fund earnings. We interpret the Attorney General’s argument to be that SPS did not prove how much of the net prepaid pension asset resulted in consumers paying $1.7 million less to SPS. We disagree. We hold that some or all of a prepaid pension asset should be included in the rate base to the extent that the evidence evinces that the asset was investor-funded, as opposed to ratepayer-funded.1 See In re Potomac Elec. Power Co., 2008 WL 516553, slip copy at 29, 263 P.U.R. 4th 1 (D.C. P.S.C.) (finding that “investor-supplied cash contributions have resulted in an asset from which [utility] customers receive a tangible benefit in the form of reduced pension expenses” and including the prepaid pension asset in the rate base), adhered to on denial of reconsideration sub nom. 2008 WL 4831456 (slip copy) (D.C. P.S.C. 2008); In re N. Ill. Gas Co., 2005 WL 2445944, slip copy at 23 (Ill. C.C. 2005) (noting that a prepaid pension asset “was created by ratepayer-supplied funds, not by shareholder-supplied funds,” and finding that the “prepaid pension asset should be eliminated from rate base”); In re Zia Nat. Gas Co., 2000-NMSC-011, ¶ 22 (noting that only investor-supplied working capital may be included in the rate base); In re Cent. Tel. Co. of Tex., 19 Tex. P.U.C. Bull. 929, 1993 WL 595464, slip copy at 13 (Tex. P.U.C. 1993) (concluding that conversely, when ratepayer-supplied money overfunds a pension plan, investors are not entitled to “earn a return on the prepaid pension asset because [this] . . . would have the effect of charging ratepayers again for amounts they have already paid”). Similarly, while a prepaid pension asset may be included in the rate base, prepaid pension liability must be subtracted from the rate base. See, e.g., In re Ky.-Am. Water Co., 1997 WL 34863470, slip copy at 10 (Ky. P.S.C. 1997) (noting that although pension liabilities can be utilized to reduce the rate base, if “a pension asset is created, then the asset should be included as a rate base addition”), opinion modified on denial of relitigation sub nom. In re Adjustment of the Rates of Ky.-Am. Water Co., 1997 WL 34863471 (slip copy) (Ky. P.S.C. 1997).

The evidence indicates that SPS has a net prepaid pension asset of approximately $22 million. The evidence also indicates that including $22 million of the net prepaid pension asset in the rate base would generate approximately $2.5 million in revenue for SPS, which exceeds the $1.7 million by which SPS asserts the pension expense was reduced. SPS maintains that its actual annual pension expense is $5.36 million, but the $1.7 million return on the prepaid pension asset reduced the pension expense to $3.66 million.

Although the Attorney General is correct to make an evidentiary contention, the premise of its argument is incorrect. Utilities are able to recover the costs of financing their business operations through the inclusion of investor-supplied working capital in the rate base. See In re Zia Nat. Gas Co., 2000-NMSC-011, ¶ 22. In his written testimony, Gene H. Wickes stated that “[t]he portion of the prepaid pension asset due to these contributions has therefore come exclusively from shareholder capital and should be included in rate base.” It is uncontested that SPS investors made contributions to the pension fund that are required by law. These contributions exceeded expenses and generated earnings that effectively reduced SPS’s—and consequently the ratepayers’—pension expense. Had the ratepayers advanced the contributions to the pension fund, their contributions would not have been included in the rate base. See In re N. Ill. Gas Co., 2005 WL 2445944, slip copy at 14. However, because the ratepayers did not make the contributions, the investors, not the ratepayers, absorbed the cost of funding the pension program, and therefore the net prepaid pension asset was properly included in the rate base. See, e.g., In re Pub. Serv. Co. of Colo., 1993 WL 494141, slip copy at 17, 148 P.U.R. 4th 1 (Colo. P.U.C. 1993) (“In order to compensate investors for the additional funds they supply to meet the higher contribution levels, the resulting prepaid assets are an appropriate addition to rate base.”); In re Potomac Elec. Power Co., 2008 WL 4831456, slip copy at 3 (concluding that inclusion of an investor-supplied prepaid pension asset in the rate base is supported by substantial evidence because “the earnings on the prepaid pension asset will reduce the annual [utility] expense, thus benefiting customers by reducing the revenue requirement”); Ind. Office of Util. Consumer Counselor, 7 N.E.3d 1025, 2014 WL 934350, at *12 (upholding a regulatory determination that a prepaid pension asset

3Because utilities may only include in the rate base investor-funded, prepaid pension assets, we emphasize that “shareholder contributions do not solely drive prepaid pension asset balances.” In re Pub. Util. Comm’n of Or., 2015 WL 4710466, at *8 (Or. P.U.C. 2015). For example, during “periods of high economic growth, a prepaid pension asset balance will increase even with no shareholder contributions,” id., presumably because, among other reasons, existing funds within a pension trust can earn unexpectedly high returns. See, e.g., In re Cent. Tel. Co. of Tex., 19 Tex. P.U.C. Bull. 929, 1993 WL 595464, slip copy at 13 (Tex. P.U.C. 1993) (noting that because a utility failed to “accurately predict that its pension fund would experience favorable investment results and that there would be reductions in benefit levels, the [utility’s] pension fund was subsequently overfunded” through rates collected earlier from ratepayers). In short, simply placing a prepaid pension asset in the rate base allows utilities to earn returns on amounts that are not shareholder contributions. See In re Pub. Util. Comm’n of Or., 2015 WL 4710466, at *8.
amounted to working capital that should be included in the rate base).

[22] We note, however, that contributions to pension funds should be scrutinized to ensure that utility investments are “used and useful” so as to inure to the benefit of consumers. See N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm’n, 1986-NMSC-059, ¶ 29, 104 N.M. 565, 725 P.2d 244 (internal quotation marks omitted) (noting that the “used and useful concept is but one factor among many to be considered by the [PRC] in its rate base analysis”). Utilities should not voluntarily overfund their pension funds simply to earn a favored rate of return. In re Appalachian Power Co., 2011 WL 2150661, slip op. at 27, 288 P.U.R. 4th 185 (W. Va. P.S.C. 2011) (“Prepayments should be subject to the same review as any other investment or expense of a utility. Inclusion of prepayments in rate base should not be used for a utility to find a convenient place to deposit funds and then expect to earn a return on those funds.”). On the other hand, mandatory contributions to pension funds are useful. Such contributions may benefit customers by generating an income-earning prepaid pension asset to reduce pension expenses, see, e.g., In re Potomac Elec. Power Co., 2008 WL 516553, slip copy at 29, and also fund the pension programs that make it possible for the utility to attract and retain highly-skilled workers. See, e.g., In re Advice Letter No. 830 - Gas of Pub. Serv. Co. of Colo., 2013 WL 5799983, at *46-47 (Colo. P.U.C.).

[23] We conclude that the Attorney General has failed to meet its burden of showing that the PRC’s inclusion of the entire prepaid pension asset was unreasonable or unlawful for lack of substantial evidence. See In re PNM Gas Servs., 2000-NMSC-012, ¶ 4.

II. THE LAWFULNESS OF THE RENEWABLE PORTFOLIO STANDARDS RIDER

A. SPS’s Recovery of Renewable Energy Procurement Costs from Non-Capped Customers

[24] The Attorney General also contends that the PRC acted contrary to law when it approved SPS’s renewable energy cost rider because the rider sought to recover renewable energy costs from non-capped customers, customers who are not subject to a legislatively imposed limit on their renewable energy costs. We review issues of law de novo. N.M. Attorney Gen. v. N.M. Pub. Regulation Comm’n, 2013-NMSC-042, ¶ 10, 309 P.3d 89. However, “[w]hen an agency that is governed by a particular statute construes or applies that statute, [we] will accord some deference to the agency’s interpretation.” Id. ¶ 12 (internal quotation marks and citations omitted). We will reverse the agency’s interpretation of a statute if it is unreasonable or unlawful. Id.

[25] The resolution of this issue necessitates a discussion of the Renewable Energy Act, §§ 62-16-1 to -10. As a preface to our discussion of this issue, some background on renewable energy promotion is warranted.

[26] Under the traditional rate formula, utilities receive a reasonable rate of return for capital project investments such as power plants. See Tomain, “Steel in the Ground,” supra, at 946. Utilities consequently have an incentive to invest in capital projects, see id., and “prefer low-risk, conventional technologies that can be built quickly instead of long-term, innovative technologies that would be riskier.” Virginia R. Hildreth, Comment, Renewable Energy Subsidies and the GATT, 14 Chi. J. Int’l L. 702, 707 (2014). As a result, “government assistance is often key to encourage investment in industries like renewable energy.” Id. Such encouragement is desirable because there are numerous benefits to renewable energy such as “lessened dependence on foreign fossil fuel supplies, heightened national security, overall cleaner air, and local and rural job creation.” Shelley Welton, From the States Up: Building a National Renewable Energy Policy, 17 N.Y.U. Envtl. L.J. 987, 995 (2008); see also Brent M. Haddad & Paul Jefferiss, Forging Consensus on National Renewables Policy: The Renewables Portfolio Standard and the National Public Benefits Trust Fund, 12 The Elec. J. 68, 69 (Mar. 1999) (listing benefits of renewable energy).

[27] Renewable portfolio standards are among the most popular methods of encouraging renewable energy development. See Lincoln L. Davies, State Renewable Portfolio Standards: Is There A “Race” and Is It “To the Top”? 3 San Diego J. Climate & Energy L. 3, 10 (2011-2012). These standards mandate that utilities incorporate renewable energy sources into their electric generation portfolios, id. at 13, and frequently enable utilities to purchase renewable energy credits4 to satisfy the mandates of renewable portfolio standards. Id. at 11. A renewable portfolio standard therefore combines “both a potentially inflexible regulatory directive and the malleable tool of economic trading,” id. at 10, to “inject an element of economic efficiency into [renewable portfolio standard] schemes.” Id. at 11.

[28] Under the Renewable Energy Act, New Mexico has a renewable portfolio standard that both mandates the incorporation of renewable energy sources into electric generation portfolios and allows for the purchase of renewable energy certificates (credits) to satisfy the mandates. Sections 62-16-4 to -5. Pursuant to this renewable portfolio standard, before the proceedings in this case, the evidence indicates that SPS received PRC approval to (1) purchase the outputs of two New Mexico wind farms, (2) pay incentives encouraging customers to install solar and biomass generation systems, (3) obtain renewable energy credits from various sources, and (4) purchase solar photovoltaic systems.

[29] The controversy over the permissibility of SPS’s proposed rider arises from a disagreement as to how renewable energy costs are allocated between different rate classes. In utility regulation, customers are often divided into different classes that are charged different rates. II Leonard Saul Goodman, The Process of Ratemaking 964-65 (1998). The creation of rate classes involves the consideration of various factors such as alternate fuel capability and types of customer, which can be classified as residential, commercial, or industrial. Id. at 965. Differential rates can be utilized to implement various policies. Tomain, “Steel in the Ground,” supra, at 946-47.

[30] In this case, cost allocation has been utilized to address a problem that is incidental to the promotion of renewable energy generation. The use of renewable energy tends to raise energy costs relative to the consumption of fossil fuels. See Hildreth, supra, at 716 (“The technology needed for renewable energy tends to be more expensive than traditional fuel sources.”); Trevor D. Stiles, Renewable Resources and the Dormant Commerce Clause, 4 Envtl. & Energy L. & Pol’y J. 34, 43-44, 45 (2009) (numerically illustrating how there is a “vast price discrepancy between renewable energy sources and fossil fuel sources for energy generation”). The prospect of

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4Renewable energy credits “typically represent the production of one megawatt hour (‘MWh’) of renewables-fueled electricity.” Davies, supra, at 11.
“overly high renewable implementation costs” has prompted concern that commercial and large industrial customers may leave the utility system or exit states that implement prohibitively expensive renewable energy promotion plans. California Commissioner Seeks Consideration of Shale Gas, 4054 PUR Util. Reg. News 1, 1 (Jan. 20, 2012). These large customers may have the capacity to self-generate their energy needs or simply close their plants in areas where energy costs are high. See Charles G. Stalon & Reinier H.J.H. Lock, State-Federal Relations in the Economic Regulation of Energy, 7 Yale J. on Reg. 427, 449 (1990). When these large customers are driven from the utility system, utility rates have to be raised even further for remaining customers, which exacerbates the potential for other customer exits. See id. In light of the potential for large customers to exit the grid, the Legislature enacted Section 62-16-4(A)(2), which limits the annual amount large customers can be charged for renewable energy procurement. The PRC calls this limit the “large customer cap.” Accordingly, costs that exceed the large customer cap may be called “large customer cap costs.”

In earlier proceedings, the evidence indicates that the PRC had already approved SPS’s “requested procurements without any reduction to SPS’s overall [renewable portfolio standards] to account for large customer cap costs.” When the PRC learned that SPS’s costs exceeded the large customer cap, the PRC specifically approved treatment of that amount as a deferred cost. “A ‘deferred cost is one that has been paid by the [utility] but is postponed for inclusion in rates until a future period.” 1 Leonard Saul Goodman, The Process of Ratemaking 321 (1998). This may occur, for example, when a utility “has a major future liability, and before collecting anything through rates, its management decides that the books should reflect the liability.” Id. Under these circumstances, a utility “may apply for [regulator] approval to fund an account, and to reflect on its books a deferred debit or ‘regulatory asset,’ … which later can be charged to ratepayers and amortized over a future period.” Id. Regulatory assets are often created to spread out the recovery of nonrecurring costs over a period of years so as to avoid substantial rate increases, which may occur if full recovery was allowed as soon as the utility made an expenditure. City of Corpus Christi v. Pub. Util. Comm’n of Tex., 51 S.W.3d 231, 244-45 (Tex. 2001). SPS filed an application seeking to obtain a rider to recover approximately $22 million of renewable energy procurement costs. Riders are surcharges applied to directly recover specific costs. See Chesapeake Utils. Corp. v. Del. Pub. Serv. Comm’n, 705 A.2d 1059, 1063 (Del. Super. Ct. 1997) (referring to a rider as a surcharge); Citizens Util. Bd. v. Ill. Commerce Comm’n, 651 N.E.2d 1089, 1102 (Ill. 1995) (“[A] rider mechanism . . . facilitates direct recovery of a particular cost.”). These surcharges give regulators more flexibility in spreading out costs charged to ratepayers over a period of time. See Chesapeake Utils. Corp., 705 A.2d at 1063 n.3. Section 62-16-4(A)(1)(a)-(d) mandates that a certain percentage of a “public utility’s total retail sales to New Mexico customers” be comprised of renewable energy. The required percentage escalates over time. See id. However, under the large customer cap provision of Section 62-16-4(A)(2), the renewable portfolio standards mandated in Section 62-16-4(A)(1) shall be reduced, as necessary, to provide for the following specific procurement requirements for nongovernmental customers at a single location or facility, regardless of the number of meters at that location or facility, with consumption exceeding ten million kilowatt-hours per year ([capped customers]). On and after January 1, 2006, the kilowatt-hours of renewable energy procured for these customers shall be limited so that the additional cost of the renewable portfolio standard to each customer does not exceed the lower of one percent of that customer’s annual electric charges or forty-nine thousand dollars ($49,000) ([large customer cap]).

Section 62-16-4(A)(2). The large customer cap in Section 62-16-4(A)(2) also escalates over time such that capped customers can continue to be charged increasing amounts for renewable energy.

The evidence indicates that SPS sought to recover the renewable energy procurement costs that exceeded the large customer cap from non-capped customers. The Attorney General opposed SPS’s application, arguing that SPS could only recover its costs from large customers. The Attorney General argues that recovery of large customer cap costs from non-capped customers is contrary to both Section 62-16-4(A)(2) and 17.9.572.15 NMAC, a regulation concerning renewable energy cost recovery. The Attorney General contends that Section 62-16-4(A)(2) mandates the reduction of renewable energy procurements if such procurements would generate costs in excess of the large customer cap. The Attorney General’s reasoning, because large customer cap costs should not have arisen as a matter of law, they cannot be allocated to non-capped customers.

In a supplemental recommended decision, the hearing examiner recommended that SPS be allowed to recover large customer cap costs from non-capped customers because given the cost limits on large customers, SPS’s ability to collect excess costs from large customers in the future would be speculative and uncertain. In a final order partially adopting the recommended decision (the final order), the PRC agreed with the hearing examiner. We affirm the PRC on this issue because its actions are consistent with Section 62-16-4(A)(2) and the Renewable Energy Act as a whole.

B. Discretion to Reduce Renewable Energy Procurements

Section 62-16-4(A)(2) states that the New Mexico renewable portfolio standards mandate “shall be reduced, as necessary” to accommodate the large customer cap. According to the Attorney General, the word “shall” indicates that renewable energy procurement reductions are mandated whenever renewable energy procurement costs would otherwise exceed the large customer cap. One opposing interpretation of Section 62-16-4(A)(2) is that the phrase “as necessary” modifies the phrase “shall be reduced” to indicate that the PRC has discretion to reduce renewable energy procurements, even if large customer cap costs would result from such procurements. The Attorney General argues that when large customer cap costs arise, the PRC has discretion regarding the amount by which renewable energy procurement should be reduced, but not whether the renewable portfolio standards should be reduced. We hold that (1) Section 62-16-4(A)(2) does not mandate a reduction in renewable energy procurement whenever large customer cap costs arise, and (2) the PRC has discretion to reduce renewable energy procurement when large customer cap costs arise.

Our analysis begins with the plain text of the statute. Garcia v. Gutierrez, 2009-NMSC-044, ¶ 53, 147 N.M. 105, 217 P.3d 591. In analyzing the phrase “shall
be reduced, as necessary," we know that "shall" is a word of mandate. See Black's Law Dictionary 1375 (6th ed. 1990). However, the phrase "as necessary" indicates discretion. Norris v. Emanuel Cty., 561 S.E.2d 240, 244 (Ga. Ct. App. 2002). Because "as necessary" modifies the word "shall" in Section 62-16-4(A)(2) (internal quotation marks omitted), the statute's plain text indicates that when large customer cap costs arise, the PRC has discretion to determine whether renewable energy procurement reductions are necessary.

The next sentence in Section 62-16-4(A)(2) provides that "the kilowatt-hours of renewable energy procured for these customers shall be limited so that the additional cost of the renewable portfolio standard to each customer does not exceed the large customer cap. The word "shall" in this sentence is not modified by any words of discretion. The Attorney General apparently relies upon this lack of discretionary language to argue that Section 62-16-4(A)(2) mandates renewable energy procurement reductions whenever large customer cap costs arise. We disagree. This sentence merely precludes capped customers from being charged costs in excess of the statutory cap. Logically, should large customer cap costs arise, the PRC can ensure compliance with the statutory cap in two ways: the PRC can either reduce renewable energy procurement or adjust what is actually charged to capped customers. In adjusting what is actually charged to capped customers, the PRC "may authorize deferred recovery of the costs of complying with the renewable portfolio standard." Section 62-16-4(A)(2).

In other words, the PRC can choose not to reduce procurements, even when large customer cap costs arise, by deferring the excess costs for later recovery, so as not to charge capped customers with statutorily prohibited costs. See id.

A plain reading of Section 62-16-4(A)(2) indicates that the PRC has the authority not to reduce renewable energy procurements, even when large customer cap costs increase. This interpretation is strongly supported by a reading of the Renewable Energy Act in its entirety, and it should therefore be adopted. See Arnold v. State, 1980-NMSC-030, ¶ 10, 94 N.M. 381, 610 P.2d 1210 ("Legislative intent is to be determined primarily from the language used in the Act or statute as a whole."). Moreover, this reading acknowledges the difficulty of avoiding large customer cap costs.

First, the renewable portfolio standard promulgated by the Renewable Energy Act provides a minimum standard. See § 62-16-4(A)(1) ("[R]enewable energy shall comprise no less than [a given] percent of each public utility's total retail sales to New Mexico customers." (emphasis added)). The Attorney General's reading of Section 62-16-4(A)(2) would have us treat the large customer cap as providing a maximum standard. This is problematic because mandating renewable energy procurement reductions whenever large customer cap costs arise would be inconsistent with Section 62-16-2(A)(5), which plainly states that "a public utility should have incentives to go beyond the minimum requirements of the renewable portfolio standard."

Second, Section 62-16-4(A) clearly evinces a legislative intent to systematically increase renewable energy use in New Mexico. Section 62-16-4(A)(1) escalates renewable energy procurement requirements over time, while Section 62-16-4(A)(2) increases the large customer cap over time. Mandating renewable energy procurement reductions whenever large customer cap costs arise would undermine New Mexico's ability to systematically increase renewable energy usage.

Third, the Attorney General's argument is erroneously premised on the idea that Section 62-16-4(A)(2) was meant to protect non-capped customers from high renewable energy costs by banning costs in excess of the large customer cap to prevent large customer cap costs from being allocated to non-capped customers. We need not adopt the Attorney General's interpretation of Section 62-16-4(A)(2) to protect non-capped customers from high renewable energy costs because another statutory provision already performs this function: Section 62-16-4(B) mandates setting an overall reasonable cost threshold for renewable energy procurement.

Fourth, the Attorney General's argument appears to assume that large customer cap costs can be forecast on an accurate and consistent basis so that in approving renewable energy procurements, the PRC can systematically avoid large customer cap costs. The record proper indicates otherwise. PRC approvals of renewable energy procurement are "based on the best information available at the time the resources were being reviewed." SPS notes that how much large customer cap costs will increase depends on future occurrences such as the fluctuation of natural gas prices. Accordingly, the evidence indicates that we cannot reasonably expect that large customer cap costs can be predictably eliminated.

Reading the language of the Renewable Energy Act as a whole, we conclude that the PRC has discretion to decline to reduce renewable energy procurement, even when large customer cap costs arise. This authority is congruent with the statutory policy of increasing renewable energy use in New Mexico. Moreover, we cannot reasonably expect that either the PRC or utilities will be able to avoid large customer cap costs. Thus, adopting the Attorney General's position that large customer cap costs have to be avoided as a matter of law also would be contrary to practical experience.

C. Section 62-16-4(A)(2) Does Not Preclude the Recovery of Large Customer Cap Costs from Non-Capped Customers

The PRC exercised its discretion not to reduce renewable energy procurement when large customer cap costs arose, which is consistent with our interpretation of Section 62-16-4(A)(2). It then authorized the deferral of large customer cap costs for future recovery. The PRC's final order provides for the collection of large customer cap costs from non-capped customers. We therefore determine the permissibility of collecting large customer cap costs from non-capped customers.

The Attorney General does not oppose SPS's ability to recover deferred large customer cap costs. It merely contends that such costs should not be recovered from non-capped customers, asserting that (1) enabling recovery of large customer cap costs from non-capped customers "violate[s] the basic ratemaking principle of cost[ ] causation," and (2) Section 62-16-4(A)(2) protects non-capped customers from paying for large customer cap costs. We reject the Attorney General's position as contrary to law and hold that large customer cap costs can be allocated to non-capped customers.

The Attorney General's contention that allocating large customer cap costs to non-capped customers violates the principle of cost causation is without merit. The plain language of Section 62-16-4(A)(2) does not mandate that renewable energy procurement costs be recovered only against those customers who caused large customer cap costs. Moreover, renewable energy procurement costs arise as a result of statutory mandate, see § 62-16-4(A)(1),
such that neither capped nor non-capped customers can be said to cause any specific procurement costs. [48] Similarly, the Attorney General’s assertion that Section 62-16-4(A)(2) protects non-capped customers from large customer cap costs is unsupported by law. Its argument assumes that Section 62-16-4(A)(2) mandates reductions in renewable energy procurement whenever large customer cap costs arise, and non-capped customers from high renewable energy costs. Under the Attorney General’s reasoning, rates for non-capped customers cannot be increased by large customer cap costs because such increases would deprive non-capped customers of the protections provided by Section 62-16-4(A)(2). We reject this reasoning because Section 62-16-4(A)(2) does not evince a legislative intent to protect non-capped customers. We have already held that Section 62-16-4(A)(2) does not mandate renewable energy procurement reductions when large customer cap costs arise. The Attorney General’s contention that Section 62-16-4(A)(2) precludes large customer cap costs to protect non-capped customers is also incorrect because nothing in Section 62-16-4(A)(2) addresses the interests of non-capped customers. See State v. Diamond, 1921-NMSC-099, ¶ 5, 27 N.M. 477, 202 P. 988 (We will not insert words that are absent in a statute.). We conclude that Section 62-16-4(A)(2) does not preclude the allocation of large customer cap costs to non-capped customers. [49] The PRC had previously approved of SPS’s procurement plans. Under Section 62-16-6(A), “[c]osts that are consistent with commission approval of procurement plans . . . shall be deemed to be reasonable.” Thus, the renewable procurement costs in this case are reasonable as a matter of law. Because these procurement costs are reasonable, SPS is entitled under Section 62-16-6(A) to recover large customer cap costs. Id. (“A public utility that procures or generates renewable energy shall recover, through the rate-making process, the reasonable costs of complying with the renewable portfolio standard.”). The evidence indicates that if large customer cap costs only can be collected from capped customers, 20 years or more could elapse “before SPS even has the opportunity to collect” these procurement costs. Thus, as the PRC determined, the Attorney General’s proposed cost recovery mechanism “is speculative and uncertain, and would not provide a reasonable opportunity for SPS to recover [large customer cap] costs.” Forcing SPS to collect large customer cap costs only from capped customers would effectively disallow recovery of these procurement costs, contrary to the Renewable Energy Act’s guarantee that utilities can recover the reasonable costs of renewable energy procurement. Sections 62-16-4(A)(2) & -6(A). [50] D. 17.9.572.15 NMAC Does Not Preclude the Recovery of Large Customer Cap Costs from Non-Capped Customers [50] The Attorney General contends that the “plain language” of 17.9.572.15 NMAC “make[s] clear that costs associated with large [capped] customers should be borne by large customers alone.” 17.9.572.15 NMAC is a regulatory provision concerning renewable energy cost recovery that references Section 62-16-4(A)(2). Our interpretation of Section 62-16-4(A)(2) therefore informs our construction of 17.9.572.15 NMAC. We have previously held in this opinion that Section 62-16-4(A)(2) provides the PRC with discretion, not a mandate, to reduce renewable energy procurement when large customer cap costs arise, and does not bar the allocation of large customer cap costs to non-capped customers. Consistent with our interpretation of Section 62-16-4(A)(2), we hold that 17.9.572.15 NMAC also does not bar the allocation of large customer cap costs to non-capped customers. [51] 17.9.572.15 NMAC provides that: A. A public utility shall recover the reasonable costs of complying with this rule through the rate making process, including its reasonable interconnection and transmission costs and other costs attributable to acquisition and delivery of renewable energy to retail New Mexico customers. B. Costs that are consistent with commission-approved annual Renewable Energy Act plans are deemed to be reasonable. C. A public utility that is permitted to defer the recovery of renewable energy costs pursuant to commission order may, through the ratemaking process, recover from customers that are not subject to the rate impact limitations of Sections 62-16-4(A)(2) and 62-16-4A(3) NMSA 1978 the cumulative sum of those deferred amounts, plus a carrying charge on those amounts. D. For customers that are subject to the rate impact limitations of Section 62-16-4A(2) NMSA 1978, a public utility may, through the ratemaking process, recover from those customers the cumulative sum of those Section 62-16-4A(2) NMSA 1978 limited deferred amounts, plus carrying charges on those amounts. E. Any renewable energy procurement costs recovered through the utility’s fuel clause shall be separately identified in its monthly and annual fuel and purchased power clause adjustment filings and its continuation filings. [52] The Attorney General’s argument relies on 17.9.572.15(D) NMAC to support its contention that large customer cap costs can only be recovered from large customers. The Attorney General seems to share our understanding that large customer cap costs, which arise pursuant to Section 62-16-4A(2), may be deferred. Based on this understanding, the Attorney General assumes that the term “Section 62-16-4A(2) NMSA 1978 limited deferred amounts” in Subsection D is a synonym for deferred large customer cap costs. Armed with this assumption, the Attorney General contends that because Subsection D concerns recovery of costs from capped customers and only Subsection D expressly refers to recovery of “Section 62-16-4A(2) NMSA 1978 limited deferred amounts,” large customer cap costs can only be recovered from capped customers. [53] We reject the Attorney General’s contention. 17.9.572.15(C) NMAC states that whenever “[a] public utility . . . is permitted to defer the recovery of renewable energy

*We also note that although the Attorney General relies on Section 62-16-4(A)(2) to argue for a cost recovery mechanism which SPS would effectively disallow its ability to recover large customer cap costs, such a mechanism would be contrary to the plain language of Section 62-16-4(A)(2), which provides that “[n]othing contained in this paragraph [concerning the large customer cap] shall be construed as affecting a public utility’s right to recover all reasonable costs of complying with the renewable portfolio standard.”
costs pursuant to commission order,” the utility may recover the deferred amounts from non-capped customers. Subsection C therefore authorizes public utilities to recover deferred costs, in general, from non-capped customers. By contrast, 17.9.572.15(D) NMAC explicitly authorizes only the recovery of “Section 62-16-4A(2) NMSA 1978 limited deferred amounts” from capped customers. Thus, although 17.9.572.15(D) NMAC arguably provides that only “Section 62-16-4A(2) NMSA 1978 limited deferred amounts” may be recovered from capped customers, 17.9.572.15(C) NMAC provides that any deferred amounts may be recovered from non-capped customers.

[54] We conclude that a plain reading of 17.9.572.15 NMAC indicates that deferred costs arising from Section 62-16-4A(2) can be recovered from both capped and non-capped customers. There is simply no language explicitly banning the collection of deferred large customer cap costs from non-capped customers. The Attorney General errs in conflating the issue of whether capped customers may be charged only for Section 62-16-4A(2) deferred amounts with whether only capped customers may be charged the aforesaid deferred amounts.

III. CONCLUSION

[55] We affirm the PRC’s final order. We will not disturb the PRC’s finding that SPS’s entire prepaid pension asset was properly included in the rate base. We also hold that the PRC properly allocated large customer cap costs to non-capped customers to enable SPS to recover its reasonable renewable energy procurement costs.

[56] IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:
BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
CHARLES W. DANIELS, Justice
TIMOTHY L. GARCIA, Judge
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Mr. Stromberg is an alumnus of the University of New Mexico and graduated from the University of New Mexico School of Law in 2010. He is admitted to practice law in New Mexico state and federal courts. Mr. Stromberg has represented clients in a variety of civil matters including complex civil litigation, trucking and transportation, and products liability. His practice now primarily focuses on medical and health care liability defense.

MADISON & MROZ, P.A.
Attorneys at Law

We are pleased to announce

Melissa A. Brown

has joined the Firm as an associate

Ms. Brown earned her bachelor’s degree in Criminology and Political Science from the University of New Mexico in 2003 and her Doctor of Jurisprudence in 2006 from Baylor Law School.

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The civil litigation firm of Atkinson, Thal & Baker, P.C. seeks an attorney with strong academic credentials and 2-10 years experience for a successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Thal & Baker, P.C., Attorney Recruiting, 201 Third Street NW, Suite 200, Clovis, NM 88101 or email to: astaffing@atkinsonlaw.com. Deadline for submission of resumes: Please send to Dan Blair, District Office Manager, 417 Giddings, Suite 200, Clovis, NM 88101 or email to: dbair@dak.state.nm.us.

Senior Trial Attorney, Assistant Trial Attorney
The Ninth Judicial District Attorney is accepting resumes and applications for an attorney to fill one of the following positions depending on experience. All positions require admission to the New Mexico State Bar. Senior Trial Attorney – This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. A minimum of five years as a practicing attorney are required. Assistant Trial Attorney – This is an entry to mid-level attorney. This position requires misdemeanor and felony caseload experience. Associate Trial Attorney – an entry level position which requires misdemeanor, juvenile and possible felony cases. Salary for each position is commensurate with experience. Send resumes to Dan Blair, District Office Manager, 417 Giddings, Suite 200, Clovis, NM 88101 or email to: dbair@dak.state.nm.us.

Assistant Trial Attorney
The 13th Judicial District Attorney’s Office is accepting applications for entry to mid-level attorney to fill the positions of Assistant Trial Attorney for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor and felony caseload experience. Associate Trial Attorney - The 13th Judicial District Attorney’s Office is accepting applications for entry level positions for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor, juvenile and possible felony cases. Upon request, be prepared to provide a summary of cases tried. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: rAragon@dak.state.nm.us. Deadline for submission of resumes: Open until positions are filled.

Assistant Trial Attorney
The 13th Judicial District Attorney’s Office is accepting applications for an attorney. This position is open to mid-level attorney. This position requires misdemeanor and felony caseload experience. Associate Trial Attorney – an entry level position which requires misdemeanor, juvenile and possible felony cases. Salary for each position is commensurate with experience. Send resumes to Dan Blair, District Office Manager, 417 Giddings, Suite 200, Clovis, NM 88101 or email to: dbair@dak.state.nm.us.

Deputy City Attorney
The City of Las Cruces has an open position for a Deputy City Attorney. Closing date for applications is February 22, 2016. Salary: $78,142.05 -- $117,213.07 annually. This is a fulltime regular, exempt position that plans, coordinates, and manages operations, functions, activities, staff and legal issues in the City Attorney’s Office to ensure compliance with all applicable laws, policies, and procedures. Minimum requirements are: Juris Doctor Degree AND seven (7) years of experience in a civil and criminal legal practice; at least one (1) year of experience in municipal finance, land use, and public labor law is preferred. A combination of education, experience, and training may be applied in accordance with City of Las Cruces policy. Must be a member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico and remain active with all New Mexico Bar annual requirements. Valid driver’s license may be required or preferred. If applicable, position requires an acceptable driving record in accordance with City of Las Cruces policy. Please check our website http://agency.governmentjobs.com/lascruces/default.cfm for further information regarding the job posting, requirements and online application process. Resumes will not be accepted in lieu of a completed application.

State Bar of New Mexico’s web site
http://www.nmbar.org
Associate Attorney
Established Albuquerque law firm seeking an Associate Attorney with 0-5 years’ experience possessing strong writing and critical thinking skills for work in MedMal and Catastrophic Injury Plaintiffs’ practice. Email resume and references to vlawofficenm@gmail.com.

Chief of Staff
The New Mexico Public Regulation Commission (NMPRC) seeks a Chief of Staff - an "at will" position serving its Commissioners and staff - to provide administration of operations. Position reports to Commissioners. Position performs management functions and provides administrative oversight of agency mission and goals. Position provides counsel to Commissioners on operations. Other duties include: ensuring successful operation of agency divisions, directing administrative activities for agency divisions, providing oversight of agency budgets. Position analyzes and makes recommendations to Commissioners on legislative initiatives and represents Commissioners in legislative matters related to operation and regulatory authority of the agency. Position is responsible for final decisions in personnel matters, including discipline and hiring. Position attends open meetings and provides reports and recommendations to Commissioners on administrative matters. Position conducts meetings for daily operations of agency, ensures deadlines are met to comply with federal and state laws and rules and regulations related to daily operation of the agency. Position supervises Division Directors and a Management Analyst, and participates in committees, statewide outreach for Commissioners, and agency task forces. Bachelor’s degree in Business Management, Public Administration or related area required, and five (5) years of management experience in the public or private sectors. Experience may be substituted for education. The chosen candidate should foster a “teamwork” approach and be able to interpret and enforce policies and procedures consistently. Salary: $75,418.52-$130,000 per year plus benefits. Salary based on education and experience. The State of NM is an EOE Employer. Applicants may email or mail their resume to Rene Kepler at Renes.Kepler@state.nm.us, or mail to NMPRC Attn: Human Resources, P.O. Box 1269, Santa Fe, NM 87504. Applications should submit resumes prior to February 10, 2016. Questions may be directed to Rene Kepler: 505-827-4324.

New Mexico Public Regulation Commission
General Counsel
The New Mexico Public Regulation Commission is accepting applications for the position of General Counsel. The position advises the Commission on regulatory matters, including rulemakings and adjudicatory proceedings involving the regulation of electric and gas utilities, telecommunications providers, and motor carriers; represents the Commission in federal and state trial and appellate courts. Manages and oversees day to day operations of General Counsel Division including case management and assignments. Involves day to day interaction with Elected Officials, Hearing Examiners and other Division Directors. The position requires extensive knowledge of administrative law practice and procedures and substantive law in the areas regulated by the Commission; ability to draft clear, concise legal documents; ability to prioritize within a heavy workload environment. Minimum qualifications: JD from an accredited law school; ten years experience in the practice of law, including at least four years of administrative or regulatory law practice and three years of staff supervision; admission to the New Mexico Bar or commitment to taking and passing Bar Exam within six months of hire. Background in public utilities, telecommunications, transportation, engineering, economics, accounting, litigation, or appellate practice preferred. Salary: $56,000-$90,000 per year (plus benefits). Salary based on qualifications and experience. This is a GOVEX “at will” position. The State of NM is an EOE Employer. Apply: Submit letter of interest, resume, writing sample and three references to: Human Resources, Attention: Rene Kepler, Renes. Kepler@state.nm.us or NMPRC P.O. Box 1269, Santa Fe, NM 87504-1269. Applications must be postmarked by February 10, 2016.

Immediate Opening for Law Clerks
Guebert Bruckner P.C. looking for law clerks to review documents in Santa Fe. This is a temporary position approximately 3-6 months. Must have own transportation. Hourly + mileage reimbursement. Apply to Kathleen A. Guebert @ kathleen@guebertlaw.com NO PHONE CALLS PLEASE

Associate Attorney
Large established Albuquerque law firm has an immediate need for an associate attorney with 3 to 5 years experience in all aspects of business and commercial law, real estate law, and litigation. Please submit a resume and writing sample to POB 92860, Albuquerque, NM 87199 attention Box D. All replies kept confidential.

Office of the State Engineer/ Interstate Stream Commission (OSE/ISC) State of New Mexico
The Litigation & Adjudication Program seeks to hire a New Mexico licensed attorney: A Lawyer Advanced to work in the Pecos Adjudication Bureau in federal & state court water rights adjudications and litigation and administrative hearings on water rights and natural resource issues. The position is located in Santa Fe. Qualifications: Juris Doctorate from an accredited law school; 5 years experience in the practice of law; member of the New Mexico State Bar. Job ID #: Pecos Attorney Advanced (OSE#6004) #2016-00419 Must apply on line at http://www.spo.state.nm.us/ from 2/10/16 to 2/17/16. The OSE/ISC is an Equal Opportunity Employer.

Las Cruces Attorney
Holt Mynatt Martinez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking an associate attorney with 3-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm’s practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to bb@hmm-law.com.

Paralegal
Personal Injury/MedMal/Bad Faith Litigation Law Firm in Albuquerque is looking for an experienced, energetic paralegal to join our team! We offer great benefits, positive and friendly environment. If you have 5 or more years’ experience, please submit your cover letter, resume and salary history, in confidence, to kdc@carterlawfirm.com.

Legal Assistant/Paralegal
Albuquerque law firm focused on civil catastrophic injury litigation seeking a full-time paralegal/legal assistant to join our trial team. Bachelor's degree and legal experience preferred. Candidate should have strong organizational skills and a positive attitude. Send resume to vlawofficemn@gmail.com.
Legal Assistant
The Federal Public Defender office for the District of New Mexico is accepting applications for a Legal Assistant position to be stationed in Albuquerque. Federal salary and benefits apply. Minimum qualifications are high school graduate or equivalent and at least three years legal secretary experience, federal criminal experience preferred. Starting salary ranges from a JSP-6 to JSP-8, currently yielding $36,031 to $57,641 annually depending on experience. This position provides secretarial and clerical support to the attorneys and staff utilizing advanced knowledge of legal terminology, word and information processing software. Legal Assistants must understand district and circuit court rules and protocols; edit and proofread legal documents, correspondence, and memoranda; transcribe dictation; perform cite checking and assemble copies with attachments for filing and mailing. Duties also include screening and referring telephone calls and visitors; screening incoming mail; reviewing outgoing mail for accuracy; handling routine matters as authorized; assembling and attaching supplemental material to letters or pleadings as required; maintaining calendars; setting appointments as instructed; organizing and photocopying legal documents and case materials; and case file management. The ideal candidate will have a general understanding of office confidentiality issues, such as attorney/client privilege; the ability to analyze and apply relevant policies and procedures to office operations; exercise good judgment; have a general knowledge of office protocols and operations; and possess excellent communication and interpersonal skills. Spanish fluency a plus. A high school diploma is necessary. Successful candidate will enjoy a fast-paced environment with a high case load. We work as a team, and are the best team in Albuquerque. Outstanding pay, perks, and benefits. Come join us. To see the position description and apply, please type into your browser: ParnallLawJobs.com

Paralegal/Policy Filing Analyst
Experienced paralegal needed for fast paced insurance company regulatory compliance department. Excellent computer skills, the ability to multitask, e-filing experience, and being a good team player are all required. Insurance company and SERFF filing experience preferred. Critical thinking skills and ability to work independently is a must. Please refer to our website for job description: http://www.centuryservicecorp.com/polfileanalyst.html. Benefit package available; Pay DOE. Inquiries confidential. Email cover letter, resume, references, writing sample, and salary requirements to lcraig@centuryservicecorp.com.

Legal Assistant
GUEBERT BRUCKNER P.C. busy litigation firm looking for experienced Legal Assistant to support 11 attorneys. Candidate will coordinate with various members of the staff to accomplish the needs of attorneys. Duties include but are not limited to: Filing, finalizing documents for submission to clients, State and Federal courts. Excellent communication skills required in order to meet deadlines and to comply with various client guidelines. Strong writing and proof reading skills, as well as knowledge of court rules required. Hours 8:30 to 5:30. Firm uses Microsoft Word, Excel, and Outlook. Please submit resume and salary requirement to Kathleen A. Guebert, POB 93880, Albuquerque, NM 87109.

Paralegal
Paralegal for Plaintiff’s Injury Firm. Minimum 3 years’ experience in Plaintiff’s injury law. Litigation experience necessary. Fast-paced environment with a high case load. Position subject to a background investigation. The Federal Public Defender office for the District of New Mexico is accepting applications for a Paralegal position to be stationed in Albuquerque. Federal salary and benefits apply. Minimum qualifications are high school graduate or equivalent and at least three years legal secretary experience, federal criminal experience preferred. Starting salary ranges from a JSP-6 to JSP-8, currently yielding $36,031 to $57,641 annually depending on experience. This position provides secretarial and clerical support to the attorneys and staff utilizing advanced knowledge of legal terminology, word and information processing software. Legal Assistants must understand district and circuit court rules and protocols; edit and proofread legal documents, correspondence, and memoranda; transcribe dictation; perform cite checking and assemble copies with attachments for filing and mailing. Duties also include screening and referring telephone calls and visitors; screening incoming mail; reviewing outgoing mail for accuracy; handling routine matters as authorized; assembling and attaching supplemental material to letters or pleadings as required; maintaining calendars; setting appointments as instructed; organizing and photocopying legal documents and case materials; and case file management. The ideal candidate will have a general understanding of office confidentiality issues, such as attorney/client privilege; the ability to analyze and apply relevant policies and procedures to office operations; exercise good judgment; have a general knowledge of office protocols and secretarial processes; analyze and recommend practical solutions; be proficient in WordPerfect, Microsoft Word and Adobe Acrobat; have the ability to communicate effectively with assigned attorneys, other staff, clients, court agency personnel, and the public; and have an interest in indigent criminal defense. Must possess excellent communication and interpersonal skills, and be self-motivated while also excelling in a fast paced team environment. Spanish fluency a plus. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. Position subject to the availability of funds. Please e-mail your resume with cover letter and 3 references to: Melissa Dearing, Administrative Officer, FDNM-HR@fd.org. Must be received no later than 3/1/2015. Only those selected for an interview will be contacted. No phone calls.

Immediate Opening for Experienced Paralegal
Barudin Law Firm is seeking a primary paralegal with excellent written and verbal communication skills who can immediately join our small team. Duties will include investigation, research, drafting of pleadings, discovery, pre-trial litigation and trial preparation. Candidate must have familiarity with personal injury, proficiency with electronic filing systems, and knowledge of New Mexico law and culture. Paralegal certification is preferred; however, an Associate’s degree plus seven years of experience or an equivalent combination of education and experience is necessary. Successful candidate will enjoy a competitive salary, generous benefits package, and an 8:00 am to 4:00 pm M-F workday. Email resume and wage history to abarudin@barudinlaw.com without delay.

Positions Wanted
Are You Looking for a FT Legal Assistant/Secretary?
7-8 years experience, Want to work in Personal Injury or Insurance Defense area ONLY. Gen./Civil Litigation. Professional. Transcription, Proofreading/Formatting, Organized, Attn. to Detail, E-filing in Odyssey-CM/ECF, Cust. Svc. Exp., Basic Pleadings, Discovery Prep., Calendarizing, File Maintenance, MSWord, MS Outlook, Excel. Please contact LegalAssistant0425@yahoo.com for Resume, Salary Expectations and References.

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For more advertising information, contact: Marcia C. Ulbarri at 505-797-6058 or email mulibarri@nmbar.org
Office Space

**620 Roma N.W.**
620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you’ll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

**Santa Fe Professional Office**
Located in the St Francis Professional Center, you and your office assistant can share two offices in a building with two other established attorneys. Large reception area, conference room, kitchenette. Ample parking. Call Donna 982-1443.

**Need Office Space?**
Plaza500 located in the Albuquerque Plaza Office building at 201 3rd Street NW offers all-inclusive office packages with terms as long or as short as you need the space. Office package includes covered parking, VoIP phone with phone line, high-speed internet, free WiFi, meeting rooms, professional reception service, mail handling, and copy and fax machine. Contact Sandee at 505-999-1726 or sgalietti@allegiancesw.com.

**Office Space Located in the Town of Bernalillo**
Restored historic building has one year lease opportunities with utilities included. Located close to NM 550 and I-25, the site is easily accessible from Albuquerque or Santa Fe with plenty of off street parking. Call 505-867-7551 to see the spaces available

**Luxury Office Space Available**
2014 Central SW- Luxury attorney’s office with secretarial space. Rent includes utilities, phone system, internet, parking, and conference room. Near all courthouses. Contact Nathalie at (505) 243-1706.

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Paralegal with 25+ years of experience available for work in all aspects of civil litigation on a freelance basis. Excellent references. civilparanm@gmail.com.

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For information on sponsorship opportunities, Annual Meeting Program Guide advertising or exhibit space, contact Marcia Ulibarri at 505-797-6058 or mulibarri@nmbar.org

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