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Presenter Biographies

28th Annual Appellate Practice Institute

Presenter Biographies

Judge J. Miles Hanisee has served on the New Mexico Court of Appeals since 2011. Judge Hanisee was born in New Orleans, Louisiana, and was raised in nearby Mandeville. In 1986, his family relocated from Louisiana to Taos, New Mexico, where his mother still resides. He attended Louisiana State University, where he earned a Bachelor of Arts degree in English in 1990. He is a 1993 graduate of Pepperdine University School of Law, where he received his Juris Doctor, was a Merit Scholar, and wrote for the law review. From 1994 to 1996, he was selected to be a law clerk by Judges Oliver Seth and Paul Kelly, both of the United States Court of Appeals for the Tenth Circuit. As an Assistant United States Attorney from 1996-2007, Judge Hanisee's responsibilities included jury trials in United States District Court and appellate advocacy before the Tenth Circuit Court of Appeals. In 2007, he formed the Law Office of J. Miles Hanisee, LLC, where he represented individual and corporate clients in criminal, civil, and administrative matters in both state and federal courts.

Senator Jacob R. Candelaria is a New Mexico State Senator, representing the 26th District, since 2013. Sen. Candelaria attended Princeton University, where he graduated with a degree in public policy in the Woodrow Wilson School of Public and International Affairs. After completing his undergraduate years, Sen. Candelaria returned to Albuquerque to attend the University of New Mexico School of Law; he graduated and was admitted to the State Bar of New Mexico in 2016. He has served as an advisory trustee with TEDxABQ, and as a member of the board of trustees at The Menaul School. Sen. Candelaria has also worked as a leadership fellow with Think New Mexico, as a program evaluator for the New Mexico Legislative Finance Committee, as a leadership analyst to late New Mexico House of Representatives Speaker Ben Lujan Sr. (D-Nambe), and as Executive Director of Equality New Mexico.

Professor Leo Romero has been a member of the UNM law faculty since 1972. His scholarship has focused mostly in the area of criminal law, but recent publications have dealt with judicial selection issues, a subject with which he became familiar when he served as chair of the judicial nominating commissions for all courts in New Mexico. Before joining the University of New Mexico Law School, Romero practiced criminal law in Washington, D.C., and began his teaching career at the Penn State University Dickinson School of Law as director of clinical studies. In addition to his service at the University of New Mexico, Romero has taught at a number of other law schools. He has been a visiting professor at Stanford University, University of Oregon, George Washington University, Washington University at St. Louis, Roger Williams University, and University of California, Hastings College of Law.

Judge Hank Bohnhoff of the New Mexico Court of Appeals was born and raised in Albuquerque. After graduating from Manzano High School in 1974, he earned his undergraduate degree with honors from Stanford University in 1978 and his law degree from Columbia University in 1982. Judge Bohnhoff clerked for United States District Court Chief Judge Howard Bratton, then joined the Rodey Law Firm in Albuquerque in 1983. He remained there until 1987 when he was appointed Chief Assistant Attorney General by New Mexico Attorney General Hal Stratton. He was later promoted to Deputy Attorney General for the office's Civil Division. Judge Bohnhoff returned to the Rodey firm in 1989 where his law practice focused on business and real estate litigation until his appointment to the Court in February 2017. For his legal accomplishments Judge Bohnhoff has been recognized in Martindale Hubbell, Best Lawyers in America, Chambers Guide to America's Leading Lawyers, Southwest Super Lawyers, and New Mexico Business Weekly.

Judge Julie J. Vargas was elected to the Court of Appeals in 2016. She graduated from Brown University in 1990 with a degree in English Literature and History. She received her J.D. from UNM in 1993, where she served as an editor of the New Mexico Law Review. Before joining the Court, Judge Vargas spent 23 years in private practice representing clients in business and real estate litigation matters. She is the co-chair of the Advisory Committee on the Code of Judicial Conduct. Before joining the Court, she served as co-chair of the State Bar's Ethics Advisory Committee, and was a member of both the Disciplinary Board, and the Board of Bar Commissioners. Judge Vargas has served on the Board of Directors for the New Mexico Museum of Natural History Foundation, volunteered for the Run for the Zoo, and rappelled down a 16-story building to raise money for Special Olympics.

Judge James E. Graves, Jr. was nominated by President Barack Obama on June10, 2010, to the United States Court of Appeals for the Fifth Circuit and confirmed by the U.S. Senate on February 14, 2011. Judge Graves was born in Clinton, Mississippi. He earned his B.A. in sociology at Millsaps College. He worked in Mississippi's Department of Public Welfare for two years before beginning law school. He then earned his law degree, as well as a master's degree in public administration at Syracuse University. Upon graduation from law school, Judge Graves worked as a staff attorney with Central Mississippi Legal Services. He engaged in private practice in Jackson for three years before joining the Office of the Mississippi Attorney General as a Special Assistant Attorney General in the Health Law Division, and later served as head of the Human Services Division. He then joined the Mississippi Department of Human Services where he served as Director of the Division of Child Support Enforcement. In 1991, Judge Graves was appointed as a circuit judge in Hinds County, where he served for ten years. In 2001, he was appointed to the Mississippi Supreme Court. He was elected to continue on the court in 2004. He served as a presiding justice from 2009 until 2011, when he joined the Fifth Circuit. As the first African American from Mississippi to serve on the Fifth Circuit, Judge Graves was awarded the Mississippi Trailblazer of the Decade award—an award that recognizes Mississippians who have shown a commitment to racial, cultural, and gender diversity and who have presented Mississippi in a positive light.

Edward Ricco is a New Mexico Board of Legal Specialization recognized specialist in appellate practice and a fellow of the American Academy of Appellate Lawyers. As the founder of the appellate practice group at the Rodey Law Firm, Ricco has been involved in numerous appeals in a wide variety of substantive areas. He is admitted to practice in the New Mexico courts, the United States Court of Appeals for the Ninth, Tenth, and District of Columbia Circuits, and the United States Supreme Court.

C. David Henderson is the Appellate Defender for the Law Offices of the New Mexico Public Defender. Henderson has practiced appellate law throughout his career in both private practice and for the public defender. He has been admitted to practice before State Courts in New Mexico; the Federal District Courts of New Mexico, the Southern District of Texas, and the District of Columbia; and before the Tenth Circuit Court of Appeals. Henderson also has filed amicus briefs in the Sixth Circuit Court of Appeals and in the United States Supreme Court. Over the years he has made a number of presentations at CLE seminars and has taught appellate advocacy at training seminars conducted by NLADA and by the Administrative Offices of the U.S. Courts.

Joey D. Moya is the Clerk of Court and Chief Counsel for the Supreme Court of New Mexico. A New Mexico native, Moya graduated from the University of New Mexico School of Law in 1988. After graduation, he practiced law with a small civil law firm in Albuquerque before joining the Prehearing Division of the New Mexico Court of Appeals in 1990. Moya temporarily left the Prehearing Division in 1999 to act as the Administrative Assistant to then Chief Justice Pamela B. Minzner, returned to Prehearing in 2001, and became the Chief Staff Attorney and Director of the Prehearing Division in April 2002. Moya joined the Supreme Court in November 2005 as its first staff attorney to help develop the Court's new Office of Supreme Court Counsel. Moya is a member of the New Mexico Compilation Commission and its advisory committee. He also serves as a commissioner on the Access to Justice Commission, and chairs the Commission's Legislation and Rules Working Group. Moya also chairs the Joint Committee on Rules of Procedure for New Mexico State Courts. On December 24, 2011, he became the sixth chief clerk of court for the Supreme Court of New Mexico since statehood. In that capacity, he also serves a secretary for the Board of Trustees of the Supreme Court Law Library and Building Manager for the historic Supreme Court Building in Santa Fe. In 2015, he received the Public Lawyer of the Year Award from the Public Law Section of the State Bar of New Mexico.

Mark Reynolds is the Clerk of Court for the New Mexico Court of Appeals.

Michael Browde is a 1968 graduate of Georgetown Law. After a clerkship on the District Court for the District of Columbia, he worked for seven years at the Legal Aid Society of Albuquerque. He joined the UNM Law faculty in 1978, where he taught public law subjects before taking Emeritus status in 2008. He remains semi-active, consulting with the NM Legislative Council Service, working on NM Trial Lawyer Association Amicus Briefs, and work with the NM Center on Law and Poverty.

Elizabeth Wagoner is a supervising attorney with the New Mexico Center on Law and Poverty's workers' rights program. She represents employees and community organizations in litigation against the NM Department of Workforce Solutions to strengthen public enforcement of the minimum wage and overtime laws in New Mexico. She also represents nonprofit groups in a campaign to pass an earned sick leave ordinance in Albuquerque. Prior to joining the Center in 2015, Wagoner was an Assistant Attorney General in the Labor Bureau of the New York State Attorney General's Office, where she investigated wage and hour violations in the fast food and taxicab industries. Prior to that, she represented employees in individual and class action lawsuits arising under federal and state wage and hour laws at Outten & Golden LLP, a plaintiff-side law firm, and at Make the Road New York, a nonprofit organization.

Greg Williams is an attorney with Peifer, Hanson & Mullins in Albuquerque and the president of the board of directors of the New Mexico Foundation for Open Government. He practices civil litigation with a focus on media law, First Amendment law, and commercial litigation.

Robert Rambo was born and raised in Philadelphia, Pennsylvania, and was trained there as a mediator in 1989, by the Friends Conflict Resolution Program. He later attended law school and graduated summa cum laude in 1993, from the University of Puget Sound School of Law (now known as the Seattle University School of Law). While in law school he received addition mediation training from the Conflict Resolution Research Resource Institute in Tacoma, Washington and volunteered as a mediator for the Pierce County District Court. Upon moving to Albuquerque in 1993, Rambo practiced briefly with a civil law firm, and spent nine years with the Office of the District Attorney for the Second Judicial District, primarily in the Violent Crimes Division. During this time he continued to mediate in a volunteer capacity for the Metropolitan Court. Rambo has mediated at the New Mexico Court of Appeals since August of 2003 and was acknowledged by the New Mexico Supreme Court Statewide ADR Commission as Mediator of the Year in 2015.

Judicial Selection, Judicial Election – What to Make of Our Hybrid System

N.M. Const. Art VI

Sec. 35. [Appellate judges nominating commission.]

There is created the "appellate judges nominating commission", consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term. (As added November 8, 1988.)

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 35 relating to the filling of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Sec. 36. [District court judges nominating committee.]

There is created the "district court judges nominating committee" for each judicial district. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the "district judges nominating committee" except that: the chief judge of the district court of that judicial district or the chief judge's designee from that district court shall sit on the committee; there shall be only one appointment from the court of appeals; and the citizen members and state bar members shall be persons who reside in that judicial district. (As added November 8, 1988.)

Annotations

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article 6, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 36 relating to the determination of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Sec. 37. [Metropolitan court judges nominating committee.]

There is created the "metropolitan court judges nominating committee" for each metropolitan court. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee except that: no judge of the court of appeals shall sit on the committee; the chief judge of the district court of the judicial district in which the metropolitan court is located or the chief judge's designee from that district court shall sit on the committee; the chief judge of that metropolitan court or the chief judge's designee from that metropolitan court shall sit on the committee only in the case of a vacancy in a metropolitan court; and the citizen members and state bar members shall be persons who reside in the judicial district in which that metropolitan court is located. (As added November 8, 1988.)

Annotations

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

N.M. Const. Art VI

Rules of the Judicial Nominating Commission.

JUDICIAL NOMINATING COMMISSION RULES

SECTION 1. Rules.

A. These Rules shall be known as the "Rules Governing Judicial Nominating Commissions," and are applicable to the appellate judges nominating commission, the district court judges nominating committees and the metropolitan court judges nominating committee established under Article VI of the New Mexico Constitution.

B. These Rules shall be effective beginning upon adoption by each commission (Appellate, District, Bernalillo County Metropolitan).

C. By a majority vote of those commissioners present, each judicial nominating commission or committee may adopt additional rules consistent with the Rules Governing Judicial Nominating Commissions, Article VI of the New Mexico Constitution and state law.

SECTION 2. Role of the Chair.

A. Upon the occurrence of a judicial vacancy or an upcoming judicial vacancy, it is the responsibility of the chair to announce publicly the existence of the vacancy, the application and nomination process and the deadline for applications.

B. The chair shall provide notice of the vacancy to the persons charged by the constitution with the duty of appointing commissioners and shall coordinate the appointment of commissioners in accordance with the constitutional requirements.

C. The chair shall schedule the meetings of the commission and provide the media with notice of the date, time and place of the meetings.

D. The chair shall provide an application packet to applicants and persons nominated by others. For inclusion in the packet, the chair shall prepare a questionnaire requesting information relevant to the evaluation criteria specified in Section 5 of these Rules. Except as specified in the questionnaire, the questionnaire becomes public upon submission.

E. The chair, after the deadline for applications has passed, shall provide the media with the list of applicants who will be considered for the vacancy and date of interviews.

F. The chair shall prepare a proposed agenda and shall send the agenda and the applications to the commission members prior to the meeting.

G. The chair shall determine the order of interviews.

H. The chair shall send a list of the applicants to the Chief Disciplinary Counsel of the Disciplinary Board and request verification that none of the applicants has been the subject of a formal specification of charges.

I. The chair shall send a list of those applicants who are serving as judges in the state to the Executive Director of the Judicial Standards Commission and request verification that none of those applicants has been the subject of formal disciplinary charges.

J. Upon written request by a commissioner, the chair may seek additional information from the applicant or others relevant to the evaluation criteria specified in Section 5 of these Rules.

K. The chair shall preside over meetings of the commission.

L. The chair shall file the oaths of office executed by the commissioners with the Secretary of State.

SECTION 3. Role of the Commissioners.

A. Each commissioner shall take an oath of office prior to the start of a meeting of the commission.

B. Each commissioner shall disclose to the commission all current or past professional, family, business, and other special relationships with any of the applicants. These relationships shall not disqualify a commissioner from participating unless the commissioner feels that he/she cannot be impartial and cannot comply with his/her oath of office as to any applicant.

SECTION 4. Active Solicitation.

A. Upon the occurrence of a judicial vacancy or upcoming judicial vacancy, it is the responsibility of the chair and the commissioners to actively solicit applicants for the position in the following ways.

B. The chair shall advertise the vacancy in as many of the following ways as possible, given the amount of time and financial resources available:

1. Announce vacancy to media within the relevant jurisdiction.

2. Announce vacancy to state, county and local bar associations, including women, minority and specialty bars (including, for example and when appropriate, organizations representing prosecutors, criminal defense attorneys, government attorneys, trial lawyers, and insurance defense lawyers) by notification to their publications and/or listservs.

3. Send email announcement to all bar association members within the Judicial District.

4. Notify the Bar Commissioners who represent lawyers in the Judicial District, asking them to suggest candidates and encouraging them to personally contact qualified attorneys to ask them to apply.

5. Identify specific sections, divisions, or committees of the State Bar whose membership might have an interest in and qualifications for the new or vacant position, asking the chairs to suggest names, and encouraging them to personally contact qualified attorneys to ask them to apply.

6. Invite nominations of qualified candidates by third parties. Invite nominated candidates to apply.

7. Place notice on the Judicial Nominating Commission website, on court websites in the relevant jurisdiction, and on the Governor's website.

8. Send notice of the vacancy to previous applicants from the relevant jurisdiction.

9. Prepare educational materials about the application process and required qualifications and make them widely available.

10. Send letters out to each member of the bar of the relevant jurisdiction asking them to apply.

C. Commission member shall make every effort to identify qualified applicants and place telephone calls to encourage them to apply.

D. When actively seeking qualified applicants, commissioners shall inform the prospective applicant that being approached by a commissioner does not guarantee a nomination. Each applicant, whether actively recruited or independently seeking a nomination, will be subject to the same investigative and interview procedures. It is important for recruited applicants to realize that they will not be given special consideration simply because the commission is inviting their applications.

SECTION 5. Evaluative Criteria.

The commissioners shall evaluate the applicants on the basis of the constitutional requirements and the following evaluative criteria:

* physical and mental ability to perform the tasks required

* impartiality
* industry
* integrity
* professional skills
* community involvement
* social awareness
* collegiality
* writing ability
* decisiveness
* judicial temperament
* speaking ability

SECTION 6. Commission Meetings.

A. A majority of the commission shall constitute a quorum. Should the chair be absent, the commission will choose a chair from among its members.

B. Meetings shall be open to the public.

C. The public shall be notified of the meeting through notice in the media and in accordance with the commission's Open Meetings Act notice resolution.

D. The chair shall report on actions taken before the meeting on behalf of the commission pursuant to Section 2 of these Rules.

E. Members of the public shall be allotted time for comments or questions concerning the policies and procedures of the commission and also time for comments concerning individual applicants. Public comment by any individual shall be limited to 5 minutes.

SECTION 7. Interviews.

A. Interviews shall be conducted in the order determined by the chair, unless the commission determines that a change is warranted by the circumstances.

B. Unless the commission decides that a different time schedule would be appropriate, applicants shall be scheduled for interviews at intervals of at least 20 minutes and may choose to start with an opening statement of no more than 5 minutes.

C. Each commissioner shall be given the opportunity to question each applicant.

D. Each commissioner should ask each applicant about any information which the commissioner has learned or heard regarding the applicant and which the commissioner intends to raise in closed session.

E. The commission may, for good reason, hear any applicant on a confidential subject in closed session.

SECTION 8. Closed Session.

A. Following the interviews, the commission may go into closed session to discuss the applicants' qualifications and to evaluate them according to the evaluative criteria specified in Section 5 of these Rules. The discussion during closed session shall be confidential. The extent of confidentiality shall be determined by the commission, but, in any event, shall extend to prohibit express or implied attribution of comments or opinions to individual commissioners.

B. As part of the discussion of the applicants, straw votes, non-binding and by secret ballot, shall be taken to determine support for particular applicants.

C. Before each round of straw votes, the names of the applicants then under consideration shall be raised for discussion by the Commission.

D. Commissioners shall cast only one vote per applicant but may vote for as many of the applicants as he/she wishes.

E. When the commission, in closed session, after deliberations and at least two rounds of straw votes, believes that it is ready to vote in public session, the commission shall reconvene in open session for a final vote.

SECTION 9. Formal Vote.

A. The commission, using the evaluative criteria set forth in Section 5, shall determine which applicants are both qualified for judicial office and should be recommended to the Governor for appointment.

B. The formal vote shall take place in public session. The chair may vote only in the event of a tie. A vote of the majority of the commissioners present shall be required to recommend a nominee or nominees to the Governor.

C. In recognition of the fact that the New Mexico Constitution vests the Governor with the authority to appoint judges and that the commission does not select the judges, the commission should strive to recommend a list of two or more names for each position to the Governor.

SECTION 10. Recommendation to the Governor.

The chair shall send to the Governor, in alphabetical but unranked order, the names of the applicants recommended by the commission. The chair shall notify the media and all applicants of the commission's recommendation to the Governor.

SECTION 11. Request for Additional Names.

If, after receiving the recommendation of the commission, the Governor chooses to request additional names, the chair shall:

A. Actively solicit further applications for the position;

B. Schedule a second meeting of the commission;

C. Provide notice to the applicants, commissioners, media and public of the second meeting;

D. Supply to the media a list of additional applicants, if any;

E. Preside over a second meeting of the commission, following the process set out in these Rules under Sections 3 - 9, including notice to the Governor of any additional names recommended by the commission.

SECTION 12. Forms.

A. Oath/Affirmation of Office

B. Open Meetings Act Resolution

C. Applicant Questionnaire

New Mexico Law Review

30 N.M. L. Rev. 177 (Summer 2000 2002)

Summer 2002

Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election

Leo M. Romero

JUDICIAL SELECTION IN NEW MEXICO: A HYBRID OF COMMISSION NOMINATION AND PARTISAN ELECTION

LEO M. ROMERO*

I. INTRODUCTION

In 1988, the citizens of New Mexico approved an amendment to the state constitution[1] that changed the way judges are selected. Before 1988, judges were selected by partisan election,[2] although the governor had absolute discretion to fill interim vacancies by appointment[3] of persons who met the constitutional qualifications. The new process, which became effective in January 1989, provides for nominating commissions to screen applicants and make recommendations to the governor who can appoint only from the list of nominees. The judge appointed by the governor serves only until the next general election, and, if the judge wishes to continue in office, the judge must run and win in that partisan election. The person winning the partisan election, either the appointed judge or a challenger, serves until the expiration of the original term. A judge elected in a partisan election then becomes eligible to run in periodic retention elections in which the electorate votes to either retain or reject the judge on a nonpartisan ballot.

The New Mexico system for selecting judges is a unique compromise with aspects of a commission nomination-gubernatorial appointment system and an electoral system.[4] The nomination-appointment aspect of the compromise involves evaluation of applicants by a judicial nominating commission, recommendation of

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* Professor of Law, University of New Mexico School of Law. As dean of the Law School from 1991 to 1997, he served as chair of the judicial selection commissions in New Mexico and wrote the Rules Governing Judicial Nominating Commissions. He wishes to acknowledge the invaluable assistance of Ida Hernandez, his research assistant, Margaret Banek, the judicial selection office administrator who, in dealing with judges and lawyers, made the process work smoothly, Robert Mead from the Law School Library for his help in tracking down archival material, and especially my colleagues, Michael Browde, Emlen Hall, Christian Fritz, and Mario Ted Occhialino, for their valuable suggestions for the improvement of this article. Thanks also to L. Michael Romero, Assistant Professor, Tufts University, for valuable comments on data presentation and interpretation, to the Honorable W. John Brennan, Chief Judge of the Second Judicial District Court, for reviewing the history of the judicial selection system approved by the voters in 1988, and to Dean Robert J. Desiderio for providing financial support for this project.

1. *See* N.M. CONST. art. VI, §§ 33-36.

2. *See id.* § 4 (amended 1988) ("The supreme court of the state shall consist of three justices, who shall be elected at the general election for representatives in congress for a term of eight years."); *id.* § 12 ("The state shall be divided into . . . judicial districts and a judge shall be chosen for each district by the qualified electors thereof at the election for representatives in congress."); *id.* § 28 ("The court of appeals shall consist of not less than three judges whose . . . election . . . shall be as provided by law . . . ."). Sections 4 and 12 of Article VI of the New Mexico Constitution were part of the 1911 Constitution of the State of New Mexico, adopted Jan. 21, 1911 (1915 Codification). Section 28 of Article VI was added to the New Mexico Constitution in 1965.

3. *See* N.M. CONST. art. XX, § 4 (amended 1988). This section provided: "If a vacancy occurs in the office of district attorney, judge of the supreme or district court, or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term." This section was amended in 1988 with the adoption of the new judicial selection system that made all judicial vacancies subject to commission nomination as a predicate to gubernatorial appointment. Section 4 of Article XX now applies only to vacancies in the offices of the district attorney and county commissioner.

4. This article avoids the use of the term "merit" to describe either of the two judicial selection systems. Rather than label either system with value-laden terms, this article describes the features of each system without suggesting that one is better than the other. *See infra* note 5 and accompanying text.

nominees to the governor by the commission, appointment by the governor from the list of nominees, and retention elections. The compromise limits the tenure of the appointed judge to the next general election and subjects the judge to the political and electoral process in that partisan election. Other lawyers may challenge and unseat the appointed judge in the primary election or general election.

This article has three purposes: (1) to determine the impact of the partisan election on the retention of judges nominated by a commission and appointed by a governor; (2) to determine the influence of the nomination-appointment process on electoral results; and (3) to determine how women and minority lawyers fared under the new compromise system. This article first provides a brief overview of the judicial selection methods in the United States and a brief history of judicial selection in New Mexico. It then describes the operation of the existing system, including the nomination and appointment process and the electoral process that follows the appointment of judges.

Subsequent sections examine the results of the first ten years under the new system—both the results of the nomination and appointment process from January 1989 to December 1998, as well as the electoral results of the first ten years. In particular, this article looks at what happened in the partisan and retention elections to the judges appointed during this period.

Based on the review of these results, this article analyzes the effect of the electoral law on the nomination and appointment aspects of the New Mexico judicial selection system. It assesses the impact of the electoral system on the appointment process and the influence of commission nomination on the partisan election. It does not, however, take a position on the debate over whether judicial selection by commission nomination and gubernatorial appointment or election selection is the better method of choosing judges. This article, therefore, attempts to answer with empirical evidence the questions of how the two systems operate together, whether the compromise favors one aspect at the expense of the other, the costs of the compromise, and how women and minority lawyers fared under the compromise system.[5]

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5. The literature on judicial selection includes the classical arguments in support of both systems, and a review of those arguments is unnecessary here in view of the fact that the New Mexico system includes aspects of both. *See, e.g.*, HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 141-152 (2d ed. 1998); Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?*, 49 U. MIAMI L. REV. 1, 6 (1994). An evaluation of whether the compromise system produces better judges than the old system is beyond the scope of this Article. Determining and applying measurements for evaluating and ranking judges are exceedingly complicated problems with no consensus among commentators about how to measure what makes for a good judge. Legitimate questions can be raised about the validity and reliability of lawyer polls and rankings of judges. *See* STUMPF, *supra* at 143, where the author states that the difficulty in determining which type of selection method produces better judges lies in the "near impossibility of operationalizing the concepts of 'good' and 'better.' Beyond a consensus that judges ought to be 'judicious,' have proper 'judicial temperament,' be objective, and perhaps have prior judicial experience . . . there remains no direct measure of what a 'good' judge is." A recent effort to measure the relationship between quality of judges appointed and their later performance appears in a report of the ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE: A PROFILE OF ALASKA'S JUDICIAL APPLICANTS AND JUDGES (1999).

II. OVERVIEW OF JUDICIAL SELECTION METHODS IN THE UNITED STATES[6]

The New Mexico plan is best understood in the context of the debate over the best method of selecting judges. Historically, there has been considerable controversy over selection of judges, and this debate has produced a variety of methods in the United States over time. The U.S. Constitution confers on the president the authority to appoint justices of the Supreme Court subject to the advice and consent of the Senate.[7] The same language has been construed to apply to federal district court and appellate judges.[8]

The states, however, have adopted various methods of selecting judges.[9] During the colonial period, the King of England appointed judges. After the Revolution, many states placed judicial appointments under legislative control with legislatures either selecting judges directly or having veto power over gubernatorial selections. Starting in 1812, states gradually began adopting elective systems for selecting judges. The rise of Jacksonian Democracy and a desire for popular accountability made this method of judicial selection the predominant one in the nineteenth century. Critics, however, feared that the partisan election of judges could be controlled by party leaders or political machines, and as a reaction to this, some states opted for nonpartisan judicial elections. This method also had its critics, who believed party leaders were controlling the selection of candidates for nonpartisan elections.

In the early part of the twentieth century, criticism of both partisan and nonpartisan elections led to calls for selection of judges from pools of qualified lawyers and not just those who were friends of politicians. The American Judicature Society, founded in 1913, proposed a plan in which the chief justice would appoint judges from a list of candidates suggested by a judicial council. A variety of other plans subsequently emerged, but all had the common feature of a nominating commission. Some were introduced in state legislatures as early as the 1930s. In 1940, adopting a plan endorsed by the American Bar Association, Missouri became the first state to embrace a judicial nominating commission system. Known as the Missouri plan, it provided for a nonpartisan commission of lawyers and non-lawyers who nominated the most qualified candidates to the governor, appointment by the governor from the list, and periodic retention elections in which the electorate decided whether or not to retain the judge.

The commission plan, often called "merit selection," has been adopted in different forms by thirty-four states for selection of all or some state judicial positions.[10] The selection plans in these states differ markedly in their details. Some states use nominating commissions for some courts and not others. The composition of the commissions also varies among state plans. About thirty states use elections

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6. For detailed histories of judicial selection in the United States, see STUMPH, *supra* note 5, at 133-41; Goldschmidt, *supra* note 5, at 4-14; Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966); MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE (1987).

7. *See* U.S. CONST. art. II, § 2.

8. *See* STUMPF, *supra* note 5, at 169-70.

9. The following discussion is taken from STUMPF, *supra* note 5, at 133-41.

10. *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, *in* JUDICIAL POLITICS READINGS FROM JUDICATURE 44, 45 (2d ed. 1999).

to select some, most, or all their judges.[11] Partisan elections are used in thirteen states, and nonpartisan elections are used to choose some, most, or all judges in seventeen states.[12] The following chart shows the judicial selection plans in effect in 1996.

JUDICIAL SELECTION IN THE STATES
Appellate and General Jurisdiction Courts
Summary of Initial Selection Methods

Merit Selection through Nominating Commission*	Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission	Partisan Election	Nonpartisan Election	Combined Merit Selection and Other Methods
Alaska Colorado Connecticut Delaware District of Columbia Hawaii Iowa Maryland Massachusetts Nebraska New Mexico Rhode Island Utah Vermont Wyoming	California (G) Maine (G) New Hampshire (G) New Jersey (G) Virginia (L)	Alabama Arkansas Illinois Louisiana North Carolina Pennsylvania Texas West Virginia	Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada North Dakota Ohio Oregon Washington Wisconsin	Arizona Florida Indiana Kansas Missouri New York Oklahoma South Dakota Tennessee

* The following ten states use merit plans only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, West Virginia, and Wisconsin.

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III. HISTORY OF JUDICIAL SELECTION IN NEW MEXICO

Before the current selection plan was adopted by the voters in 1988, all judges in New Mexico were selected by the voters in partisan elections.[13] Vacancies occurring between elections were filled by the governor, who had absolute

11. *See id.* at 46.
12. *See id.*
13. *See* Kenneth W. Miller & Gilbert K. St. Clair, *State Judicial Selection: The New Mexico Plan* 3 (Mar. 1992); *see also* supra notes 1-3 and accompanying text.

discretion in filling the vacancy. This system had its origin in the 1910 constitution which provided for a partisan-elected judiciary.

The 1988 amendment to the New Mexico Constitution adopting the new judicial selection system was the culmination of over fifty years of efforts to reform the method of selecting judges. A 1952 article in the *Journal of the American Judicature Society*[14] describes the early efforts at reform. In 1933, the New Mexico legislature considered two bills to change the partisan election of judges. One bill provided for election of judges on a nonpartisan ballot and the other provided for a bar primary in which the New Mexico Bar Association would decide who should be on the ballot in judicial races.[15] Neither bill passed, but in 1935, the State Bar of New Mexico convened a conference of a dozen statewide organizations to discuss possible improvements in the selection of judges. The conference adopted a resolution favoring nonpolitical selection of judges, and appointed a committee to develop a specific plan for consideration at a subsequent meeting of the conference. It does not appear that a plan was produced or that the conference ever met again.[16]

During World War II, another unsuccessful effort was made to move to nonpartisan selection of judges. At the annual meeting of the state bar in 1948, a group of Las Cruces lawyers proposed a resolution to have the organization go on record as favoring the Missouri plan for selection of judges, but the resolution failed.[17] The next year, the state bar reconsidered the proposal and submitted a draft plan to the membership for study and approval at the next meeting. At the 1950 annual meeting, the state bar approved the draft plan that provided for nomination of three persons by a nominating commission, with appointment by the governor from the list of nominees, followed by retention elections.[18] This proposal was introduced in the 1951 legislature,[19] and after an amendment that changed the number of votes required to reject a judge in the retention election, the plan was passed and went before the voters for approval in September of 1951.[20] The voters defeated the judicial selection plan by a substantial margin, with most of the negative votes coming from heavily Hispanic populated counties in Northern New Mexico. Opponents of the plan argued that Spanish-Americans would not be recommended by commissions or appointed by governors, and Hispanic politicians opposed the amendment.[21]

Governor Ed Mechem, who supported the proposed constitutional amendment, instituted his own plan modeled on the one rejected by the voters.[22] He created an ad hoc judicial nominating commission to recommend candidates to him for appointment, and he limited his selection to those recommended by the commission.[23] All governors since Governor Mechem have used some form of

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14. Glenn. R. Winters, *The New Mexico Judicial Selection Campaign—A Case History*, 35 J. AM. JUDICATURE SOC'Y 166 (1952).
15. *See id.* at 167.
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 168.
21. *See id.* at 170.
22. *See* Miller & St. Clair, *supra* note 13, at 6.
23. *See id.*

"voluntary merit selection" in which the state bar has played a key role in recommending lawyers to fill interim vacancies.[24] The appointed judges, however, were required to run in partisan elections if they intended to retain their position.

The 1969 constitutional convention considered changing the electoral system of selecting judges, but the judicial committee of the convention was divided on a proposed appointive system.[25] The convention, sitting as a committee of the whole, rejected the proposed change and retained a partisan-elected judiciary.[26] Another effort to eliminate partisan election of judges failed in 1982. The legislature proposed a constitutional amendment that provided for commission nomination of candidates for appointment by the governor and for nonpartisan retention elections. The nominating commission would have also evaluated judges before retention elections, and the commission's recommendation would appear on the ballot next to the candidates' name. The voters defeated the proposed amendment.[27]

The reformers finally succeeded in changing the system for selecting judges in 1988 with the approval of the constitutional amendment that provides for a compromise between selection of judges based on commission nomination and partisan election of judges. The original proposal called for a pure nomination-appointment-retention system, but the legislature insisted on a compromise requiring one partisan election before a judge could be eligible for retention elections.[28] All judges sitting in 1988 would be considered to have met the competitive election requirement and would face only retention elections.[29] The compromise plan went before the voters in November, 1988. Described on the ballot as "judicial reform,"[30] the voters approved the plan by a vote of 203,509 to 159,957.[31] The new judicial selection system went into effect on January 1, 1989.

The impetus for the reforms adopted by the voters in 1988 came primarily from the Second Judicial District Judges in Bernalillo County.[32] Judge W. John Brennan and Judge Rebecca Sitterly, both of the Second Judicial District in Albuquerque, wrote the original proposal submitted to the legislature and limited the proposal to the appellate courts and courts in Bernalillo County.[33] The proposal called for a nomination-appointment-retention election system for selecting judges similar to the Missouri plan.[34] The judges from the Second Judicial District in Bernalillo County amended the proposal to include all of the judicial districts in the reform plan. Judges from the other judicial districts in New Mexico objected to the limitation and indicated that they would support the proposal if it applied to all of the judicial districts in the state.[35] The New Mexico District Judges Association, headed by District Court Judge W. John Brennan, Common Cause, the League of

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24. *See id.*
25. *See* Eric D. Dixon, *A Short History of Judicial Reform in New Mexico*, 73 JUDICATURE 48 (1989).
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.* at 49.
30. *See id.*
31. *See id.*; *see also* the note following N.M. CONST. art. VI, § 35.
32. Telephone Interview with Judge W. John Brennan, Chief Judge of the Second Judicial District (1999).
33. *See id.*; *see also* Miller & St. Clair, *supra* note 13, at 6.
34. *See* Dixon, *supra* note 25, at 48.
35. *See* Telephone Interview with Judge Brennan, *supra* note 32.

Women Voters, and a group called Court Update supported the reform plan submitted to the legislature.[36] Because of opposition in the legislature to the proposal, the Judges Association agreed to the addition of a partisan election to the plan.[37] This change in essence formalized the system that had been in effect since Governor Mechem adopted the use of ad hoc nominating commissions to recommend candidates to fill interim vacancies.[38]

The compromise plan that emerged from the legislature that went to the voters in November of 1988 established a nominating committee process and preserved the partisan election of judges.[39] It also brought the legislature into the judicial selection process by giving to the speaker of the house of representatives and the president pro tempore of the senate the power to appoint members of the nominating commissions.[40]

During the debate over the proposed constitutional amendment, the three groups that had successfully lobbied the proposal through the legislature formed a coalition called "People for Judicial Reform."[41] The coalition engaged in fund raising and promoted the amendment in a statewide campaign. Proponents emphasized the benefits of removing judicial selection from the political arena.[42] In particular, they argued that the amendment would favor competence rather than political skills, produce more qualified judges, and eliminate the effects of campaigning on judicial impartiality.[43] They also argued that the proposed amendment would, after the first partisan election, avoid political judicial races that force judges to seek campaign money from attorneys who appear before them.[44] Proponents also addressed the concern about accountability by arguing that retention elections would give voters an opportunity to reject judges.[45] In short, the proponents asserted that the proposed amendment would improve the quality of the judiciary and minimize the influence of politics even though the amendment included one partisan election.[46]

The amendment had its opponents. Three of the five supreme court justices opposed it and actively campaigned against it, claiming that the plan was elitist in that lawyers dominated the nominating commissions.[47] Opponents forcefully premised their arguments on the theme that a democracy requires the selection of public officials, including judges, by the people in open elections. They saw the nominating commission and retention elections as taking power away from the electorate.[48] They also claimed that retention elections granted judges de facto life tenure, and that the amendment, instead of taking politics out of judicial selection,

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36. *See id.*; *see also* Dixon, *supra* note 25, at 49.
37. Telephone Interview with Judge Brennan, *supra* note 32; *see also* Dixon, *supra* note 25, at 48.
38. *See* Miller & St. Clair, *supra* note 13, at 6.
39. *See* N.M. CONST. art. VI, § 35.
40. *See id.*
41. *See* Dixon, *supra* note 25, at 49.
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*

shifted the politics from the electoral system to the nominating commission.[49] Finally, they argued that the new system would not produce any better judges than the partisan election process.[50]

Proponents of the amendment appeared to be better organized than the opponents as they raised money for advertisements and obtained the endorsements of two of the influential newspapers in New Mexico, the *Albuquerque Journal* and the *Santa Fe New Mexican*.[51] The amendment passed by a rather comfortable margin, with voters in nineteen of the thirty-three counties approving the plan.[52] The three most populous counties in the state all approved the amendment.[53]

IV. DESCRIPTION OF THE JUDICIAL NOMINATION AND APPOINTMENT PROCESS

New Mexico's hybrid system for selecting judges became effective on January 1, 1989, and applies to the selection of appellate judges for the Supreme Court of New Mexico and the New Mexico Court of Appeals,[54] as well as trial judges for the district courts[55] and the metropolitan court.[56] The constitutional amendment created fifteen separate judicial nominating commissions to recommend candidates to the governor.[57] These commissions consist of the Appellate Judges Nominating Commission, which screens and nominates candidates for the supreme court and court of appeals; thirteen District Court Judges Nominating Committees for each of the thirteen judicial districts in New Mexico; and the Metropolitan Court Judges Nominating Committee for the one Metropolitan Court in Bernalillo County (Albuquerque).[58]

The new judicial selection system in New Mexico differs substantially from the nomination-appointment-retention plans in other states and also from the *Model Judicial Selection Provisions* developed by the American Judicature Society.[59] First, the New Mexico compromise plan, unlike any other state employing a system of nominating commission and retention elections, interposes a partisan election between the nomination-appointment and retention elections.[60] Second, the New Mexico system, with three non-lawyers on a commission of fourteen,[61] has a smaller percentage of non-lawyers on the nominating commission than any other state.[62] Third, with three judges on the commissions, New Mexico has more judges on

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49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.* The most populous counties are Bernalillo (Albuquerque), Dona Ana (Las Cruces), and Santa Fe.
54. *See* N.M. CONST. art. VI, § 35.
55. *See id.* § 36.
56. *See id.* § 37.
57. *See id.* §§ 35-37.
58. *See id.*
59. The Model Judicial Selection Provisions are included in the HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS published by the American Judicature Society (1985); *see also* Dixon, *supra* note 25, at 49.
60. *See* N.M. CONST. art. VI, § 33.
61. *See id.*
62. *See* Dixon, *supra* note 25, at 49.

nominating commissions than any other state.[63] Fourth, unlike the model provisions and the provisions in other states requiring commissions to nominate a certain number of candidates to the governor for appointment, usually two to five,[64] the New Mexico plan has no specific number of candidates that must be nominated by the commissions. Finally, the New Mexico plan, unique among the states and contrary to the *Model Judicial Selection Provisions*,[65] allows the governor to request additional names to be added to the list of nominees.[66]

A. *Commission Composition*

Each of the commissions includes the dean of the School of Law at the University of New Mexico (the only law school in the state) as chair, three judges, three non-lawyers, and at least seven lawyers. According to article VI section 35 of the New Mexico Constitution, the Appellate Judges Nominating Commission shall include the chief justice of the supreme court, or his designee, and two judges of the court of appeals appointed by the chief judge of the court of appeals.[67] In addition to the judges, the state's leading political officials appoint six members to the commission. The governor, president pro tempore of the senate, and the speaker of the house of representatives each appoint two commissioners—one who is a lawyer licensed to practice law in New Mexico, and one who is a citizen of New Mexico who is not licensed to practice law in any state.[68] To complete the commission membership, the president of the state bar of New Mexico, in consultation with the judges on the commission, appoints at least four members of the state bar, representing civil and criminal prosecution and defense.[69] Because the constitution requires that the commissions be politically balanced, with an equal number of members from each of the two largest political parties, the president of the state bar and the judges may appoint additional members of the bar in order to achieve political parity.[70] These additional appointments must insure that the diverse interests of the state bar are represented, and the dean of the law school is named as the final arbiter of whether the diverse interests are represented.[71] The persons serving as dean during the first ten years have interpreted diverse interests to include not only law practice diversity, but geographic, gender and ethnic diversity as well.[72]

Because of the requirements of political balance and diversity, most commissions have fourteen to eighteen commissioners, not counting the chair.[73] Counting the

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63. *See id.*

64. *See* Model Judicial Selection Provisions, *supra* note 59, art. 1 § 1.

65. The Model Judicial Selection Provisions do not include a provision for commissions to submit additional nominees at the governor's request.

66. *See* N.M. CONST. art. VI, § 35.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. The persons serving as chair during the ten year period were Deans Ted Parnall (1989-1991), Leo M. Romero (1991-1997), and Robert J. Desiderio (1997-1998).

73. *See* ANNUAL REPORTS OF THE JUDICIAL SELECTION OFFICE (on file at the University of New Mexico School of Law) [hereinafter JUDICIAL SELECTION REPORTS]. The Judicial Selection Office compiles annual

required three judges on each commission, the six political appointees, and at least four lawyers appointed by the state bar president and judges, a commission would have thirteen members. Unless one of the appointees is not registered in one of the two largest political parties, a thirteen-member commission will be unbalanced. As a result, the state bar president and judges appoint more than four lawyers in order to achieve political balance and diversity.

Appointments to the commissions must be made every time a judicial vacancy occurs because at present there is no term for commissioner appointments. The constitution provides that commissioners shall be appointed for such terms as may be provided by law,[74] but the New Mexico Legislature has not enacted any law specifying the terms for commissioner appointments. In the absence of any terms for commissioners, each of the appointing authorities is asked each time a vacancy occurs whether the same appointees will be retained or replaced. In most commissions, there is some, but not much, turnover in the composition of the commission from vacancy to vacancy.[75]

As an example of the composition of one of the commissions, Table 1 sets forth the membership of the Appellate Judges Nominating Commission,[76] the only statewide commission.

Table 1: Composition of Appellate Judges Nominating Commission

Chair
1. Dean of University of New Mexico School of Law

Three Judges
1. Chief justice of the Supreme Court or designee
2. Judge of the Court of Appeals appointed by the Chief Judge of the Court of Appeals
3. Judge of the Court of Appeals appointed by the Chief Judge of the Court of Appeals

Six Political Appointments
4. Lawyer appointed by the Governor
5. Citizen appointed by the Governor
6. Lawyer appointed by the Speaker of the House
7. Citizen appointed by the Speaker of the House
8. Lawyer appointed by the President Pro Tempore of the Senate
9. Citizen appointed by the President Pro Tempore of the Senate

statistics on the commissions, applicants, nominees, and appointments. The annual reports also include gender and ethnic information about the commissioners, applicants, nominees, and appointees.

74. *See* N.M. CONST. art. VI, § 35.

75. *See* JUDICIAL SELECTION REPORTS, *supra* note 73.

76. *See* N.M. CONST. art. VI, § 35.

Four Appointments by the State Bar President and the Judges on the Commission

10. Lawyer
11. Lawyer
12. Lawyer
13. Lawyer

Additional Lawyer Appointments to Achieve Political Balance and Diversity

14. Lawyer(s) appointed by the State Bar President and the Judges

The District Court Nominating Commissions[77] differ in composition from the Appellate Judges Nominating Commission chiefly with respect to the judges on the committees. The chief judge of the district where the vacancy exists replaces one of the judges from the court of appeals so that the three judges are a supreme court justice, a judge from the court of appeals, and a district court judge.[78] In addition, the lawyer and citizen members must reside in the judicial district.[79]

The Metropolitan Court Judges Nominating Committee,[80] likewise, differs in composition only with respect to the judges on the committee. The three judges are a justice of the supreme court, a judge of the district court in which the metropolitan court is located, and the chief judge or designee of the metropolitan court where the vacancy exists.[81] Like the district court committee members, the attorney and citizen members must reside in the judicial district in which the metropolitan court is located.[82]

Each commissioner takes an oath of office at the start of the commission meeting requiring the commissioner to swear that he/she will faithfully and impartially discharge the duties of judicial selection commissioner.[83] Although personal or professional relationships between a commissioner and an applicant do not disqualify a commissioner from participating in the evaluation of the applicant pool, a commissioner must disqualify him/herself if the commissioner feels the he/she cannot be impartial and cannot comply with his/her oath of office as to any applicant.[84] In order to insure that any relationships are made public, the Rules Governing Judicial Nominating Commissions require each commissioner to disclose to the commission all current or past professional, family, business, and other special relationships with any of the applicants.[85] This disclosure occurs during the interview stage of the commission meeting.

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77. *See* N.M. CONST. art. VI, § 36.
78. *See id.*
79. *See id.*
80. *See id.* § 37.
81. *See id.*
82. *See id.*
83. *See* Rules Governing Judicial Nominating Commissions of the State of New Mexico § 3(A), published as an appendix to N.M. CONST. art. VI [hereinafter Rules Governing Judicial Selection Commissions].
84. *See id.*
85. *See* Rules Governing Judicial Selection Commissions § 3(B).

B. *Notice of Vacancy*

The judicial selection process applies whenever a judicial vacancy occurs in the appellate court, district court, or the metropolitan court.[86] A vacancy can occur due to a resignation, death, expiration of a term, or the creation of a new judicial position by the legislature. Upon the occurrence of a vacancy, the chair of the judicial nominating commission issues a notice of vacancy soliciting nominations and applications from lawyers who meet the constitutional or statutory qualifications for the vacant judicial position.[87] The notice of vacancy, announcing the deadline for applications and the meeting date of the judicial selection commission, is published in the *New Mexico Bar Bulletin* and in state-wide and local newspapers. In addition, the notice is sent to all of the specialized bar associations, such as the Women's Bar Association, the Hispanic Bar Association, the Black Lawyers Association, and the Indian Bar Association.[88] The chair also provides notice of the vacancy to the persons charged by the constitution with the duty of appointing commissioners and coordinates their appointments.[89]

C. *Qualifications for Judicial Positions*

The constitutional qualifications for appellate and district court judges are quite minimal. To qualify for the supreme court and court of appeals, a person must be at least thirty-five years of age, have resided in the state for at least three years, and have been in the actual practice of law for at least ten years preceding assumption of office.[90] To be qualified for the position of district judge, a person must be thirty-five years of age, have actually practiced law for six years, and be a resident in the district in which the judicial position is located.[91] The statutory qualifications for the metropolitan court include membership in the bar and the practice of law in New Mexico for at least three years, but no age or residency requirements.[92]

D. *Commission Evaluation of Candidates*

The constitutional amendment prescribes a process for the initial selection of judges on the basis of merit. Section 35 of article VI provides that, for any vacancy, the nominating commission "shall actively solicit, accept and evaluate applications from qualified lawyers" and shall "submit to the governor the names of persons *qualified* for the judicial office and *recommended* for appointment to that office by

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86. *See* N.M. CONST. art. VI, §§ 35-37.

87. *See id.* § 35; Rules Governing Judicial Selection Commissions § 2(A).

88. Rule Governing Judicial Selection Commissions section 2(A) requires that the Chair publicly announce the vacancy. Rule section 2(A) does not prescribe to whom the notice should be given, but the practice of the Judicial Selection Office has been to notify the bar through the *New Mexico Bar Bulletin*, special bar associations, and the general media.

89. *See* Rules Governing Judicial Selection Commissions § 2(B).

90. *See* N.M. CONST. art. VI, § 8 (qualifications for justices of the supreme court), and § 28 (qualifications for judges of the court of appeals). The qualifications for appellate judges were changed in 1988 in a constitutional amendment. The changes in the qualifications were part of the amendment changing the judicial selection method.

91. *See* N.M. CONST. art. VI, § 14. The constitutional amendment that changed the judicial selection method also changed the qualifications for district judge.

92. *See* N.M. STAT. ANN. § 34-8A-4 (Supp. 1996). The amendment to article VI changing the method of judicial selection did not change the qualifications for metropolitan court judges. The metropolitan court is a statutorily created court with limited jurisdiction.

a majority of the commission."[93] This language requires the commission to make two decisions: (1) whether the applicant is qualified, and (2) should the applicant, if qualified, be recommended to the governor based on the evaluation of the application.

The phrase, "qualified for the judicial office," is not defined in article 6 section 35. Qualified may refer solely to the constitutional requirements for judicial positions,[94] or the term may encompass a broader notion of those qualities that define a good judge. A commission's determination that a candidate meets the constitutional requirements does not mean that the person must be recommended for appointment. The use of the word "and" between "qualified" and "recommended" in article VI section 35 makes clear that the "qualified" determination and "recommended" decision are separate. Even if "qualified" is interpreted to include the qualities that a good judge should possess, the recommendation language in section 35 contemplates that a commission could find a candidate to be qualified in its broader sense, that is, to have the qualities of a good judge, but decide not to recommend the candidate. The language of section 35, therefore, does not require that all qualified candidates be recommended, however qualified is defined.

Because the qualifications specified for judges in the constitution concerning age, years of practice of law, and residency, do not involve evaluation by the commission, section 35 contemplates that the decision to recommend will be based on merit after an evaluation of the application and applicant. In fact, the constitution specifically authorizes the commission to "require an applicant to submit any information it deems relevant to the consideration of his (her) application".[95]

The constitution does not require the commission to recommend any particular number of nominees to the governor. According to the constitution, all candidates receiving a majority of the votes of the commission will be nominated.[96]

In order to effectuate the constitutional language requiring the commissions to assess applications, evaluative criteria have been adopted in the *Rules Governing the Judicial Nominating Commissions*.[97] The evaluative criteria specified in the Rules were borrowed from the *Handbook for Judicial Nominating Commissions*[98] published by the American Judicature Society. They include the following:

-physical and mental ability to perform the tasks required
-impartiality
-industry
-integrity
-professional skills
-community involvement
-social awareness
-collegiality

93. N.M. CONST. art. VI, § 35 (emphasis added).
94. *See supra* text accompanying notes 90-92.
95. N.M. CONST. art. VI, § 35.
96. *See id.*
97. *See* Rules Governing Judicial Selection Commissions § 4.
98. *See* HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, *supra* note 59, at 57-63.

-writing ability
-decisiveness
-judicial temperament
-speaking ability

The New Mexico Judicial Selection Commissions have agreed that these criteria specify the qualities that make for a good judge and should be used in evaluating judicial candidates.[99] These criteria in essence define qualified in its non-constitutional sense, but more importantly, they guide the commissions' recommendation decision.

Because the New Mexico Constitution authorizes commissions to require applicants to submit any information relevant to the consideration of their applications,[100] commissions have adopted, as part of the application process, a questionnaire that asks for information relevant to the evaluative criteria.[101] In addition, the Rules require the chair of the commission to obtain information about the applicants from the Disciplinary Board and from the Judicial Standards Commission, the commission that investigates charges of misconduct by judges.[102] The Rules also authorize the chair, upon the written request of any commissioner, to seek additional information from an applicant or other persons relevant to the evaluative criteria.[103] Finally, the commissions obtain relevant information by interviewing every candidate in open and public meetings.[104] The commission may, for good reason, question any applicant on a confidential subject in closed session.[105]

E. Applicant Questionnaire

Attorneys interested in applying for a judicial position must complete a questionnaire that has been approved by all of the judicial selection commissions and adopted as part of the *Rules Governing Judicial Nominating Commissions*.[106] It includes questions concerning education, employment history, involvement in professional and civic activities, physical and mental health, any criminal or professional rule violations, the nature of practice experience, and the extent of experience in appellate and trial work, including jury trials. The questionnaire also asks candidates to submit five letters of recommendation, to include a current resume, to explain their reasons for applying for a judicial position, and to list the factors that they believe make them well-suited for it. Once the deadline for applications has passed, the names of the candidates are published both state-wide and locally, and the completed questionnaires are considered public documents available for anyone to see.[107]

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99. *See* Rules Governing Judicial Selection Commissions §§ 4, 8(A).
100. N.M. CONST. art. VI, § 35.
101. *See* Rules Governing Judicial Selection Commissions § 2(D); Applicant Questionnaire, N.M. CONST. art. VI app.
102. *See* Rules Governing Judicial Selection Commissions § 2.
103. *See id.* § 2(J).
104. *See id.* §§ 5, 6.
105. *See id.* § 6(E).
106. *See* Applicant Questionnaire, N.M. CONST. art. VI app..
107. *See* Preface to Applicant Questionnaire, N.M. CONST. art. VI app.

F. Inquiry to Disciplinary Board and Judicial Standards Commission

Once the deadline for applications has passed, the names of all applicants are sent to the Disciplinary Board and the names of those who have served or currently serve as judges are sent to the Judicial Standards Commission, asking if any of the applicants have been the subject of formal disciplinary proceedings.[108] The applicant questionnaire requires a signed and notarized waiver of confidentiality authorizing the judicial selection commission to obtain otherwise confidential information regarding charges and determinations of professional and judicial disciplinary bodies.[109] Notwithstanding the breadth of the waiver required, commissions are not interested in all complaints filed against applicants but only those complaints that result in some finding of misconduct.[110] Misconduct may result in either formal discipline, like suspension or reprimand, or informal dispositions, like informal admonitions, that do not invoke the full panoply of disciplinary proceedings.[111]

Apart from the inquiry to disciplinary bodies, the commissions do not independently investigate the backgrounds of the applicants or attempt to verify the information supplied by the candidates in the questionnaire.[112] If allegations relevant to the criteria come to the attention of the commission, the commission chair will then investigate the allegations and report the findings to the commission. Also, upon written request by a commissioner, the chair may seek additional information from the applicant or others relevant to the evaluation criteria.[113]

G. Commission Meetings

According to the constitution, the commissions must meet within thirty days of the actual occurrence of a vacancy and report their recommendations to the governor.[114] The meeting is open to the public[115] and the media are given notice of its date, time, and location.[116] Candidates also may attend the meeting, including the interviews of other candidates, but only after their interview is completed. The chair establishes the order of interviews randomly.[117]

The commission meetings open with a determination of a quorum, introduction of commission members, and the administration of the oath taken by each commissioner to faithfully and impartially discharge the duties of the office of

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108. *See supra* text accompanying notes 100-102.

109. *See* Applicant Questionnaire, N.M. CONST. art. VI app. Question 23 of the questionnaire asks applicants, "to your knowledge, has any formal charge of violation of any rules of professional conduct ever been filed against you in any jurisdiction? If so, when? How was it resolved?"

110. According to the Disciplinary Counsel, many complaints against lawyers are without merit and are dismissed. See NM RULES OF PROFESSIONAL RESPONSIBILITY 17-206 (1995) for the types of discipline.

111. *See id.*

112. The Rules Governing Judicial Selection Commissions impose no obligation on the Commission or the Chair to conduct an independent investigation or to verify information contained in the questionnaire. *But see infra* note 113 and accompanying text.

113. *See* Rules Governing Judicial Selection Commissions § 2(J).

114. *See* N.M. CONST. art. VI, § 35.

115. *See* Rules Governing Judicial Selection Commissions § 5(B).

116. *See id.* § 5(C).

117. *See id.* §§ 2(G), 6(A).

Judicial Nominating Commissioner.[118] The agenda includes the report of the chair on actions taken on behalf of the commission, public comment, candidate interviews, closed session discussion of the applicants, and the public vote. There is an opportunity for public input during the public comment part of the agenda, and members of the public are allotted time either for questions or comments on the policies and procedures of the commission or for comments concerning individual applicants.[119]

Most of the commission meeting time is devoted to interviews of all applicants—no matter the number. Some vacancies have attracted more than twenty applicants, but the commission rules do not authorize any preliminary screening to reduce the number of interviews by the full commission. Each commissioner is given the opportunity to question each applicant,[120] and the rules admonish commissioners to ask applicants about any information which the commissioner has learned or heard regarding the applicant and which the commissioner intends to raise in closed session.[121] This rule attempts to provide applicants with an opportunity to respond to negative information that might be raised about their candidacy in the closed discussion. The commission may, for good reason, hear any applicant on a confidential subject in closed session.[122] If an applicant chooses to submit information on a confidential basis, the chair makes such information available to the commissioners but will not disclose it to the public unless the commission votes to make it public.[123] Typical of the information submitted confidentially is psychological counseling following a divorce or loss of a close family member. This information would be responsive to the item on the questionnaire asking if there is any mental or physical problem that would affect the ability of the applicant to perform the duties of judge.[124]

Following the interviews, the commission meets in closed session to discuss the applicants' qualifications and to evaluate them according to the evaluative criteria specified in the Rules Governing Judicial Nominating Commissions.[125] The state Open Meetings Act permits commissions to discuss personnel matters in closed session.[126] The discussion during closed session is confidential, but the extent of confidentiality is determined by each individual commission.[127] Most commissions adopt a rule of total confidentiality that prevents disclosure of anything said in closed session. The interest in promoting full and frank discussions supports the rule of total confidentiality. Commissioners supporting total confidentiality express

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118. *See id.* § 3(A). See N.M. CONST. art. VI, § 37 (10(A)) for the oath of office for Judicial Selection Commissioners.

119. *See* Rules Governing Judicial Selection Commissions § 5(E).

120. *See id.* § 6(C).

121. *See id.* § 6(D).

122. *See id.* § 6(E).

123. The Rules Governing Judicial Selection Commissions do not address this situation. This was the experience of the author while serving as Chair.

124. *See* Applicant Questionnaire question 21, N.M. CONST. art. VI app.

125. *See* Rules Governing Judicial Selection Commissions § 7(A).

126. *See* N.M. STAT. ANN. § 10-15-1(H)(2) (Supp. 1995). This provision exempts hiring discussions from the requirement that meetings of public bodies be open to the public. This provision also specifies that "[j]udicial candidates interviewed by any commission shall have the right to demand an open interview."

127. *See* Rules Governing Judicial Selection Commissions § 7(A).

fears that they cannot be candid in the discussion if their comments about candidates can be disclosed, especially when some of the candidates are sitting judges. Some commissions have adopted a rule of partial confidentiality, a rule that allows commissioners to disclose to candidates, other lawyers, or the media the substance of the discussions concerning any candidate, but prevents disclosure of any information that would identify particular comments by particular commissioners. Supporters of partial confidentiality argue that applicants deserve to know what considerations led the commission to exclude them from the list of nominees and that commissioners should be able to respond to questions from members of the bar or media asking why certain candidates made the list and others did not.[128] The partial confidentiality rule attempts to balance the interest of honest and candid discussions about candidates with the interest of public disclosure of information. Neither rule, of course, prohibits disclosure of information that was part of the open part of the meeting, including the interviews, or information included on the questionnaire, a public document. Nor does either rule preclude a commissioner from disclosing his or her own personal opinion about the strength or weakness of any applicant.

The Rules require that straw votes, non-binding and by secret ballot, be taken in closed session to determine the degree of support for each applicant.[129] Before each round of straw votes, the applicants under consideration are discussed.[130] In the straw vote each commissioner votes for as many of the applicants that he/she wishes to see on the list of nominees that goes to the governor.[131] The commission must hold at least two rounds of straw votes in closed session, and when it believes that it is ready to decide which candidates to recommend, the commission reconvenes in public session for a final vote.[132]

The formal and official vote takes place in public session.[133] A vote of the majority of the commissioners present is required to recommend any nominee to the governor,[134] and, according to the constitution, the chair may vote only in the event of a tie.[135] Although the constitutional provision does not mandate any specific number of nominees, the Rules Governing Judicial Selection Commissions recognize that the governor, not the commission, has the authority to appoint judges. Thus, the Rules encourage commissions to strive to recommend two or more names for each position.[136]

Commissions attempt to give the governor some choice in the appointment process but also try to limit the governor's choice by recommending only the most qualified applicants. The American Judicature Society in its Model Judicial Selection Provisions supports a limit on the number of candidates to be nominated. Indeed, according to the Model Provisions, nominating commissions should

128. This statement comes from the author's personal recollection of the debates surrounding the issue.
129. *See* Rules Governing Judicial Selection Commissions § 7(B).
130. *See id.* § 7(C).
131. *See id.* § 7(D).
132. *See id.* § 7(E).
133. *See id.* § 8(B).
134. *See id.*
135. *See* N.M. CONST. art. VI, § 35.
136. *See* Rules Governing Judicial Selection Commissions § 8(C).

recommend "no more than five nor less than two qualified persons for each vacancy."[137] This language gives commissions the flexibility to submit fewer names whenever they have difficulty finding five qualified nominees, a situation that may occur in less populated areas. The commentary to the Model Provisions justifies the maximum number of five nominees as necessary to insure that commissions nominate only the most qualified candidates.[138] The minimum number of two, according the American Judicature Society, allows commissions to limit, but not eliminate, the choice of the appointing authority.[139]

Because most commissioners do not want to be on record as voting against particular applicants, especially the lawyer commissioners who will have an ongoing relationship with the lawyers and judges who did not get nominated, the formal vote usually comes in the form of a motion to recommend a slate of candidates to the governor.[140] This motion is usually approved by a majority vote. In this way, commissioners do not have to vote on each applicant individually. Moreover, this vote format prevents public disclosure of the degree of support for each candidate so that applicants will know only if they did or did not have support from a majority of the commission. They will not know if they had virtually no support, substantial support, or overwhelming support. In addition, the practice of not ranking the nominees serves to avoid unnecessarily labeling of the successful candidates as highly qualified or just barely qualified.

By voting on a slate of candidates, commissions do not publicly embarrass unsuccessful applicants or label unsuccessful applicants as unqualified. The chair sends the names of the nominees to the governor in alphabetical but unranked order.[141]

H. Appointment Process

The governor has thirty days after receipt of the list of recommended candidates in which to appoint someone from the list to fill the judicial vacancy.[142] The governor, however, may make one request of the commission for submission of additional names, and upon such a request, "the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office."[143] The governor may make such a request only once. If the governor fails to make an appointment from the final list of nominees within thirty days, the chief justice of the supreme court shall appoint someone on the list.[144]

When the governor requests additional names, the commission reconvenes within thirty days of the request and votes on those applicants who were not recommended

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137. *See* Model Judicial Selection Provisions, *supra* note 59, at 1.
138. *See id.* at 14.
139. *See id.*
140. *See id.*
141. *See* Rules Governing Judicial Selection Commissions § 9.
142. *See* N.M. CONST. art. VI, § 35.
143. *Id.*
144. *See id.*

the first time.[145] No new applications are accepted, and the commission generally does not re-interview the candidates. The commission discusses the applicants in closed session, conducts straw votes, and then votes in public. The constitution does not require the commission to submit additional names, even if requested by the governor. If no applicants obtain a majority vote of the commissioners, no new names will be recommended.

Commission screening of candidates provides a valuable service to the governor, especially for vacancies occurring at the district court level. The governor can avoid local political pressure to appoint a particular lawyer if the lawyer is not recommended by the commission. Because the lawyer is not on the list of nominees, the governor does not offend the political leaders by appointing someone other than their choice. Before the adoption of the current nomination and appointment system, governors voluntarily used an informal ad hoc nominating commission in part to eliminate lawyers who would make poor judges but who had the support of the political forces.

V. DESCRIPTION OF THE ELECTORAL PROCESS

The current New Mexico judicial selection system requires that appointed judges participate in two types of elections—first, a partisan election which may be contested, and second, uncontested retention elections. According to the constitution, any person appointed to fill a vacancy under the judicial selection process described above serves until the next general election.[146] Then he or she must run as a candidate in order to remain on the bench.[147] The winner of that election holds the office until the expiration of the original term.[148] This provision subjects the appointed judge to New Mexico election law, which includes primary elections for the selection of candidates by political parties and general elections contested by the nominees of the political parties.[149] The person winning the partisan election becomes eligible for a nonpartisan retention election at the expiration of the term.[150] The constitution, therefore, submits all judges to the New Mexico election laws.

A. *Partisan Election*

Briefly, New Mexico election law depends on political parties to name the candidates to be on the ballot at general elections.[151] A person seeking to be listed on the general ballot, therefore, must be nominated by one of the political parties[152]

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145. *See id.*

146. *See id.*

147. *See id.* The specific language states that the appointed judge's successor "shall serve until the next general election."

148. *See id.* Judges of the supreme court and court of appeals have terms of eight years, and judges of the district court have terms of six years. Metropolitan court judges have terms of four years. A vacancy created by resignation or death of a judge is filled for the duration of the term held by the judge who is replaced. *See* N.M. CONST. art. VI, § 33.

149. *See* N.M. STAT. ANN. §§ 1-8-1 to 1-24-4 (Supp. 1999).

150. *See* N.M. CONST. art. VI, § 33.

151. *See* N.M. STAT. ANN. §§ 1-8-1 to 1-24-4 (Supp. 1999).

152. *See id.* § 1-10-4 (1995).

or file as an independent candidate.[153] Generally, to obtain a party's nomination, a person must win the party's primary election.[154] A person may also receive the party's nomination without running in the primary election. If the judicial vacancy occurs too late for the appointed judge to be included in the primary election or occurs after the primary election, the central committee of the political party designates its nominee for the general election.[155]

The central committee may select its party's nominee for vacancies that occur either before or after the primary. The central committee can designate the party's candidate before the primary when a judicial vacancy occurs or will occur after the date of the issuance of the governor's primary election proclamation.[156] General elections take place every two years, and the governor must issue a primary election proclamation the last Monday in January of each even-numbered year.[157] In a mandamus action in the Supreme Court of New Mexico,[158] the court ruled that the governor is subject to a mandatory, non-discretionary duty when issuing a primary election proclamation to include judicial offices, "which by virtue of facts known on the date the proclamation is issued (the last Monday in January of each even-numbered year) has resulted or will result in a vacancy, such that the successor of the person appointed . . . to fill the vacancy must be chosen at the general election in November of that year."[159] Applying that ruling to five cases before it, the court concluded that two new judgeships created by the legislature effective in January of the election year must be included in the primary election proclamation because these vacancies were known on the date of the proclamation.[160] In addition, two judicial positions—one that became vacant the year before and one that became vacant in January of the election year, but before the last Monday, must be included in the proclamation, even though no one had been appointed to fill that position by the date of the required proclamation.[161] With respect to a resignation that would not become effective until after the proclamation date although the resignation had been tendered before the proclamation date, the court ruled that this vacancy was "not known" as of the proclamation date.[162] The court, therefore, concluded that the governor had no duty to include this office in the primary election proclamation.[163]

A fair reading of the court's decision regarding the judicial offices, which must be included in the primary election proclamation, suggests that the determination turns on the date of the vacancy, not the date that it is known that a vacancy will occur. In the case involving a vacancy occurring in February, it was known before the proclamation date that the vacancy would occur because of the letter of

153. *See id.* § 1-8-48 (Supp. 1999).
154. *See id.* § 1-8-1 (1995).
155. *See id.* § 1-8-7(A) & (B) and § 1-8-8(A).
156. *See id.* § 1-8-7(A)(2).
157. *See id.* § 1-8-12.
158. *See* State *ex rel.* Montoya, Nos. 21,964, 21,991, and 21,994 (N.M. Mar. 10, 1994). The New Mexico Supreme Court issued an unpublished Order granting in part and denying in part the consolidated petitions for a writ of mandamus.
159. *Id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*

resignation. The court stated that this resignation did not become effective until February 8, 1994, and "accordingly it was not known as of January 31, 1994, that that office would become vacant."[164] Apparently, the court views a vacancy as known only when the vacancy actually occurs. In all of the other cases before it, the actual vacancy as defined by the court occurred before the proclamation date. For example, in the case of a metropolitan judge appointed to the district court three days before the proclamation date, the court treated the appointment as effectively creating a vacancy even though the judge had not effectively resigned from the metropolitan court.[165] The court ruled that the appointment of an incumbent judge to fill another judicial vacancy was the equivalent of a vacancy due to death, effective resignation, removal, or creation of a new judgeship by the legislature.[166]

The governor may amend the proclamation to include later vacancies, but only those vacancies due to removal, resignation or death.[167] The proclamation can only be amended between the time of its issuance and the time set in the original proclamation for filing declarations of candidacy or statements of candidacy for convention designation.[168] The election law provision authorizing an amended proclamation states that the "Governor *may* amend the proclamation."[169] This language, discretionary and not mandatory, suggests that the governor need not include a later qualifying vacancy in the primary election proclamation by issuing an amended proclamation. The discretionary language in the proclamation amendment statute constrained the court from issuing an order mandating the governor to issue an amended proclamation to include the judicial position that became vacant only eight days after the proclamation date.[170] In cases where vacancies are not included in the primary proclamation, the central committees of the political parties designate their nominees.[171]

In addition to designating nominees for judicial vacancies not included in the governor's primary proclamation, the central committee of a party may also designate a nominee for the general election after the primary election if the party's nominee, either elected or designated, will not appear on the general election ballot for any reason.[172] The time period for designation by the central committee to fill vacancies in the list of a party's nominees depends on the cause of the vacancy. If the vacancy on the general ballot is due to the death of the nominee, the central committee may appoint another person of the same party affiliation to fill the vacancy up until five days before the general election.[173] For any other cause of a vacancy on the general ballot, the central committee must make its appointment to fill the vacancy at least fifty-six days before the general election.[174]

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164. *Id.*
165. *See id.*
166. *See id.*
167. *See* N.M. STAT. ANN. § 1-8-16 (1995).
168. *See id.*
169. *Id.* (emphasis added).
170. *See* State *ex rel.* Montoya.
171. *See* N.M. STAT. ANN. § 1-8-7A(2) (1995).
172. *See id.* § 1-8-8.
173. *See id.* § 1-8-8(C).
174. *See id.*

The primary election is the usual way of selecting the party's candidate for the general election, and the election law imposes several requirements on a person seeking to run in the primary election. A person must file a declaration of candidacy for the elective position and file a nominating petition with the requisite number of signatures of voters of the candidate's party.[175] Generally, a candidate needs signatures amounting to at least three percent of the total vote of the candidate's party in the last election in order to get on the primary election ballot.[176] If a political party chooses to convene a convention for the purpose of designating candidates on the primary ballot, a candidate needs a number of signatures amounting to at least two percent to be considered by the convention delegates for designation.[177] Every candidate receiving twenty percent of the delegates' votes will be placed on the primary ballot.[178] Candidates who do not receive the convention designation may still get on the primary ballot by collecting additional signatures that total at least four percent of the total vote of the candidate's party at the last election.[179]

Apart from the system for selecting political party nominees for the general election, a person may get on the general election ballot as an independent candidate.[180] In order to qualify as an independent candidate, a person must file a declaration of independent candidacy and submit a nominating petition[181] with voter signatures amounting to at least three percent of the votes cast in the last election.[182] For a statewide office, like judges of the supreme court or court of appeals, the three percent refers to the votes cast in the state,[183] and for a district office, like district judge, the three percent refers to votes cast in the district.[184]

New Mexico election law also provides for write-in candidates at the primary election stage.[185]

B. Retention Election

The person who wins the partisan election, either the appointed judge or challenger, holds the judicial office until the expiration of the original term.[186] Terms for justices of the supreme court and judges on the court of appeals are eight years, six years for district court judges, and four years for metropolitan court judges.[187] At the expiration of the original term, the judge elected in the partisan

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175. *See id.* § 1-8-21 (Supp. 1999).
176. *See id.* § 1-8-33 (1995).
177. *See id.* § 1-8-33(B).
178. *See id.* § 1-8-21.1(C).
179. *See id.* § 1-8-21(A) and § 1-8-33(D) (Supp. 1999).
180. *See id.* § 1-8-46 (1995).
181. *See id.* § 1-8-48(A) (Supp. 1999).
182. *See id.* § 1-8-51(C) & (E).
183. *See id.* § 1-8-51(C).
184. *See id.* § 1-8-51(E).
185. *See id.* § 1-8-36.1. This provision applies to elections for district judges, magistrates, and offices voted on by all voters of the state. Because the judicial positions on the supreme court and court of appeals are state-wide positions, this provision would apply to elections for appellate judges.
186. *See* N.M. CONST. art. VI, § 35.
187. *See id.* § 33.

election is eligible for a nonpartisan retention election.[188] The judge in such an election has no opposition on the ballot, and the only question presented to the voters is whether to retain or reject the judge. To be retained, a judge must receive at least fifty-seven percent of the votes.[189] Additionally, a judge seeking retention must file a declaration of candidacy by the deadline for filing a declaration of candidacy in a primary election.[190]

VI. RESULTS UNDER THE NEW NOMINATION AND APPOINTMENT SYSTEM

This section reviews the results of the judicial selection system in the first ten years of its operation from the commission nomination to the appointment by the governor. It examines the number of vacancies filled, commissions convened, and the number of applicants reviewed and recommended.[191] It also examines demographic data regarding the applicants, nominees, and appointed judges in this period. The next section will review the electoral results involving the appointed judges.

A. Number of Vacancies

In the first ten years under the new judicial selection system, from January 1, 1989, through December 31, 1998, eighty-one judges were appointed to fill the eighty-two vacancies that occurred. The unfilled vacancy resulted from the refusal of one judicial selection commission to nominate anyone to fill a vacancy because of the short-term and temporary nature of the vacancy because of unusual circumstances.[192] The eighty-one appointments under the new system filled vacancies in every court in New Mexico during the ten-year period. Table 2 sets forth the number of appointments to each court during this period.

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188. *See id.*

189. *See id.*

190. *See id.* § 34.

191. The information for this section comes from the records of the Judicial Selection Office at the University of New Mexico School of Law. The records include files on every vacancy filled since the new judicial selection system went into effect on January 1, 1989, as well as annual reports reflecting the number of vacancies, commissions convened, applicants, nominees, and judges appointed in each year beginning with 1989. The records also include a cumulative report of the annual reports. The annual reports include gender and ethnic data on the commissioners, applicants, nominees, and appointed judges.

192. This vacancy, in the Third Judicial District in June 1996, occurred when the appointed judge resigned after losing in the primary election. Because the judicial position would be filled at the November general election by one of the two candidates winning the Democratic and Republican party nominations in the primary elections, the vacancy caused by the resignation would be short-term and temporary, at most for five months. The Judicial Selection Commission refused to recommend any candidate to fill this vacancy. The governor asked the Commission to reconvene and to submit recommendations to him for appointment, but the Commission again declined to nominate anyone. Members of the commission in open session offered as the primary reason for their refusal that two of the candidates for the vacancy were also the candidates on the general election ballot who, it was believed, wanted to be appointed in order to be the incumbent on the ballot. Members of the commission felt that their nomination would be essentially a meaningless act, at best, and would be perceived as a political act, at worst. The above account is the recollection of the author who served as Chair of the Judicial Selection Commission during 1996.

Table 2: Number of Appointments from 1989-1998

Supreme Court	7
Court of Appeals	7
First Judicial District	6
Second Judicial District	16
Third Judicial District	6
Fourth Judicial District	1
Fifth Judicial District	5
Sixth Judicial District	1
Seventh Judicial District	3
Eighth Judicial District	1
Ninth Judicial District	2
Tenth Judicial District	1
Eleventh Judicial District	4
Twelfth Judicial District	3
Thirteenth Judicial District	3
Metropolitan Court	15
Total	81

B. Number of Commissions Convened and Reconvened

In order to fill the eighty-two vacancies, seventy-three commissions were convened,[193] and seven of those commissions were reconvened at the request of the governor who asked for additional names after receiving the list of nominees. Of the seven commissions reconvened, three commissions added names to the list and three commissions resubmitted the same names. One commission, reconvened after recommending no names to the governor, refused to nominate anyone.

C. Number of Nominees Recommended by Commissions

Although the constitutional amendment does not require that judicial selection commissions recommend a specific number of nominees to the governor and only requires that the commissions recommend those candidates receiving a majority of the votes of the commissioners,[194] most of the commissions sent more than one name to the governor. Of the seventy-three commissions convened, nine sent only one name and one sent no name. The governor asked for additional names in only four cases where the nine commissions recommended only one candidate. In the other cases, the governor appointed the single nominee. In those four cases where

193. Some commissions had multiple vacancies to fill. For example, when the legislature created three new judicial positions for the court of appeals effective July 1, 1991, the Appellate Judges Nominating Commission met once to recommend candidates for the three vacancies.

194. *See* N.M. CONST. art. VI, § 35.

the governor asked the commission to submit more than one name, the commission resubmitted the same single name in three cases. The governor appointed the single nominee in two of those cases and refused to appoint in the third, leaving the appointment to the chief justice of the supreme court.

The different judicial selection commissions recommended a total of 278 nominees to the governor to fill the eighty-two vacancies during the ten-year period of this study. This total reflects an average of 3.39 nominees per vacancy even though for nine of the vacancies, the commissions nominated only one person. Of the 278 nominees, sixty-seven, or twenty-four percent, were women and ninety-two, or thirty-three percent, were minority lawyers. The minority nominees included eighty Hispanics, five African Americans, and seven Native Americans.

The requirement of a majority vote by the commission for recommendation to the governor also explains the occasionally different results for some candidates who applied for more than one vacancy. Some candidates who were recommended to the governor to fill one vacancy did not receive a majority vote of the commissioners when they applied for another vacancy in the same court. The pattern of differential results for these candidates includes those who were first nominated and later did not make the list, those who did not make the list of nominees the first time and later were nominated, and those who were recommended, later not nominated, and later recommended. Why these once-successful candidates did not get a majority of the commissioners to include them on the list of nominees for a different vacancy cannot be answered because no record exists that explains the votes of the commissioners. Critics of the commission nomination system point to the inconsistent results for some candidates as an indictment of the process.[195] It should be noted, however, that for each vacancy, the commission often has some different members because commissioners are not appointed for terms and the appointing authorities may change their appointments for each vacancy. Also, the applicant pool is usually different for each vacancy even though it often includes some repeat applicants.

Table 3 shows that thirty-six applicants, or 21.3%, of the 169 candidates who applied for more than one vacancy in the same court and received at least one nomination experienced different results for different vacancies in the same court.[196] On the other hand, 133 candidates who applied for two or more vacant judicial positions in the same court were nominated every time they applied.

195. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, Ex. E (Minority Report) (Dec. 23, 1997) (on file with author).

196. The Fourth, Sixth, Eighth, and Tenth Judicial Districts had only one vacancy through 1998. In those districts, candidates for the one vacancy could never have a different result.

Table 3: Candidates with Different Results for Different Vacancies

	Vacancies	Recommended	Not Recommended for Another Vacancy
Supreme Court	7	15	0
Court of Appeals	7	15	7
1st Judicial District	6	16	4
2nd Judicial District	16	39	12
3rd Judicial District	6	12	3
4th Judicial District	Only one vacancy		
5th Judicial District	5	9	0
6th Judicial District	Only one vacancy		
7th Judicial District	3	4	0
8th Judicial District	Only one vacancy		
9th Judicial District	2	4	0
10th Judicial District	Only one vacancy		
11th Judicial District	4	4	1
12th Judicial District	3	7	0
13th Judicial District	3	8	1
Metropolitan Court	15	36	8
Totals	81	169	36

D. Number of Appointments of Judges of the Same Political Party as the Governor

Three governors made appointments under the judicial selection system during the ten years from 1989 to 1998. Two were Republicans, Gov. Gary Carruthers and Gov. Gary Johnson, and one was a Democrat, Gov. Bruce King. As might be expected, Table 4 shows that each governor tended to appoint judges belonging to his political party,[197] but the percentage of same-party appointments varies significantly among the three governors.

Governor Carruthers, midway through his four-year term when the new judicial selection system became effective in 1989, was the first governor to make appointments under the new system. From 1989-90, Governor Carruthers made fourteen appointments, including ten Republicans and four Democrats. Although nominating commissions sent only one name for three vacancies to Governor

197. The primary source of the party affiliation for the appointed judges is the election returns for the judicial races. Since the appointed judges must run in the next general election in order to retain their position, the primary and general election returns reflect the party affiliation of the appointed judges in the partisan elections.

Carruthers, all three single nominees were Republican lawyers and Governor Carruthers appointed the single nominee in each case.

Governor King succeeded Governor Carruthers, and, during his term from 1991-94, appointed thirty judges to the bench, including twenty-nine Democrats and one Republican. For two of the vacancies filled during Governor King's term, nominating commissions sent a single nominee. In one of those cases, where the single nominee was a Democrat, Governor King appointed the single nominee. In the other case, where the single nominee was a Republican, Governor King requested additional names of the commission. When the commission reconvened and sent the same name, Governor King appointed the Republican nominee.

Governor Johnson succeeded Governor King, and, during his first term as governor, from 1995-98, made thirty-seven appointments, nineteen Republicans and eighteen Democrats. For four of the vacancies filled during Governor Johnson's first term, nominating commissions sent him just one name, and all four single nominees were Democrats. In one of those cases, Governor Johnson appointed the Democrat without requesting additional names from the commissions. In the other three cases, Governor Johnson asked the commissions to reconvene and send him additional names. In two of those cases, the same single Democrat was recommended and Governor Johnson appointed one and refused to appoint the other, leaving it to the chief justice of the New Mexico Supreme Court to make the appointment in accordance with the N.M. Constitution. In the third case in which the commission was requested to send additional names, the commission added one name to the list sent to the governor, and Governor Johnson appointed the Democrat who had been the single nominee recommended by the commission the first time. For all four vacancies in which a single nominee was sent to Governor Johnson, Democratic judges were appointed even after requests for additional names.

Unfortunately, data are not available to show the political affiliation of the candidates recommended to the three governors. The nominating commissions do not request information about the candidates' political affiliation in the applicant questionnaire. Such data would provide a more complete picture of the political influence at the appointment stage because it would show the political options that the commission list presented to the governors. Even without this information, the available data show a significant political influence at the appointment stage.

Table 4: Comparison of Gubernatorial Appointments

	Carruthers (R)	**King (D)**	**Johnson (R)**
Number of Appointments	14	30	37
Number of Democrats Appointed	4 (28.6%)	28 (93.3%)	18 (48.6%)
Number of Republicans Appointed	10 (71.4%)	1 (3.3%)	19 (51.4%)

E. Demographic Data Regarding Applicants, Nominees, and the Eighty-One Appointed Judges

Table 5 summarizes the gender and ethnic data regarding the applicants, commission nominees, and the judges appointed to the bench during the period from January 1, 1989, to December 31, 1998. The eighty-two vacancies in the first ten years under the new system attracted 932 applicants, which produced 279 nominees and eighty-one gubernatorial appointments.

Table 5: Gender and Ethnic Data Regarding Applicants, Nominees, and Appointed Judges (1989-1998)

	Applicants		Nominees		Appointed Judges	
	Number	**Percent**	**Number**	**Percent**	**Number**	**Percent**
Total	932		278		81	
Women	234	25.1%	67	24.1%	20	24.7%
Minority	244	26.2%	92	33.1%	22	27.1%
Hispanic	218	23.4%	80	28.8%	17	21.0%
African American	9	1.0%	5	1.8%	3	3.7%
Native American	17	1.8%	7	2.5%	2	2.5%
Asian American	0	0.0%	0	0.0%	0	0.0%

These figures show that the commissions do an effective job of limiting the number of candidates for the governor's consideration. Only about thirty percent of the applicants have been recommended to the governor over the ten-year period of this study. Critics of the new nomination-appointment system point to the small number of nominees as proof that the commissions often do not recommend candidates who would be good judges as measured by the evaluative criteria.[198] Although there is a difference of opinion as to whether some candidates should be recommended or not, there is little or no disagreement about others who are not nominated. In short, commissions are expected to screen applicants and nominate only the top candidates.[199]

The eighty-one judges appointed under the new system include twenty women and twenty-two minority lawyers (seventeen Hispanics, three African Americans, and two Native Americans). A substantial number of the appointed judges were women or minority, with women at almost twenty-five percent and minority appointments at just over twenty-seven percent. It should be noted that some of the women judges include minority women and some of the minority judges include women.

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198. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, *supra* note 195, at Ex. E, 2 ("Committees also have refused to recommend former supreme court justices who obviously were qualified for district court.").

199. *See id.* at 9.

The data suggest that women and minority lawyers have not been disadvantaged by the commission screening process under the new system. The number and percentage of women and minority lawyers appointed under the new system tracks quite closely the numbers and percentages of women and minority applicants and nominees. Table 5 shows that the percentage of women applicants, 25.1%, produced 24.1% of the nominees and 24.7% of the appointed judges. Minority applicants, who constituted 26.2% of the applicant pool, did even better. This applicant pool produced 33.1% of nominees and 27.1% of the appointed judges.

An examination of the gubernatorial appointments of women and minority candidates reveals small differences in the appointment of women by the three governors during the period of this study but significant differences in the appointment of minority lawyers. Table 6 shows that all three of the governors appointed women to fill vacancies in the twenty to thirty percent range. Their appointment of minority lawyers, however, ranged from zero to 46.6%.

Table 6: Comparison of Gubernatorial Appointments of Women and Minority Lawyers

	Carruthers (1989-90)		**King (1991-94)**		**Johnson (1995-98)**	
	Number	**Percent**	**Number**	**Percent**	**Number**	**Percent**
Total Appointments	14		30		37	
Women Appointed	3	21.4%	6	20.0%	11	29.7%
Minority	0	0.0%	14	46.6%	8	21.6%

A comparison of the number of minority judges in 1988, appointed or elected under the old system, with the number of minority judges appointed under the new constitutional amendment from 1989 to 1998, confirms that minority lawyers have suffered no disadvantage under the new system. According to the 1990 Task Force on Minorities in the Legal Profession Report, twenty-seven percent of the eighty-one judges in New Mexico in 1988 were of minority descent.[200] This percentage mirrors the percentage of minority judges, 27.1%, appointed under the new system.[201] The percentage of minority lawyers appointed to the bench also compares favorably to the percentage of minority lawyers in the bar. In 1988, minority lawyers represented seventeen percent of the lawyers in New Mexico and twenty-seven percent of the judges.[202] In 1998, they represented twenty-two percent of the

200. *See* STATE BAR OF NEW MEXICO TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, FINAL REPORT—THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO 84 (1990).

201. *See supra* tbl. 5.

202. *See* STATE BAR OF NEW MEXICO TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, *supra* note 200, at 84.

bar,[203] and during the first ten years under the new system of judicial election, they received 27.1% of the appointments to fill judicial vacancies.[204]

VII. ELECTORAL RESULTS IN JUDICIAL RACES

This section reviews the election results in the primary and general elections in judicial races subject to partisan elections in the first ten years under the new judicial selection system.[205] It will also look at the demographic data regarding the elected and defeated judges, and in particular, will examine the electoral results for women and minorities. Furthermore, it will look at the empirical data regarding the lawyers who ran against the appointed judges and especially the data regarding the successful lawyer candidates who defeated appointed judges. This period encompasses the five general elections of 1990, 1992, 1994, 1996, and 1998.

The eighty-one appointments under the judicial selection system resulted in seventy-nine judicial races in partisan elections in the first ten years. Two of the appointed judges resigned before the next election, and two other judges were appointed to fill the vacancies created by their resignations. The latter two judicial appointees ran in the next election. These four appointments, therefore, resulted in only two partisan elections.

Of the seventy-nine judicial races, seventy-eight included appointed judges. The appointed judges won fifty-eight races and lawyer candidates defeated the appointed judges in the other twenty races. In one race, the appointed judge did not file a declaration of candidacy, and, of course, a lawyer candidate won that seat.

The history of the eighty-one judges appointed during the ten-year period from 1989 to 1998 shows that while most of them, forty-nine,[206] continue to serve in the original appointed position at the end of 1998, their individual histories differ. The length of their service varies depending on the date of their appointment. Some have served as long as ten years if appointed in early 1989, and some as little as several months if appointed in 1998.

A. Number of Appointed Judges Surviving the Next General Election

Table 7 shows the history of the eighty-one judges appointed to fill vacancies in the first ten years under the judicial selection system. It shows that fifty-eight won in the next general election, twenty lost in either the primary or general election, two resigned and did not run in the partisan election, and one, who was appointed

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203. *See* THE STATE BAR OF NEW MEXICO TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION II, REPORT ON THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO—AN UPDATE 1990-1999 11 (1999).

204. *See supra* tbl. 5.

205. The information for this section is taken from election returns for the elections of 1990, 1992, 1994, 1996, and 1998. *See* SECRETARY OF STATE, STATE OF NEW MEXICO OFFICIAL RETURNS, 1990 Primary and General Elections; SECRETARY OF STATE, STATE OF NEW MEXICO OFFICIAL RETURNS, 1992 Primary and General Elections; SECRETARY OF STATE, STATE OF NEW MEXICO OFFICIAL RETURNS, 1994 Primary and General Elections; SECRETARY OF STATE, STATE OF NEW MEXICO OFFICIAL RETURNS, 1996 Primary and General Elections; SECRETARY OF STATE, STATE OF NEW MEXICO OFFICIAL RETURNS, 1998 Primary and General Elections [hereinafter STATE OF NEW MEXICO OFFICIAL RETURNS, 1990, 1992, 1994, 1996, 1998].

206. *The State Bar of New Mexico 1998-1999 Bench and Bar Directory* contains the names of current judges. See JUDICIAL SELECTION REPORTS, *supra* note 73, for the names of judges appointed during the ten year period.

late in 1998, after the 1998 election, will stand for election in the year 2000. Of the twenty who did not survive the next general election, nine lost to opponents in the primary election and nine lost in the general election. One did not get on the general election ballot because the Democratic Party Central Committee, after the primary election, selected someone other than the appointed judge as the party's candidate. One did not get on either the primary or general ballot because he did not file a declaration of candidacy or a petition with the requisite number of signatures by the deadline. The vacancy occurred shortly before the deadline, and the timing of this particular vacancy meant that candidates seeking the nomination had to file a declaration of candidacy and a petition before the scheduled meeting of the nominating commission. This candidate did not have enough signatures going into the commission interview, and the candidate knew that if nominated by the commission and appointed by the governor he would only serve until his successor had been elected in the partisan election. When the governor appointed him, he knew that he could not run in the partisan election.

Table 7: History of the Eighty-One Appointed Judges

Number surviving the partisan election	58
Number losing in the primary election	9
Number losing the party's central committee nomination	1
Number losing in the general election	9
Number not filing a declaration of candidacy	1
Number resigning before the election	2
Number appointed too late to run in the 1998 election	1

An examination of the electoral results for statewide judicial elections shows striking differences between the results for supreme court and court of appeals races. In the six supreme court partisan elections during the period of this study, three appointed justices lost to challengers. By comparison, all of the seven court of appeals judges recommended and appointed in this period won in the partisan election.

Examination of the election results on a district-by-district basis also reveals significant variations. In five judicial districts—the Fifth, Sixth, Seventh, Ninth, and Tenth—all of the recommended appointed judges won in the partisan election. In four judicial districts—the Third, Fourth, Eighth and Eleventh—the appointed judges lost in fifty percent or more of the partisan races. In fact, seven of the twenty appointed judges who did not survive the partisan election lost in these four districts. In the most populated metropolitan area of the state, most of the appointed

judges survived the partisan election. Fourteen of sixteen appointed judges in the Second Judicial District won, and ten of the fourteen appointed metropolitan court judges won.

B. Number of Appointed Judges Winning Retention Elections

At the end of 1998, after ten years under the new system, only thirty-one of the eighty appointed judges had stood for a retention election and all of them were retained. As noted above, fifty-eight survived the partisan election and therefore would be subject to retention elections in the future. Of the fifty-eight appointed judges eligible for retention elections, thirty-one had stood for retention by the end of 1998, and twenty-one had not yet been in the judicial position long enough for a retention election. The remaining new judges did not stand for retention for various reasons, the most common being their resignation from the bench before the time for their retention election. All thirty-one of the appointed judges who stood for retention were retained.[207] The percentage of the vote required for retention was increased from a simple majority to fifty-seven percent in 1994.[208]

Although two judges lost retention elections in the ten-year period under review, both of those judges were on the bench before the amendment came into effect on January 1, 1989, and pursuant to the amendment, subject only to retention elections.[209] Both lost after the percentage required for retention was raised from fifty to fifty-seven percent.

C. Partisan Election Results for the Appointed Judges

An analysis of both the primary and general election results for the 1990, 1992, 1994, 1996, and 1998 elections reveals interesting data regarding the eighty-one judges appointed in the first ten years under the new system. All but three of the eighty-one ran in the next election. The three who did not run included two who resigned before the election, one who retired and one who accepted an appointment as a federal administrative law judge. The remaining judge who did not run served until his successor was elected in the general election.

1. Results in Primary Elections

Twenty-one of the seventy-eight appointed judges who ran for election, almost twenty-seven percent, had no opposition in the partisan election. These fortunate twenty-one had no opposition in either the primary or general election. Another twenty-three faced no one in the primary but drew opposition in the general election. A total of forty-four, therefore, did not face a contested primary election. Another nine skipped the primary election because the vacancy that they filled occurred too late to be included in the primary election. These nine judges were placed on the general election ballot as a result of their nomination by their political

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207. None of the judges who came to the bench by defeating appointed judges in the partisan election lost a retention election during the period of this study. Some of these judges, however, had not stood for retention by the end of 1998.

208. *See* N.M. CONST. art. VI, § 33.

209. *See id.*

party's central committee, and three of them ran unopposed in the general election. Counting the forty-four judges who had no primary opposition and the nine who bypassed the primary election due to the timing of the vacancy, a total of fifty-three of the seventy-eight judges, or sixty-eight percent, were placed on the general election ballot without facing a contested primary election.

An examination of the forty-four judges running unopposed in the primary elections in 1990, 1992, 1994, 1996, and 1998, discloses no trends. In four of the five elections, more than fifty percent of the appointed judges faced no opposition at the primary stage. Only in the 1994 election did the percentage fall below fifty percent.

In the 1989 to 1998 period, twenty-five judicial races included contested primary elections, and twenty-four of these contested primaries involved appointed judges. The other contested primary involved a race in which the appointed judge did not run. In the twenty-four contested races including appointed judges, the appointed judges won sixteen and lost eight, a 66.6% win rate.

Table 8 shows the number of uncontested and contested primary elections in judicial races for each of the five elections as well as the results of the contested elections. In addition, the table shows the number of judicial races in which the judicial candidate on the general election ballot was designated by the central committee rather than selected by voters in the primary election.

Table 8: Primary Election Results for Appointed Judges[210]

	1990	1992	1994	1996	1998	Totals
Number of races	13	16	10±	18	21	78
Uncontested primary	9	8	2	11	14	44
Chosen by party's central committee	1	2	3	1*	1	8
Contested primary	3	6	4	5	6	24
Won	3	4	3	3	3	16
Lost	0	2	1	2	3	8
Success rate in contested primaries	100%	67%	75%	60%	50%	67%
Total advancing to general election	13	14	8	15	18	68
Percentage advancing to general election	100%	88%	80%	83%	86%	87%

*One appointed judge not designated by Central Committee
±One contested primary, but the appointed judge did not run

A summary of the results of the primary elections in the seventy-eight judicial races in this study indicates that sixty-eight appointed judges survived the primary hurdle under the election law and ran in the general election. Looking at the ten

210. *See* STATE OF NEW MEXICO OFFICIAL RETURNS, 1990, 1992, 1994, 1996, 1998, *supra* note 205.

judges who did not advance to the general election, eight lost in primary elections, one did not win the nomination of the central committee, and one did not run in the primary. Looking at the sixty-eight judges who advanced to the general election, forty-four had no opposition in the primary, sixteen won in contested primary elections, and eight received the nomination of their party's central committee. In all, eighty-seven percent of the appointed judges survived the primary stage and ran in the general election.

2. Results in General Elections

Of the eighty-one judges appointed from 1989 to 1998, seventy-eight had participated in a partisan election by the 1998 election. By the time of the general election, however, ten appointed judges had lost in the primary election or had not been selected as their party's nominee by the central committee. In the seventy-eight elections, forty-four were contested and thirty-four involved only one candidate on the general election ballot. Of the sixty-eight appointed judges who advanced to the general election stage, thirty-one faced no opposition and thirty-seven faced a contested election. Three of the ten lawyer candidates who defeated appointed judges in the primary election also faced no opposition in the general election. The other seven challengers ran in contested elections. The total of thirty-one uncontested general elections for appointed judges included twenty-one who also faced no opposition in the primary election, seven who won in the primary election, and three who were nominated by their party's central committee. Just over forty percent of the seventy-eight judges who ran in elections to keep their seats on the bench faced no general election opponent. An analysis of these figures as reflected in Table 9 below shows that in the elections of 1990, 1992, and 1994, just over fifty percent of the judicial races in the general elections were uncontested and that 48.7% of the appointed judges were not challenged in the general election. In the 1996 general election, the percentage of appointed judges in uncontested races dropped to 27.7%, and in the 1998 election, the percentage went up to thirty-eight percent.

In looking at the results of the thirty-seven contested elections involving appointed judges, twenty-seven appointed judges won and ten lost, a 72.9% win rate. This winning percentage in general elections is slightly better than the winning percentage of 66.6% for judges in contested primary elections.

To summarize the electoral results, both primary and general, of the seventy-eight judicial races during the first ten years under the new judicial selection system, only ten judges did not survive the primary stage, and one of those did not run. Of the sixty-eight moving into the general election, only ten lost. In short, eighty-seven percent of the appointed judges advanced to the general election, and eighty-five percent of those won in the general election. In total, fifty-eight appointed judges survived the partisan election, a 74.3% survival rate.

Table 9: General Election Results[211]

	1990	1992	1994	1996	1998	Total
Races involving Appointed Judges						
Number of races	13	16	10	18	21	78
Uncontested election	7	7	5	5	7	31
Contested election	6	7	3	10	11	37
Won	3	7	1	10	6	27
Lost	3	0	2	0	5	10
Success rate in contested election	50%	100%	33%	100%	55%	73%
Races NOT involving Appointed Judges*						
Uncontested election	0	2	0	0	1	3
Contested election	0	0	2	3	2	7
Overall success rate of appointed judges	77%	88%	60%	83%	62%	74%

*Includes races where the appointed judge lost in the primary or was not selected by the central committee

3. Results in Partisan Elections for Women

The twenty women appointed to the bench were quite successful in the partisan election. Seventeen of them, representing eighty-five percent, survived the partisan election, and six of these women had no opposition in either the primary or general elections.

At the primary stage, twelve women judges had no opposition, six ran in contested primaries, and two did not have to run in the primary and were nominated by their party's central committee. In the six contested primary elections, the women judges won five and lost one. Overall, nineteen of the twenty women judges advanced to the general election, a much higher percentage, ninety-five percent, than the group of judges as a whole, eighty-seven percent.

At the general election stage, fifteen of the seventeen women judges on the general ballot won. Seven faced no opposition and twelve ran in contested races, ten winning and two losing.

Tables 10 and 11 show the primary and general election results for women in each of the five elections in the period reviewed.

211. *See id.*

Table 10: Primary Election Results for Women Judges[212]

	1990	1992	1994	1996	1998	Totals
Number of primary races involving women appointed judges	3	3	2	5	7	20
Uncontested primary	0	2	1	4	5	12
Chosen by political party's central committee	1	0	0	1	0	2
Contested primary	2	1	1	0	2	6
Won	2	1	1	0	1	5
Lost	0	0	0	0	1	1
Success rate in contested primaries	100%	100%	100%	NA	50%	83%
Total advancing to general election	3	3	2	5	6	19
Percent advancing to general election	100%	100%	100%	100%	86%	95%

Table 11: General Election Results for Women Judges[213]

	1990	1992	1994	1996	1998	Total
Races involving women appointed Judges						
Number of general election races	2	3	2	5	6	18
Uncontested election	0	2	0	1	3	6
Contested election	2	1	2	4	3	12
Won	1	1	1	4	3	10
Lost	1	0	1	0	0	2
Success rate in contested elections	50%	100%	50%	100%	100%	83%
Overall success rate of appointed judges in general elections	50%	100%	50%	100%	100%	89%

4. Results in Partisan Elections for Minorities

The results for minority judges running in the partisan election are not as favorable as the results for women. Although twenty minority judges were appointed from 1989 to 1998, only nineteen ran in the partisan election. One

212. *See id.*
213. *See id.*

resigned to accept an appointment as a federal administrative law judge, one was appointed too late to run in the 1998 general election and must run in 2000, and the other did not file a declaration of candidacy. The results, therefore, track only the nineteen minority judges (fifteen Hispanics, three African Americans, and one Native American) who participated in partisan elections. Fourteen minority judges (eleven Hispanics, two African Americans, and one Native American) survived the partisan election, representing sixty-eight percent of the nineteen minority judges, and five of them (four Hispanics and one Native American) faced no opposition in either the primary and general elections.

At the primary stage, fourteen minority judges (ten Hispanics, three African Americans, and one Native American) had no opposition and three ran in contested primaries (all Hispanics). Two minority judges were spared a primary election and were nominated by their party's central committee (both Hispanics). In the three contested primary elections, the appointed minority judges (all Hispanics) won one and lost two (both to other Hispanic challengers). Overall, seventeen (thirteen Hispanics, three African Americans, and one Native American) of the nineteen minority judges who ran in partisan primary elections advanced to the general election. In percentage terms, just over eighty-nine percent of the minority judges advanced to the general election. This figure is not quite as high as the percentage for women judges at ninety-five percent, but slightly higher than the percentage of all appointed judges at eighty-seven percent.

At the general election stage, of the seventeen minority judges on the general ballot, thirteen won (ten Hispanics, two African Americans, and one Native American) and four lost (three Hispanics, and one African American). Five (four Hispanics, and one Native American) faced no opposition, and twelve ran in contested races (nine Hispanics and three African Americans), winning eight (six Hispanics and two African Americans) and losing four (three Hispanics and one African American).

Looking at the results for each minority group, seventeen Hispanics were appointed, fifteen ran in partisan elections to retain their seats, thirteen (eighty-six percent) survived the primary round and ran in the general election, and ten won in the general election. Hispanic judges faced only three contested primary races, winning one and losing two, and faced nine contested general elections, winning six and losing three. Overall, 66.6%, or ten of the fifteen Hispanic judges who ran, survived the partisan election.

All three African Americans appointed to the bench ran in the partisan election, all survived the primary stage without opposition, and two of the three won in the general election. The one Native American judge who ran in the partisan election won both the primary election and general election without opposition.

Tables 12 and 13 show the election results for the minority appointed judges in the five elections during the first ten years under the new judicial selection system.

Table 12: Primary Election Results for Appointed Minority Judges[214]

	1990	1992	1994	1996	1998	Totals
Number of races involving appointed minority judges	0	7	4*	4	4**	**19**
Hispanic		5	4	3	3	15
African American		1		1	1	3
Native American		1				1
Chosen by party's central committee						2
Hispanic			2			2
African American						
Native American						
Uncontested primary						**14**
Hispanic		3	1	3	3	10
African American		1		1	1	3
Native American		1				1
Contested primary						**3**
Hispanic		2	1			3
Won		0	1			1
Lost		2	0			2
African American						
Won						
Lost						
Native American						
Won						
Lost						
Success rate in contested primaries						
Hispanic		0%	100%			33%
African American						
Native American						

* Although six minority judges had been appointed to the bench and subject to the partisan election, two did not run in the partisan election.
** Five minority judges were appointed to the bench and subject to a partisan election, but one (Hispanic) was appointed too late to run in the 1998 general election and will stand for election in 2000.

214. *See id.*

Table 13: General Election Results for Appointed Minority Judges[215]

	1990	1992	1994	1996	1998	Totals
Number of general election races involving appointed minority judges	0	5	4	4	4	**17**
Hispanic		3	4	3	3	13
African American		1		1	1	3
Native American		1				1
Uncontested election						**5**
Hispanic		1	1	1	1	4
African American						0
Native American		1				1
Contested election						**12**
Hispanic		2	3	2	2	9
Won		2	1	2	1	6
Lost		0	2	0	1	3
African American		1		1	1	3
Won		1		1	0	2
Lost		0		0	1	1
Native American						0
Won						0
Lost						0
Success rate in contested election						
Hispanic		100%	33%	100%	50%	67%
African American		100%	NA	100%	0%	67%
Native American						

D. Data Regarding the Lawyers Who Challenged Appointed Judges in Partisan Elections

In the seventy-nine judicial races in the first ten years of the new judicial selection system, eighty-nine lawyers ran for judicial positions held by appointed judges. The number of lawyer candidates challenging appointed judges includes those who ran in primary elections and those who were designated by their party's central committee. The total includes twenty-three women and thirty-three minority lawyers. The breakdown of the minority lawyers reflects thirty-one Hispanics, one Native American, and one Asian American. Looking at party affiliation, fifty-four of the eighty-nine lawyers sought the Democratic nomination and thirty-five sought the Republican nomination.[216] Most of the minority lawyers, twenty-eight, also ran

215. *See id.*
216. *See id.*

as Democrats. Only five ran as Republicans. The women lawyer candidates included fourteen Democrats and nine Republicans.

Table 14 shows the numbers of lawyers, including their gender and minority status, running for judicial office in each of the five elections. It also shows that the number of lawyers seeking judicial office through the partisan election route has increased from the first two elections, 1990 and 1992, to the last three, 1994, 1996, and 1998. In the 1990 and 1992 elections, the number of lawyer candidates did not exceed the number of judicial races. In the 1994, 1996, and 1998 elections, the number of lawyers running exceeded the number of judicial races.

Table 14: Lawyers Contesting Judicial Races[217]

	1990	1992	1994	1996	1998	Totals
Total Judicial elections	13	16	10	18	21	78
Contested elections	7	11	7	15	14	54
Lawyer candidates	12	14	14	24	25	89
Democratic	10	7	8	10	19	54
Republican	2	7	6	14	6	35
Women candidates	2	3	3	3	12	23
Democratic	2	1	3	1	7	14
Republican	0	2	0	2	5	9
Minority candidates	4	6	4	6	13	33
Democratic	3	5	3	5	12	28
Republican	1	1	1	1	1	5

Just over forty-six percent of the eighty-nine lawyers running for a judicial position never applied to the judicial selection commission for the position they sought. Table 15 shows that these forty-one lawyers bypassed the commission screening and went directly to the electorate in the partisan election. Interestingly, twenty-eight members of this group never submitted an application for any vacancy and never subjected themselves to the commission interview and screening process. Instead, they chose the electoral route. The other thirteen lawyer candidates who bypassed the selection commission had applied at least one time for a judicial vacancy but chose not to apply for the position for which they ran in the partisan election.

Forty-eight of the eighty-nine lawyer candidates tried, unsuccessfully, the judicial selection commission route before they ran for the judicial position. This group of forty-eight lawyers includes twenty-four who applied for the position when the vacancy was announced, were recommended for the position by the commission but were not appointed by the governor. The other twenty-four lawyers who submitted applications for the vacancy and went through the interview process did not get nominated by the commission.

217. *See id.*

Table 15: Lawyer Candidates and Applications for Judicial Selection Commissions[218]

	1990	1992	1994	1996	1998	Totals	Number Successful	Success rate
Never applied for any vacancy	4	4	2	9	9	28	5	17.9%
Did not apply for position	2	2	2	5	2	13	3	23.1%
					Total	41	8	19.5%
Applied and recommended	2	4	5	4	9	24	8	33.3%
Applied and NOT recommended	4	4	5	6	5	24	4*	16.6%
					Total	48	12	25.0%
Total number of lawyer candidates	12	14	14	24	25	89	20	22.5%

*One applicant withdrew before the interview and was not considered

Table 15 also shows that the lawyers who were recommended by a commission and not appointed had the best success rate in the partisan election with a 33.3% win rate (eight of twenty-four). Adding these eight challengers to the fifty-eight appointed judges who survived the partisan election, eighty-four percent of the judges winning the partisan election went through all parts of the process and succeeded at both the nomination and the electoral stages.

E. Data Regarding the Lawyers Who Came to the Bench by Defeating Appointed Judges

As mentioned earlier, twenty of the judges appointed under the new judicial selection system in the first ten years did not survive the first partisan election. The twenty lawyers elected in the partisan election ran for the positions filled by judges appointed by the governor after nomination by judicial selection commissions. The lawyer challengers won three judicial positions on the supreme court, thirteen on the district courts, and four on the metropolitan court. Nine of these elected judges defeated appointed judges in the primary election, and nine defeated appointed judges in the general election. One defeated the incumbent judge by winning the nomination of the Democratic Party Central Committee after the primary, and

218. *See id.*

another won the partisan election although the appointed judge did not declare his candidacy and did not run in the primary or general election.

Looking at this group of twenty successful challengers to the appointed judges, eight bypassed the judicial selection commissions and did not submit applications or submit to interviews by the commissions.[219] The other twelve applied for the position they eventually ran for, although one withdrew before the commission interview and was not considered for nomination.[220] Of the twelve who applied and went through the interview process, eight were included on the list of applicants recommended to the governor.[221] The other four were not recommended to the governor.[222]

An examination of the political affiliation of the twenty lawyers elected in partisan elections shows that sixteen ran as Democrats and four as Republicans. In the three supreme court races won by challengers, all three ran as Democrats. The four winning Republicans won two district court positions and two metropolitan court positions.

An examination of the number of successful challenges to incumbent judges in each of the five general elections during the ten-year period shows that the percentage of successful challengers has varied and no trends emerge. The first election, in 1990, resulted in three of thirteen appointed judges (twenty-three percent) losing in the partisan election. In the 1992 election, two of the sixteen appointed judges (12.5%) lost; in the 1994 election, four of ten (forty percent) lost; in the 1996 election, three of eighteen (16.6%) lost; and in last election studied, the 1998 election, eight of twenty-one (38.1%) lost. These figures show that fifteen of the twenty judges who did not survive the partisan election lost in the last three elections, and the largest number of defeated judges in an election, seven, lost in the last election.

Looking at the eight elected lawyers who chose to bypass the judicial nominating commission process, seven of them successfully challenged appointed judges in the last three elections of the period under review, 1994 to 1998. Four of these successful challengers unseated appointed judges in the last general election of the period, 1998.

F. Demographic Data Regarding the Lawyers Elected to the Bench and the Defeated Appointed Judges

An examination of the twenty elected lawyers who successfully ran for the position held by an appointed judge, shows that they included six women, eleven Hispanics, one Native American, and one Asian. The twenty appointed judges who did not survive the first partisan election included three women, six Hispanics, and one African American. Six of the seven minority defeated judges lost to minority challengers.

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219. *See supra* tbl. 15.
220. *See id.*
221. *See id.*
222. *See id.*

The number of women and minority lawyers elected to the judiciary increased the number of women and minority judges who came to the bench under the new selection system. Counting the appointed judges who survived the partisan election and the minority challengers who defeated appointed judges in the electoral process, there was a net increase in the number of women, Hispanic, and Native American judges as a result of the partisan election. The number of women judges increased by three to a total of twenty-three, Hispanic judges increased by five to a total of twenty-two, and Native American judges increased by one. The number of African Americans decreased by one. Table 16 shows the number of women and minority judges appointed or elected during the ten-year period of this study and the results for the appointed judges in the partisan election.

Table 16: Women and Minority Judges Appointed and Elected (1989-1998)[223]

	Women	Hispanics	African Americans	Native Americans
Appointed judges	20	17	3	2*
Appointed judges lost	3	6	1	0
Challengers won	6	11	0	1
Net gain/loss	3	5	-1	1
Total Number of judges	23	22	2	3

* One Native American judge resigned before partisan election.

VIII. COMPARISON OF RESULTS FOR WOMEN AND MINORITY LAWYERS UNDER THE OLD AND NEW METHODS OF SELECTING JUDGES

The number of vacancies filled under the new compromise system has produced slightly more women and minority judges than did the old system. According to a 1992 study, the old system, from 1981 to 1988, filled 12.8% of the new judicial vacancies with women, either by partisan election or gubernatorial interim appointment.[224] In the first three years under the new system adopted by the voters, 18.7% of the vacancies were filled by women appointees.[225] The results after ten years under the new system show an even greater percentage of women appointees, 24.7% (twenty of eight-one).[226]

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223. *See* JUDICIAL SELECTION REPORTS, *supra* note 73; STATE OF NEW MEXICO OFFICIAL RETURNS, 1990, 1992, 1994, 1996, 1998, *supra* note 205; *see also supra* tbls. 10 and 11 (election results for women); tbls. 12 and 13 (election results for minority judges and lawyers).

224. *See* Miller & St. Clair, *supra* note 13, at 10.

225. *See id.*

226. *See* JUDICIAL SELECTION REPORTS, *supra* note 73.

The results for minority lawyers, although not showing the same gains as for women, reflect an increase in minority appointments to the bench under the new system. According to the 1992 study, minority judges selected under the old system in the period from 1981 to 1988 was 24.7%, and in the first three years under the new system, increased slightly to twenty-five percent.[227] The results after the first ten years under the new system show an even greater percentage of minority appointees, 27.5% (twenty-two of eighty-one).[228]

The commission nomination and appointment system has not operated to the disadvantage of women and minorities based on the results through the first ten years. Indeed, the data in Table 17 suggest that women and minority lawyers fare better in the new selection system that they did under the political appointment-partisan election system that existed before the constitutional amendment.

Table 17: Comparison of Results of Women and Minority Lawyers Appointed under the Old and New Methods of Selecting Judges

	Percent Women	**Percent Minority**
Old System Appointments/Elections (1981-1988)	12.8	24.7
New System Appointments (1989-1991)	18.7	25.0
New System Appointments (1989-1998)	24.7	27.5
New System Appointments/Net Elections (1989-1998)	28.4	33.3

The electoral process, however, did not favor minority judges appointed after commission screening. Seven of the twenty-two appointed minority judges lost in the partisan election.[229] These losses, however, were more than compensated for by the number of minority lawyers defeating appointed judges in the partisan election. Counting the fifteen minority judges who survived the partisan election and the twelve minority lawyers who won races against appointed judges, the net result was a gain of five minority judges.[230]

The electoral system did not work to the disadvantage of women appointed to the bench. In the partisan election, seventeen of the twenty judges won, and the number of women judges increased by three when the six successful women layers challengers are counted.[231]

This study shows that women and minority lawyers have fared quite well under the new system for selecting judges at the nomination, appointment, and electoral stages. The data dispel the arguments and fears raised by opponents of the new system that women and minority lawyers would not do as well as they had in the purely electoral system. At the nomination and appointment stages, the data show that the number and percentages of women and minority lawyers appointed under the new system closely tracks the numbers and percentages of women and minority

227. *See* Miller & St. Clair, *supra* note 13, at 10.
228. *See* JUDICIAL SELECTION REPORTS, *supra* note 73.
229. *See supra* tbl. 16.
230. *See id.*
231. *See id.*

applicants and nominees. Clearly, women and minority lawyers have not been at a disadvantage under the commission screening and gubernatorial appointment process.

Women and minority lawyers have also been quite successful at the electoral stage, either as appointed judges or lawyer challengers. Tables 10 and 11 show the favorable election results for women appointed judges, and Table 16 for women challengers. Tables 12 and 13, likewise, show favorable results for minority appointed judges, and Table 16 shows even more favorable results for minority challengers.

IX. IMPACT OF THE ELECTORAL PROCESS ON NOMINATION-APPOINTMENT SELECTION

The most significant impact of the New Mexico compromise judicial selection plan can be seen in the number of appointed judges who did not survive the partisan election. In the first ten years under the system, the partisan election system led to the defeat of twenty of the eighty-one judges appointed by the governor after recommendation by a nominating commission. Some of the appointed judges who lost in the partisan election did not receive the nomination of their political party and, therefore, were denied the opportunity to keep their seat in the general election in which the entire electorate could vote.

The interposition of a partisan election between the appointment and retention election has meant that lawyers seeking judicial positions need not go through the screening process by the judicial selection commission. In fact, forty-one of the eighty-nine lawyers (forty-six percent) who ran for judicial positions bypassed the commission screening stage and went directly to the electoral process.[232] They did not fill out the questionnaire asking for information relevant to their qualifications, nor did they subject themselves to inquiries to the Disciplinary Board about their professional conduct. Moreover, they did not undergo the interview process at open meetings of the judicial nominating commissions. And most important, they did not submit to evaluation by the commissions on the basis of the evaluative criteria. If more lawyers choose to bypass the commission, the nomination-appointment stages may become less meaningful.

The partisan election requirement in the New Mexico compromise plan forces appointed judges to enter the political arena. The election law in New Mexico depends heavily on partisan politics to narrow the number of candidates on the general election ballot, and appointed judges must comply with all of the election law requirements. They must file a declaration of candidacy with the requisite number of signatures on petitions. They must obtain the nomination of their party or run as an Independent candidate in order to get on the general election ballot. Because of the centrality of the party system in the election law, they must run in the primary election of their party or seek the designation by the central committee. They must raise money, get a campaign treasurer, and file reports on their campaign contributions and expenditures. They must mount a campaign and appear at political

232. Of the forty-one lawyers who bypassed the commission screening, only eight were successful. *See supra* tbl. 15.

rallies. They must spend time away from the job of judging to carry their campaign to the voters in both the primary and general elections.

The current system presents appointed judges with some handicaps in the partisan election. The 1998 amendment does not give the appointed judge the benefit of an automatic right to be on the general election ballot. In order to be placed on the general election ballot, the appointed judge must get involved in party politics and receive a party's nomination. In addition, the timing of the appointment and the election sometimes affords insufficient time for the judge to establish a record to take to the voters. Some vacancies in the ten-year period of this study occurred within several months of the next general election, and the appointed judges had to begin the campaign for the primary and general election immediately after appointment, and in some cases had to begin collecting signatures even before the commission met. In these cases in which the timing of the vacancy occurred shortly before the election, the judge devoted time to campaigning instead of building a record that would support the advantage of incumbency. In recognition of this problem, a Task Force of the State Bar recommended that an appointed judge serve for at least one year before standing for election.[233] It further recommended that the appointed judge be given a place on the general election ballot without the need for nomination by one of the political parties and without complying with the requirements for getting on the ballot as an Independent candidate.[234] Under this proposal, the appointed judge would be automatically on the ballot by reason of nomination and appointment.

The unique New Mexico plan formalizes a hybrid method of selecting judges, combining a commission nominating and gubernatorial appointment process with an electoral process. Each part of the system has its influence. The nomination-appointment process gives the advantage of incumbency to appointed judges in the partisan election as almost seventy-five percent of the appointed judges win the election. On the other hand, the electoral part of the system provides an alternative route to the bench, a route that permits applicants to bypass commission screening and public scrutiny. The data show that the partisan election part of the compromise has played a significant role, producing the other twenty-five percent of the judges. Based on the electoral results in the first ten years, the odds of winning the partisan election favor appointed judges. Just over seventy-four percent of the appointed judges survived the partisan election. By comparison, only 22.5% of the lawyers challenging appointed judges in the partisan election were successful.

Is the loss of twenty-five percent of these judges in the partisan elections acceptable? The New Mexico plan does not suggest a proper balance between the two methods of selecting judges. On one hand, a loss of twenty-five percent means that substantial investments in time and effort by the commissions and governor

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233. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, *supra* note 195, at 7-8. The 1993 Constitutional Revision Commission recommended that for vacancies occurring after the general election proclamation the appointed judge would run in the next succeeding general election. Because the election proclamation is issued on the last Monday in January of election years, this recommendation would give appointed judges almost two years in the position before running in the partisan election. *See* REPORT OF THE CONSTITUTIONAL REVISION COMMISSION 53 (Dec. 1995).

234. *See id.* at 8.

have been negated in the electoral forum. In addition, there is a personal and perhaps professional cost borne by the individuals who shut down their practice or resigned from a position only to lose in the partisan election. Another cost, harder to measure, would be the possible effect on potential applicants. Is a twenty-five percent chance of losing in a partisan election sufficiently high to deter some good lawyers from applying, even if they are willing to undertake the risks of being nominated and appointed?[235] On the other hand, the compromise plan contemplated the defeat of some of the appointed judges in contested elections. It provided an alternate route to the bench, a route that could bypass the nomination-appointment process. Should the compromise produce seventy-five percent of the judges by the nomination-appointment process and twenty-five percent by the electoral process as it has in the first ten years? If the percentages were reversed, would the judicial selection system be working properly? Would the value of the nomination-appointment part of the system become less meaningful and less justifiable if the electoral route began to produce most of the judges? Unfortunately, the New Mexico plan offers no answers to these questions.

The partisan election feature of the New Mexico plan could theoretically dominate the commission process completely if all lawyers seeking to be judges bypassed the commission screening and ran for the judicial position. Governors would lose the power of appointment, judicial vacancies would remain unfilled until the next general election, and courts would be shorthanded. Some lawyers would undoubtedly continue to seek nomination and appointment in order to gain the advantage of incumbency. But if most lawyers seeking judicial positions bypass the commission screening process and a greater percentage of these lawyers win the partisan election, the commission-appointment process would become less meaningful and the investment in that process less justifiable.

If commission screening under the New Mexico plan serves a valuable function in evaluating judicial applicants, it should be accorded significance at least equal to that accorded the partisan election. To be selected as a judge under the present system, all lawyers must pass the electoral test, but not all lawyers need submit their candidacy to the commission evaluation process. One way to give commission evaluations equal significance would be to make recommendation by a commission a prerequisite for the partisan election. With this change, only lawyers who were nominated by a commission for the vacancy would be eligible to challenge the appointed judge in the partisan election. This requirement would insure that all judges have met the criteria used by commissions, and it might also move commissions to recommend more candidates knowing that a recommendation is a predicate for the partisan election as well as for appointment by the governor.

Another way to increase the influence of the commission nomination process, but not as much as the nomination requirement, would be to require all candidates in the partisan election to submit to the commission screening process. This change would mean that all candidates in the election would have been subjected to commission evaluation. Voters would also know whether candidates were

235. It should be noted that the risk of losing the partisan election may differ by position as well as by district.

recommended for appointment. This change, while expanding the role of the commission nomination in the electoral forum, would not be as significant a curtailment on the electoral process as the nomination predicate would be.

X. CONCLUSION

The results of this study raise a central question about the unique New Mexico compromise, should the citizens accept the way the compromise works and continue with the hybrid system? Or do the conflicts in the compromise present problems serious enough to warrant abandonment of the compromise and adoption of one system or the other? In other words, does the New Mexico hybrid system include the best of both systems or the worst of both?

Two in-depth examinations of the compromise system concluded that the current system should not be jettisoned and recommended changes that might improve the system. The State Bar of New Mexico's Task Force on Judicial Selection found that the current system is not perfect,[236] but nevertheless concluded that no statutory or constitutional revisions be made at this time that would change the system.[237] The Task Force recognized that efforts at improving the New Mexico plan might backfire and lead to the repeal of the present system and a return to the purely elective method of selecting judges.[238] The Task Force had reason to fear repeal of the current system since a minority of the Task Force filed a report recommending the elimination of the commission-nomination part of the New Mexico plan.[239] In addition, in every legislative session since 1988, bills have been introduced to repeal the hybrid system and to return to the electoral method of choosing judges.[240] The conclusion of the Task Force to accept the imperfect system with its unique compromise reflects its sense "that the 1988 amendment has increased the quality of New Mexico's judges."[241]

The 1993 New Mexico Constitutional Revision Commission also concluded that the current system should not be abandoned.[242] In its final report submitted in 1995, the Constitutional Revision Commission noted that the compromise system "continues to draw considerable criticism from among the judiciary, the bar and the public at large."[243] The criticism came from those who wished to return to a purely elective system as well as from those who preferred a purely commission-appointment system.[244] A third group supported the present hybrid system based on

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236. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, *supra* note 195, at 4.

237. *See id.*

238. *See id.*

239. *See id.* at Ex. E.

240. *See* S.J. Res. 6, 44th Leg., 2d Sess. (N.M. 2000); S.J. Res. 7, 44th Leg., 1st Sess. (N.M. 1999); S.J. Res. 9, 43rd Leg., 2d Sess. (N.M. 1998); S.J. Res. 14, 43rd Leg., 1st Sess. (N.M. 1997); S.J. Res. 8, 42nd Leg., 2d Sess. (N.M. 1996); S.J. Res. 8, 42nd Leg., 1st Sess. (N.M. 1995); S.J. Res. 1, 41st Leg., 2d Sess. (N.M. 1994); S.J. Res. 14, 41st Leg., 1st Sess. (N.M. 1993); S.J. Res. 14, 40th Leg., 2d Sess. (N.M. 1992); S.J. Res. 4, 40th Leg., 1st Sess. (N.M. 1991); S.J. Res. 5, 39th Leg., 2d Sess. (N.M. 1990); S.J. Res. 9, 39th Leg., 1st Sess. (N.M. 1989).

241. *See* REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, *supra* note 195, at 4.

242. *See* REPORT OF THE CONSTITUTIONAL REVISION COMMISSION, *supra* note 233, at 53.

243. *Id.*

244. *See id.* at 53; *id.* App. E at 12-17 (minutes of first meeting).

the view that it includes values of both systems.[245] After considering the debate and noting the definite trend among the states to move away from pure partisan election of judges, the Constitutional Revision Commission decided to recommend no changes in the structure of the current hybrid system but to recommend improvements to the current system.[246]

Despite criticisms of the hybrid system, there appears to be no consensus to change it, or more accurately, how to change it. Neither the proponents of a pure nomination-appointment system nor the proponents of a partisan election system have been able to muster the political support to impose their system. Each side of the debate, however, seems to have sufficient political power to prevent adoption of either of the two pure systems. It appears, therefore, that the forces that produced the compromise still exist ten years after the compromise was struck. Neither the State Bar Task Force nor the Constitutional Revision Commission recommended abandonment of the compromise even though it combines contradictory values that do not complement each other; indeed, the two parts of the compromise provide alternative routes to the bench. Because the hybrid includes aspects that each side wants, both sides have been willing to live with the compromise even though they criticize it and would prefer their own system.

This study shows that both sides have learned to live with the compromise, since both the nomination-appointment aspect and the electoral aspect have played significant roles in the selection of New Mexico judges. Most of the judges serving at the end of 1998 had successfully undergone favorable scrutiny by a commission and by the voters, and some of the judges had come to the bench by the electoral route. Women and minority lawyers have been reasonably successful in getting nominated, appointed and elected. If the results in the future remain close to the results found in the first ten years, the New Mexico plan should continue to be an acceptable compromise. If, however, the results change and favor the partisan election route, support for the compromise may disappear and lead to an attempt to adopt a pure nomination-appointment system. Such an attempt would undoubtedly be opposed and would unleash a political struggle for adoption of one system or the other.

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245. *See* REPORT OF THE CONSTITUTIONAL REVISION COMMISSION, *supra* note 233, at 53.

246. *See id.* The Commission made four recommendations. The first change would permit the governor, the speaker of the house, and the president pro tempore of the senate to appoint two non-lawyers to a commission rather than requiring one of the appointments to be a lawyer. The second change would permit the dean to designate someone to serve as chair. Under the third amendment, a judge appointed after the general election proclamation was issued would not have to run in that general election but would have to run in the next succeeding general election.

NOTES

From Private Practice to Appellate Judge – Lessons Learned

NOTES

Effective Appellate Practice

NOTES

Recent Developments in New Mexico Appellate Practice

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

(Civil Appeals and Generally Applicable Principles)

Compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

28th Appellate Practice Institute, September 2017

Cases from Bar Bulletin, Vol. 55, No. 32 through Vol. 56, No. 31
(August 2016 –July 2017)

Appealable Judgments and Orders – Finality

Cordova v. Cline, 2017-NMSC-020, 396 P.3d 159.

Provision in Anti-SLAPP statute providing for "expedited appeal" by any party from trial court order on certain motions creates right of immediate, interlocutory appeal from trial court's ruling, even though order otherwise would be non-final due to pending counterclaims – an example of legislature's "authority to establish appellate jurisdiction and to create a right of appeal." [¶ 15]

N.M. State Investment Council v. Weinstein, 2016-NMCA-069, 382 P.3d 923, cert. denied, 2016-NMCERT-007, __ P.3d __.

In challenge to district court's approval of settlements between state agency and defendants in Fraud Against Taxpayers Act (FATA) suits, orders dismissing defendants pursuant to settlements were final for purposes of appeal, although share of settlement proceeds and amount of attorney fees to be awarded to appellants-qui tam plaintiffs had yet to be determined. FATA's language itself contemplates that determination of a qui tam plaintiff's award and attorney fees is "subsequent to and supplementary to" adjudication on merits or resolution by settlement. Additionally, determination of these amounts is "collateral to" the orders under review per Kelly Inn, because any determination of qui tam plaintiffs' share and attorney fees will not alter district court's declaration of parties' rights and liabilities pursuant to settlement agreements. [¶¶ 31-34]

Notice of Appeal – Timeliness

L.D. Miller Constr., Inc. v. Kirschenbaum, 2017-NMCA-030, 392 P.3d 194.

Defendants filed motion for reconsideration more than 30 days after trial court's ruling – outside the time allowed, absent extraordinary circumstances, for Rule 1-060(B) motions aimed at correcting errors of law. Timely appeal was taken from denial of the motion. Court of Appeals held it could review denial of motion on the merits. District court did not treat motion as untimely, and motion in part detailed breakdown of Defendants' relationship with their attorney and their search for new counsel before filing motion pro se. District court would have been within its discretion to determine that under circumstances the motion to reconsider was timely, had the issue been raised below. Applying presumption of regularity and liberal construction of appellate rules in favor of reaching merits, Court of Appeals declines to dismiss appeal.

Notice of Appeal – Effect on District Court's Jurisdiction

Jury v. Jury, 2017-NMCA-036, 392 P.3d 242.

During appeal, district court had jurisdiction to award attorney fees related to one party's non-appearance at deposition in aid of enforcement of judgment. Enforcement proceedings are collateral to the issues presented by the judgment on appeal. [¶¶ 61-63]

Standards of Review

– Abuse of Discretion

State v. LeMier, 2017-NMSC-017, 394 P.3d 959.

Reviewing district court's imposition of witness exclusion sanction under abuse of discretion standard. "As a reviewing court, we cannot attempt to precisely delineate how trial courts are to exercise their discretionary authority in the varied cases over which they must preside. Similarly, we cannot second-guess our courts' determinations as to how their discretionary authority is best exercised. As an appellate court, we necessarily operate with imperfect information about the proceedings we review, and our assessment of the propriety of the [district court's discretionary] decision . . . must reflect this reality." [¶ 17]

-- Arbitration Awards, Modification

Shah v. Devasthali, 2016-NMCA-053, 371 P.3d 1080, cert. denied, 2016-NMCERT-005, __ P.3d __.

On review of district court's modification of an arbitration award, appellate court's primary task is to determine de novo whether district court adhered to proper principles: court's discretion is sharply limited, court should exercise great caution in interfering with method of dispute resolution chosen by parties, and court should respect finality of award and not redetermine merits of award or review for errors of law or fact; district court's function is to conduct an evidentiary hearing and enter findings of fact and conclusions of law upon each issue raised in the application to vacate or modify the award. Appellate court determines whether substantial evidence supports district court's findings of fact and whether court correctly applied law to facts. [¶¶ 7-10]

-- Findings of Fact, Sufficiency

Robey v. Parnell, 2017-NMCA-038, 392 P.3d 642.

In response to argument that district court's award of consequential damages was not supported by express finding that damages were foreseeable, Court of Appeals notes that findings are sufficient if, taken as a whole, they support the judgment and that necessary findings may be inferred from findings made. Court concludes that from findings considered collectively "we can

reasonably infer that implicit in the district court's finding that Plaintiff suffered consequential damages is that those consequential damages were indeed foreseeable." [¶ 41]

-- General Verdicts

Christopherson v. St. Vincent Hosp., 2016-NMCA-097, 384 P.3d 1098, cert. denied, 2016-NMCERT-010, __ P.3d __.

In original trial, plaintiff asserted multiple ways in which hospital's conduct allegedly was negligent. Jury returned verdict finding hospital negligent but not specifying which conduct was basis for finding of negligence. Jury was unable to agree on question of causation. Held: it was proper for district court to order new trial on causation only. Court of Appeals rejected defense contention that causation was not separable from negligence, and both questions had to be retried, because it was not possible to tell on which ground original jury found negligence or whether all jurors in first trial found negligence on same ground. First, court applied general verdict rule, under which "[a] general verdict may be affirmed under any theory supported by evidence unless an erroneous instruction was given," noting that no claim of insufficient evidence or instructional error was made in first trial. Next, court adopted rule from criminal context that jury unanimity is required only with respect to the verdict, not as to which of alternative theories was basis for verdict; "a jury need not agree on the factual ground on which a negligence finding is based." Based on application of these rules, original verdict on negligence was valid and could be relied upon by jury in retrial, and there was no error in ordering new trial only on causation. [¶¶ 23-34]

Preservation of Issues

Mikeska v. Las Cruces Regional Med. Ctr., LLC, 2016-NMCA-068, 388 P.3d 266, cert. denied, 2016-NMCERT-007, __ P.3d __.

Plaintiff adequately preserved contention that witness should not have been permitted to testify about purpose of statute and that there had been no statutory violation. Plaintiff filed motion in limine which was denied and, although "it may have been best practices [for plaintiff] to raise her objection again during [the witness's] testimony" which she did not do, issue was preserved by motion in limine, objection to jury instructions based on challenged testimony, and motion for new trial. [¶ 6]

Holcomb v. Rodriguez, 2016-NMCA-075, 387 P.3d 286, cert. denied, 2016-NMCERT-008, __ P.3d __.

Defendants claiming on appeal that trial court erred in directing verdict on their counterclaim for trespass based on failure to prove actual damages did not preserve correct argument made on appeal that nominal damages were available. Defendants' strategy was to pursue actual damages; they never sought nominal damages in trial court nor mentioned the availability of nominal damages in responding to directed verdict motion. "Defendants failed to specifically alert the district court to the availability of nominal damages . . . . Accordingly, we decline to reverse the district court's dismissal of Defendants' counterclaim . . . on a ground Defendants advance for the first time on appeal." [¶¶ 12-14]

Williams v. Mann, 2017-NMCA-012, 388 P.3d 295.

Reversing district court's dismissal on limitations grounds of plaintiff's New Mexico Human Rights Act (NMHRA) lawsuit. Plaintiff had previously brought NMHRA claim in federal court under court's supplemental jurisdiction, and federal tolling provision, 28 U.S.C. § 1367(d), therefore saved claim from limitations bar. Given that plaintiff failed to cite § 1367(d) in trial court or in supplemental briefing requested by Court of Appeals and that appellate court raised statute on its own initiative, lack of preservation was the "strongest argument against reversal." But plaintiff's argument that trial court's assertion of supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) tolled limitations period was sufficient to preserve issue; an appellant is simply required to invoke a trial court ruling on the "same grounds" argued on appeal, and plaintiff's argument was adequate to alert district court to issue. Court would not apply preservation rules in an unduly technical matter to avoid meritorious basis for reversal. Plaintiff pointed to general federal law allowing exercise of supplemental jurisdiction over state law claims and would not be held to have forfeited argument for reversal based on another provision of the same statute. Defendants also share blame because they had obligation to inform trial court of directly applicable statute.

Robey v. Parnell, 2017-NMCA-038, 392 P.3d 642.

Party's argument in trial court that alleged warranty was not in writing, made to question evidentiary support for claim of warranty, did not preserve argument made on appeal that statute of frauds barred any non-written warranty. [¶ 16]

Certiorari & Certification – Supreme Court

State Engineer v. Diamond K Bar Ranch, LLC, 2016-NMSC-036, 385 P.3d 626.

Court of Appeals granted interlocutory appeal, then quashed appeal after full briefing. Supreme Court granted writ of certiorari to review question before Court of Appeals.

State v. Suazo, 2017-NMSC-011, 390 P.3d 674.

Although Court of Appeals certified a single issue to Supreme Court, Supreme Court addresses a second issue presented by the appeal as well. When Supreme Court accepts certification, it has jurisdiction over the entire case.

Harmless Error

Robey v. Parnell, 2017-NMCA-038, 392 P.3d 642.

It was harmless error for district court to award the same damages alternatively on two theories, one of which was not valid, where award of damages on other theory was proper and there was no indication that plaintiff received double recovery. [¶ 32]

Precedent

State v. Suazo, 2017-NMSC-011, 390 P.3d 674.

"[T]he committee commentary to a jury instruction is only persuasive to the extent that it correctly states the law." [¶ 20]

State Uninsured Employers' Fund v. Gallegos, 2017-NMCA-044, 395 P.3d 533.

"[U]npublished memorandum opinions are not controlling authority, and we need not distinguish non-precedential cases." [¶ 18 n.3]

Administrative Appeals

Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Comm'n, 2016-NMCA-055, 374 P.3d 710, cert. denied, 2016-NMCERT-004, __ P.3d __.

In judicial review of adoption of administrative agency rule that differed substantially from prior rule on subject, court's review was limited to record compiled in agency proceeding; court would not take judicial notice of record of prior rulemaking proceedings. [¶ 15]

Appeals to District Court

Barraza v. State Taxation & Revenue Dep't, 2017-NMCA-043, 395 P.3d 527.

Driver brought Rule 1-074 NMRA administrative appeal of license revocation. District court erroneously converted proceeding to mandamus action which it decided under its original jurisdiction, denying relief. Driver filed notice of appeal. Court of Appeals considered appeal after issuing order to show cause why appeal should not be dismissed for failure to file petition for writ of certiorari. On merits, Court of Appeals reversed and remanded for consideration by district court in its appellate capacity.

Appellate Rules

Extensive amendments to Rules of Appellate Procedure adopted, effective December 31, 2016. An associated amendment to Rule 1-054(B) of the Rules of Civil Procedure brings New Mexico law into accord with federal law regarding finality of orders adjudicating fewer than all claims presented or the rights and liabilities of fewer than all parties involved in an action; such orders are not appealable until entry of an order adjudicating all claims and the rights and liabilities of all parties, absent Rule 1-054(B) certification.

Amended Rule 12-314 - Sealing of court records, effective Mar. 31, 2017. Vol. 66, No. 11 SBB 23 (Mar. 15, 2017).

Amended Rule 12-307.2 - Electronic filing, effective Aug. 21, 2017. Vol. 56, No. 33 SBB 17 (Aug. 16, 2017).

Proposed rules amendments (pending, comment period closed):

12-210 Calendar assignments
12-313 Appellate mediation
12-502 Certiorari to Court of Appeals

Vol. 56, No. 10 SBB 16 (Mar. 8, 2017).

El Castillo Retirement Residences v. Martinez

Background

El Castillo is a non-profit continuing care retirement community. Residents at El Castillo must meet the facility's financial worth and health criteria. They then are entitled, on payment of an entry fee and monthly fees, to live in the community, to enjoy its services and amenities, and to receive the level of care, including assisted living and nursing care, needed as they age. The facility's fees, on average, are calculated to cover operating costs and maintain reserves against deficits. Thus, the community is self-sustaining, with some residents paying their way and others subsidizing the cost of residents whose care needs exceed the fees they pay.

Article VIII, Section 3 of the New Mexico Constitution exempts from property taxation "all property used for . . . charitable purposes." The constitutional provision has been held to apply only to property that creates a substantial public benefit through a use that primarily and substantially furthers a charitable purpose.

Continuing care communities are recognized by statute. A provision of the state Property Tax Code exempts from taxation certain continuing care communities that (1) are tax-exempt under Section 501(c)(3) of the Internal Revenue Code, (2) donate or render gratuitously a portion of their services or facilities, and (3) use revenues in excess of operating costs to further their charitable purpose, including the maintenance, improvement, or expansion of facilities.

El Castillo applied for a property tax exemption under the Constitution and statute, which was denied by the Santa Fe County Assessor. It protested the denial to the county Valuation Protests Board. The Protests Board entered findings of fact and ruled that El Castillo did not satisfy the statutory grounds for an exemption; it did not address separately the constitutional exemption because El Castillo did not rely on the constitutional provision as a separate basis for exemption and the Board lacked jurisdiction to consider the constitutional provision in relation to the statute.

Procedural Course

El Castillo appealed the Protests Board's ruling to the district court. It argued that the court, under its appellate jurisdiction and pursuant to Rule 1-074 NMRA, should set aside the Protests Board's denial of a statutory exemption as arbitrary, capricious, and not supported by substantial evidence. It also argued that the court, under its original jurisdiction, should hold that the constitutional exemption applied to El Castillo.

The district court entered its own findings of fact. It held that El Castillo satisfied the plain language requirements of the statute and was entitled to an exemption under the statute. The court also held that the statute gave definition to the general requirements of the Constitution and that by meeting the statutory requirements El Castillo qualified for a tax exemption under the Constitution as well. The Assessor filed a notice of appeal to the Court of Appeals.

Court of Appeals – 2015-NMCA-041, 346 P.3d 1164

The Court of Appeals held that as a result of the Protests Board's failure on jurisdictional grounds to address the constitutional exemption, the Assessor's appeal was divided into two procedural tracks: review of the statutory exemption under the district court's appellate jurisdiction and review of the constitutional exemption under the district court's original jurisdiction. Because the Assessor had filed only a notice of appeal, which brought up the district court's action under its original jurisdiction, the Court of Appeals lacked jurisdiction to consider the statutory exemption. The Assessor should have filed a petition for writ of certiorari to bring up for review the district court's action under its appellate jurisdiction. The Assessor's docketing statement did not serve as a substitute for the petition.

Citing Maso v. N.M. Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, aff'd, 2004-NMSC-028, 136 N.M. 161, the Court of Appeals noted the principle that in an appeal from an administrative decision, the district court also has original jurisdiction to address constitutional questions outside the scope of the administrative agency's review. The Court of Appeals next engaged in a lengthy analysis and concluded that the Protests Board did not have jurisdiction to address the constitutional property tax exemption. The district court therefore properly exercised its original jurisdiction over the constitutional issue and, in that connection, properly made original findings of fact.

On the merits of the constitutional issue, the Court of Appeals reversed the district court, holding that El Castillo did not qualify for a property tax exemption under the Constitution. Because the statutory exemption was not properly before it, however, the Court of Appeals left in place the district court's determination that El Castillo qualified for a tax exemption under the statute. The Assessor filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the petition to address the property taxation issue and "to clarify the subject matter appropriate for appellate review in circumstances such as these."

Supreme Court - 2017-NMSC-___, __ P.3d __ (No. S-1-SC-35148, N.M. Aug. 17, 2017)

The Supreme Court held that the statutory exemption must be read to incorporate the constitutional requirements for a property tax exemption, so that a property that satisfies the statutory exemption only, and not the constitutional exemption, cannot be granted a tax exemption without violating the Constitution. As a result, the Supreme Court was faced with a Court of Appeals decision that allowed an unconstitutional application of the exemption statute to stand. That result flowed from a perceived jurisdictional defect resulting from the splitting of the district court appeal into original-jurisdiction and appellate-jurisdiction tracks and the failure of the Assessor to bring up the district court's appellate-jurisdiction ruling properly for review by the Court of Appeals. That same division caused the statutory and constitutional exemptions to be analyzed independently – precisely the substantive error identified in the Court's merits ruling.

The Supreme Court held that both the district court and the appellate court committed errors in the exercise of their jurisdiction. First, the Court determined that the district court had exercised original jurisdiction over both the statutory and the constitutional issues. It should have exercised appellate jurisdiction over the statutory issue. Issuing new findings of fact was error.

Next, the Court held that the Court of Appeals had erred by reviewing the constitutional question without addressing the statutory question as well. The Court of Appeals should have reviewed both issues, because statutes must be interpreted and applied in harmony with the Constitution. The issues in this appeal were intertwined and inseparable. The Supreme Court reversed the Court of Appeals, holding that El Castillo is not entitled to a property tax exemption under either the constitutional or the statutory exemption.

Comment

How did the Supreme Court reach the statutory issue which the Court of Appeals held had not been properly appealed? Calling the issues "inseparable" does not really answer the jurisdictional puzzle here – unless the Supreme Court's opinion is limited to the circumstances before it. Perhaps the opinion only defines the scope of review by the Court of Appeals in an administrative appeal that involves both the applicability of a statute and the constitutionality of that very application. If so, El Castillo holds that both the statutory, appellate-jurisdiction issue and the interrelated constitutional, original-jurisdiction issue are to be reviewed together – apparently as a matter of constitutional necessity – regardless of whether the appeal was properly perfected with respect to the appellate-jurisdiction track as well as the original-jurisdiction track in the district court. That would appear to be a very broad interpretation of the jurisdiction of the Court of Appeals over appeals from the exercise of the district court's appellate jurisdiction absent a petition for writ of certiorari.

In some administrative appeals, however, statutory and constitutional issues are not coupled as they were in El Castillo. For instance, an appellant may challenge the result of an administrative hearing on substantial evidence grounds and also challenge on due process grounds the manner in which the proceeding was conducted, thereby presenting independent appellate-jurisdiction and original-jurisdiction issues to the district court. In El Castillo, the Supreme Court avoided any appearance of a jurisdictional problem in reviewing both the applicability of the statutory tax exemption and its constitutionality by declaring that the district court acted under its original jurisdiction in addressing each issue. If so, both issues were properly brought up for further review as of right by the Assessor's notice of appeal. But how can we tell whether a district court is exercising original jurisdiction in an administrative appeal on an issue it should have reviewed under its appellate jurisdiction, when both kinds of issues are present? It cannot be simply that the court has made factual findings because, as the Court of Appeals pointed out, the district court's entry of findings of fact is consistent with its exercise of original jurisdiction over a constitutional issue outside the scope of the agency's consideration. And, to the extent the district court's "findings" are actually a construction of the exemption statute, they are consistent with the court's exercise of its appellate jurisdiction. If the record looks the same regardless of whether the district court observed the proper boundaries in exercising its original and appellate jurisdiction, how do we know when a notice of appeal is sufficient to bring up all issues to the Court of Appeals in an administrative appeal and when a companion petition for writ of certiorari is needed as well?

At the root of the jurisdictional problem in this case is the separation of a single question – is El Castillo entitled to a property tax exemption? – into distinct statutory and constitutional

components because our current system of administrative appeals forces that division to be made upon appeal to the district court. The problem is compounded because separate methods of obtaining further appellate review must be exercised after the district court resolves the issues presented under its appellate jurisdiction and its original jurisdiction – a procedural trap that can cause an appellant to forfeit review of a potentially meritorious issue, as a number of reported cases reflect including the Court of Appeals decision here. The Supreme Court found a solution to the problem in this case, but it is not one that fits into a neat and logical analysis or extends easily to general applicability. Perhaps, after several decades of experience with the current administrative appeal system, it is time to reexamine and rationalize the process through which New Mexico courts review administrative agency actions.

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

(Criminal Appeals)

Compiled by David Henderson,
Appellate Defender,
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28th Appellate Practice Institute, September 2016

Cases from July 2016-July 2017

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1. Motions to withdraw pleas; retroactivity of new procedural rules.

State v. Trammell, 2016-NMSC-030, 387 P.3d 220.

- While motions to withdraw a guilty plea are subject to review for an abuse of discretion, whether to apply a new rule retroactively is subject to *de novo* review. 2016-NMSC-031, ¶13.
- Although motion to withdraw guilty plea might properly have been treated as a petition for writ of habeas corpus, from which Defendant could have filed a petition to the Supreme Court under Rule 5-802, this did not deprive the Court of Appeals of jurisdiction, as the proper remedy would have been to transfer the case to the Supreme Court. 2016-NMSC-031, ¶ 15
- Under *Teague v. Lane*, 489 U.S. 288, 310 (1989), "'If it is an old [procedural] rule, it applies both on direct and collateral review. If it is a new rule, it generally applies only to cases that are still on direct review.'" *State v. Ramirez* (*Ramirez I*), 2012-NMCA-057, ¶ 6, 278 P.3d 569 (quoting *State*

v. Frawley, 2007-NMSC-057, ¶ 34, 143 N.M. 7, 172 P.3d 144), *aff'd Ramirez II*, 2014-NMSC-023. 2016-NMSC-031, ¶ 17.

- Defense counsel's duty to inform a defendant of the collateral consequences of a plea are analyzed in terms of the procedural rules and professional norms in effect at the time of the entry of the plea. 2016-NMSC-031, ¶¶ 19-21.

2. Preserved error in an element instruction.

State v. Suazo, 2017-NMSC-011, 390 P.3d 674.

- Preserved error in instruction for second-degree murder that defined the necessary mens rea as whether the defendant "knew or should have known" of substantial risk of death or great bodily harm was not harmless where the defendant's knowledge of whether a shotgun was loaded was in dispute. Even though jury also found the defendant guilty of aggravated battery of a second person based on the same conduct and under an instruction requiring an intent to injure, the prosecution tied the mens rea for this crime to the erroneous second-degree murder instruction and it was not clear in what order the jury rendered its verdicts.

3. Confidentiality of child victims; fundamental error in element instruction.

State v. Samora, 2016-NMSC-031, 387 P.3d 230.

- Although some mention of the alleged victim's name was inevitable at trial, Court did not use victim's name given "the constitution and laws of New Mexico require that we respect 'the victim's dignity and privacy throughout the criminal justice process,' "and because the alleged victim was a child under NMSA 1978, Section 32A-1-4(B) (2005, amended 2016). 2016-NMSC-031¶ 3, n1.
- Issue of fundamental error in elements instruction turned on whether the element of lack of consent was factually at issue in case where Defendant was convicted of CSPM and kidnapping; if so, the error was fundamental unless the Court could determine that the jury necessarily found that element existed based on the evidence and its verdicts. The Court held, first, that the evidence placed the element of consent at issue. Additionally, the jury's finding that the Defendant had kidnapped the victim by deception did not necessarily show it found the subsequent sexual act sometime later between the defendant and the victim was non-consensual, especially in light of the jury's hung verdict on the alternative charge of CSPM through force or coercion and it's written questions regarding the age of consent. 2016-NMSC-031, ¶¶ 29-32.

- *Sua sponte*, the Court further held the error in the CSPM instruction tainted the jury's kidnapping verdict, because the jury could have inferred the intent to hold the victim in order to commit a sexual offense referred to the offense it had found to have occurred under the erroneous CSPM instruction. .

  2016-NMSC-031, ¶33.

  Cf. State v. Lucero, 2017-NMSC-008, 289 P.3d 1039.

  - Evidence supporting verdict for intentional child endangerment did not place at issue whether defendant intended to abuse child or simply committed an intentional act that indirectly caused death; therefore, there was no fundamental error).

4. Substantial evidence review.

   State v. Garcia, 2016-NMSC-034, 384 P.3d 1076

   - Under the two-step process for determining whether the evidence supports the jury's verdict, the Court first must construe the evidence in the light most favorable to the jury's verdict before deciding whether a rational juror could have found guilt beyond a reasonable doubt. Given this standard, the COA erred in relying on the principle that evidence equally consistent with two inferences does not prove either, as this failed to give proper deference to the jury's verdict.

5. Statutory interpretation.

State v. Stephenson, 2017-NMSC-002, 389 P.3d 282

- In interpreting requirement to convict someone of unlawfully "leaving or abandoning" a child, the Court would give separate meaning to each phrase in order to effect legislative intent. Thus, while "abandon" implied an intent not to return, "leave" meant "[t]o depart; voluntarily go away" under circumstances exposing a child to harm. In the case at hand, however, the State failed to prove the child's compartment syndrome which resulted from legs being pinned between a bed and fallen dresser during the night, was due to risk of harm created by mother's act of putting the child to bed with bedroom door locked.

Cf. State v. Jimenez, 2017-NMCA-039 ,¶ 33, 392 P.3d 668.

- In interpreting the meaning of "evading or fleeing" the police as used in Section 30-22-1, the Court employed the maxim "*noscitur a sociis,*" which confines the word to a meaning kindred to that of the words with which it is associated." This canon "instructs that, when interpreting an unclear or ambiguous term within a statute, we 'look[] to the neighboring words in a statute to construe the contextual meaning of a particular word in the statute.' *In re Gabriel M.*, 2002-NMCA-047, ¶ 19, 132 N.M. 124."

6. Issues of substantial public interest for purposes of Rule 12-502, NMRA.

State v. Begay, 2017-NMSC-009, ¶¶ 7-8, 390 P.3d 168.

- Despite the Legislature's recent amendment of NMSA 1978, Section 34-5-14(B)(4), the Court of Appeals interpretation of the older version of the statute as not permitting courts of limited jurisdiction to toll the running of probation for those who abscond called into question a significant number of orders by such courts across the State and thus presented a question of substantial and statewide public interest.

7. Effect of a ruling on the merits of an untimely motion to suppress.

State v. Rivas, 2017-NMSC-022, ¶ 37, 398 P.3d 299.

- Although the trial court ruled a motion to suppress statement of juvenile defendant in first-degree murder case was untimely, the trial court also ruled on the merits of the motion. Given "the airing of the merits arguments from both sides below and on appeal, given the district court's denial on the merits, and given the nature of this claim, we conclude the suppression issue has been adequately presented for our review. *See* Rule 12-321(A) NMRA."

8. Motions in limine and preservation.

State v. Carrillo, 2017-NMSC-023, ¶¶ 22-23, 399 P.3d 367.

- Because a ruling on a motion in limine is necessarily a preliminary ruling, defendant waived issue regarding admissibility of witnesses' testimony by failing to renew the objection at trial.

9. Prejudice from false police testimony concerning a confession not cured by a prompt admonition to the jury.

State v. Hernandez, 2017-NMCA-020, 388 P.3d 1016.

- When a police officer gave false testimony in violation of a court order that the defendant confessed to being the driver of a car involved in a fatal accident, the prejudice arising from this false testimony was not cured by the court's vague and inaccurate instruction that the jury should disregard what it termed "vague" and "nonresponsive" testimony rather than granting a mistrial.

10. Prejudice from denial of motion for a bill of particulars in a child sexual abuse case.

State v. Huerta-Castro, 2017-NMCA-026, 390 P.3d 185.

- Failure to provide bill of particulars in case involving carbon copy counts of child sex abuse independently required reversal of all but one "course of conduct" count.

11. Standard of review for voluntariness and for plain error.

State v. Bregar, 2017-NMCA-028, 390 P.3d 212

- Court applies a "totality of the circumstances" test to volunariness claims derived from the "three-phased process" set out in *Culombe v. Connecticut*, 367 U.S. 568, 603-05 (1961).

> In the *first phase*, there is the business of finding the crude *historical facts*, the external, 'phenomenological' occurrences and events surrounding the confession. In other words, the court begins with a determination of what happened. We are *not restricted to examining only those facts deemed dispositive by the trial court.* However, when faced with conflicting evidence, we will *defer to the factual findings of the trial court*, as long as those findings are supported by evidence in the record. . . . The *second phase* is a determination of *how the accused reacted* to the external facts. This is an admittedly imprecise effort to infer—or imaginatively recreate—*the internal psychological response* of the accused to the actions of law enforcement officials. *The third phase is an evaluation of the legal significance* of the way the accused reacted to the factual circumstances. This requires the application of the due process standards to the court's perception of how the defendant reacted. We are *not required to accept the trial court's legal conclusion that the police officers did not act coercively.*

2017-NMCA-028, ¶ 5.

- Finding no plain error, the Court nevertheless noted a "tension" between the language of *State v. Montoya*, 2015–NMSC–010, ¶ 46, 345 P.3d 1056 "one of our Supreme Court's most recent applications of the plain error standard," and *State v. Lucero*, 1993–NMSC–064, ¶ 13, 116 N.M. 450, in describing plain error. "According to *Montoya*, the standard of review for plain error is

roughly the same as the analysis for constitutional fundamental error: 'the [appellate court] must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict.' 2015-NMSC-010, ¶ 46...." However, " *Lucero* states that the standard of review for plain error is simply whether the error 'affect[s] substantial rights[,]' a standard which the court itself characterized as 'less stringent' than ... fundamental error." 2017-NMCA-028, ¶ 42.

12. Jurisdiction to hear appeal from denial of motion to withdraw plea.

State v. Gallegos-Delgado, 2017-NMCA-031, ¶ 8, 392 P.3d 200

- reviewing the jurisdictional issue de novo, the Court held the defendant properly requested relief under Rule 1-060(B)(4) NMRA, "which is the proper procedural mechanism for a person no longer in state custody to appeal an allegedly void judgment." Further, the Court of Appeals "has jurisdiction when a defendant wishes to 'challenge his underlying criminal conviction when in the custody of ICE' if the Defendant has filed a Rule 1-060(B)(4) motion."
- "Although a conditional discharge is not a conviction under New Mexico law," moreover, "it has that effect under federal immigration law when an alien has pled guilty and a judge has ordered some type of punishment, even if a formal adjudication of guilt has been withheld. 8 U.S.C. § 1101(48)(A)."

13. Prosecutorial misconduct.

State v. Montgomery, 2017-NMCA-___, --- P.3d ----, 2017 WL 2482819 (June 6, 2017).

- Prosecutor's reliance in closing to excluded police expert testimony regarding a defendant's possible blood alcohol level following alleged consumption of two drinks was improper, denied the defendant a fair trial, and required reversal.

14. The Second Judicial District Case Management Order -- certification and jurisdiction.

State v. Navarro-Calzadillas, 2017-NMCA-034, 392 P.3d 236, & *State v. Seigling*, 2017-NMCA-035, 392, 226.

- The Court had certified to the Supreme Court the question of whether the case management order permitted a district court to exclude witnesses or evidence as a sanction for violating discovery deadlines, based on the Court of Appeals' concern with reconciling the local rule with existing precedent under the Rules of Criminal Procedure. The Supreme Court quashed certification, suggesting that it views its acceptance of jurisdiction as a discretionary act. Certiorari subsequently was granted to review the Court of Appeals decision.

State v. Lucero, 2017-NMCA-___, ___P.3d ___, 2017 WL 1231722 (April 3, 2017).

- The Court declined to reconsider or distinguish *State v. Armijo*, 1994-NMCA-136, ¶ 6, 118 N.M. 802, which held the State had a right to review a dismissal without prejudice.

NOTES

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NOTES

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MANDAMUS IN NEW MEXICO

CHARLES T. DUMARS*
MICHAEL B. BROWDE**

INTRODUCTION

Although the common law origins of the writ of mandamus are somewhat obscure,[1] mandamus apparently began as nothing more than a royal wish or direction conveyed to subordinates regarding something the King wished done.[2] Sir Edward Coke is credited with first formalizing the writ when, as Chief Judge of the King's Bench, in *Bagg's Case*,[3] he took the King's prerogative into his own hand and fashioned a remedy to restore an official to office.[4] Nearly a century later, Chief Justice Holt defined the writ as applying to matters public in nature,[5] and limited its use to situations where no other remedy existed.[6] Building from these essentials, Lord Mansfied, Chief Justice of King's Bench in the mid-eighteenth century, formulated mandamus into an established remedy for an individual to obtain redress of grievances against officers and bodies of government.[7] By the late 18th century, the writ had become so entrenched that Blackstone could describe it in terms which readily serve as a definition for the modern writ:

> A Writ of Mandamus is in general, a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposes to be consonant with right and justice.[8]

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1. Jenks, *The Prerogative Writs in English Law*, 32 Yale L. J. 523, 529 (1923). *See generally* Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N. Y. L. Forum 478, 486-87 (1963); F. Ferris, The Law of Extraordinary Legal Remedies 218 (1926).
2. Weintraub, *supra* note 1, at 479-80.
3. 11 Co. Rep. 93, 77 Eng. Rep. 1271 (K.B. 1615).
4. For a discussion of Bagg's Case, *see* Jenks, *supra* note 1, at 530.
5. Parkinson's case, Holt, 143, 90 Eng. Rep. 977 (K.B. 1689).
6. Case of Andover, Holt, 442, 90 Eng. Rep. 1143 (K.B. 1701).
7. *See generally* Weintraub, *supra* note 1, at 498-502. Eminating originally from the King's Bench, the Writ was legal rather than equitable in nature. Jenks, *supra* note 1, at 532; Ferris, *supra* note 1, at 221-22.
8. 3 Blackstone, Commentaries *110.

The prerogative writ of mandamus, along with general King's Bench jurisdiction, found roots in the early courts of the American Colonies.[9] As in England,[10] however, the American states generally adopted statutory provisions governing writs of mandamus.[11] Indeed, the current New Mexico mandamus statute harks back to Blackstone's definition, and has remained virtually unchanged since its first enactment in 1884.[12]

It is the purpose of this article to give a broad overview of mandamus in New Mexico in a manner which will prove instructive to the prospective mandamus litigant. After outlining in some detail the legal basis for the writ and the statutory requirements which govern its issuance, attention will be given to the case law suggesting that mandamus is an exclusive remedy against official wrongdoing. The bulk of the article then deals with the three most litigated mandamus questions: (1) Who has standing? (2) When is the remedy at law inadequate so that mandamus will lie? And (3) what constitutes official discretion which cannot be controlled by the writ? Finally, special attention is paid to the relationship between mandamus and the doctrine of sovereign immunity.

LEGAL BASIS AND STATUTORY REQUIREMENTS

Article VI, Section 3 of the New Mexico Constitution provides that the supreme court "... shall have original jurisdiction in ... mandamus against all state officers, boards and commissions." Section 6 of that same article gives district courts original jurisdiction concurrent with that of the supreme court to issue writs of mandamus, but prohibits their issuance to courts of equal or superior jurisdiction. Notwithstanding these clear constitutional directives, New Mexico statutory law gives exclusive original jurisdiction to the district court or a judge thereof.[13] It is primarily from these sources the supreme court and the district courts derive their power to issue writs of mandamus.[14]

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9. *See generally*, Goodman, *Mandamus in the Colonies–The Rise of the Superintending Power of American Courts*, 1 Am. J. Legal Hist. 308 (1957), continued at 2 Am. J. Legal Hist. 1 & 129 (1958).

10. *See*, Note, *Mandamus: Common Law and Statutory Developments*, 20 Iowa L. Rev. 667, 669-72 (1935).

11. *E.g.*, *Id.* at 671; Note, *Mandamus in New England*, 37 Boston U.L. Rev. 456, 457 (1957).

12. Laws of N.M. 1884, ch. 1, § 37.

13. N.M. Stat. Ann. § 22-12-3 (1953).

14. *See, e.g.*, State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968). The supreme court held in State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967), that Article VI, Section 29, of the New Mexico Constitution, does not confer upon the Court of Appeals original jurisdiction to issue extraordinary writs. The court did

The conflict between Article VI, Section 3 of the Constitution and New Mexico statutory law has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction in mandamus.[15] However, Supreme Court Rule 12 has given force and effect to the policy behind the statute,[16] by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."[17] The standard applied in exercising original jurisdiction under the Rule has been whether the particular case is of such public importance to the state as to require original consideration by the high court.[18] Absent a compelling reason for bringing the action in the supreme court, the district court is the proper forum for a mandamus action against anyone other than another district court.

The New Mexico statutes delineate in some detail the requirements for a proper mandamus action.[19] As more fully developed below,[20] these requirements are often strictly construed.[21] The writ may be issued to any inferior "tribunal, corporation, board or person to compel the performance of an act which the law especially enjoins as a duty resulting from an "office trust or station."[22] Although the

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not decide, however, whether the court of appeals could issue writs to lower tribunals under its inherent power in aid of its appellate jurisdiction.

15. *See, e.g.*, State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

16. No doubt the legislature, in enacting § 22-12-3, recognized that the primary function of the supreme court, as the ultimate appellate tribunal of the State, should not be undercut by the needless concern for cases which could first be presented to an inferior tribunal.

17. N.M. Stat. Ann. § 21-2-1(12)(a)(1) (1953). This subsection represents an amendment to the Rules, effective May 1, 1974, and tracks the language of its predecessor, Supreme Court Rule 24.

18. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968); State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968); State ex rel. Shell Petroleum Corporation v. Worden, 44 N.M. 400, 103 P.2d 124 (1940). In Thompson v. Legislative Audit Commission, 79 N.M. 693, 448 P.2d 799 (1968), the court found issuance of the original writ proper ". . . in view of the possible inadequacy of other remedies and the necessity of an early decision on the question of great public importance." *Id.* at 694-95, 448 P.2d at 800-01.

In addition, on rare occasions, the court will, under its "superintending power" over inferior courts conferred by Article VI, Section 3, issue the writ to lower courts irrespective of traditional or statutory mandamus considerations. State ex rel. Dubois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

19. N.M. Stat. Ann. §§ 22-12-6 to 11 (1953). *See generally*, Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972); Laumbauch v. Board of County Comm'rs, 60 N.M. 226, 290 P.2d 1067 (1955).

20. *See* the Exclusivity of Mandamus, *infra* pp. 165-169.

21. Even a *pro se* indigent prisoner in solitary confinement has been held to the strict requirements of mandamus pleading. Birdo v. Rodriquez, 84 N.M. 207, 501 P.2d 195 (1972).

22. N.M. Stat. Ann. § 22-12-4 (1953).

writ may require an inferior tribunal or body to exercise judgment or to discharge its functions, the New Mexico statute provides that it cannot control "judicial discretion."[23] Nor will the writ issue when there is a "plain speedy and adequate remedy in the ordinary course of law."[24] Furthermore, a party seeking the writ must be "beneficially interested"[25] in the action sought to be compelled.

The procedure for filing a mandamus action is rather convoluted. The party seeking the writ files a "petition for writ of mandamus."[26] If the petition is proper in form,[27] the court issues an

23. N.M. Stat. Ann. § 22-12-14 (1953). *See* When Mandamus Will Lie, Section C, *infra.*

24. N.M. Stat. Ann. § 22-12-5 (1953). *See* When Mandamus Will Lie, Section B, *infra.*

25. N.M. Stat. Ann. § 22-12-5 (1953). *See* When Mandamus Will Lie, Section A, *infra.*

26. The precise designation of the parties is a matter of some confusion. The statute [N.M. Stat. Ann. § § 22-12-1 through 22-12-14 (1953)] refers to the party seeking the writ as the plaintiff, the party opposing the writ as the defendant. Supreme Court Rule 12, however, refers to the party against whom the writ is sought as the respondent, and the party seeking the writ as the petitioner. The court has referred to the parties in a mandamus action as petitioner and respondent, *State ex rel. Barela v. New Mexico State Board of Education,* 80 N.M. 220, 453 P.2d 583 (1969), as applicant and defendant, *Hutchison v. Gonzales,* 41 N.M. 474, 71 P.2d 140 (1937), as plaintiff and defendant, *Laumbauch v. Board of County Comm'rs,* 60 N.M. 226, 290 P.2d 1067 (1955) and as relator and respondent, *State ex rel. Chavez v. Evans,* 79 N.M. 578, 446 P.2d 445 (1968). In an attempt to avoid confusion, the parties shall be denominated petitioner and respondent throughout this article.

Mandamus cases have on some occasions been styled "state ex rel. . . .", and on other occasions the caption does not involve the state at all. Since most petitioners stand in the posture of a private attorney general, it is proper to caption mandamus cases "State ex rel . . .". But *see* Dunn v. Town of Gallup, 38 N.M. 197, 29 P.2d 1053 (1934).

27. The following represents a hypothetical petition in proper form:

STATE OF NEW MEXICO COUNTY OF LOBO

IN THE DISTRICT COURT

STATE OF NEW MEXICO *ex. rel.*
ABC ENTERPRIZES, INC.,

Petitioner,

No. _____

-vs-

CITY OF LOBO, a
municipality,

Respondent.

VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioner alleges:

1. Petitioner is a corporation doing business within the City and County of Lobo.

2. Respondent is a municipality within Lobo County, State of New Mexico.

3. Petitioner is taxed by the City of Lobo at a rate of 10 mills whereas

order[28] directing the court clerk to issue the writ.[29]

The court may issue either an "alternative" writ or a "peremptory" writ, based upon the prayer in the Petition. The alternative

other incorporated businesses within that same municipality are taxed at only 5 mills.

4. The Respondent has a mandatory non-discretionary duty to follow the United States Constitution.

5. This arbitrary taxation scheme is invidious and discriminatory in violation of the Fourteenth Amendment to the United States Constitution.

6. The Respondent has breached its mandatory non-discretionary duty to follow the United States Constitution by implementing and applying the discriminatory taxation scheme against Respondent.

7. Petitioner is a person "beneficially interested" in the issues of this case, namely the taxation schemes of the City of Lobo, in the same manner as all members of the public at large. Petitioner is also uniquely affected by the unconstitutional conduct of the Respondent.

8. Petitioner has no plain, speedy and adequate remedy in the ordinary cause of law.

WHEREFORE Petitioner prays that it be awarded a Writ of Mandamus commanding Respondent to:

1) comply with its mandatory non-discretionary duty to tax all businesses within the municipality including Petitioner, on an equitable non-discriminatory basis.

2) pay to Petitioner the damages it sustained as a result of the unlawful conduct of Respondents together with costs and disbursements.

Respectfully submitted,

_____

Attorney for Petitioner.

(verified)

28. The Order of the Court in the petition referred to in note 27, *supra*, would read as follows:

STATE OF NEW MEXICO COUNTY OF LOBO

IN THE DISTRICT COURT

STATE OF NEW MEXICO *ex. rel.*
ABC ENTERPRIZES, INC.,

Petitioner,

No. _____

-vs-

CITY OF LOBO, a
municipality,

Respondent.

ORDER FOR ALTERNATIVE WRIT OF MANDAMUS

This matter having come before the Court upon the verified Petition of Peti-

writ is in the nature of an order to show cause, and directs the respondent to either grant the relief requested or show cause before the court on a certain date why he has not done so. The peremptory

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tioner; it appearing to the satisfaction of the Court from the Petition that the Petitioner is entitled to the relief requested in the Petition; it further appearing that an Alternative Writ should issue; that Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, and that this remedy is prescribed by statute,

IT IS ORDERED that an Alternative Writ of Mandamus in due form of law be issued by the Clerk of this Court commanding Respondent to:

1. Comply with its mandatory non-discretionary duty to tax all businesses within the municipality, including Petitioner, on an equitable, non-discriminatory basis.

2. Pay to Petitioner the damages sustained as a result of the unlawful conduct of Respondents together with costs and disbursements; or show cause before this Court at _____o'clock in the _____noon of the _____day of _____, 1973, why they should not do so.

IT IS FURTHER ORDERED that true copies of the Petition, the Writ, and this Order be served upon Respondent in the same manner as a summons in a civil action.

_____

District Court Judge

29. N.M. Stat. Ann. § 22-12-6 (1953). The writ in our hypothetical case would appear as follows:

STATE OF NEW MEXICO COUNTY OF LOBO

IN THE DISTRICT COURT

STATE OF NEW MEXICO *ex. rel.*
ABC ENTERPRIZES, INC.,

Petitioner,

No.: _____

-vs-

CITY OF LOBO, a
municipality.

Respondent.

ALTERNATIVE WRIT OF MANDAMUS

TO: City of Lobo,
a municipality

GREETINGS: Whereas it appears to the Court as follows:

1. Whereas Petitioner is a corporation doing business within the City and County of Lobo.

2. Whereas Respondent is a municipality within Lobo County, State of New Mexico.

3. Whereas Petitioner is taxed by the City of Lobo at a rate of 10 mills whereas other incorporated businesses within that same municipality are taxed at only 5 mills.

writ is a final appealable order which may be issued without notice to the opposing party "when the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it."[30]

The alternative writ is the usual writ sought since the peremptory writ is issued *ex parte* and grants final relief without any prior notice or opportunity to be heard. Although the New Mexico Supreme Court held in an early case that issuance of a peremptory writ did not contravene due process of law,[31] more recent cases[32] expanding

4. Whereas the Respondent has a mandatory non-discretionary duty to follow the United States Constitution.

5. Whereas this arbitrary taxation scheme is invidious and discriminatory in violation of the Fourteenth Amendment to the United States Constitution.

6. Whereas the Respondent has breached its mandatory non-discretionary duty to follow the United States Constitution by implementing and applying the discriminatory taxation scheme against Respondent.

7. Whereas Petitioner is a person "beneficially interested" in the issues of this case namely the taxation schemes of the City of Lobo, in the same manner as all members of the public at large. Petitioner is also, uniquely affected by the unconstitutional conduct of the Respondent.

8. Whereas Petitioner has no plain, speedy and adequate remedy in the ordinary course of law.

THEREFORE, you are commanded forthwith to:

1. Comply with your mandatory non-discretionary duty to tax all businesses within the municipality, including Petitioner, on an equitable, non-discriminatory basis.

2. Pay to Petitioner the damages sustained as a result of the unlawful conduct of Respondent together with costs and disbursements; or show cause before this Court at _____o'clock in the _____noon of the _____day of _____, 1973, why you should not do so.

_____

DISTRICT COURT CLERK

30. N.M. Stat. Ann. § 22-12-7 (1953). The need for peremptory writs might as well be questioned since injunction in aid of mandamus is always available. *See, e.g.*, Laumbauch v. Board of County Commissioners, 60 N.M. 226, 290 P.2d 1067 (1955).

31. In *Board of County Commissioners v. Fourth Judicial District*, 29 N.M. 244, 259, 223 P. 516, 520 (1924), the court found no due process violation was involved because the respondents, County Commissioners, as public officers, had not been deprived of any "rights" protected by the Constitution:

> A public officer who is commanded to perform an official duty, suffers neither in his personal or his property rights, and these rights alone are safeguarded by the Constitution.

Unfortunately, the conclusion of the court that no "rights" were involved because no public officer has a "right" to breach his public duty begs rather than decides the due process issue.

Interestingly, since the writ had been issued *ex parte* immediately after the petition was filed, no service had been effected upon the respondents. Against the contention that the lower court had acquired no *in personam* jurisdiction, the court held that the filing of an answer attacking the final judgment as invalid because the parties were not allowed to appear, was a waiver of their contention the court lacked *in personam* jurisdiction.

32. Fuentes v. Shevin, 407 U.S. 67, *reh. den.*, 409 U.S. 902 (1972); Bell v. Burson, 402

the concept of due process have so undercut that earlier ruling as to render use of the peremptory writ constitutionally suspect[33] and inadvisable.

In addition to delineating the full and complete allegations of the petition, the alternative writ designates the return day and the manner of service.[34] On the return day, the party respondent is obligated to file a response in the same manner as an answer to a complaint in a civil action.[35] If no answer is filed on the return date, the court may enter a default and award a peremptory writ.[36] The statute further provides that if an answer is filed containing new matter "the Plaintiff may at the trial or other proceeding avail himself of any valid objection to its sufficiency or may countervail it by evidence either in direct denial or by way of avoidance."[37]

The pleadings in a mandamus action are construed and may be amended in the same manner as pleadings in any other civil action.[38] Issues raised by the pleadings are tried in the same manner as any other civil action,[39] but there exists no right to trial by jury.[40] The court has the power to extend the time within which to answer a

U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972). In *Blackhurst, supra,* the court, following *Fuentes,* decided due process requires that prior to issuance of a writ of replevin, the defendant must be given notice and an opportunity to be heard. The same should be true of a writ of mandamus.

33. Should the *Board of County Commissioners* issue arise again, it is hard to see how public officials would be given less due process protection than other citizens. Surely, in light of the cases referred to in note 32, *supra,* the court would be compelled to abandon *Board of County Commissioners. Cf.* Gomez v. Dulce Independent School District, 85 N.M. 708, 516 P.2d 697 (1974).

34. N.M. Stat. Ann. § 22-12-8 (1953). On original petitions, the supreme court often requires oral argument on the issue of whether an alternative writ should issue. Presumably, in cases other than against District Judges, this would be to determine whether the issue is of sufficient "public interest" to warrant issuance of the writ originally. However, in a case seeking a writ against a district judge, such preliminary oral argument is unnecessary. Such cases should always be heard on the merits.

35. N.M. Stat. Ann. § 22-12-10 (1953). The statute does not specify whether the return date is also the trial setting. Supreme court practice generally is to require trial on the return date unless the court instructs otherwise. The general district court practice also requires trial on the return date. This is understandable despite the absence of the usual 30-day answer time, *Cf.* N.M.R. Civ. P. 12(a), given the extraordinary nature of the writ. The general practice is tempered, however, by the natural proclivity of the courts to allow extensions of time when necessary for adequate preparation, especially in cases involving important questions of public policy. *See* text accompanying note 41, *infra.*

36. N.M. Stat. Ann. § 22-12-10 (1953). Of course, no due process problem is posed by a peremptory writ entered after service on the opposing party, followed by his failure to respond.

37. N.M. Stat. Ann. § 22-12-10 (1953).

38. N.M. Stat. Ann. § 22-12-11 (1953).

39. N.M. Stat. Ann. § 22-12-11 (1953).

40. Territory of New Mexico ex. rel. Lewis v. Commissioner of Bernalillo County, 5 N.M. 1, 16 P. 855 (1888).

writ past the designated return date, and the supreme court has held that extensions of time or leave to amend should be freely granted.[41] Since mandamus pleadings are construed in the same manner as pleadings in other civil actions, the broad rules relating to notice pleading contained in Rules 8 and 12 of the New Mexico Rules of Civil Procedure are used to test the sufficiency of the writ.[42]

If judgment is awarded a petitioner, he is entitled as a matter of right to recover the damages he has sustained together with costs and disbursements.[43] If a peremptory mandamus is issued to a public officer, body or board, and the officer or member of the body or board does not comply with the order, absent some showing of "just excuse," he may be fined up to $250.00.[44] The fine is paid into the state treasury and when paid, is a bar to any further action for any "penalty incurred by such officer or member of such body or board by reason of his refusal or neglect to perform."[45] This provision does not, however, preclude the court from jailing for contempt any person refusing to comply with its order.[46] Appeals are taken from mandamus judgments in the same manner as from any other action,[47] including the requirement that parties submit findings of fact and conclusions of law.

The mandamus statute provides that the case is to be tried on the writ and the answer.[48] In applying the statute the supreme court has

41. State ex rel. Fitzhugh v. City Counsel of Hot Springs, 56 N.M. 118, 41 P.2d 100 (1952); State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P.2d 242 (1926).

42. Heron v. Kool, 47 N.M. 218, 140 P.2d 737 (1943); State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

43. N.M. Stat. Ann. § 22-12-12 (1953).

44. N.M. Stat. Ann. § 22-12-13 (1953).

45. N.M. Stat. Ann. § 22-12-13 (1953).

46. *In re* Delgado, 140 U.S. 586 (1891).

47. N.M. Stat. Ann. § 22-12-14 (1953). The supreme court has stated that in a mandamus action against the state to enforce a pre-existing judgment, the peremptory writ of mandamus to pay the judgment is not a final order for purposes of appeal, but rather a pleading auxillary to a pre-existing judgment similar to a writ of execution. Consequently, in that circumstance, absent some jurisdictional contention, no appeal would be allowed. State ex rel. State Highway Commission v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963).

48. N.M. Stat. Ann. § 22-12-11 (1953). *See* State ex rel. Cheser v. Beall, 41 N.M. 652, 73 P.2d 329 (1939). The supreme court in *State ex rel. Fitzhugh v. Council of City of Hot Springs*, 56 N.M. 118, 241 P.2d 100 (1952), though noting that a motion to dismiss was not a proper pleading in a mandamus action found it was not reversible error to deny the motion and grant leave to answer even after the return date of the writ.

Although the case is to be tried on the writ and the answer, this principle has not been applied so stringently as to foreclose intervention. But *cf.* Mobile America, Inc. v. Sandoval County Comm'n., N.M. , 518 P.2d 774 (1974). Non-state public officers have been allowed to file a "complaint in intervention," and oppose the relief requested by the petitioner, *Schmitz v. New Mexico State Tax Commission*, 55 N.M. 320, 232 P.2d 986 (1951), as well as to file a third-party answer, *Belmore v. State Tax Comm'n.*, 56 N.M. 436,

held that after issuance of the alternative writ the petition drops away and is a nullity.[49]

The court in an early case held that a public body could not use mandamus to compel other public officers to perform their statutory duties as it was not the "real party in interest."[50] More recently, however, the Court in *Reese v. Dempsey*,[51] made it clear that any public body may seek mandamus to compel a duty owed to it by another as a function of its status as a public body.[52]

The court has also held that a mandamus action may be dismissed for failure to join an indispensable party when the petitioner fails to join every person who has an act to perform in connection with the granting of the relief requested,[53] and where it is not within the power of the respondent to perform the act requested.[54] However, the better and more practical rule was articulated by the court in *State v. Quesenberry*,[55] where the petitioner was seeking to enforce a money judgment against the State Highway Commission. The respondent contended that the petition should be dismissed for failure to join an indispensable party, or parties. Even though the judgment ran only against the State Highway Commission, the respondent argued that the chief highway engineer, the director of finance and administration, and the state treasurer were indispensable parties.

245 P.2d 149 (1952). Furthermore, mandamus actions have been successfully combined with actions for declaratory and injunctive relief. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 242 (1972).

One pitfall to be avoided is answering allegations contained in the petition but not contained in the writ. If allegations contained in the petition are answered, the court can treat them as if they were contained in the writ. *State ex rel. Burg v. City of Albuquerque*, 31 N.M. 576, 249 P. 242 (1926). Rather than answering the petition, the appropriate procedure is to assert as the first defense in the responsive pleading that the writ is insufficient, and limit the remainder of the response to the actual writ. For an extended discussion of the problems created the writ-and-the-answer rule, *see* Exclusivity of Mandamus, *infra* p.

49. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242 (1926).

> Supreme Court Rule 12(a) mitigates this rule in original jurisdiction cases by providing that "the proposed form of writ may have the petition appended as an exhibit." That procedure, however, will not suffice in district court actions. State ex. rel. Burg v. City of Albuquerque, *supra*; Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54, 55 (1974).

50. Board of Commissioners of Bernalillo County v. Hubbell, 28 N.M. 634, 216 P. 496 (1923).

51. 48 N.M. 417, 152 P.2d 157 (1944).

52. *See also*, City of Santa Rosa v. Jaramillo, N.M. , 517 P.2d 69 (1974). It should be noted that supreme court rule 12(a)(2) requires in original actions against public officers that the petitioner set forth the names of any real parties in interest.

53. Chavez v. Baca, 47 N.M. 471, 144 P.2d 175 (1943).

54. Territory ex rel. Lester v. Suddith, 15 N.M. 728, 110 P. 1058 (1910). State ex rel. State Board of Education v. Montoya, 73 N.M. 162, 386 P.2d 252 (1963).

55. 74 N.M. 30, 390 P.2d 273 (1964).

The basis of the argument was that under the statute, the chief highway engineer was required to sign the voucher, the director of the department of finance and administration must issue the warrant, and the state treasurer must pay it. The court gave this argument the burial it deserved:

> As applied to the circumstances here present, we believe the better rule to be that persons are not indispensable parties who have mere ministerial duties to carry out in paying a judgment. [citations omitted] There should be no presumption, absent a showing to the contrary, that an officer who is to perform merely ministerial duties will refuse to act.[56]

Thus, under *Quesenberry,* a petitioner need not join every single public officer in the chain of command when he seeks the performance of a statutory duty.

Finally, the court has rejected the contention that mandamus is improper if it seeks negative relief, i.e. to compel a public officer *not* to act. In New Mexico mandamus will lie to compel an officer to act or to enjoin him from acting.[57]

THE EXCLUSIVITY OF MANDAMUS

In 1944, the case of *Heron v. Garcia*[58] was decided by the supreme court. Born in obscurity, *Heron* was destined to spawn the most serious problem confounding New Mexico mandamus practice; a problem which must ultimately be faced and resolved by the supreme court.

In *Heron,* the petitioner brought an action against the county treasurer of Rio Arriba County seeking to compel him to issue petitioner a tax deed to property previously taken for delinquent taxes. The treasurer refused because two years previously he had issued a deed to another person claiming to be the owner. Although not brought in mandamus, the court concluded this was an action in the nature of mandamus and specifically held that "Any order commanding a public officer to perform a ministerial duty is equivalent to a writ of mandamus and should be governed by the rules for issuing such writs."[59]

Since a mandamus action must be tried on the writ and the

56. 74 N.M. at 32-33, 390 P.2d at 275.

57. State ex rel. Roberson v. Board of Ed. City of Santa Fe, 70 N.M. 261, 372 P.2d 832 (1963); Kiddy v. Board of County Commissioners of Eddy County, 57 N.M. 145, 255 P.2d 678 (1953); State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

58. 48 N.M. 507, 153 P.2d 514 (1944).

59. 48 N.M. at 510, 153 P.2d at 515. The court denied the writ for failure to find a "clear" non-discretionary duty owed the petitioner.

answer, and since the court had already blurred the lines between mandamus and negative injunction,[60] *Heron* raised the specter of the case brought (apparently properly) in injunction, but "in the nature of mandamus" which must fail because of the absence of a writ in proper form. Furthermore, if as *Heron* suggested, mandamus is an exclusive remedy, the possibility was raised that future litigants would be subjected to reversal based merely on the form of the action and the pleadings.

Unfortunately, the specter of *Heron* came to life in *Laumbauch v. County Commissioners.*[61] *Laumbauch* began with a complaint in the District Court of San Miguel County challenging an annexation election. The complaint alleged that certain illegal votes had been cast, and that other qualified electors had been denied the right to vote. It further alleged that if the balance of the duly qualified voters were counted as required by law the result of the election would have been changed. The complaint then asked for the following relief:

> 1. That Defendants [election Judges] be required to count said rejected ballots or to call in the judges of election from said precincts numbers 22 and 65 of San Miguel County. To count the same for their respective precincts and to correct their returns.
>
> 2. That Defendants be required to deduct from said returns from said precincts the votes non resident and unqualified and challenged voters or to call in the judge of election to do so and to correct the returns.
>
> 3. That the Defendants be enjoined from proceeding with said canvass of election and that they continue to canvass by postponement thereof until they show cause if any they have, why they should not do as stated in Paragraph I and II of this prayer.[62]

The trial court signed an "Order to Show Cause" why an injunction should not issue. The defendants answered by filing a document entitled "Response to Alternative Writ of Mandamus," consisting of legal exceptions to the sufficiency of the "Order to Show Cause" which the defendants contended was an alternative writ of mandamus. The trial court found that although plaintiff had not intended to file an action in mandamus, this was in fact a mandamus action. Based upon that finding, the court held that the "Order to Show Cause" (now considered the alternative writ) did not contain sufficient allegations to state a claim upon which relief could be granted. The action was dismissed.

60. In re Sloan, 5 N.M. 590, 25 P. 930 (1891).
61. 60 N.M. 226, 290 P.2d 1067 (1955).
62. *Id.*

Plaintiff appealed, and the supreme court resoundingly affirmed, giving full life to the inchoate doctrine of *Heron.* The court began with the principle that the nature of the action was to be determined not by the style of the case or form of the pleading, but rather by an *ad hoc* analysis of the relief requested and the parties involved. Pointing out that this was an action against a public officer to force compliance with a legal duty, the court believed itself compelled to follow the *Heron* rule that "any order commanding a public officer to perform a ministerial duty is equivalent to a writ of mandamus and shall be governed by the rules for issuing such writs."[63]

In *Laumbauch,* unlike *Heron,* the rule was applied to the mere technicalities of mandamus pleading.[64] The court followed the mandamus principle that the case must be tried solely on the writ and the answer. Finding the order to show cause to be a wholly insufficient alternative writ, the court affirmed the dismissal of the lower court despite the presence of a complaint with all the necessary allegations to warrant consideration on the merits.

Under a literal reading of *Laumbauch,* all actions seeking to compel action by public officials must be brought in mandamus, and the lack of the formal requirements of mandamus pleading will doom the action to failure. This places the prospective litigant in a serious dilemma. As will be discussed in more detail,[65] there must be no adequate remedy at law or any official discretion involved if mandamus is to succeed. Even where a case involves official discretion or an available remedy at law exists, the strict application of *Laumbauch* would force a litigant to pursue mandamus as an exclusive remedy, risking a ruling that mandamus will not lie. If, on the other hand, the pleader ignores *Laumbauch* and files an action for declaratory or injunctive relief, he runs the risk of a *Laumbauch* dismissal for failure to plead in mandamus.[66]

One method of obviating the problem was brought to light in *Montoya v. Blackhurst.*[67] In *Montoya* the magistrate court had issued an *ex parte* writ of replevin, pursuant to the New Mexico

63. 60 N.M. at 233, 290 P.2d at 1071, quoting Heron v. Garcia, 48 N.M. 507, 508, 153 P.2d 514, 515 (1944). The fact that the complaint asked for a negative injunction against adjournment of the canvassors was of no moment to the court; this point was brushed aside with the assertion that the injunctive relief requested in the complaint was merely sought to aid the court's mandamus powers.

64. In *Heron,* the question was one of substance, *i.e.,* is the legal duty clear?

65. *See* When Mandamus Will Lie, *infra.* p. 169.

66. For a classic example of the consequences which can result from failing to heed Laumbauch, *see* Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).

67. 84 N.M. 91, 500 P.2d 176 (1972).

replevin statute.[68] Petitioner filed a mandamus action in the district court seeking to invalidate the replevin statute on the grounds that the magistrate court had a mandatory, non-discretionary duty under the United States and New Mexico Constitutions to provide notice and an opportunity to be heard prior to the issuance of writs of replevin.

Laumbauch apparently dictated mandamus since the case sought to compel public officers (the magistrate judges) to comply with their obligation under the law. However, in anticipation of the possibility that the district court would conclude mandamus was improper because (1) there existed an adequate remedy at law by appeal, or (2) the case involved a discretionary function of the Judges, the petition was amended to a complaint for declaratory and injunctive relief *or in the alternative,* petition for alternative writ of mandamus. The district court ordered Defendants to show cause why a declaratory judgment should not be awarded and why an injunction should not issue. The court also issued an alternative writ of mandamus, returnable on the same day as the order to show cause. If mandamus was proper, the court could make the writ permanent, and if it was improper but the case merited relief, the court could grant the declaratory and injunctive relief. At the hearing on the merits, the district court granted both forms of relief. It declared the statute unconstitutional, enjoined its enforcement, and issued a peremptory writ of mandamus. On appeal, the New Mexico Supreme Court affirmed the granting of the writ of mandamus.

The appellants-respondents contended on appeal that under *Laumbauch,* the only allowable pleadings in a mandamus action were the Writ and the Answer, and therefore it was reversible error to join a mandamus action with a complaint for declaratory and injunctive relief. The court expressly stated that it did not decide whether joinder of declaratory judgment with mandamus was proper, but in ruling on the propriety of mandamus and affirming the lower court, it did decide that issue, albiet *sub silentio.*[69] Reading *Montoya* with prior supreme court rulings that injunctive relief may be combined with mandamus,[70] and that a declaratory judgment is also appropriate where mandamus will lie,[71] leads to the firm conclusion that alternative pleading is valid, and can obviate the *Laumbauch* prob-

68. N.M. Stat. Ann. § 36-13-6 (1953), *et. seq.*

69. *Cf.* Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).

70. Laumbauch v. Board of County Comm'rs., 60 N.M. 226, 290 P.2d 1067 (1955). *In re* Sloan, 5 N.M. 500, 25 P. 930 (1891).

71. Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958).

lem.[72] If the court concludes the action is not ripe for mandamus, declaratory and injunctive relief can be awarded. Alternatively, if the court concludes it is ripe for mandamus, the declaratory and injunctive relief can be denied at no loss to the petitioner.

Where *Heron* and *Laumbauch* lead us astray is in the negative inference present in both cases that declaratory and injunctive relief may not be sought against public officials to compel them to follow the law. Declaratory and injunctive relief have been used to that end,[73] and pleading in that form against government officials need not be abandoned, *Laumbauch* to the contrary notwithstanding.[74]

WHEN MANDAMUS WILL LIE

There are three major areas of concern for the litigant seeking to challenge official action or inaction by way of mandamus. First, in order to have standing the petitioner must be a party "beneficially interested" within the meaning of the mandamus statute.[75] Second, it must be clear that there is no plain, speedy and adequate remedy at law.[76] And, finally, petitioner must not be seeking to control official discretion.[77] If any of these three factors are wanting, mandamus will not lie and the action will be subject to dismissal. Since these three issues are critical to the decision to seek mandamus, each shall be analyzed individually, in an effort to uncover the pitfalls awaiting those who may resort to mandamus without adequately assessing its propriety.

A. Standing—When is a Party "Beneficially Interested"?

Any consideration of standing in mandamus begins with the

72. Where alternative pleading is used, however, adherence to mandamus pleading requirements cannot be avoided. Compare Blackhurst v. Montoya, 84 N.M. 91, 500 P.2d 176 (1972), with Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).

73. Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958); *See* Peoples Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

74. Welcome clarification in this area could come from express supreme court recognition of the fact that suits for declaratory and injunctive relief are equally appropriate. While mandamus is generally more expeditious, since the court may set the answer date short of the normal 30 days, this difference is diminished somewhat by Rule of Civil Procedure 65 which allows for consolidation of a hearing on the merits with a hearing on preliminary injunction, if expedition in an injunctive action is necessary. Mandamus, of course, may be sought originally in the supreme court, while an injunctive action must be brought in district court. These and other distinctions must be weighed by the litigant in choosing the form of action, but a well pleaded action in either form should pass muster with the modern court. For a further discussion of this point *see* note 100, *infra*, and text accompanying notes 173-79, *infra*.

75. N.M. Stat. Ann. § 22-12-5 (1953).

76. *Id.*

77. N.M. Stat. Ann. § 22-12-4 (1953).

seminal case of *State ex. rel. Burg v. City of Albuquerque.*[78] In *Burg,* the petitioner sought a writ of mandamus against the city and the city commissioners to compel them to submit an ordinance granting a utility franchise to the voters pursuant to a proper referendum petition. The district court dismissed the writ for failure to state a cause of action, and the supreme court reversed and remanded.

Addressing the contention that petitioner did not have standing, the court stated as the general rule:

> . . . that mandamus may be issued to enforce the performance of a public duty by public officers, upon application of any citizen whose rights are affected in common with those of the public. Such person is "beneficially interested" in the enforcement of the laws.[79]

After reviewing the status of the law relative to whether mandamus can be brought only by the Attorney General, the court opted for the prevailing view that private persons may move for mandamus to enforce a public duty. Following its stated rule, the court held that petitioner's status as a resident and qualified elector of the City of Albuquerque was sufficient to "imply that degree of identification with the citizenship of the community"[80] that would entitle him to bring the action.

The broad standing definition enunciated in *Burg*—"any citizen whose rights are affected in common with those of the public"—was further developed in *Hutcheson v. Gonzales.*[81] *Hutcheson* involved an original petition filed in the supreme court by a qualified elector against the Secretary of State to compel her to comply with Article XIX, Section 1 of the Constitution which seemingly obligated her to place certain proposed Constitutional Amendments on the general election ballot.

The court considered together respondent's contentions that the original writ was improvidently issued and that petitioner lacked standing "because the same principles touch each contention."[82] Relying on an early original jurisdiction case, the court expanded the *Burg* doctrine to allow standing in mandamus "where the case 'is publici juris; that is, a case which affects the sovereignty of the state,

78. 31 N.M. 576, 249 P. 242 (1926).
79. 31 N.M. at 584, 249 P. at 246.
80. 31 N.M. at 586, 249 P. at 247.
81. 41 N.M. 474, 71 P.2d 140 (1937).
82. 41 N.M. at 491, 71 P.2d at 151. *See* notes 2-5 *supra* and accompanying text for a discussion of original mandamus jurisdiction.

its franchises or prerogatives *or the liberties of its people.*' "[83] (Emphasis by the court.) Finding that this case involved the right to vote, which the court characterized as "one of the 'blessings of liberty,' "[84] the court ruled that petitioner was "beneficially interested" within the meaning of the mandamus statute.[85] *Burg* and *Hutcheson* clearly established that standing in mandamus is broadly conferred upon those seeking to enforce public rights. In essence, then, a petitioner in mandamus is in the nature of a private attorney general, seeking to protect rights which are of a public nature.

Unfortunately, in *State ex rel. Gomez v. Campbell*[86] the waters of mandamus standing were muddied. *Gomez* was brought by "residents, citizens, qualified electors and taxpayers of the City and County of Santa Fe"[87] who sought by way of mandamus to compel the transfer to Santa Fe of all offices of the executive branch of government. The action was based upon certain constitutional requirements for the Executive Branch.[88]

The *Gomez* court sidestepped both *Hutcheson* and *Burg* by finding that "[t]here is no question in this case relating to the elective franchise or the right to vote. . . ."[89] Relying primarily upon *Asplund v. Hannett,*[90] the court concluded that petitioners were without standing. Surprisingly, however, after denying standing and warning against the dangers of rendering advisory opinions, the court turned to consider the merits, stating:

> However, upon rare occasions *involving questions of great public interest,* the Court may, in its own absolute discretion, proceed to determine the question. (citations omitted) Although not without reluctance, in our judgment the instant case is a proper one for such a determination.[91] (emphasis supplied)

83. Hutcheson v. Gonzales, 41 N.M. 474, 492, 71 P.2d 140, 151, citing State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611, 613 (1912).

84. 41 N.M. at 492, 71 P.2d at 151.

85. 41 N.M. at 494, 71 P.2d at 152. The court distinguished the narrow non-mandamus standing case, Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926), on grounds that plaintiff in that case brought the action as a taxpayer seeking to vindicate merely a private right.

86. 75 N.M. 86, 400 P.2d 956 (1965).

87. *Id.* at 88, 400 P.2d at 958.

88. Article V, Sec. 1 of the New Mexico Constitution reads in pertinent part as follows:
> The officers of the executive department except the lieutenant-governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

89. 75 N.M. at 91, 400 P.2d at 959.

90. 31 N.M. 641, 249 P. 1074 (1926).

91. 75 N.M. at 92, 400 P.2d at 960 (emphasis added).

The action of the court in *Gomez* belied its words. While stating that the petitioners lacked standing, the court applied a variation of the *Burg-Hutcheson* rule and allowed the case to proceed because of its public import.[92]

The court moved back to its pre-*Gomez* view of mandamus standing in word as well as deed in *State ex rel. Castillo Corp. v. New Mexico State Tax Commission.*[93] In *Castillo,* the court held that petitioner had standing even though the right sought to be enforced was a private right (the right of a taxpayer) because the "case involves a question of such unusually great public interest that we feel called upon to exercise the discretion vested in us and to determine the issue."[94]

The court, in 1971, gave renewed emphasis to the *Burg-Hutcheson* public interest concept of standing in mandamus actions in *Womack v. Regents of the University of New Mexico.*[95] While holding that Petitioner did not have standing as a mere taxpayer, the court, citing *Burg,* went out of its way to declare in dictum that: "This is not to say that a private person may not sue for mandamus to enforce a public duty not due to the state."[96]

Most recently the court reemphasized that standing in mandamus is dependent upon the public nature of the right sought to be enforced. In *City of Santa Rosa v. Jaramillo*[97] the court found that a city had standing to challenge by way of mandamus the failure of the Alcoholic Beverage Control Department to revoke a license as required by law. The court relied on the fact that "the object is the enforcement of a public right,"[98] and then took the public interest notion to an extreme, noting that in this case (where the petitioner was a municipality) it was not even necessary for the petitioner "to show that it had any legal interest in the result."[99]

In essence then, standing in mandamus is based upon the public nature of the issue sought to be resolved. If the right sought to be enforced is public in nature, then petitioner has standing to bring the

92. For a somewhat different view of *Gomez see* Utton, *Law of Standing in New Mexico,* 2 N.M. L. Rev. 171, 182-85 (1972).

93. 79 N.M. 357, 443 P.2d 850 (1969).

94. *Id.* at 359, 443 P.2d at 852. In *State, ex rel. Barela v. New Mexico State Board of Education,* 80 N.M. 220, 453 P.2d 583 (1969), the court, without extended discussion, waived aside lack of standing arguments in a case in which petitioners brought an action as mere property owners within a school district seeking to void a consolidation by way of mandamus. This case can be rationalized only on the private-right-brigaded-with-public-interest doctrine of *Castillo.*

95. 82 N.M. 460, 483 P.2d 934 (1971).

96. 82 N.M. at 461, 483 P.2d at 934.

97. 12 N.M. State Bar Bull. 624 (1973).

98. 12 N.M. State Bar. Bull. at 625.

99. *Id.*

case. If the right is private in nature, standing will be found if the private right is infused with sufficient public importance. The court has, thus, given sufficiently broad definition to "a person beneficially interested" within the meaning of the mandamus statute to allow private suitors to vindicate public rights or private rights clothed with public interest. As a result, where clear official wrongs are perpetrated against the public at large, the remedy is at least theoretically available through any person.[100]

B. Is There a Plain, Speedy and Adequate Remedy at Law?

The second prerequisite for mandamus is the absence of any plain, speedy and adequate remedy in the ordinary course of law.[101] If there is an alternative remedy, the writ ordinarily will not issue.[102] The words "remedy in the ordinary course of law" have been defined as: (a) a remedy in damages; (b) a remedy by appeal to a higher court; and (c) an administrative remedy.

Mandamus is not a proper remedy to enforce contract rights since there exists an adequate remedy at law for damages.[103] Also, if there exists a remedy by way of *quo warranto,* mandamus will not lie.[104] Where the alternative remedy for damages is not adequate, as in the case of an action to compel the state to comply with its obligations under a contract involving real property, mandamus will lie.[105]

Initially, the New Mexico Supreme Court took a restrictive view of mandamus where an appeal might lie. Following the narrow view of mandamus expressed in *Conklin v. Cunningham,*[106] the court in *State ex rel. Sweeney v. Second Judicial District Court*[107] held that

100. The public nature of standing and the need to allege it in those terms in mandamus is radically different from the standing considerations in the usual injunction case. The latter situation usually calls for alleging standing in private and personal terms rather than in the posture of vindication on behalf of the public. This conceptual difference should be kept in mind and considered in deciding whether to bring an action in mandamus or injunction. For a discussion of other differences between injunction and mandamus, *see* note 74, *supra* and text accompanying notes 173-79, *supra.*

101. N.M. Stat. Ann. § 22-12-5 (1953).

102. State ex rel. Sweeny v. Second Judicial Dist., 17 N.M. 282 (1912). As pointed out in note 18, *supra,* the supreme court may issue the writ under its superintendency power irrespective of the adequacy of other remedies.

103. Shepard v. Board of Education of Jemez Springs Mu. School Dist., 81 N.M. 585, 470 P.2d 306 (1970), Sanchez v. Board of Education of Town of Belen, 80 N.M. 286, 454 P.2d 768 (1969), State ex rel. Evans v. Field 27 N.M. 384, 201 P. 1059 (1921), State v. Board of Education, 18 N.M. 183 (1913).

104. Jaramillo County Clerk v. State ex rel. Board of County Comm'nrs., 32 N.M. 20, 250 P. 729 (1926).

105. State Highway Commission v. Clark, 79 N.M. 29, 439 P.2d 547 (1968).

106. 7 N.M. 445, 455, 38 P. 170 (1894).

107. 17 N.M. 282, 127 P. 23 (1912).

mandamus would *not* lie to compel a district court to reinstate an appeal from probate court which it had dismissed for want of jurisdiction, as there existed an adequate remedy by appeal.[108]

Since *Sweeney*, the court has carved out numerous exceptions to this rule and held that the writ will issue, notwithstanding the existence of a right of appeal: (1) where the process of appeal will result in unnecessary delay and expense;[109] (2) where it will result in the denial of fundamental constitutional rights;[110] (3) where the petitioner is clearly and unquestionably entitled to relief on the merits;[111] and (4) where the issue would be moot on appeal.[112]

In *State ex rel. Cardenas v. Swope*,[113] the court issued a writ to a district judge directing him to set a case for trial in Valencia County, *after* he had granted a motion for a change of venue to Bernalillo County. The court held that the remedy by appeal was inadequate because of the great delay and expense involved if the petitioner had to defend and appeal the decision to the supreme court for reversal on the technical ground of improper venue.

In *Flores v. Federici*,[114] the defendant in a criminal case was denied the right to trial by jury under Article II, Section 12 of the New Mexico Constitution. The court concluded the writ should be granted notwithstanding the right of appeal, because of the "fundamental right" involved:

> The respondent strongly asserts that mandamus is not proper since petitioner has an adequate remedy at law. Frankly, we do not agree. *The petitioner has been denied a fundamental right* which should not be left to any contingency. We think mandamus is the proper remedy. To hold otherwise could lead to palpable absurdity.[115] (emphasis supplied)

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108. 17 N.M. at 285, 127 P. at 25. Finding the remedy by appeal to be adequate in workmen's compensation cases, the court has declined to consider such a case by way of mandamus. State ex rel. Gallegos v. McPherson, 63 N.M. 133, 314 P.2d 891 (1957). The Court also has found appeal to be adequate to challenge an adverse decision of the Commission of Public Lands, absent the existence of exigent circumstances. Andrews v. Walker, 60 N.M. 69, 287 P.2d 423 (1955).

> Most recently the court found an adequate remedy by way of appeal from an order refusing to quash a writ of garnishment where the question is the jurisdiction of the issuing court. Alfred v. Anderson, 13 New Mexico Bar Bulletin and Advance Opinions 54 (1974).

109. State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954).
110. Flores v. Federici, 70 N.M. 358, 374 P.2d 119 (1962).
111. Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963).
112. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).
113. 58 N.M. 296, 270 P.2d 708 (1954).
114. 70 N.M. 358, 374 P.2d 119 (1962).
115. *Id.* at 361, 374 P.2d at 121 (Emphasis added).

In *Sender v. Montoya,*[116] the court added another consideration to be weighed in determining whether the remedy by appeal is adequate. The supreme court in *Sender* granted a writ of mandamus against a district judge ordering him to dismiss a complaint for failure of prosecution. Relying on *Swope* and *Flores,* the court listed as one of its reasons for granting the writ, that "the final result cannot be otherwise than favorable to Petitioner."[117] The court concluded that mandamus is proper whenever "a refusal to do so would have required a reversal on appeal after trial."[118]

If *Sender* were read to allow mandamus whenever a petitioner is able to establish that he will succeed on appeal, it would negate the inadequate remedy of law doctrine and render every clear error by a district court subject to review by way of mandamus. The *Sender* fact situation involved sufficient burden, expense, delay and hardship, however, to render remedy by appeal inadequate.[119] When such circumstances exist, the certainty of success on appeal becomes, as it did in *Sender,* an important consideration in favor of allowing mandamus.

Most recently in *Montoya v. Blackhurst,*[120] the court added another consideration in determining whether the remedy by appeal would be adequate—whether the issue on appeal would be moot because the damage sought to be prevented would already been done. *Montoya* was an attack on the constitutionality of the magistrate court replevin statutes. The supreme court concluded man-

116. 73 N.M. 287, 387 P.2d 860 (1963).
117. *Id.* at 291, 387 P.2d at 863.
118. *Id.*
119.

> The issue in the trial court involves the ownership and right to possession of over three hundred separate documents, many of which are several pages in length and practically all of which are in longhand in the Spanish language. For these documents to be transcribed, and perhaps translated, would of itself involve great cost and considerable delay in the preparation of a transcript, even if the ordinary delays attendant to a somewhat involved trial could be minimized. It would be many months, if not years, before the case could be decided by us. However, this of itself would not justify the extraordinary relief sought. . . . It is more the combination of all the various facets of the litigation which makes it apparent that to refuse the writ "would result in needless expense and delay.

Id. at 291, 387 P.2d at 863.

120. 84 N.M. 91, 500 P.2d 176 (1972). *See also,* State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n., 79 N.M. 357, 443 P.2d 850; State ex rel. State Highway Comm'n v. Clark, 79 N.M. 29, 439 P.2d 547 (1968). It is important to note that the court has held that where a petitioner fails to exhaust an available remedy by appeal, he totally forecloses his right to mandamus, even though the right of appeal no longer exists. State Board of Parole v. Lane, 63 N.M. 105, 314 P.2d 602 (1957).

damus was proper because the constitutional issue would have been moot on appeal:

> In order to test the constitutionality of the procedures of the replevin statute, a defendant must appear at the hearing and assert as a defense the unconstitutionality of the replevin statutue. If he should lose, on appeal to the district court, the issue of a taking without a prior hearing would clearly be *moot* because he had his day in court at the magistrate level. If he should win on the merits at the magistrate level there would be no appeal to test the taking of his property without notice and an opportunity to be heard.[121]

The keys, then, to the allowance of mandamus as a remedy when the right of appeal exists, are the presence of irreparable injury, the deprivation of a fundamental right, great hardship, costly delays and unusual expense, which, when taken together, render the remedy by appeal inadequate. Where the harm to petitioner is sufficiently grave the court has not been timid about deeming the remedy by appeal inadequate.

An adequate remedy by appeal to an administrative body will bar mandamus[122] as certainly as an adequate remedy by appeal to a court, and similar rules apply to the determination of whether the administrative appeal is adequate.[123] Although mandamus will not lie before administrative remedies have been exhausted, it is the appropriate remedy to compel a state agency to provide administrative remedies it has failed to make available.[124]

A dilemma is created by two somewhat contradictory New Mexico decisions relating to exhaustion of administrative remedies prior to application for mandamus. In *Brown v. Romero,*[125] the plaintiff, a school teacher, was terminated without written notice or opportunity to be heard. The terms of her teaching contract provided that unless she received written notice to the contrary, her contract was automatically renewed each year. Pursuant to statute, she sought a hearing before the local school board. The board denied her a hearing contending that she was not entitled to one because she did not have tenure. From the denial of a hearing, Mrs. Brown appealed to the state board which also refused her a hearing. From the state board denial a statutory appeal was taken to district court. In district court,

121. 84 N.M. at 92, 500 P.2d at 177.

122. Tafoya v. New Mexico State Police Bd., 81 N.M. 710, 472 P.2d 973 (1970). Shepard v. Board of Education of Jemez Springs, 81 N.M. 585, 470 P.2d 306 (1970).

123. *See, e.g.,* Tafoya v. New Mexico State Police Bd., 81 N.M. 710, 472 P.2d 973 (1970).

124. Stapleton v. Huff, 50 N.M. 208, 173 P.2d 612 (1946).

125. 77 N.M. 547, 425 P.2d 310 (1967).

the boards of education which had denied her a hearing, moved to dismiss her appeal for her failure to exhaust administrative remedies. The district court agreed with the boards and dismissed the action. The supreme court affirmed, holding that in this case exhaustion of the remedy of mandamus was a prerequisite to statutory appeal to district court:

> The allegation that both the local board and the State Board refused a hearing makes it plain that the teacher in this instance has failed to exhaust her administrative remedies. Mandamus was available as a remedy to test Mrs. Brown's right to a hearing before the governing board.[126]

The *Brown* case clearly holds that before an appeal can be sought in the courts from an inadequate administrative hearing or a failure to grant a hearing, the plaintiff must first exhaust available extraordinary remedies.

On the other hand, the court in *State ex rel. Shepard v. Board of Education of Jemez Springs,*[127] held that a party must exhaust his administrative and judicial remedies of appeal before mandamus is proper.[128] If these appellate routes are ignored, mandamus will not lie. The teaching of the two cases taken together is that after an adverse decision of a state agency, the petitioner must attempt to invoke whatever administrative review is available. If no hearing is granted, however, the only appropriate way to proceed is to seek a writ of mandamus prior to appealing through the administrative framework. If, on the other hand, an opportunity for a hearing is provided by the agency, the petitioner is obligated to seek review by way of available administrative and judicial appeals.[129]

C. Does the Writ Seek to Control "Official Discretion"?

The third line of inquiry by a court in evaluating the propriety of mandamus is whether the petitioner is attempting to control official

126. 77 N.M. at 549, 425 P.2d at 312.

127. 81 N.M. 585, 470 P.2d 306 (1970).

128. 81 N.M. at 586, 470 P.2d at 307. *See, e.g.,* State Board of Parole v. Lane. 63 N.M. 105, 314 P.2d 602 (1957).

129. If, after a request for a hearing before the administrative agency a decision is rendered denying relief to the petitioner which is based on *factual determinations* by the agency, but the petitioner is unsure whether this would be construed by the court to constitute a hearing, the safest route is to appeal from the decision and also seek the writ. In the mandamus proceeding, the petitioner can take the view that the agency has failed to provide him with an administrative hearing and therefore to protect his rights of appeal under *Brown* he must seek the extraordinary writ. In the appellate case he should contend that the decision was a final appealable administrative action. The cases should be consolidated and the alternative theories explained as an attempt to avoid the *Brown-Shepard* dilemma.

discretion.[130] The court speaks to the same issue by asking whether the act sought to be compelled is a clear "ministerial duty," but the inquiry under either label is the same.[131]

In outlining the contours of official discretion the court has developed three lines of authority. One deals with the discretion of judges, another with the discretion of public officers and a third with judicial review of the fact-finding decisions of administrative bodies where no right of appeal exists.

1. The Discretion of Judicial Officers.

The court in *State ex rel. Sweeney v. Second Judicial District*[132] articulated its first general definition of judicial discretion:

> In every court of general jurisdiction there resides authority which is not strictly defined or limited by fixed rules of law, *but which must be exercised in order to justly vindicate substantive rights, properly framed [sic.] issues, and duly conduct trial.* This authority may be said in a general way to be the power of the judge to rule and decide as his best judgment and sound discretion dictate.[133] (emphasis supplied)

Under this broad definition, the court held that the question of jurisdiction over an appeal from probate court was within the discretion of the district judge and not subject to control by mandamus.[134]

The court has retreated dramatically from the absolute prohibition laid down in *Sweeney*. In *State ex rel. Heron v. Kool*,[135] the court held that even if the issue involves discretion, the writ is proper if there has been an "abuse of discretion."[136] In *Sender v. Montoya*,[137] the court, over the vigorous dissent of Justice Noble, narrowed the scope of judicial discretion further. The petitioner brought

130. N.M. Stat. Ann. § 22-12-4 (1953). Although the statute refers to judicial discretion, the term has been applied to all official discretion exercised by governmental agencies.

131. *See, e.g.*, Witt v. Hartman, 82 N.M. 170, 477 P.2d 608 (1970).

132. 17 N.M. 282, 127 P. 23 (1912).

133. 17 N.M. at 283, 127 P. at 24, quoting *Alexander v. Smith*, 20 Tex. Civ. App. 304, 49 S.W. 916 (1899).

134. *Id.*

135. 47 N.M. 218, 140 P.2d 737 (1943).

136. 47 N.M. at 220, 140 P.2d at . In State ex rel. Cardenas v. Swope, 58 N.M. 296, 270 P.2d 708 (1954), the court found an abuse of discretion in a decision concerning proper venue. One of the factors justifying the application of the abuse of discretion doctrine was the tremendous waste of judicial time and resources if the matter proceeded to trial in the wrong venue. Yet, in State ex rel. Gallegos v. MacPherson, 63 N.M. 133, 314 P.2d 891 (1957), the court found no abuse of discretion by the lower court in granting a new trial.

137. 73 N.M. 287, 387 P.2d 860 (1963).

an original mandamus proceeding in the supreme court seeking to compel a district judge to dismiss a replevin action brought against him by the state records administrator. The basis of the petition was the failure of plaintiff in the replevin action to take any action to bring the case to trial for more than two years. The petitioner contended that under Rule 41(e) of the New Mexico Rules of Civil Procedure, the court had a non-discretionary duty to dismiss the action. The trial court disagreed and refused to dismiss because the plaintiff had filed requests for admissions within the two year period.

The supreme court granted the writ, concluding that the dismissal under Rule 41(e) was mandatory notwithstanding the filing of the requests for admissions. Justice Compton, writing for the court, addressed the question whether an act by a judicial officer involves judicial discretion if the judge must exercise legal or factual judgment before acting. He concluded that even though a judicial act (in this case whether to grant a Rule 41 motion) may require an exercise of judgment, this does not mean it necessarily involves judicial discretion.[138] He concluded further that there is no clear and distinct line dividing acts which involve judicial discretion and those that do not. Rather, each case must be examined on its own facts.[139]

Justice Noble, in dissent, attempted to define judicial discretion in terms of whether the legal issue before the lower court had previously been ruled upon by the supreme court and hence was clear. After pointing out that the court below had exercised judicial judgment he stated:

> The motion in this case sought dismissal for failure to prosecute the action within two years after its filing. Response to the motion recited the actions reflected by the files and called for the exercise of judicial judgment as to whether any of those actions, including plaintiff's request for admissions, constituted such action by plaintiff to bring the cause to its final determination as to satisfy the

138. 73 N.M. at 292, 387 P.2d at 862.

139.

> Thus, *Kiddy* implies that mandamus will issue to control the actions of an officer if he acts contrary to law, but the writ will be denied when the officer decides in accord therewith. Other language in the opinion, to the effect that mandamus is inappropriate where interpretation and judgment are necessary, must be considered in context, not as an inflexible rule. Were it otherwise, mandamus would practically never issue, because it can almost always be shown that some form of judicial determination must be exercised upon which the refusal to act is based. *The border line between judicial discretion and ministerial duty is not clearcut. It is frequently a matter of degree—a shading from black to white or a grey area which can only be determined in each particular case.*

73 N.M. at 292, 387 P.2d at 863. (Emphasis added.)

> requirements of and prevent mandatory dismissal under Rule 41(e).[140]

He concluded the writ should not have issued in this case and forcefully argued it should not issue in any case where the exercise of judgments of fact or law are involved.[141] The court in *Sender,* by rejecting the dissent of Justice Noble, highlighted its willingness in a proper case to overturn a lower decision by mandamus, even though the lower court exercised legal and factual judgment before acting.

In *State ex rel. Peters v. McIntosh,*[142] the court without explanation went further and stated that mandamus will control judicial discretion if it will prevent the doing of useless things. In *Montoya v. Blackhurst,*[143] the writ of mandamus issued to a magistrate judge directing him to dismiss a writ of replevin previously issued because the issuance of the writ violated due process. Issuance of the writ was upheld even though the replevin statutes provided that the court *shall* issue the writ of replevin upon posting of the appropriate bond. The magistrate court had breached its mandatory duty to *not* follow the statute in view of its higher duty to follow the United States Constitution.[144]

Perhaps the most dramatic evidence of the court's movement away from the broad definition of "judicial discretion" articulated in *Sweeney,* is found by a comparison of that case with the more recent decision in *Frock v. Fowlie.*[145] In *Sweeney,* the petitioner sought an original writ in the supreme court to compel a district court to assume jurisdiction of an appeal from probate court. The lower court had previously dismissed the appeal for lack of jurisdiction. The supreme court denied the writ because there existed a plain speedy and adequate remedy by appeal, and because the action of the lower court involved judicial discretion.

Fifty-seven years later, an original writ was again sought from the

140. 73 N.M. at 293, 387 P.2d at 864.

141.

> [B]ut this court has no original jurisdiction to direct the respondent court to decide an issue, not theretofore specifically decided by this court, in a particular manner. (Citations omitted.) Mandamus was said in *People v. Dusher,* 411 Ill. 535, 104 N.E.2d 775, 779, not to lie to direct or modify the exercise of judicial discretion where the Judge must answer the inquiry: " '*What is the law* and has it been violated or obeyed?' "

73 N.M. at 293, 387 P.2d at 864.

142. 80 N.M. 496, 458 P.2d 222 (1969).

143. 84 N.M. 91, 500 P.2d 176 (1972).

144. Even more recently, the court held that mandamus was the appropriate remedy for compelling the District Attorney to comply with his mandatory duty under the due process clause to *not* bring murder indictments against criminal defendants in breach of "plea bargained" agreements. State ex rel. Plant v. Scerese, 84 N.M. 312, 502 P. 1002 (1972).

145. 80 N.M. 506, 458 P.2d 581 (1969).

supreme court again seeking to compel a district judge to assume jurisdiction of an appeal from probate court. The district judge had concluded he did not have jurisdiction of the appeal based upon his interpretation of the complicated statutes relating to probate court appeals. The supreme court in *Frock* analyzed the statutes, disagreed with the interpretation of the lower court, and issued a peremptory writ directing him to reinstate the appeal without mention of judicial discretion, *Sweeney*, or its progeny.

It is now beyond question that in cases involving questions of law, such as the constitutionality or interpretation of a statute, the rubric of judicial discretion is no longer a bar to mandamus.

2. Discretion of Public Officers

The decisions limiting the power of the court to review administrative discretion by mandamus did not have so humble or conservative a beginning as did the decisions dealing with the discretion of judges. The supreme court has always been unwilling to restrict its power to review administrative agencies by way of mandamus.

As early as 1913, in the case of *Lorenzio v. James*,[146] the court was called upon to answer the question whether certain county commissioners could be compelled to revoke a liquor license pursuant to a statute which provided: "Any retail liquor license granted as provided for by law *may* be revoked by the Board of County Commissioners of the county wherein the same was issued. . . ."[147] Although the statute on its face granted discretion to the commission, by use of the word *may*, the court found that mandamus was appropriate and no discretion was involved.[148] Nor did the fact that the public officer made factual determinations in deciding whether or not to revoke the license mean the duty was discretionary:

> A duty to be performed is nonetheless ministerial because the person who is required to perform it may have to satisfy himself of the existence of the state of facts under which he is given his right or warrant to perform the required duty.[149]

In *State ex rel. Perea v. County Commissioners*,[150] the court temporarily retreated from its position in *Lorenzio*. While agreeing

146. 18 N.M. 240, 135 P. 1172 (1913).
147. Laws 1905, ch. 115, § 4.
148. *See* State ex rel. Robinson v. King, 13 New Mexico Bar Bulletin and Advance Opinions 22 (1974), where any language in the election code was construed as being mandatory, thereby supporting a writ of mandamus.
149. 18 N.M. at 244-45, 135 P. at 1173.
150. 25 N.M. 338, 182 P. 865 (1919).

that an act was not discretionary merely because it involved factual determinations, the court suggested that if an exercise of judgment was involved, the act was discretionary and mandamus would not lie:

> A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.[151]

The court, in *Kiddy v. Board of County Commissioners of Eddy County,*[152] continued to backslide and articulated this very narrow definition of acts subject to mandamus:

> As brought out by the court in *Wailes v. Smith,* a nondiscretionary or ministerial duty exists when the officer is entrusted with the performance of *an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion nor judgment.*[153] (emphasis supplied)

The retreat from *Lorenzio,* however, was shortlived. Just four years after *Kiddy,* the court, in *State ex rel. Four Corners Exploration Co. v. Walker,*[154] abandoned the position taken in *Kiddy* and *Perea.* The court broadened its mandamus power by limiting the inquiry into administrative discretion to an examination of whether the *law* directs the public officer to act in a certain way. Whether or not the administrator has made factual determinations or whether he has exercised judgment before acting are not relevant under the *Four Corners* test.

> . . . it is nevertheless well established that mandamus will lie to compel the performance of mere ministerial acts or duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown, *even though the officer be required to exercise judgment before acting.*[155] (emphasis supplied)

Under *Four Corners,* the defense of discretion by a public officer

151. 25 N.M. at 340, 182 P. at 866.

152. 57 N.M. 145, 255 P.2d 678 (1953).

153. 57 N.M. at 149, 255 P.2d at 681 (Emphasis added).

154. 60 N.M. 459, 292 P.2d 329 (1957). Since *Walker,* the court has upheld a mandamus action against the state parole board. The court recognized that the parole board has discretion to determine whom it will parole, and whose parole it may choose to revoke. However, the court held that where statutes proscribed procedures for parole revocation and the degree to which time previously served should be credited to his sentence, mandamus would lie to compel compliance with the statutes. Conston v. New Mexico State Board of Probation and Parole, 79 N.M. 385, 444 P.2d 296 (1968).

155. 60 N.M. at 463, 292 P.2d at 331.

appears to be limited to those situations where the official is not obligated as a matter of law to do the act.

In summary, the court has taken the position that it will examine acts of public officers on a case-by-case basis to determine whether discretion is involved and hence whether mandamus will lie. The court will not be deterred from reviewing official actions by mandamus solely because the public official was making factual determinations or exercising judgment before acting.

3. Review of Administrative Fact-Finding Bodies Where No Right of Appeal Exists

In *Swisher v. Darden,*[156] the court expanded the scope of mandamus by holding that mandamus is an appropriate remedy for review, on the record, of final agency action where no right of appeal exists. That decision placed administrative fact-finding boards in a category separate and apart from traditional mandamus respondents.

Mary Alice Swisher, a black, tenured teacher at Booker T. Washington High School in Las Cruces was terminated by the local school board when the black and white high schools in Las Cruces were integrated. She appealed the decision to the state school board, which found she had been terminated "without just cause." The local board refused to follow the state board's decision. Mrs. Swisher brought a mandamus action in the district court to enforce the state board decision against the local board. In the district court the board attempted to put on evidence and the testimony of witnesses. The court denied the proffer of additional evidence, and adopted the findings and decision of the state board, holding that they were not "arbitrary, unlawful, unreasonable or capricious."[157]

On appeal, the supreme court affirmed the lower court, holding that a mandamus action based upon the decision of an administrative board should be tried in the same manner as an administrative appeal, namely, on the record. The court also limited its review to "Whether its [the state board's] decision is based upon substantial evidence or whether it is arbitrary, unlawful, unreasonable or capricious."[158]

The court in *Ross v. State Racing Comm'n*[159] followed the *Swisher* case in reviewing by mandamus a final decision of the State Racing Commission denying the award of a license to engage in horse racing near Carlsbad, New Mexico. The court conceded that the

156. 59 N.M. 511, 287 P.2d 73 (1955).
157. 59 N.M. at 516, 287 P.2d at 77.
158. 59 N.M. at 515, 287 P.2d at 76.
159. 64 N.M. 478, 330 P.2d 701 (1958).

power vested in a board to grant a license on prescribed conditions is generally a matter of discretion. However, the court held, it had power by way of mandamus to "correct arbitrary or capricious action which amounts to an abuse of discretion and is thus contrary to law."[160] The court then reversed the racing commission because there was "no factual basis for the conclusion reached here."[161]

The supreme court has adhered to the principles of *Swisher* and *Ross,* and most recently articulated the state of the law in *Sanderson v. State Racing Comm'n:*[162]

> Generally, mandamus will not lie to control the discretion of an administrative board. [Citations omitted] *But an exception to the general rule is recognized where the administrative board has acted unlawfully or wholly outside its jurisdiction or authority, or where it has abused its discretion.*[163] (emphasis supplied)

Thus, the court has seen fit, where no right of review exists, to create a right of judicial review by way of mandamus.[164] When mandamus is used in this manner it is clear that the court should apply the traditional standard of review of administrative decisions.

MANDAMUS AND THE DEFENSE OF SOVEREIGN IMMUNITY

Perhaps one of the most significant features of mandamus is that it creates a vehicle for avoiding the doctrine of sovereign immunity.

Since the early case of *State ex rel. Evans v. Field,*[165] the supreme court has stated that actions in mandamus against public officers are not barred by the doctrine of sovereign immunity, because the suit is not one against the state, but rather is to enforce a duty owed by a public officer to his principal—the State. The court was unequivocal in this regard, despite the fact that the case involved a contract with the state and could result in an award of a money judgment against the state.[166]

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160. 64 N.M. at 483, 330 P.2d at 704.
161. *Id.*
162. 80 N.M. 200, 453 P.2d 370 (1969).
163. 80 N.M. at 201, 453 P.2d at 370.
164. Resort to mandamus was made necessary by the failure of the New Mexico Administrative Procedures Act to provide for general applicability to all agencies. *See* N.M. Stat. Ann. § 4-32-23 (1953), as amended.
165. 27 N.M. 384, 201 P. 1059 (1921).
166.

> [W]here the law directs or commands a state officer to perform an act under given circumstances, which performance is a mere ministerial act, not involving discretion, mandamus will lie to compel the action, notwithstanding performance of the state's contract may incidentally result. In such a case the action is not really upon the contract, but is against the officer as a wrongdoer. He is, under such circumstances, not only violating the rights of the

The principle was reasserted in *Gamble v. Velarde*,[167] an action against the state auditor, and in *Harriet v. Lusk*,[168] an action to enjoin the consolidation of public schools. Although *Harriet* was an action for declaratory and injunctive relief, the holding relating to sovereign immunity was dictated by its similarity to mandamus. The court concluded that had the action been in mandamus, sovereign immunity would not have been a bar:

> Before considering the merits of this case it is necessary to dispose of appellee's contention that this is a suit against the state concerning which the court is without jurisdiction. However, the defense of suit against the state does not apply in this case. . . .
>
> As we interpret Section 73-20-1 of 1953 Compilation, the duty of the State Board of Education to determine the economic feasibility of consolidation of schools not meeting minimum attendance requirements was mandatory. There was no discretion to so determine or not determine. If the board had refused to make the determination mandamus would certainly lie to enforce action on the part of the board. . . .[169]

Most recently, in *State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n*,[170] the supreme court allowed a corporation to sue the New Mexico Tax Commission[171] in mandamus to compel it to promulgate an order providing for a uniform assessment rate for ad valorem taxes:

> It is contended that the sovereign immunity doctrine is applicable to this case. We find such an argument completely without merit, having been answered in Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958). This is not a suit against the State; it is a mandamus proceeding to require the performance of a duty plainly required under the constitution, i.e., to prescribe an assessment ratio so that property shall be uniformly assessed in proportion to its value.[172]

The mandamus route around sovereign immunity has taken on increased importance due to the confused state of New Mexico law

relator, but is disobeying the express command of his principal the state. Injunction will likewise lie to restrain illegal action of a state officer, notwithstanding a breach of the state's contract may thus incidentally be prevented.

Id. at 389, 201, P.2d at 1061.

167. 36 N.M. 262, 13 P.2d 559 (1939).

168. 63 N.M. 383, 320 P.2d 738 (1958).

169. 63 N.M. at 386, 320 P.2d at 740-41.

170. 79 N.M. 357, 443 P.2d 850 (1969).

171. It is interesting to note that this was suit against the State Tax Commission as well as the individual commissioners and the court apparently did not consider this to be a problem.

172. 79 N.M. at 359, 443 P.2d at 852.

in the area of injunctions against state officials caused by *Sangre De Cristo Development Corp., Inc. v. City of Santa Fe.*[173] The court in *Sangre De Cristo* disregarded the substantial authority to the contrary[174] and held that sovereign immunity is a bar to an action seeking to enjoin a city and county from exercising planning and platting authority over a subdivision on Indian land. The court cavalierly ignored the contrary authority stating:

> A reference to the foregoing cited cases shows that in New Mexico the doctrine of governmental immunity has not only been adhered to in tort cases or in cases in which there is likely to be a direct and adverse effect upon the public treasury, but in other types of cases as well.[175]

Although this sweeping assertion suggests that all of the previous decisions of the court with respect to sovereign immunity have been reversed, no such reading is compelled. At the outset, the court pointed out that sovereign immunity became a problem because the action was brought against the city and county and not the individual city and county commissioners:

> The issue of governmental immunity arises from the fact that the Plaintiff sued defendants as governmental entities. *The councilmen and Commissioners of Defendants were not sued as individuals.*[176] (emphasis supplied)

This language is an invitation to litigants to avoid the sovereign immunity doctrine in New Mexico by engaging in the *Ex Parte Young*[177] fiction of suing individuals—rather than the state—to enjoin them from acting illegally and unconstitutionally under color of their office. This conclusion is bolstered by the recent decision of *Gomez v. Dulce Independent School District,*[178] in which the court held that the Federal Civil Rights Act of 1871[179] states a cause of action in state court and also creates an exception to the sovereign immunity doctrine.

However, the confusion caused by *Sangre De Cristo* has hardly

173. 84 N.M. 343, 503 P.2d 323 (1972).

174. *E.g.,* Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958); Board of Trustees of the Town of Casa Colorado Land Grant v. Pooler, 32 N.M. 460, 259 P. 629 (1927); State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).

175. 84 N.M. at 347, 503 P.2d at 327.

176. 84 N.M. at 346, 503 P.2d at 326.

177. 209 U.S. 123 (1908).

178. 85 N.M. 708, 516 P.2d 679 (1974). Whether the Dulce Independent School Board in addition to the individual members of that board is an appropriate defendant in a § 1983 action is now open to question in light of the Supreme Court's holding in City of Kenosha v. Bruno, 412 U.S. 507 (1973).

179. 42 U.S.C. § 1983 (1970).

dissipated, and until further clarified by the supreme court, mandamus is the only sure way to avoid sovereign immunity problems when seeking to compel action by governmental officials.

CONCLUSION

Early English antecedents of the modern writ of mandamus lead us to expect a remedy extraordinary in nature and narrow in scope. A reading of the New Mexico Mandamus Statute leads to the same expectation, and the early New Mexico decisions reinforce that view of the writ. Recent case law, however, has transformed the writ into a thoroughly modern instrument.

The rigidity of form has survived the onslaught of time, but it is not a stumbling block to the use of the writ. And, surely its historic antecedants deserve at least that touch of recognition. Once past the matter of form, however, mandamus becomes a versatile and useful device.

The rules of standing in mandamus have been broadly defined to allow individual vindication of public wrongs by way of the writ. Furthermore, the availability of appeal is no longer an absolute roadblock to its issuance. In addition, the early definition of official discretion has given way, allowing mandamus to be used to challenge interpretations of law, even where those interpretations require factual judgments. Mandamus has also been used to impress a right to judicial review where statutes expressly foreclose that right. Finally, use of the writ is an express exception to and the surest way around the defense of sovereign immunity.

The writ is now available against a plethora of officials,[180] to control such wide-ranging kinds of official action[181] that in New

180. Writs of mandamus have issued to the Governor, *State ex rel. Shepard v. Mechem*, 56 N.M. 762, 250 P.2d 897 (1952), the Attorney General, *State ex rel. Maloney v. Neal*, 80 N.M. 460, 457 P.2d 708 (1969), state boards and commissions, *Sanderson v. State Racing Commission*, 80 N.M. 200, 453 P.2d 370 (1969), local boards and commissions, *Mora County Board of Education v. Valdez*, 61 N.M. 361, 300 P.2d 943 (1956), municipalities, *State ex rel. Johnson v. Village of Carrizozo*, 35 N.M. 597, 4 P.2d 922 (1931), and even community ditch associations, *State ex rel. Black v. Aztec Ditch Co.*, 25 N.M. 590, 185 P. 549 (1919).

181. Mandamus has been used: to compel the Governor to amend his proclamation of election, *State ex rel. Robinson v. King*, 13 New Mexico Bar Bulletin and Advance Opinions 22 (1974), to require the Secretary of State to certify names for election, *State ex rel. Chavez v. Evans*, 79 N.M. 578, 446 P.2d 445 (1968), to challenge the constitutionality of a statute, *Montoya v. Blackhurst*, 84 N.M. 91, 500 P.2d 176 (1972), to compel judges of election to count certain ballots, *Reese v. Dempsey*, 48 N.M. 417, 152 P.2d 157 (1944), to compel the state to pay a judgment, *State Highway Commission v. Quesenberry*, 74 N.M. 30, 390 P.2d 273 (1964), to compel an ousted elected official to turn over his books and papers to a newly elected successor, *Conklin v. Cunningham*, 7 N.M. 445, 38 P. 170 (1894), to compel a county to assess utility taxes, *State ex rel. Reynolds v. Board of Commissioners, Guadalupe County*, 71 N.M. 194, 376 P.2d 976 (1962), to compel a District Attorney to

Mexico it has become the most common vehicle for challenging official wrongs. In an era of expanding government size and concomitant growth in governmental power, it is not surprising that the ancient writ of mandamus should become a major device by which the individual can control the abuse of governmental power.

live up to a plea bargain, *State ex rel. Plant v. Scerese*, 84 N.M. 312, 502 P.2d 1002 (1972), to compel a District Judge to select jurors in a specific manner, *State ex rel. Maloney v. Neal*, 80 N.M. 460, 457 P.2d 708 (1969), to compel a city to levy a tax to pay a judgment obtained against it in tort, *Barker v. State ex rel. Napoleon*, 39 N.M. 434, 49 P.2d 246 (1935) as well as in contract, *Territory ex rel. Pariear v. City of Socorro*, 12 N.M. 177, 76 P. 283 (1904), to compel the State Tax Commission to recognize claims for per diem expenses, *State ex rel. Thompson v. Beall*, 37 N.M. 72, 18 P.2d 249 (1932), to compel the State Corporation Commission to pay salaries, *State ex rel. Stephen v. State Corp. Commission*, 25 N.M. 32, 176 P. 866 (1918), to compel a County Clerk to take down minutes of the meetings, In re Delgado, 140 U.S. 586 (1891), to compel the Legislative Audit Commission to recognize the constitutional position of State Auditor, *Thompson v. Legislative Audit Commission*, 79 N.M. 693, 448 P.2d 799 (1969), to compel a city to hold a referendum election, *City Commission of Albuquerque v. State ex rel. Nichols*, 75 N.M. 438, 405 P.2d 924 (1965), to compel the attorney general to certify a bond election, *Board of Education of Village of Cimarron v. Maloney*, 82 N.M. 167, 477 P.2d 605 (1970), to compel the State Police Board to provide an officer with a hearing, *Tafoya v. New Mexico State Police Board*, 82 N.M. 167, 472 P.2d 973 (1970), to compel the City to levy a tax to pay debts, *McAtee v. Gutierrez*, 48 N.M. 100, 146 P.2d 315 (1944), and to compel the State Treasurer to invest money from earmarked funds, *State v. Marron*, 18 N.M. 426, 137 P. 845 (1914).

THE WRIT OF PROHIBITION IN NEW MEXICO

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INTRODUCTION

> *The . . . injury, which is that of an encroachment of jurisdiction, or calling one* coram non judice, *to answer in a court that has no legal cognizance of the cause, is also a grievance, for which the common law has provided a remedy by the writ of* prohibition. 3 Blackstone's Commentaries 111.

A. History

The writ of prohibition, a common law writ, is said to be as old as the common law itself, dating back to the 12th century.[1] The writ was first used to prevent the ecclesiastical courts from usurping the power of the civil courts.[2] At that time, jurisdiction to grant the writ was vested in the court of King's Bench, although it was not exclusively confined to that tribunal.[3] In early England the writ was used

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1. J. High, A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto and Prohibition, § 764 (3d ed. 1874), [hereinafter cited as High]; Note, 36 Harv. L. Rev. 863 (1922); Maitland, *History of the Register of Original Writs,* 3 Harv. L. Rev. 97, 114 (1889); Annot., 77 A.L.R. 245 (1932). The earliest treatise on English law, written about 1181 by Glanville, mentions several forms of the writ. *See* J. Beames, Translation of Glanville 56, 96-98 (1812).

2. High § 764. *See also* 63 Am. Jur. 2d, *Prohibition* § 1 (1972); Adams, *The Writ of Prohibition to Court Christian,* 20 Minn. L. Rev. 272 (1936); Hughes & Brown, *The Writ of Prohibition,* 26 Geo. L.J. 831 (1938); Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 509, 38 P. 580, 587 (1894) (dissenting opinion). The courts of Westminster, Kings Bench, Common Pleas, and Exchequer, issued the writ, "both when they claimed jurisdiction of the question themselves, and also when the court to which it was issued had no jurisdiction, while another inferior court possessed it." *Id.* at 491, 38 P. at 582.

3. 3W. Blackstone, Commentaries on the Laws of England 112 (Christian, Chitty, Lee, Hovenden, Ryland ed. 1861):

> A prohibition is a writ issuing properly out of the court of king's bench, being the king's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas or exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

See also Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 491, 38 P. 580, 582 (1894).

primarily to protect the sovereign and the common law courts, while in the United States, "It would seem that protection of sovereign rights has been supplanted by protection of the rights of private parties as the central purpose of prohibition."[4]

In the 1888 case of *Tapia v. Martinez*,[5] the Supreme Court of the Territory of New Mexico stated that in the exercise of chancery and common law jurisdiction, ". . . the supreme and district courts have power to issue the writ of prohibition, but the grounds for its exercise are not defined, and recourse must be had to the practice of the courts of chancery and common law, in furnishing rules of decision."[6] Other than case law, New Mexico still has no defined substantive rules for the issuance of the writ.[7] The Supreme Court and the district courts no longer need rely entirely on chancery and common law for authority to issue the writ, however, as Article VI, Section 3 of the New Mexico Constitution gives the New Mexico Supreme Court the power to issue writs of prohibition "for the complete exercise of its jurisdiction."[8] This authority was extended by the Supreme Court in the case of *State ex rel. Harvey v. Medler*[9] where it held that it had not only the rather limited power to issue a writ of prohibition to a district court in aid of its appellate jurisdiction, but also the independent power to prohibit a district court from exceeding its own jurisdiction. This power to issue a writ of prohibition in instances other than when necessary for the complete exercise of its jurisdiction is found in the high court's power of superintending control over district courts, also derived from Article VI, Section 3 of the New Mexico Constitution.[10]

It should be noted that since the Court derives its power to issue

4. Comment, 37 Mich. L. Rev. 789, 791 (1939).

5. 4 N.M. (Gild.) 329, 4 N.M. (John.) 165, 16 P. 272 (1888).

6. 4 N.M. (Gild.) at 335, 4 N.M. (John.) at 167, 16 P. at 275.

7. *But see* Rule 12 of the Rules Governing Appeals to the Supreme Court and Court of Appeals and Original Proceedings in the Supreme Court [hereinafter cited as N.M. Sup. Ct. R.], N.M. Stat. Ann. §21-12-12 (Interim Supp. 1974), which sets out the elements of the petition and the procedure by which peremptory and alternative writs may be issued and served.

8. N.M. Const. art. VI, §3 provides that:

> The Supreme Court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. . . .

9. 19 N.M. 252, 142 P. 376 (1914).

10. *See also* Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 491, 38P. 580, 582 (1894); Atchison, T. & S.F. Ry. Co. v. State Corporation Comm'n, 43 N.M. 503, 511, 95 P. 2d 676, 683 (1939).

the writ of prohibition from its power of superintending control over inferior courts,[11] its original jurisdiction in prohibition is confined to "inferior courts" and does not extend to prohibitory actions against state officers or agencies. Hence, to bring an action against a state officer or agency, the petitioner must proceed first in the district court unless there is some extraordinary reason, such as great public interest, for first proceeding in the Supreme Court.[12]

> Our original jurisdiction in prohibition is confined to "inferior courts" and does not extend to prohibitory actions against state officers. As to state officers, at least, our original jurisdiction is confined to mandamus and quo warranto. Our original jurisdiction in prohibition arises from our superintending control over inferior courts and is confined to them.[13]

While the Court of Appeals has no jurisdiction to issue extraordinary writs except in aid of its appellate jurisdiction,[14] the district courts by virtue of Section 13 of Article VI have the "power to issue writs of prohibition . . . except to courts of equal or superior jurisdiction."[15] Presumably this means that the district court has the

11. The Supreme Court also has original jurisdiction to issue the writ when it is "necessary or proper for the complete exercise of its jurisdiction." N.M. Const. art. VI, § 3.

12. Atchison, T.&S.F. Ry. Co. v. State Corporation Comm'n, 43 N.M. 503, 95 P.2d 676 (1939). This case limited the case of Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 38 P. 580 (1894), where it was said, "The law is well settled that the writ will issue to a board or officer exercising judicial or quasi-judicial functions." *Id.* at 498, 38 P. at 584. In the *Atchison* case the Supreme Court held that its original jurisdiction was confined to inferior courts and does not extend to actions against state officers or agencies. The Court further held that, even if it did have jurisdiction over the cause, the rule of State *ex rel.* Owen v. Van Stone, 17 N.M. 41, 47, 121 P. 611, 613 (1913), would control. That is, if the Supreme Court and a district court have concurrent jurisdiction to issue an extraordinary writ, the Supreme Court will, in the absence of some controlling necessity, decline jurisdiction in all cases brought by private suitors. Of course, whenever a writ is sought against a district judge only the Supreme Court has jurisdiction to issue it. State *ex rel.* Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967). Hence, the *Van Stone* rule applies to state officers, boards, administrative agencies, and lesser courts, *e.g.* magistrate and probate.

13. Atchison, T.&S.F. Ry. Co. v. State Corporation Comm'n, 43 N.M. 503, 512, 95 P.2d 676, 684 (1939).

14. State *ex rel.* Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967).

15. N.M. Const. art. VI, § 13 states:

> The district court shall have original jurisdiction in all matters and causes not excepted in this Constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

The Supreme Court has held that while the term " 'inferior court' is usually applied to

power to issue the writ to probate, magistrate, and municipal courts but not to other district courts and certainly not to the Court of Appeals or the Supreme Court. The district court's power to issue the writ to another district court sitting as a juvenile court would be questionable.

B. Nature of the Writ

Perhaps the best overview of the writ comes from the dissent in *Lincoln-Lucky & Lee Mining Co. v. District Court:*[16]

> . . . a procedure by prohibition is the exercise of the very highest authority known to the law. It is the highest prerogative writ. 'It is a writ,' says Mr. High, 'directed to an inferior court for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested.' High, Extr. Rem. 762. Three things must occur, therefore, to give the court jurisdiction of this procedure: First, the court to which the writ is directed must be a court of inferior and limited jurisdiction; second, it must be made to appear by the record or declaration supported by affadavit that such inferior court is about to usurp a power it does not possess, or is about to transcend its jurisdiction; third, it must appear that the party applying for the writ is without other remedy, as by appeal, writ of error, or writ of certiorari.

This use of the writ to prevent usurpation of power or transcendance of jurisdiction was further described in *State ex rel. Harvey v. Medler,* as follows:

> an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction.[17]

Functionally, the writ is used "to restrain the exercise of unauthorized judicial or quasi-judicial power, which is regarded as a contempt of the state or sovereign, and which may result in injury to the state or to its citizens."[18] The theory is that allowing a court to act without jurisdiction is to allow an affront to society and the rule of law.

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courts of limited or special jurisdiction, yet it is used in different senses and frequently refers to relative rank and authority, and not to intrinsic quality. So it has been held that a court is inferior to another when it is placed under the supervisory or appellate control of such other court." State *ex rel.* Harvey v. Medler, 19 N.M. 252, 259, 142 P. 376, 378 (1914).

16. 7 N.M. 486, 512-13, 38 P. 580, 589 (1894) (dissenting opinion).

17. 19 N.M. 252, 258, 142 P. 376, 378 (1914).

18. High § 764 (a).

Although both injunction and prohibition are used to restrain legal proceedings, there is a vital distinction between the two which was recognized by the dissent in *Lincoln-Lucky & Lee Mining Co. v. District Court*:[19]

> Of all the extraordinary writs known to the law it [prohibition] is the most extraordinary. It may with propriety be said that the writs of injunction and mandamus, formerly characterized as extraordinary writs, are no longer to be regarded as in that category. The leading distinction between the last writs mentioned and the writ of prohibition is that while the former operate upon parties, laying its hands upon them, and enjoining certain duties, the latter, as a writ, operates upon a court. It is the means by which one court lays its hand upon another court. It is a contest for jurisdiction going only from a superior to an inferior court, operating not as a writ of review, but emanating from one to the other as a command, or, as its name implies, an absolute prohibition.

It has been said that an injunction recognizes the jurisdiction of the court, while prohibition denies the jurisdiction of the court.[20] And mandamus is said to be the counterpart of prohibition, since mandamus is an affirmative remedy, commanding certain things to be done, while prohibition is a negative remedy, forbidding certain things to be done.[21] However, these distinctions have blurred with time such that, although they cannot be considered interchangeable, there is a great deal of overlap.[22]

This article will examine the procedure for obtaining a writ of prohibition: the formal requisites of the petition, standing to seek the writ, and the hearing on the writ. Also the article will analyze the meaning of "jurisdiction" as that term is used in strict prohibition proceedings, that is, those in which the court lacks jurisdiction over the parties or subject matter. The article will then explore actions in excess of a court's jurisdiction and the concept of superintending control. Finally, the writ's application to constitutional questions will be considered, as well as defenses to the granting of the writ. First, however, we will examine the practical considerations involved in seeking the writ.

C. Uses of the Writ

At common law, anyone could move for a writ, "whether a party or a mere stranger, the purpose being to prevent inferior courts from

19. 7 N.M. 486, 508, 38 P. 580, 587 (1894) (dissenting opinion).
20. High § 763.
21. *Id.*
22. Harriet v. Lusk, 63 N.M. 383, 320 P.2d 738 (1958).

usurping jurisdiction in matters which pertained to other courts."[23] This rule was based on the theory that to allow any court to proceed without jurisdiction was to allow an affront to the whole judicial system. However, in New Mexico the petitioner must be a party to the suit before he can raise the jurisdictional question.[24] Furthermore, it has been held that where a stranger intervenes in a proceeding and thereby submits his rights to the court for adjudication, he is not entitled to a writ of prohibition to restrain the court from determining those rights.[25] This old rule would probably not be upheld today. Under the rules of civil procedure now followed an intervenor has every right that an original party litigant possesses. Since one needs to be a party to attack the court's jurisdiction, he should not be held to waive his rights to challenge the court's jurisdiction by the mere act of intervention.

The writ is effective in obtaining a speedy disposition of a case in which the trial court either does not have jurisdiction of the parties or subject matter or where the court is about to exceed its constitutional, statutory, or common law jurisdiction.[26] By seeking the writ the petitioner may save costs for litigation and appeals and possibly avoid contempt for refusal to act as directed by the trial court when the court has no jurisdiction to compel the act. The writ may also be used to delay a cause.[27]

The writ has been employed effectively in the areas of workmen's compensation,[28] civil contempt,[29] disqualification of judges,[30]

23. Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 510, 38 P. 580, 588 (1894) (dissenting opinion).

24. State *ex rel.* Adair v. Swope, 61 N.M. 144, 147, 296 P.2d 751, 752 (1956).

25. State *ex rel.* Parsons Mining Co. v. McClure, 17 N.M. 694, 133 P. 1063, (1913). *See also* State *ex rel.* Lebech v. Chavez 45 N.M. 161, 113 P.2d 179 (1941).

26. State *ex rel.* Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961).

27. *See, e.g.,* State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 388, 338 P.2d 113, 116 (1959).

28. State *ex rel.* St. Louis, Rocky Mountain & Pacific Co. v. District Court 38 N.M. 451, 34 P.2d 1098 (1934); State *ex rel.* Gibbons v. District Court, 65 N.M. 1, 330 P.2d 964 (1958); State *ex rel.* Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961); State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962); State *ex rel.* Mountain States Mut. Cas. Co. v. Swope, 58 N.M. 553, 273 P.2d 750 (1954); State *ex rel.* Pacific Employees Ins. Co. v. Arledge, 54 N.M. 267, 221 P.2d 562 (1950).

29. State *ex rel.* Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961); State *ex rel.* Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

30. State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933); State *ex rel.* Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934); State *ex rel.* Shufeldt v. Armijo, 39 N.M. 502, 50 P.2d 852 (1935); State *ex rel.* Tittmann v. Hay, 40 N.M. 370, 60 P.2d 353 (1936); State *ex rel.* Gandert v. Armijo, 41 N.M. 38, 63 P.2d 1037 (1936); State *ex rel.* Romero v. Armijo, 41 N.M. 40, 63 P.2d 1039 (1936); State *ex rel.* Cruz v. Armijo, 41 N.M. 44, 63 P.2d 1041 (1936); State *ex rel.* Sartain v. Patton, 42 N.M. 64, 75 P.2d 338 (1938); State *ex rel.* Tittman v. McGhee, 41 N.M. 103, 64 P.2d 825 (1937); State *ex rel.* Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938); Mares v. Lool, 51 N.M. 36, 177 P.2d 532 (1946);

multiplicity of actions or suits,[31] statute of limitations,[32] indispensable parties,[33] failure to dismiss under Rule 41(3) of the Rules of Civil Procedure,[34] constitutional questions,[35] appeals from administrative bodies,[36] service of process,[37] preemption,[38] contempt,[39] and statutory construction.[40]

In judging the probability of the writ being granted, the advocate will need to examine such factors as his chances of an immediate appeal, the consequences if the wrong goes uncorrected, the seriousness of the wrong, and the probability that the Supreme Court will not desire to interfere directly with a lower court. However, even though the issuance of the writ was once said to be within the sound discretion of the Court,[41] many recent decisions make it clear that

State *ex rel.* Prince v. Coors, 51 N.M. 42, 177 P.2d 536 (1946); State *ex rel.* Pacific Employees Ins. Co. v. Arledge, 54 N.M. 267, 221 P.2d 562 (1950); State *ex rel.* Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

31. State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

32. State *ex rel.* St. Louis, Rocky Mountain & Pac. Co. v. District Court, 38 N.M. 451, 34 P.2d 1098 (1934); State *ex rel.* De Moss v. District Court, 55 N.M. 135, 227 P.2d 937 (1951)); State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrozolo, 70 N.M. 475, 375 P.2d 118 (1962).

33. State *ex rel.* Del Curto v. District Court, 51 N.M. 297, 183 P.2d 607 (1947); State *ex rel.* Swayze v. District Court, 57 N.M. 266 258 P.2d 377 (1953); State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); State *ex rel.* Board of County Comm'rs of Grant County v. Burks, 75 N.M. 19, 399 P.2d 920 (1965); State *ex rel.* Attorney General v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

34. Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966); Baca v. Burks, 81 N.M. 376, 467 P.2d 392 (1970).

35. State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933); Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966); State *ex rel.* Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948); State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959); Historical Soc'y v. Montoya, 74 N.M. 285, 393 P.2d 21 (1964); State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

36. State *ex rel.* Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949); State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959); State *ex rel.* State Corp. Comm'n v. McCulloch, 63 N.M. 436, 321 P.2d 207 (1958); State *ex rel.* State Tax Comm'n v. District Court, 69 N.M. 295, 366 P.2d 143 (1961); State *ex rel.* State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963); State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970); Petroleum Club Inn Co. v. Franklin, 72 N.M. 347, 383 P.2d 824 (1963); State *ex rel.* State Bd. of Educ., 73 N.M. 162, 386 P.2d 252 (1963).

37. Tapia v. Martinez, 4 N.M. (Gild.) 329, 4 N.M. (John.) 165, 16 P. 272 (1888); Hammond v. District Court 30 N.M. 130, 228 P. 758 (1924); State *ex rel.* Truitt v. District Court, 44 N.M. 16, 96 P.2d 710 (1939); State *ex rel.* Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924); State *ex rel.* Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934).

38. State *ex rel.* Haddock Eng'rs Ltd. v. Swope, 56 N.M. 782, 251 P.2d 266 (1952).

39. State *ex rel.* Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961).

40. State *ex rel.* Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914); State *ex rel.* Mountain States Mut. Cas. Co. v. Swope, 58 N.M. 553, 273 P.2d 750 (1954); State *ex rel.* J.P. (Bum) Gibbins, Inc. v. District Court, 65 N.M. 1, 330 P.2d 964 (1958); State *ex rel.* Miller v. Tackett, 68 N.M. 318, 361 P.2d 724 (1961); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961); Cal-M Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963).

the issuance when based on jurisdictional grounds is a matter of right.[42] Thus, it was held in *State ex rel. Transcontinental Bus Service v. Carmody* that,

> . . . what is said on the discretionary character of the writ in the Medler case, relates to its use in the exercise of our superintending control over inferior courts. If it ever was the law in this state that discretion is a material factor when considering the right to the writ on jurisdictional grounds, it was repudiated and abandoned . . .[43]

D. Procedure

Although there are no statutory substantive rules for issuance of the writ, there are Supreme Court rules detailing the procedure for obtaining a writ.[44] Rule 12 of the New Mexico Supreme Court Rules provides that the petition must be verified and set forth the following: (1) if the application could have been made to some other court, the circumstances making it necessary to seek relief first in the Supreme Court; (2) the name of the real party in interest, if the respondent is a public official purportedly discharging official duties; (3) the basis of the Supreme Court jurisdiction; (4) the grounds, facts, and law supporting the application; and (5) the relief sought.

The petitioner must serve the petition and the writ and file proof after so doing.[45] The old Rule 24(4) governing extraordinary writs provided that the respondent or person against whom the writ issues could by demurrer or motion question the sufficiency of the petition in lieu of an answer.[46] This provision has been deleted from the new rules apparently because such issues were never determinative of the court's decision.

The petition should be styled "State of New Mexico *ex rel.* Petitioner vs. Respondent."[47] In *City of Roswell v. Richardson,*[48]

41. State *ex rel.* Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914); State *ex rel.* Parks v. Ryan, 24 N.M. 176, 173 P. 858 (1918); Hammond v. District Court, 30 N.M. 130, 228 P. 758 (1924); State *ex rel.* State Tax Comm'n v. Chavez, 44 N.M. 260, 101 P.2d 389 (1940).

42. Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930); Cal-M Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963); State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969); State *ex rel.* Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948); State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); State *ex rel.* Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

43. State *ex rel.* Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 370, 208 P.2d 1073 (1949). *But cf.* State v. Zinn, 80 N.M. 710, 712, 460 P.2d 240 (1969).

44. *See* N.M. Sup. Ct. R. 12, N.M. Stat. Ann. §21-12-12 (Interim Supp. 1974).

45. *Id.*

46. N.M. Stat. Ann § 21-2-1 (24)(4) (1970).

47. For a description of a writ of mandamus and an example of the Verified Petition, Order, and Alternative Writ of Mandamus, see Du Mars & Browde, *Mandamus in New Mexico,* 4 N.M.L.Rev. 155, 158-161 (1974). Of course, the essential allegations are slightly different in prohibition. Specifically, unless a writ of superintending control is sought, the

the Supreme Court held that the writ should issue "in the name of the state on the relation of some one, but, where the want of jurisdiction is clear, the failure to sue out the writ of prohibition in the name of the state will be treated as a mere irregularity not affecting the merits of the application."[49] The Court cited as authority High's *Treatise on Extraordinary Legal Remedies:*

> But while it is irregular to issue the writ (of prohibition) in the name of a private citizen, instead of the state, yet, if such irregularity in no way affects the merits of the application, the writ will not be set aside when a jurisdiction is usurped without any pretense of right.*** The governing principle in such cases is that, when an inferior court proceeds in excess of its lawful jurisdiction, it is chargeable with a contempt of the sovereign as well as a grievance to the parties injured, and the courts are therefore less stringent as to the degree of interest required of the applicant than in cases of mandamus and other extraordinary remedies.[50]

As noted above, the petition must recite the grounds for relief. Emphasizing this requirement, the Supreme Court in denying the writ held that, "Generally the application for the writ should recite grounds for the granting of the relief to the exclusion of allegations of evidence heard by the trial court."[51]

When a petition and writ are served upon a respondent, they usually command him to desist and refrain from any further proceedings until the Supreme Court orders otherwise. If any action is taken, even with the approval of all interested parties, it is an "absolute nullity."[52]

As with any complaint or petition, the moving party must be prepared to prove the essential allegations:

> The person seeking the writ must prove the essential allegations of his petition. The court will make no assumptions not warranted by the evidence, but will indulge in the presumption that the action of the inferior court was correct and within the scope of its authority.[53]

Thus, when the petitioner alleged that the respondent's action was

petitioner need not allege the lack of a plain, speedy, and adequate remedy in the ordinary course of law. However, the other allegations are essentially the same.

48. 21 N.M. 104, 152 P. 1137 (1915).

49. *Id* at 108, 152 P. at 1138.

50. *Id* at 107, 152 P. at 1138, *citing* High, §779.

51. State v. Zinn, 80 N.M. 710, 713, 460 P.2d 240, 243 (1969). *See also* State *ex rel.* Parks v. Ryan, 24 N.M. 176, 173 P. 858 (1918).

52. Cal-M, Inc. v. McManus, 73 N.M. 91, 93, 385 P.2d 954, 955 (1963).

53. State v. Zinn, 80 N.M. 710, 713, 460 P.2d 240, 243 (1969). *See also* State *ex rel.* Parks v. Ryan, 24 N.M. 176, 173 P. 858 (1918).

arbitrary and constituted an abuse of discretion, the writ of prohibition was denied where there was no evidence before the court to sustain the allegations, either by way of a record of the hearing to which the petitioner objected or by way of respondent's reasons for overruling petitioner's objection. The court stated that it must be "informed of the circumstances."[54]

The failure to prove essential allegations of a petition has been the basis for discharging a writ more than once. In the recent case of *Baca v. Burks,*[55] the Court dismissed a petition for this reason:

> At the hearing before us, held pursuant to our Rule 24(5), no evidence was submitted to substantiate this allegation nor do we find any in the transcript of the proceedings in respondent's court filed here. No findings of fact nor conclusions of law were requested nor were any made by the respondent.[56]

The petitioner in *Baca v. Burks* had alleged that he had no adequate remedy at law and that any appeal would be costly and would not afford him a speedy and proper relief. It was this allegation which he failed to prove. Proof is especially burdensome in requests for the writ based on the Court's power of superintending control where the petitioner must show he has no other adequate remedy.

In *State ex rel. Stanley v. Lujan*[57] it was urged by the successful respondent that since the writ was dismissed as being without merit the respondent's costs should be assessed against the petitioner. The Supreme Court disallowed the attorney fees by noting that in the absence of a statute or rule of court, attorney fees are not properly taxable. The Court further disallowed other "charges" because even though the suit lacked merit, the high court did not feel it was instituted in bad faith. Hence, the rule in New Mexico is that if a case is instituted in good faith, no costs will be assessed against unsuccessful petitioner.[58]

SUBSTANTIVE PRINCIPLES GOVERNING ISSUANCE OF THE WRIT

A writ of prohibition may be issued by the New Mexico Supreme Court [59] in four instances: (1) when the lower court lacks jurisdiction over the subject matter; (2) when the lower court lacks jurisdiction over the parties; (3) when the lower court is acting in

54. State v. Zinn, 80 N.M. 710, 713, 460 P.2d 240, 243 (1969).
55. 81 N.M. 376, 467 P.2d 392 (1970).
56. *Id.* at 377, 467 P.2d at 393.
57. 43 N.M. 348, 93 P.2d 1002 (1939).
58. *Id.* at 350, 93 P.2d at 1003.
59. The Court of Appeals has no jurisdiction to issue extraordinary writs. State *ex rel.* Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967).

excess of its jurisdiction; and (4) when the Supreme Court otherwise finds it necessary to exercise its power of superintending control over the lower courts. In this part we will examine the substantive rules governing the issuance of the writ in these four instances.

A. Want of Jurisdiction Over Subject Matter

> Jurisdiction deals with the fundamental question of whether the court has power to hear and entertain the action. If a court has no jurisdiction to hear the cause, the judgement it renders is void . . . .[60]

Since prohibition will issue if the court lacks jurisdiction, it will issue if the court lacks the power to hear and entertain the action. In light of this principle the New Mexico Supreme Court has broadly defined the jurisdictional test as, "the court's power to entertain and hear the suit."[61] In determining whether a court has jurisdiction over a matter, the question is "not whether the court had a right to decide the issue in a particular way, but did it have the right to decide at all."[62] If a court has a right to decide an issue in any way, it has jurisdiction. One example of a court having no right whatsoever to decide an issue would be a probate court attempting to decide a workmen's compensation case. The probate court would be prohibited from deciding the workmen's compensation case not because the court might decide wrongly but because the court has no statutory power even to consider the issue.[63] The Supreme Court does not look at the particular case, claim, or judgment before it; it looks at the general jurisdiction of the trial court over cases of the type before it. In another opinion, the Supreme Court has based the jurisdictional test on the trial court's right or authority to render any judgment in the particular type of action before it. From a different viewpoint, prohibition will not issue unless the high court is convinced that the judgment below would be void[64] and subject to collateral attack.[65]

60. J. Walden, Civil Procedure in New Mexico 4 (1973).

61. Mozley v. Helmick, 37 N.M. 97, 100, 18 P.2d 1024, 1026 (1933); *see* State *ex rel.* State Tax Comm'n v. Chavez, 44 N.M. 260, 263, 101 P.2d 389, 390 (1940).

62. State *ex rel.* Kermac Fuels Corp. v. Larrazolo, 70 N.M. 475, 481, 375 P.2d 118, 122 (1962). *See also* State *ex rel.* St. Louis Rocky & Pac. Co. v. District Court, 38 N.M. 451, 452, 34 P.2d 1098, 1099 (1938).

63. State *ex rel.* St. Louis, Rocky Mt. & Pac. Co. v. District Court, 38 N.M. 451, 452, 34 P.2d 1098, 1099 (1934); State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 477, 375 P.2d 118, 122 (1962).

64. State *ex rel.* St. Louis, Rocky Mountain & Pac. Co. v. District Court, 38 N.M. 451, 453, 34 P.2d 1098, 1099 (1934).

65. State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 386, 338 P.2d 113, 115 (1959); State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 481, 375 P.2d 118, 122 (1962). State *ex rel.* Heron v. District Court, 46 N.M. 290, 302, 128, P.2d

Going beyond these simple statements of jurisdictional tests, the Supreme Court has attempted to set out in more detail the essential elements of jurisdiction. One of the more complete is contained in the case of *Peisker v. Chavez*:[66]

> The three essential elements of jurisdiction are:
> (1) jurisdiction of the class of cases to which the one to be adjudged belongs,[67]
> (2) jurisdiction of the parties to the action,[68] and
> (3) the point decided must be, in substance and effect, within the issues.[69]

In clarifying the first element, which will be the focus of this section, jurisdiction over the subject matter, the Supreme Court has held that the trial court has subject matter jurisdiction if it is authorized to administer the statute involved.[70] If there is no statute involved, the trial court has subject matter jurisdiction if the sovereign has conferred jurisdiction on the court over matters of the kind presented:

> By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and it is to be sought for in the general nature of its powers, or in the authority specially conferred.[71]

To find subject matter jurisdiction when no statute is involved, one must look to the general nature of the court's powers. In New Mexico, to discover the general nature of the trial court's powers, one

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454, 458 (1942), held that "if, absent prohibition in the given case, the judgment therein rendered, unless reversed for error or direct review, would be binding on the parties and not subject to collateral attack as a mere nullity, then prohibition will not lie, otherwise it will." One should not, however, equate the definition of jurisdiction with that of collateral attack. The concept of collateral attack is much broader than merely a lack of jurisdiction. *See* F. James, Civil Procedure 532-549. Further, such an equation is circular and does not serve to identify when the court has jurisdiction over a matter.

66. 46 N.M. 159, 163, 123 P.2d 726, 728 (1942). *See also* Gilmore v. District Court, 35 N.M. 157, 162, 291 P. 295 (1930); State *ex rel.* State Tax Comm'n v. Chavez 44 N.M. 260, 262, 101 P.2d 389, 390 (1940).

67. *See* J. Walden, *supra* note 60, at 29.

68. *Id.* at 3.

69. In some decisions this element is stated as the power or authority to decide the particular matters presented. State *ex rel.* State Tax Comm'n v. Chavez, 44 N.M. 260, 262, 101 P.2d 389, 390 (1940). See text accompanying notes 130-199, *infra.*

70. State *ex rel.* St. Louis, Rocky Mountain & Pac. Co. v. District Court, 38 N.M. 451, 452, 34 P.2d 1098, 1099 (1934).

71. Mares v. Kool, 51 N.M. 36, 41, 177 P.2d 532, 535 (1947), (citing Cooper v. Reynolds, 7 US (10 Wall) 63, 67 (1870)).

would look at the powers a court traditionally exercised at common law.[72]

There are very few cases in which the common law, subject matter jurisdiction of a trial court has been successfully challenged. The scarcity of cases has two causes. First of all, the primary challenge to a court exercising jurisdiction based upon a common law cause of action would be that the complaint failed to state a cause of action. This occurs because district courts, being courts of general jurisdiction, have jurisdiction over all common law causes of action. Hence, a challenge to a particular cause of action would have to be on substantive grounds, *i.e.*, that there is no such cause of action. As will be seen,[73] failure to state a cause of action is not jurisdictional, and consequently prohibition will not lie. This reasoning, however, would not apply to courts of limited or inferior jurisdiction. The second reason that there are few challenges to a court's jurisdiction when it is proceeding upon a common law cause of action is that the court is presumed to be correct when it acts.

> Every presumption not inconsistent with the record is to be indulged in favor of the jurisdiction of courts having unlimited jurisdiction, and their judgments, however erroneous, can not be questioned when attacked collaterally, unless it be shown affirmatively that they had no jurisdiction of the case.[74]

In spite of these two problems, there are two New Mexico cases in which a court considering a nonstatutory cause of action was prohibited from proceeding because the trial court did not have subject matter jurisdiction. In the first case, *State ex rel. Haddock Engineers Ltd. v. Swope,*[75] the constitutional doctrine of federal preemption was raised via prohibition. The New Mexico Supreme Court granted the writ because the district court had no jurisdiction over the subject matter of a tort action brought against an employer by an injured longshoreman. The Court held that the employee's exclusive remedy was provided by the Federal Longshoremen's Compensation Act. Since federal jurisdiction under this act was "paramount and exclusive" of any state remedy, the district court had no subject matter jurisdiction, and consequently prohibition was granted.

The second case in which the Supreme Court held that the trial court had no common law jurisdiction was *State ex rel. Lynch v. District Court.*[76] In *Lynch* the lower court attempted to appoint a

72. *See* N.M. v. Stat. Ann. §21-3-3 (1970).
73. See text accompanying notes 103-107, *infra.*
74. State v. Patten, 41 N.M. 395, 399, 69 P.2d 931, 933 (1937).
75. 56 N.M. 782, 251 P.2d 266 (1952).
76. 41 N.M. 658, 73 P.2d 333 (1937).

receiver to take over the duties of the town of Gallup because the town had not paid its municipal bonds. On considering the writ of prohibition, the Supreme Court held "that equity is without power to appoint a receiver to levy and collect taxes."[77] The opinion was based on the premise that at common law a receiver could not be appointed to collect revenues for a town. The court, lacking subject matter jurisdiction over the action, was thus prohibited from proceeding.

In contrast to the dearth of jurisdictional challenges based on a court's lack of common law jurisdiction, there are many cases challenging the trial court's lack of jurisdiction over statutory causes of action. These challenges can be divided into two types of cases: those in which the cause of action is basically private, for instance, workmen's compensation cases, and those cases in which the cause of action is basically public, for instance, administrative law cases.

In examining the decisions, concerning the trial court's jurisdiction over statutory causes of action, one should keep in mind that the jurisdictional test is whether the trial court has authority to administer the statute involved and not whether the trial court has a right to decide the issue in any particular way. The "authority-to-administer-the-statute" test is merely a particularized application of the general rule, discussed above, that the Court will not look at the particular case before it nor examine the lower court's right to render a particular decision, but instead will look merely at the general jurisdiction of the trial court.

In *State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court,*[78] a case involving a private cause of action, it was held that even though a workmen's compensation judgment could not be upheld on appeal because it was barred by the statute of limitations, prohibition would not issue because

> the statute commits workmen's compensation litigation to the jurisdiction of the district courts. If the administration of the statute be the subject matter here involved, it is within the jurisdiction challenged . . .[79]

The Supreme Court expressly rejected the contention in *St. Louis* that it should look not only at a court's general jurisdiction, but also at the jurisdiction of the lower court over the particular case or claim. "Here the test of jurisdiction is not the right or authority to render a particular judgment; it is the right or authority to render

77. *Id.* at 663, 73 P.2d at 337.
78. 38 N.M. 451, 452, 34 P.2d 1098, 1099 (1934).
79. *Id.* at 452, 34 P.2d at 1099 (1934).

any judgment."[80] Had the Court looked at the particular case or claim before it, prohibition would have issued because the claim was not filed within the statutory period.

The Court, however, on numerous occasions has slipped away from this limited approach to prohibition in favor of a more permissive standard. Although it has the power to correct mere errors under its power of superintending control, it should recognize and apply such an approach and not attempt to expand the definition of jurisdiction. One case typifying the permissive approach is *State ex rel. Mountain States Mutual Casualty Co. v. Swope*,[81] a case involving a private cause of action. In *Mountain States* prohibition issued to prevent a lower court from hearing a workmen's compensation which was filed prematurely. After examining the statute which provided for workmen's compensation actions, the high court held that the action could not be brought until the employer failed to make the maximum monthly payments required by law. "To permit suits to be filed, as in the instant case, would be to condone a circumvention of the letter and spirit of the act itself, which we decline to do."[82] The alternative writ of prohibition was made permanent, because in the Court's opinion, in order for the statute to confer jurisdiction on the court, the employer must have failed to make the compensation payments required by law.

The question presented by the *Mountain States* case is whether a mere failure to adhere closely to the statute amounts to an act without jurisdiction. When one compares the result in *Mountain States* with the Court's jurisdictional test set out in *St. Louis*, a conflict develops. In *Mountain States* the trial court had the general authority to administer the statutes involving workmen's compensation. The Supreme Court apparently felt that the lower court had no jurisdiction over the particular case because it was filed prematurely. But the Supreme Court had expressly rejected such an approach to examining jurisdiction in *St. Louis* wherein it held that it looks not at the particular case but rather at the general authority of the lower court.[83]

The Court confronted this conflict in the enlightened decision of *State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo*,[84] another case involving a private cause of action. In *Kermac* the petitioner alleged that the trial court had no jurisdiction because the case was

80. *Id.*
81. 58 N.M. 553, 273 P.2d 750 (1954).
82. *Id.* at 555, 273 P.2d at 751.
83. See text accompanying notes 78-80, *supra.*
84. 70 N.M. 475, 375 P.2d 118 (1962).

filed prematurely (as in *Mountain States*) and because the statute of limitations had run (as in *St. Louis*). The petitioner further claimed respondent was without jurisdiction because the plaintiff workman failed to give proper notice of the injury as required by law.[85]

The high court recognized the obvious conflicts in the prior decisions of *St. Louis* and *Mountain States*.[86] The Court also noted that several of its prior decisions (not involving prohibition) had held that timely filing and notice were jurisdictional.[87] Despite these decisions, the Court held in *Kermac* that it did not follow that prohibition should issue where the trial court fails to follow closely a statute creating a private cause of action.

The correct rule, the Court held, was that followed in *St. Louis*:

> [J]urisdiction being present of both the subject matter and the parties, ordinarily prohibition will not issue, and further . . . the question [is] not whether the court had a right to decide the issue in a particular way, but did it have the right to decide it at all.[88]

The concept of jurisdiction over the particular case (failure to follow the statute) was correctly described by the *Mountain States* Court as "jurisdictional only in the sense that it is precedent to the right to maintain an action for recovery if the question is properly (and timely) raised."[89] The clear impact of the decision in *Kermac* is that "jurisdiction over the particular case," encompassing a substantive statutory condition precedent, is less a concept of pure jurisdiction than a bastard child of the demurrer or the present day motion to dismiss for failure to state a claim. It is therefore no longer a basis for prohibition.[90]

Although the cases dealing with prohibition based on private statutory causes of action are rare, as are those concerning common law causes of action, prohibition cases dealing with public statutory causes of action are numerous because in the public law area the district court loses the presumption that it acts with jurisdiction.

The reason for the loss of the presumption and, hence, the increased willingness on the part of the Court to grant prohibition in administrative law cases (public law cases) lies in the doctrine of

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85. *Id.* at 478, 375 P.2d at 120.

86. *Id.*

87. *Id.* at 479, 375 P.2d at 120, 121. *See* Ogletree v. Jones, 44 N.M. 567, 106 P.2d 302 (1940); George v. Miller & Smith, Inc., 54 N.M. 210, 219 P.2d 285 (1950).

88. State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 481, 375 P.2d 118, 122 (1962).

89. Clower v. Grossman, 55 N.M. 546, 550, 237 P.2d 353, 355 (1951).

90. *See* text accompanying notes 103-107, *infra*.

separation of powers embodied in Article 3, Section I of the New Mexico Constitution:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted.

Under the doctrine, one branch of state government may not exercise powers or duties of another.[91] If a case is based on a private cause of action, the district courts, being courts of general jurisdiction, are presumed to be acting within their jurisdictional powers. However, in the field of public law or administrative law this presumption is not valid because of the constitutional mandate of separation of powers. In public law cases the trial court has the burden of justifying its assumption of jurisdiction by express constitutional or statutory authority.[92]

One case typifying this doctrine is *State ex rel. State Corporation Commission v. McCulloh.*[93] Although the case might be explained on the basis of the district court "exceeding" its jurisdiction,[94] it can also be considered as a case in which the trial court had no subject matter jurisdiction *ab initio.* In *McCulloh* the petitioner, the State Corporation Commission, sought to prohibit the trial court from enjoining the Commission's own order pending the trial court's review of the reasonableness of those orders.

Basing its decision on a separation of powers theory, the Supreme Court held that if the trial court were allowed to enjoin a Commission order, it would be exercising powers and duties of another branch of government without specific constitutional or statutory authority. Thus, the trial court had no jurisdiction to enjoin the Commission's orders:

> The State Corporation Commission in these matters is an administrative board exercising a legislative function which courts are without power to control and review except by express constitutional or statutory authority.[95]

91. State *ex rel.* State Corp. Comm'n v. McCulloh, 63 N.M. 436, 438, 321 P.2d 207, 208 (1957).

92. *See* Transcontinental Bus Sys. Inc., v. State Corp. Comm'n, 56 N.M. 158, 167, 241 P.2d 829, 834 (1952) and State *ex rel.* State Corp. Comm'n v. McCulloh, 63 N.M. 436, 438, 321 P.2d 207, 208 (1957).

93. 63 N.M. 436, 321 P.2d 207 (1958).

94. *See* text accompanying notes 130-164, *infra.*

95. 63 N.M. 436, 438, 321 P.2d 207, 208 (1958) (quoting Transcontinental Bus Sys., Inc. v. State Corp. Comm'n, 56 N.M. 158, 167, 241 P.2d 829, 834 (1952)).

Since there was no constitutional or statutory authority providing for the enjoinment of a Commission order prior to the time the order was found unreasonable, the writ was made absolute.

Not only will prohibition issue to prohibit enjoinment of an administrative decision when there is no constitutional or statutory authority for enjoinment, but in deference to the separation of powers principle, prohibition will issue even when the district court has jurisdiction concurrent with that of an administrative body if the agency is proceeding under its statutory authority and all administrative remedies have not been exhausted. Simply stated, the rule is that the district court has no power over administrative matters, including administrative appeals, until all administrative remedies have been exhausted by the claimant. The rule is the same even if the district court acquires jurisdiction before the administrative agency does.

An example of this principle is *State ex rel. State Corporation Commission v. Zinn*[96] where the petitioner, the State Corporation Commission, sought to prohibit the respondent judge from hearing a declaratory judgment action concerning a matter before the agency. The declaratory action had been instituted in the trial court to determine whether the district court or the agency had jurisdiction over the matter. The plaintiff in the district court had also sought to enjoin the agency from considering the matter pending the trial court's resolution of the declaratory judgment action. On the basis of the separation of powers provision of the New Mexico Constitution, the Supreme Court held that the Commission had primary jurisdiction to pass upon the issues presented in the declaratory judgment action. Applying the doctrine of exhaustion of administrative remedies as required by the separation of powers doctrine, the Court held:

> that so long as relator was proceeding under its statutory authority and administrative remedies had not been exhausted, the district court was without jurisdiction to entertain the proceedings, and accordingly was subject to prohibition by this court.[97]

Before a trial court will be prohibited from proceeding with an action due to a litigant's failure to exhaust administrative remedies, however, it must be clear that the agency has jurisdiction over the matter. If the agency has no jurisdiction, prohibition will issue against it.[98] The separation of powers doctrine is not involved unless the agency has jurisdiction over the subject matter.

96. 72 N.M. 29, 380 P.2d 182 (1963).

97. *Id.* at 36, 380 P.2d at 186-87. This was reaffirmed in State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

98. *See, e.g.*, Petroleum Club Inn Co. v. Franklin, 72 N.M. 347, 383 P.2d 824 (1963).

A case in which the agency had no jurisdiction is *State ex rel. State Board of Education v. Montoya*.[99] In *Montoya* prohibition was invoked by an agency to challenge the jurisdiction of a trial court which the agency claimed was usurping its powers. The State Board of Education sought to prohibit a district court suit which, as in *Zinn*, was instituted to enjoin the agency itself from proceeding. The basis of the district court action was that the agency had no jurisdiction over the cause. The Board based its petition for a writ on the doctrine of failure to exhaust administrative remedies set out in *Zinn*.

The Supreme Court held, however, that there was a decisive distinction between the two cases. In *Zinn* the agency had jurisdiction over the subject matter, and hence, all administrative remedies were constitutionally required to be exhausted before the district court could review the matter. However, in *Montoya* the agency had no jurisdiction over the subject matter, and exhaustion of administrative remedies was therefore not required. In *Montoya* the Court held that any right the agency had to consider the matter had to be based on the state constitution or on state statutes. Finding no right in the agency to consider the matter from these sources unlike the court's finding in *Zinn*), the Supreme Court held that the agency had no subject matter jurisdiction to hear the cause. Thus, prohibition would not lie against the district court.[100]

The distinction between *Zinn* and *Montoya* is tenuous at best. The Court emphasized in *Montoya* that the Commission in *Zinn* had jurisdiction over the subject matter,[101] and hence prohibition lay against the district court under the exhaustion of administrative remedies doctrine. In *Montoya* the correct found no jurisdiction in the State Board of Education, and hence prohibition did not lie against the district court which had jurisdiction.

The real issue presented and not faced by the Court is, Who should decide the jurisdictional question first, the administrative agency, the district court, or the Supreme Court? For the Court merely to hold that the State Board of Education had no jurisdiction without also making some rule for future resolution of jurisdictional conflicts between administrative agencies and courts is bound to result in waste of judicial time and energy. The Supreme Court does not have the resources to determine originally who has jurisdiction in every case. Either the district court or the agency must first determine the

99. 73 N.M. 162, 386 P.2d 252 (1963).

100. *Id.* at 169, 386 P.2d at 257.

101. State *ex rel.* State Bd. of Educ. v. Montoya, 73 N.M. 162, 169, 386 P.2d 252, (1963).

extent of the agency's jurisdiction. In the furtherance of the orderly administration of justice it would appear that, absent exceptional circumstances, if an agency claims jurisdiction, it should be given the opportunity first to examine the question fully. This would be the same right normally granted to the district court by the Supreme Court.[102] The litigants would have the normal right to appeal. Any other resolution will leave the door open to future conflicts wasting the time of the agency, the district courts, and the Supreme Court as in *Montoya* and *Zinn*.

There are several Supreme Court cases which deal with issues which would appear at first glance to involve the subject matter jurisdiction of a court and merit the use of prohibition, but closer examination reveals that these issues do not call into question the court's subject matter jurisdiction.

One such issue is the defense of failure to state a cause of action.[103] Prohibition is not available to test the sufficiency of either a criminal or a civil complaint. The Supreme Court has repeatedly held that the failure of a plaintiff to state a cause of action does not invlove the subject matter jurisdiction of the trial court. "If the court proceeds upon a complaint which does not state a cause of action, it commits an error which is reviewable only upon appeal or writ of error."[104] The basis of this doctrine is that, "a writ of prohibition is not available as a writ of error, but is available only where there is a lack of jurisdiction."[105] This holding has been followed in *Mares v. Kool*,[106] a criminal case, in which the Supreme Court held that "prohibition is not available as a remedy for testing the sufficiency of the complaint."[107]

Neither does a court's failure to dismiss a nondiligently prosecuted

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102. *See* text accompanying notes 221-240, *infra*.

103. *See* N.M.R. Civ. P. 12(b)(6), N.M. Stat. Ann. § 21-1-1 (12)(b)(6) (1970).

104. State *ex rel.* Mitchell v. Medler, 17 N.M. 644, 653, 131 P. 976, 980 (1913).

105. *Id. But see* Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961). These cases have been overruled by the 1966 Amendments to the Rules of Civil Procedure, Rule 12(b)(2).

106. 51 N.M. 36, 177 P.2d 532 (1946).

107. *Id.* at 42, 177 P.2d at 535. *See also* State *ex rel.* Hannah v. Armijo, 37 N.M. 423, 24 P.2d 274 (1933); State *ex rel.* Stanley v. Lujan, 42 N.M. 291, 77 P.2d 178 (1938). These discussions do not negate the possibility of seeking a writ based on the Court's power of superintending control although it would seem hard to meet the requirements. Note, however, that prohibition is available to restrain a trial if there is no criminal complaint since the complaint is needed to confer jurisdiction on the court. State *ex rel.* Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948); Ralph v. Police Court 84 Cal. App. 260, 190 P.2d 632 (1948). In the same manner, prohibition will lie to restrain on appeal when no bond is filed. However, prohibition will not lie to test the sufficiency of the bond since the power of the court to proceed is not involved. State *ex rel.* Heron v. District Court, 46 N.M. 296, 128 P.2d 454 (1942).

action involve the subject matter or personal jurisdiction of the court. Although in *Sitta v. Zinn*,[108] the Supreme Court held that the trial court acted in excess of its jurisdiction in refusing to dismiss an action which was not dilligently prosecuted, four years later the high court held in *Baca v. Burks*,[109] that there was "no jurisdictional question presented" and prohibition would not issue, even though Rule 41(e) of the New Mexico Rules of Civil Procedure would require dismissal on appeal.[110]

Venue is another issue which, although it might appear otherwise, will not support the issuance of a writ for failure of subject matter jurisdiction. Two prohibition cases in New Mexico have dealt with challenges to the trial court's jurisdiction on the basis of lack of venue, *Peisker v. Chavez*[111] and *State ex rel. Appelby v. District Court.*[112] In both cases the petitioners challenged the trial court's hearings of suits in counties other than the ones where the actions were filed. The Supreme Court in denying the petitions held that even though the respondents erred in changing the venue over petitioners' objection, the trial courts had jurisdiction of the parties and subject matter, and prohibition would not lie.

Finally, the Supreme Court has held that failure to comply with the rules of appellate procedure is not jurisdictional. In 1930, in the case of *Gilmore v. District Court*[113] the petitioner sought to prohibit the respondent district judge from hearing an appeal from the probate court. The Supreme Court refused to issue a writ of prohibition because the Constitution of New Mexico granted an appeal from probate court to district court as a matter of right. The high court held that district courts do not acquire jurisdiction by virtue of procedural statutes and the writ was refused:

> Undoubtedly the legislature may prescribe reasonable appellate procedure, but it cannot thereby curtail the jurisdiction of the district court. The questions raised by relator are procedural and not jurisdictional. They are questions which require the exercise of judicial discretion by a court having jurisdiction.[114]

The holding in *Gilmore* was reaffirmed in the case of *State ex rel. Heron v. District Court.*[115] In *Heron* the petitioner sought to pro-

108. 77 N.M. 146, 420 P.2d 131 (1967).
109. 81 N.M. 376, 467 P.2d 392 (1970).
110. *See also* Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), a case involving mandamus to compel dismissal.
111. 46 N.M. 159, 123 P.2d 726 (1942).
112. 46 N.M. 376, 129 P.2d 338 (1942).
113. 35 N.M. 157, 291 P. 295 (1930).
114. *Id.* at 164, 291 P. at 298.
115. 46 N.M. 290, 128 P.2d 451 (1942); 46 N.M. 296, 128 P.2d 454 (1942).

hibit the district court from hearing an appeal from a judgment in forcible entry and detainer rendered by a justice of the peace because an appeal bond had not been properly executed. Citing *Gilmore,* the Supreme Court held that questions relating to the form, execution, amount, and approval of an appeal bond involved matters within the subject matter jurisdiction of the district court; therefore, prohibition would not issue.

B. Want of Jurisdiction Over Parties

The second element set out in *Peisker,* which if not present is a ground for granting a writ of prohibition, is lack of jurisdiction over the parties to the action.[116] The principal means by which a court may acquire jurisdiction over a defendant is by personal service of process.[117] In an early case involving a defective service of process, *Hammond v. District Court*[118] the New Mexico Supreme Court ruled that defective service conferred no jurisdiction over the person. The Court ruled that the lower court's summons was defective because it was returnable in a shorter time than that prescribed by law. Holding that the defect made the summons void, the Court issued its writ.[119]

The *Hammond* decision was reaffirmed in *State ex rel. Truitt v. District Court,*[120] where the Supreme Court held that there must be personal service of process before a trial court has jurisdiction to enter an in personam decree. Since the action was in personam and not in rem (as contended by respondent), and since the nonresident defendant had only been served by constructive service of process, the high court issued its writ of prohibition.[121]

The court may also lack personal jurisdiction if an indispensable party is not brought before the court. The rule was early established in New Mexico that ". . . all persons whose interests will necessarily be affected by any decree in a given case, are necessary and indispensable parties, and the court will not proceed to a decree without them . . ."[122] The court is without jurisdiction to proceed in the absence of an indispensable party, and prohibition would issue if the court attempted to do so.

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116. 46 N.M. at 163, 123 P.2d at 729.
117. J. Walden, *supra* note 60 at 3.
118. 30 N.M. 130, 228 P. 758 (1924).
119. *Id.* at 135, 228 P. at 760.
120. 44 N.M. 16, 96 P.2d 710 (1939).
121. In regard to defective service, *see also* State *ex rel.* Delgado v. Leaby, 30 N.M. 221, 231 P. 197 (1924) *and* State *ex rel.* Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934).
122. American Trust & Sav. Bank v. Scobee, 29 N.M. 436, 453, 224 P. 788, 790 (1924).

> [B]ecause of the absence of an indispensable party, we have here the situation where the court is completely without jurisdiction to hear or try any issue in the cause, and any judgment rendered therein would be a complete nullity.[123]

In line with this jurisdictional concept of indispensable parties the Supreme Court has held that the failure to raise the issue during trial does not constitute a waiver because if a court proceeds without an indispensable party, then the court is without jurisdiction. The situation is the same as if no attempt at trial had been made.[124]

The rule that failure to join an indispensable party is jurisdictional has been substantially modified by the 1969 amendments to Rule 19 of the New Mexico Rules of Civil Procedure.[125] The new Rule 19 has radically altered the concept of indispensable parties,[126] by dividing potential parties into two categories—those who are to be joined if feasible and those who must be joined if the action is to proceed. In order to decide that a person must be joined and that the action cannot proceed in his absence, the trial court must find that in equity and good conscience the action should not proceed with only the parties before it. Hence, the question is no longer one of jurisdiction,[127] but one of facts to be found by the trial court within its discretion. Prohibition has never been able to contest the discretion of the trial court nor to contest the factual findings of the trial court. Prohibition has not issued on indispensable party grounds since the 1969 Amendments.[128]

It is interesting to note that at least one court has suggested (and one justice has held in a concurring opinion), "That which may be waived is not jurisdictional."[129] Since jurisdiction of the person

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123. State Game Comm'n v. Tackett, 71 N.M. 400, 404, 379 P.2d 54, 56 (1962).
124. Sellman v. Haddock, 62 N.M. 391, 403, 310 P.2d 1045, 1053 (1957).
125. N.M. Stat. Ann. §21-1-1 (19) (1970).
126. *See* J. Walden, *supra* note 60, at 159.
127. *Id.* at 160.
128. Note, however, that the Supreme Court in the case of Richins v. Mayfield, 85 N.M. 578, 514 P.2d 854 (1973), stated that, "if the party is indispensable and he has not been joined, the failure to join renders the suit defective." *Id.* at 581, 514 P.2d at 857. Even though this statement is probably dicta, it can be reconciled with the foregoing discussion. Reconciliation can be achieved by limiting the "defect" to one of error only and hence making prohibition inappropriate. It can also be achieved by noting that under the new Rule 19, the determination of indispensibility is basically a factual, discretionary finding and if not challenged on appeal becomes binding; therefore the determination would not be subject to collateral attack and prohibition would not lie. With the exception of the *Mayfield* case, the New Mexico Supreme Court has applied new Rule 19 in the manner intended by its authors. *See* Home Fire & Marine Ins. Co. v. Schultz, 80 N.M. 517, 458 P.2d 592 (1969); Eldridge v. Salazar, 81 N.M. 128, 464 P.2d 547 (1970), and J. Walden, *supra* note 60, at 160-61.
129. State *ex rel.* Appelby v. District Court, 46 N.M. 376, 379, 129 P.2d 338, 340

may be waived in most instances, the application of this principle would nullify one element of jurisdiction set out in *Peisker*. Such a result would be improper.

C. Actions in Excess of Jurisdiction

Another of the essential elements of jurisdiction set out in *Peisker* is the requirement that the court must have the power or authority to decide the particular matters presented. If it does not, it may be acting in "excess of its jurisdiction" and be subject to prohibition.

Acts prohibited as being "in excess of jurisdiction" fall into three general categories:

> (1) the court's initial subject matter jurisdiction lapses;
> (2) the court has jurisdiction over the subject matter as a whole but is without power to issue a particular kind of order; and
> (3) the court fails to adhere closely to the subject matter of a statutorily created right.

Where a court's initial jurisdiction over the subject matter or the parties lapses, prohibition will issue to restrain further judicial action. This can happen in a variety of ways. For instance, once notice of appeal has been filed, jurisdiction lapses in the lower court to consider matters other than technicalities concerning the appeal itself.[130] Prohibition has issued against an inferior court of limited statutory jurisdiction where the court sought to reopen its judgment without statutory authority.[131] Once jurisdiction lapses, further judicial action is as void of judicial power as if there had been no jurisdiction originally.[132] Two cases, *State ex rel. Harvey v. Medler*[133] and *Hammond v. District Court,*[134] are illustrative.

In *Harvey* the district court was considering a criminal charge against the county clerk, a matter over which the court clearly had subject matter jurisdiction. Before trial got underway, however, the court was forced, for want of a properly assembled petit jury, to order a continuance until the next court term. Faced with a delay the District Attorney invoked a special statute permitting temporary suspension of public officials in certain instances pending final adjudication of the criminal matter. The lower court granted a hear-

(1942) (concurring opinion of Justice Bickley, citing Peisker v. Chavez, 46 N.M. 159, 164-165, 123 P.2d 726, 729 (1942)).

130. State *ex rel.* Heron v. District Court, 46 N.M. 290, 128 P.2d 451 (1942); University of Albuquerque v. Barrett, 13 N.M. St. B. Bull. 465 (November 14, 1974).

131. State *ex rel.* Davie v. Bolton, 53 N.M. 256, 206 P.2d 258 (1949).

132. *Cf.* State *ex rel.* Transcontinental Bus Serv., Inc. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

133. 19 N.M. 252, 142 P. 376 (1914).

134. 30 N.M. 130, 228 P. 758 (1924).

ing on the suspension, but in the interim the defendant filed for a writ of prohibition against the lower judge. The defendant claimed, *inter alia,* that by statute any such hearing for the purpose of temporary suspension must be held before and not after the continuance is granted, and therefore, so long as the continuance was in effect, the court's jurisdiction to consider suspension had lapsed. The Supreme Court agreed. Although conceding the lower court's jurisdiction over the general subject matter, the Supreme Court held that having granted the lengthy continuance, the lower court would be acting in excess of its jurisdiction in proceeding any further (although it could possibly consider a retraction of the continuance).

Similarly, in *Hammond* prohibition issued to prevent the lower court from entertaining a judgment creditor's supplementary proceedings against the judgment debtor because no new subpeona had been served to initiate the proceedings. The lower court's initial jurisdiction had lapsed upon entry of judgment; the supplementary proceedings required supplementary jurisdiction. Prohibition issued because the lower court was without such jurisdiction. Although the court did not use the express terminology of acts "in excess of jurisdiction", the rubric clearly applies.

Where a court is vested with jurisdiction over the subject matter of a case, yet is considering a particular order which it has no authority to issue, then prohibition will issue to prevent the court "from going beyond its legitimate powers in a matter of which it has jurisdiction".[135] A case in point is *State ex rel. Miller v. Tackett.*[136]

In *Miller,* a workmen's compensation case, the lower court ordered the plaintiff employee to permit the employer access to his medical records as a prerequisite to his continuing with the case. In effect, the court ordered the plaintiff to waive his doctor-patient privilege conferred by statute. The employee applied for a writ of prohibition. The Supreme Court conceded the presence in the lower court of general subject matter jurisdiction, but held that the issuance of this particular order was in excess of that jurisdiction.

> It is respondent's position that since he had jurisdiction of the parties and of the subject matter of the workmen's compensation case, prohibition should not be entertained by us, citing numerous decisions of this court . . . . However, there is a corollary to this rule that prohibition will lie where the court is exceeding its jurisdiction, even though it had jurisdiction of the parties and generally of the subject matter.[137]

135. State *ex rel.* Harvey v. Medler, 19 N.M. 252, 258, 142 P. 376, 378 (1914).
136. 68 N.M. 318, 361 P.2d 724 (1961).
137. *Id.* at 322, 361 P.2d at 727.

The lower court had not merely erred in issuing the order; it was totally without power to do so. No authority for the order could be read into the statute, and none existed at common law. In fact, no court has the power to order waiver of a specific testimonial privilege or even to consider the subject matter of such an order.

Other cases fit the *Miller* analysis. In *State ex rel. Lynch v. District Court*[138] municipal bondholders sued the City of Gallup asking for an accounting of funds and an order placing the city in receivorship for the purpose of the collection and distribution of assessment proceeds. On application for a writ of prohibition, the Supreme Court conceded the existence of common law subject matter jurisdiction in the lower court to entertain a suit in accounting and that the court had statutory jurisdiction to consider the contractual claims of the bondholders. But neither that specific statute nor the common law gave authority to the lower court to consider placing a municipality into receivorship. Nor could it be read into the subject matter of an action in accounting. Therefore, any order issued by the court would be outside the scope of the subject matter and in excess of its original accounting jurisdiction and therefore "a complete nullity and subject to collateral attack."[139]

In a trilogy of criminal cases, *State v. Tackett,*[140] *State v. Zinn,*[141] and *State v. Felter,*[142] the Supreme Court considered the question whether and under what circumstances the state in a criminal prosecution could be ordered to reveal statements and testimony of witnesses before the grand jury. The issue was the traditional privilege of secrecy granted grand jury proceedings. The upshot of the three decisions is that, as in *Miller,* the lower court has no power to order a waiver; no authority exists in statutory or common law nor can it be implied from the clear grant of subject matter jurisdiction over criminal cases. Without power, the court was acting in excess of jurisdiction.

Conceptually, it is easy to imagine similar instances of a court vested with subject matter jurisdiction considering an order outside that subject matter and which it has no authority to issue. For instance, in a civil case a court obviously cannot order a losing party to jail. A judge cannot sentence a criminal defendant beyond the statutory maximum; it is outside the subject matter of the case, the

138. 41 N.M. 658, 73 P.2d 333 (1937).

139. *See* State *ex rel.* Transcontinental Bus Serv., Inc. v. Carmody, 53 N.M. 367, 370, 208 P.2d 1073, 1075 (1949) (commenting on the effect of the opinion in State *ex rel.* Lynch v. District Court, 41 N.M. 658, 73 P.2d 333 (1937)).

140. 78 N.M. 450, 432 P.2d 415 (1967).

141. 80 N.M. 710, 460 P.2d 240 (1969).

142. 85 N.M. 619, 515 P.2d 138 (1973).

criminal statute which is the basis of the accusation.[143] In civil cases judicial relief granted outside the scope of that requested in the complaint, and outside the scope of relief authorized in the statute, has been said to be in excess of jurisdiction.[144] In such cases the focus is upon the particular order at issue and whether the court has authority in law to consider it or such authority as can conceivably by implied from the general subject matter of the case.[145]

The distinction between judicial acts in excess of jurisdiction and acts merely erroneous has been described as at best a fine line.[146] *State ex rel. Miller v. Tackett*[147] illustrates the difficulty of drawing that line. Whereas in *Miller* the Court properly issued prohibition on the theory that no court can order waiver of an absolute testimonial privilege, any court does have the power to inquire whether a testimonial privilege has in fact been waived, or indeed whether such a privilege exists given the facts of the particular case. If the privilege is a qualified rather than an absolute one, the court can inquire whether exceptions such as good cause and good faith have been satisfied.

The Court in *Miller* specifically recognized this distinction:

> . . . where the statute specifically grants the privilege it is beyond the powers of the court to direct petitioner to waive the same. The situation differs from that which is present where the court is given power and authority to do certain acts upon proof of good cause or other proper showing provided for in the statute. If there is a question as to whether good cause has been established, or proper showing made, prohibition is not the proper mode for raising the issue, since the court having the power to make the order was acting within its jurisdiction, and errors or mistakes made by it are reviewable only on appeal or by writ of error. That is not the instant situation. Here, the act of the court was clearly beyond its powers and the order was void.[148]

143. *See, e.g.,* State v. McNeece, 82 N.M. 345, 481 P.2d 707 (1971).

144. Santa Fe, S.J., & N.R.R. v. Helmick, 36 N.M. 157, 9 P.2d 695 (1932); Walls v. Erupcion Mining Co., 36 N.M. 15, 6 P.2d 1021 (1931), a nonprohibition case.

145. *Cf.* Lloyd v. Lloyd, 60 N.M. 441, 292 P.2d 121 (1955), a non-prohibition case; *but see* City of Roswell v. Richardson, 21 N.M. 104, 152 P. 1137 (1915); Starnes v. Starnes 72 N.M. 142, 381 P.2d 423 (1963). Prohibition has also been granted on the basis of the defense of sovereign immunity on the theory that the court would be without power and in excess of its jurisdiction to consider issuance of an order against the state without its consent. *See* State *ex rel.* Board of County Comm'rs v. Burks, 75 N.M. 19, 399 P.2d 920 (1965); State *ex rel.* Swayze v. District Court, 57 N.M. 266, 258 P.2d 377 (1953); State *ex rel.* State Tax Comm'n v. Chavez, 44 N.M. 260, 101 P.2d 389 (1940).

146. State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

147. 68 N.M. 318, 361 P.2d 724 (1961).

148. *Id.* at 323, 361 P.2d at 727-28 (1961); *cf.* Walls v. Erupcion Mining Co. 36 N.M. 15, 6 P.2d 1021 (1931).

What the court in *Miller* did not have the power to do was to acknowledge the privilege and order it waived on its face.

The difference may distill down, however, to nothing more than semantics. In *State v. Tackett*[149] the Supreme Court issued prohibition against the lower court's holding that as a matter of law the prosecution had to waive its privilege against revealing secret testimony. Subsequently, in *State v. Zinn*[150] the defendant meticulously framed his request for information not in terms of an absolute legal right but in terms of satisfying the factual prerequisites necessary to show good cause, or "particularized need", the exception to a qualified privilege.[151] The lower court invoked its discretion and determined as a factual matter that the privilege did not apply in that particular case, and the Supreme Court refused to interfere. The point is that in *Zinn*, by relying on the lower court's traditional fact-finding discretion and by framing a limited order, the defendant avoided prohibition.[152]

When the legislature creates a statutory right, it is well settled that the statute invoked must be followed closely by the parties.[153] If in adjudicating the statutory claim the court strays from the legislative mandate, the result is not only error but what has at times been characterized as an act in excess of jurisdiction.[154] When prohibition has been sought against the lower court, the result has often times been a confusion of jurisdictional principles. An example is the case of *State ex rel. J.P. (Bum) Gibbins v. District Court.*[155]

In *Gibbins* the claimant in a workmen's compensation case requested that the employer pay for certain medical expenses prior to trial on the questions of liability and damages. Before the court could hear claimant's motion the employer sought a writ of prohibition. The Supreme Court issued the writ, interpreting the workmen's

149. 78 N.M. 450, 432 P.2d 415 (1967).

150. 80 N.M. 710, 460 P.2d 240 (1969).

151. State v. Felter, 85 N.M. 619, 620, 515 P.2d 138, 139 (1973).

152. On the merits, *State v. Zinn* is difficult to square with *State v. Tackett* and *State v. Felter*. Moreover, in none of these cases did the Court address itself to the propriety of prohibition, which may explain why the applicability of the "excess" theory appears strange in this context. Applying the thrust of State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962) and State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970) to these cases indicates that prohibition might not be issued in such a situation in the future.

153. State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

154. Santa Fe, S.J. & N.R.R. v. Helmick, 36 N.M. 157, 9 P.2d 695 (1932); State *ex rel.* Mountain States Mut. Cas. Co. v. Swope, 58 N.M. 553, 273 P.2d 750 (1954); *cf.* Ogletree v. Jones, 44 N.M. 567, 106 P.2d 302 (1940); Clower v. Grossman, 55 N.M. 546, 237 P.2d 353 (1951); George v. Miller & Smith, Inc., 54 N.M. 210, 219 P.2d 285 (1950).

155. 65 N.M. 1, 330 P.2d 964 (1958).

compensation statute as precluding the adjudication of expenses prior to determination of liability. Having gone outside the statute, the lower court was, at least in the eyes of the Supreme Court, without power to hear the matter and threatening to act in excess of its subject matter jurisdiction.

Similarly, in *Cal-M, Inc. v. McManus*[156] the plaintiff requested a prejudgment attachment, a right expressly conferred by statute, but did not post bond, a prerequisite which was also clearly set forth in the statute. The court granted the request, and the defendant sought prohibition. The Supreme Court issued the writ, concluding that "when there is noncompliance with the legislative mandate, the jurisdiction of the court does not attach".[157]

In both cases the Court acknowledged general subject matter jurisdiction. The sole basis for prohibition was the failure to adhere strictly to the statutory procedure. Yet where was the true lack of power essential for prohibition? In *Gibbins* the court was authorized to consider issues of medical expenses; its contemplated order was well within the general subject matter of the workmen's compensation statute. The court's error was that its consideration of medical expenses was premature, yet not something altogether extrinsic to the subject matter of the case.[158] Similarly, in *Cal-M* the court was expressly authorized to issue writs of attachment prior to judgment. The lower court erred in proceeding without bond, but its order of attachment was certainly contemplated by the statute.[159] In short, the lower courts in both cases were guilty of nothing more than misreading the respective statutes: they misapplied conditions precedent. Their error was in the result reached, not in the threshold questions of whether they had a right to decide.[160] It is only the

156. 73 N.M. 91, 385 P.2d 954 (1963). *See also* State *ex rel.* Heron v. District Court, 46 N.M. 290, 128 P.2d 451 (1942); State *ex rel.* Heron v. District Court, 46 N.M. 296, 128 P.2d 454 (1942); Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930).

157. 73 N.M. 91, 93, 385 P.2d 954, 955 (1963).

158. Gibbins can be considered an appropriate exercise of prohibition on an "excess" theory only if restricted to a holding that even to consider an award of medical expenses prior to trial so violates fundamental principles of fairness inherent in a legal system that no court can ever consider such an order. *See, e.g.*, State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933). Unfortunately the Court's opinion is much broader than this and amounts to an issuance of the writ simply on the grounds that the lower court misread the statute by failing to follow a statutory condition precedent. The error was, then, more in the nature of those properly propounded in a motion to dismiss for failure to state a claim on the merits.

159. 73 N.M. at 94, 385 P.2d at 957.

160. The viability of Gibbins is in considerable doubt in light of its treatment by the Court in State *ex rel.* Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962). *Cal-M v. McManus* is rarely cited, and indeed the Court in writing the opinion omitted an authoritative reference to any other prohibition cases including *Kermac* decided only one year earlier. A similar case is Carter v. Montoya, 75 N.M. 730, 410 P.2d 951

latter that is truly a question of jurisdiction.[161]

The Supreme Court has recognized the inconsistencies imbedded in its prior decisions and in *State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo*[162] sought to reassert its traditional constraints on prohibition. *Kermac*, a workmen's compensation case, involved a petition for a writ of prohibition against a lower court that had denied a motion to dismiss notwithstanding glaring failures of the employee to satisfy statutory prerequisites. If prohibition had been proper in *Gibbins* it seemed doubly appropriate here, especially since similar statutory deficiencies had previously been characterized as jurisdictional in other workmen's compensation cases.[163]

The Court asked itself the familar questions: Did the lower court have jurisdiction of the subject matter? Clearly it did. Was the court authorized to issue this kind of order within the subject matter of workmen's compensation? Clearly the court had the power to deny a motion to dismiss. Where then was the lack of power, the "excess" of jurisdiction?

> Stronger language to state that notice and timely filing requirements are mandatory can hardly be imagined. However, it does not follow from this fact, or the fact that they may be considered jurisdictional that prohibition should issue where the court fails to dismiss the case upon the facts being called to its attention.[164]

(1966), of doubtful validity, since the only precedents cited by the Court were cases based on superintending control and not strictly on acts in excess of jurisdiction.

161. State *ex rel.* Tax Comm'n v. Chavez, 44 N.M. 260, 101 P.2d 389 (1940),

162. 70 N.M. 475, 375 P.2d 118 (1962).

163. The employer claimed that the injured workman had failed to give proper notice of injury and that the case was premature because the employer had not yet refused to make compensation payments. Both items were expressed conditions to the suit under the statute. Similar provisions had previously been described as jurisdictional in nature. The Court in *Kermac* discussed at length the bifurcated history of subject matter of jurisdiction as involving jurisdiction over the subject matter generally and jurisdiction over the particular case. *See* Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 25 N.M. 686, 187 P.2d 560 (1919). The latter case involved the question of how closely the court adhered to the particular statute at issue, and resembles the modern-day motion to dismiss for failure to state a claim more than true subject matter jurisdiction. The resemblance is all the more striking in that the so-called jurisdiction over the particular case, unlike contemporary subject jurisdiction, could be waived by failure to raise it before the lower court. Clower v. Grossman, 55 N.M. 546, 237 P.2d 353 (1951). The Court in *Kermac* disaffirmed this obsolete jurisdictional view as no longer being a ground for prohibition. For cases in addition to the above based on jurisdiction over the particular case, *see generally*, State *ex rel.* Mountain States Mut. Cas. Co. v. Swope, 58 N.M. 553, 273 P.2d 750 (1954); Ogletree v. Jones, 44 N.M. 567, 106 P.2d 302 (1940); George v. Miller & Smith, Inc., 54 N.M. 210, 219 P.2d 285 (1950); Spieker v. Skelly Oil Co., 58 N.M. 674, 274 P.2d 625 (1954); Yardman v. Cooper, 65 N.M. 450, 339 P.2d 473 (1959); Sanchez v. Bernalillo County, 57 N.M. 217, 257 P.2d 909 (1953); Copeland v. Black, 65 N.M. 214, 334 P.2d 1116 (1959).

164. 70 N.M. at 480, 375 P.2d at 122.

Although the Court's discussion of the property of prohibition based upon acts in excess of jurisdiction is cryptic, the import of the decision is clear. Failure to adhere closely to the statutory prerequisites constitutes clear error, but clear error alone does not deprive the lower court of its power to decide the question in the first instance.

Clearly, the Court's approach in *Kermac* is preferable to that expressed in *Gibbins* and *Cal-M.*[165] Taking the Court at its word in the latter two cases leads to the untenable conclusion that any variance from the procedure set out in a statutory cause of action is jurisdictional. For instance, within the attachment proceeding in *Cal-M* any slight defect in the bond, the affidavit, or even the form of the writ itself, all set forth expressly by statute, would be jurisdictional, thus enabling the party to proceed immediately by prohibition. Given the vast number of statutory causes of action in New Mexico the use of prohibition would be multiplied tenfold; its scope would stretch beyond that of appeal; and prohibition would become merely a remedy for denial of the motion to dismiss for failure to state a claim. Such an interpretation would go far beyond the narrow scope originally given the extraordinary writ.

An obvious overlap exists between judicial acts without jurisdiction and those in excess of jurisdiction. Many times there appears to be very little difference between the two, and the Supreme Court has emphasized that the practical consequences of either are identical.[166] And oftentimes the Court has intervened on the putative ground that there has been an act in excess of jurisdiction, only to base its opinion on what amounts to little more than clear error.

Fortunately, the Court in *Kermac* and other cases has reasserted its policy of prudent self-restraint against premature review of issues not strictly jurisdictional in nature. It is only through such continuing diligence that the Court can avoid a potentially serious threat to the fair and orderly administration of justice.

D. The Power of Superintending Control

Not only does Article VI, Section 3 of the New Mexico Constitution give the Supreme Court the power to issue writs of prohibition, but it gives the Supreme Court "superintending control over all

165. As evidence of support for the policy of self-restraint announced in *Kermac*, see State *ex rel.* Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949); State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970); State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

166. *See* State *ex rel.* Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

inferior courts. . . ."[167] Similarly, the district courts are given the power of "supervisory control" over "inferior courts and tribunals in their respective districts."[168] This power has become very important in the area of prohibition for even when the Supreme Court concludes that the district court has jurisdiction over the cause and the parties and the power to issue the particular order under consideration, the high court may nonetheless intervene almost at will by a writ of prohibition under its power of superintending control (hereinafter designated simply as a writ of superintending control) to restrain or correct serious errors below.[169]

Historically, the power of superintending control grew out of the need for control over inferior courts:

> The power of superintending control is the power to control the course of ordinary litigation in inferior courts, as exercised at common law by the Court of King's Bench and by the use of writs specifically mentioned in the Constitution and other writs there referred to or authorized.[170]

When extraordinary writs are issued under the power of superintending control, they are in no way restricted by the technical parameters of these writs, and the writs can issue whether or not other remedies are available.[171]

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167. N.M. Const. art. VI, §3 provides that:

> The Supreme Court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the Supreme Court, or before any of the district courts or any judge thereof.

168. N.M. Const art. VI, §13 provides that:

> The district court shall have original jurisdiction in all matters and causes not excepted in this Constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The District courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction: provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district court shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat.

169. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939).

170. State v. Roy, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936).

171. Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1935).

> As is so often stated in the decisions, the power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bound only by the exigencies which call for its exercise. As new instances of these occur it will be found able to cope with them. And, if required, the tribunals having authority to exercise it, will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted."[172]

Given this broad, almost limitless power of the Supreme Court to issue writs of superintending control, it should come as no surprise that serious objection to such plenary power was not long in coming. As early as in the case of *State ex rel. Harvey v. Medler*[173] the respondents in opposition to the writ gloomily predicted the end of an orderly administration of justice "in that at almost every stage of proceedings in the district court application might be made to this court for one or more of the various writs in order to control the action of the district court, or superintend the exercise of its functions."[174] Conceding the power to intervene, the high court in *Harvey* nonetheless sought to assuage these concerns with an affirmation of its own self-restraint:

> [I]t is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion to be granted or withheld according to the circumstances of each particular case, to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable.[175]

In order to implement this "great caution" in the consideration of writs of superintending control, the Supreme Court has fashioned a variety of self-imposed restraints. The statement of Justice Sadler in *State ex rel. Transcontinental Bus Service, Inc. v. Carmody*[176] has been often quoted and paraphrased:

> It can be taken as settled that this [superintending] control may not be invoked to perform the office of an appeal. . . . On the other hand, even though the trial court be moving within its jurisdiction and the threatened action be error only, as distinguished from a

172. *Id.* at 236, 89 P.2d at 616 (quoting from brief of plaintiff in error without specifically adopting the language).
173. 19 N.M. 252, 142 P. 376 (1914).
174. *Id.* at 259, 142 P. at 378.
175. *Id.*
176. 53 N.M. 367, 208 P.2d 1073 (1949).

> want of jurisdiction as well, this court may intervene by an appropriate writ in an exercise of its power of superintending control, if the remedy by appeal seems wholly inadequate; . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense.[177]

To these criteria others have been added through the years, including consideration of "fundamental rights"[178] and "the public interest."[179] The writ has been described as proper when the lower court's order is "arbitrary and tyrannical".[180] And the *raison d'etre* of the writ, the supervision of the lower courts in the interest of an orderly administration of justice, has at times been offered as an additional independent basis.[181]

Succinctly stated, the litigant petitioning for a writ of superintending control must be prepared to demonstrate one or more of the following: (a) an egregious error by the court below; (b) inadequacy of appeal; (c) extraordinary burdens for the petitioner should the writ not issue; and (d) an issue which affects the public interest, fundamental rights, or the orderly administration of justice. Although these criteria have been variously stated to be either cumulative or independent, it is clear that the prudent litigant will address all of them.

In *State ex rel. DeMoss v. District Court,*[182] a medical malpractice action, the lower court interpreted the applicable statute of limitations as not precluding a certain wrongful death action, and the parties were ordered to proceed to trial. On the basis of a prior New Mexico case directly on point and holding that the statute of limitations was a bar which would defeat a plaintiff's verdict, the defendant applied for a writ of superintending control. On the basis of this clear precedent the Court issued the writ. Although recognizing other factors such as the burden upon the parties should trial and appeal be necessary, the Supreme Court was clearly influenced by the degree to which the lower court had erred in refusing to follow direct precedent. Mere error, however, without some other form of prejudice is never sufficient.[183] An example is *State ex rel. Kermac*

177. *Id.* at 378, 208 P.2d at 1080.

178. Albuquerque v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939).

179. *See, e.g.,* State *ex rel.* State Tax Comm'n v. District Court, 69 N.M. 295, 366 P.2d 143 (1961).

180. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

181. *See, e.g.,* State *ex rel.* Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

182. 55 N.M. 135, 227 P.2d 937 (1951).

183. An exception to this general rule may be the situation where the court below is clearly acting without jurisdiction, but prohibition is inappropriate because of a technicality

Nuclear Fuels Corporation v. Larrazolo,[184] where the lower court refused to dismiss a workmen's compensation case despite allegations that various statutory requirements had not been satisfied. Instead the court deferred consideration until all the evidence was in at trial. On application for the writ of superintending control, the Supreme Court conceded that under the force of its precedent, the defendant's claims were valid. The Court noted, however, the lack of prejudice in a mere delay until trial at which time the lower court would reconsider the validity of the defenses. Unlike the situation in *State ex rel. DeMoss v. District Court*, the petitioner here was not being forced into the unnecessary burden of a full-fledged appeal. Absent such a burden, the writ would not issue.

In some instances matters raised prior to trial are all but impossible to appeal. In such a predicament, the Court has often looked favorably upon an application for the writ of superintending control. In *State ex rel. Transcontinental Bus Service, Inc. v. Carmody*[185] the order at issue, a decision by the district court to remand to the State Corporation Commission for further proceedings, could not by itself be reviewed on appeal. The point was appealable only after remand to the Commission, the taking of further evidence, a Commission decision, and subsequent review by the lower court. All of this, of course, was precisely what the petitioner, Transcontinental Bus, sought to avoid, and this properly influenced the court in issuing the writ.[186]

Similarly, judicial or administrative orders which are inherently transitory, such as a temporary restraining order issued pursuant to Rule 65 of the Rules of Civil Procedure, may not be worth the time and money to appeal. Therefore, an issue which the Supreme Court regards as significant may never reach the Court on appeal or, if it would, it might well be moot. The Supreme Court has intervened by

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(*e.g.*, failure to raise the issue before the lower court; no jucicial act remains to be prohibited). In such an instance, the Court has indicated that if the lower court is proceeding to a void judgment which will result in a substantial wrong and force a burdensome appeal, then it will interfere by the writ of superintending control. For judicial error other than one of jurisdiction the Court will still require a demonstration of additional prejudice. *See, e.g.*, State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

184. 70 N.M. 475, 375 P.2d 118 (1962).

185. 53 N.M. 367, 208 P.2d 1073 (1949).

186. Much of this problem might now be avoided by interlocutory appeal; *see* N.M. Stat. Ann. § § 21-10-2.1 (A)(3), -3 (Supp. 1973), and 21-12-3 (a)(2), (g) (interim Supp. 1974). Although the point has never been discussed by the Court, it would seem consistent with the policy of judicial restraint to require as a prerequisite for extraordinary writs, at least an attempt before the lower court to certify an issue for interlocutory appeal. *See generally New Mexico's Analogue to 228 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts*, 2 N.M.L.Rev. 113 (1972).

a writ of superintending control to preserve an issue on this very justification.[187]

Most often the inadequacy of the appeal is phrased in terms of its tremendous cost and delay. That is, the Court is urged to rule by way of superintending control on the specific, isolated issue presented in order to avoid forcing the litigant to undergo the cost of raising every appealable issue after an unsuccessful final judgment below. The costs of appeal have at times been persuasive,[188] but have just as often failed.[189] Every case involves appeal costs and delay which can very easily be characterized as burdensome to the losing party, so the Court will usually demand more.

Economic damage to a party sufferred pending appeal has been persuasive to the Court where, as in *State ex rel. Transcontinental Bus Service, Inc. v. Carmody*,[190] the regulatory commission allowed a business competitor of the petitioner to continue the challenged practice pending appeal to the courts. Conversely, where the party requesting the writ had in fact prevailed before the commission and was merely challenging the procedure for review contemplated by the district court, the lack of continuing economic damage clearly hindered its petition for the writ of superintending control.[191]

What the Court properly seems to require is the kind of burdensome injury that is truly irreparable and unique. For example, in *State ex rel. DeMoss v. District Court*[192] a wrongful death action against a well-known doctor, the Court was properly impressed by the irreparable damage to professional reputation threatened by a lawsuit that, in light of clear precedent, was certain to be reversed on appeal.

An additional criterion, only recently articulated, is the effect the issues may have on the commonwealth. For instance, in *State ex rel.*

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187. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970). The Court noted the transitory nature of seven day suspension orders issued against malfeasant jockeys by the State Racing Commission. Since fines imposed by the Commission were also insignificant, "the probability of a case reaching [the Court] on appeal is remote." *Id.* at 111, 476 P.2d at 770. Since jockey licenses were renewed annually, any case that was appealed might well be moot. This problem, coupled with the importance to the state of the substantive issue to be decided (state gambling laws), motivated the Court to issue the writ of superintending control.

188. *See, e.g.*, State *ex rel.* Transcontinental Bus Serv., Inc., v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

189. *See, e.g.*, Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939); State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

190. 53 N.M. 367, 208 P.2d 1073 (1949).

191. State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

192. 55 N.M. 135, 227 P.2d 937 (1951).

Tax Commission v. District Court[193] the Court was presented with an injunction obtained by Mountain States Telephone against the State Tax Commission. The injunction restrained the Commission from the collection of taxes under a new assessment formula in any of the counties containing Mountain States property. In these counties Mountain States was one of the largest taxpayers, and such taxes had to be collected yearly for the county governments to budget properly. The Court therefore concluded that the threat to the public interest was one of perhaps several irreparable injuries which warranted extraordinary review of the lower court's action.

Similarly, the unique effect upon the public welfare in *State ex rel. State Racing Commission v. McManus*[194] and *Montoya v. McManus*[195] constituted the principal if not the sole incentive for extraordinary review. In *State Racing Commission* the State complained that ex parte, temporary restraining orders were issuing with increasing frequency to order the reinstatement of jockeys suspended for racing infractions. This, coupled with the unlikelihood that such short-term suspensions would be appealed by the parties, constituted a recurring impediment to the State's foremost interest in the prudent regulation of gambling activities. *Montoya* concerned an election contest by an unsuccessful candidate for the office of Lieutenant Governor. The "legislative policy of speedy disposition of election contests"[196] would be seriously threatened if the voters as well as the contestants had to tolerate the delays incidental to any full-fledged appeal. On this basis the writ was issued.

As noted previously, the origins of the writ of superintending control, both in the New Mexico Constitution and at common law, are embedded in the historical need for supervision over inferior courts in the interest of the proper administration of justice. *State ex rel. Anaya v. Scarborough*[197] provides a classic example of the need for such supervisory control. In *Scarborough* a criminal defendant charged with first degree murder petitioned to have the district judge prohibited from sitting further on his case because the judge had improperly insinuated himself into the plea bargaining process and was biased against the defendant. The Supreme Court noted the improper behavior of the court and the patent unfairness of forcing the defendant to subject himself to trial before that court and wait

193. 69 N.M. 295, 366 P.2d 143 (1961).
194. 82 N.M. 108, 476 P.2d 767 (1970).
195. 68 N.M. 381, 362 P.2d 771 (1961).
196. *Id.* at 392, 362 P.2d at 779.
197. 75 N.M. 702, 410 P.2d 732 (1966).

until appeal to raise the issue of prejudice.[198] Although the Court refused to conclude that bias did in fact exist, the writ nonetheless issued to prevent the mere appearance of judicial impropriety.

> We perceive our duty under our power of superintending control is to make certain, insofar as humanly possible, that the traditional respect and high regard in which courts generally are held will in no way be encroached upon. In order to do so we are most assuredly of the opinion that courts must not only be impartial, unbiased and fair but, in addition, that no suspicions to the contrary be permitted to creep in.[199]

E. Constitutional Questions

Constitutional questions that pertain directly to the jurisdiction of a court are oftentimes adjudicated by way of prohibition. The most common examples arise from questions of administrative law.[200] With ever-present tension between administrative agencies and their overseer judicial bodies, the constitutional guarantee of separation of powers as defined further by the Legislature must necessarily come into play in determining judicial power over an independent governmental branch.

The more challenging problems arise when constitutional issues do not intrinsically relate to jurisdiction. For example, statutes giving rise to causes of action have been challenged numerous times on constitutional grounds. Obviously, the basis for the challenge can be any one of a number of constitutional provisions, none of which relate expressly or implicitly to the separation of powers or the powers of the judiciary. The decisions are split on the propriety of deciding by prohibition constitutional questions that do not relate intrinsically to constitutional judicial power.

Two cases, *State ex rel. Hannah v. Armijo*[201] and *Board of Commissioners of Guadalupe County v. District Court,*[202] appear to take the position that since a successful constitutional attack on whatever grounds will leave the court without any valid subject matter statute to administer, subject matter jurisdiction is necessarily implicated, and prohibition is a proper vehicle to adjudicate the issue. The case

198. Of importance to the Court was the severity of the charge and the fact that the petitioner was incarcerated without bond. The mere delay in an appeal was therefore probably inadequate.

199. 75 N.M. at 710, 410 P.2d at 737.

200. *See, e.g.,* State *ex rel.* State Corporation Comm'n v. McCulloh 63 N.M. 436, 321 P.2d 207 (1958); State *ex rel.* Corporation Comm'n v. Zinn 72 N.M. 29, 380 P.2d 182 (1963); State *ex rel.* State Bd. of Educ. v. Montoya 73 N.M. 162, 386 P.2d 252 (1963).

201. 37 N.M. 423, 24 P.2d 274 (1933).

202. 29 N.M. 244, 223 P. 516 (1924).

of *State ex rel. Oil Conservation Commission v. Brand*[203] takes the opposing position that since the constitutionality of the subject matter statute is a question almost never subject to collateral attack, constitutional questions cannot be considered per se jurisdictional. This line of cases would permit adjudication of a constitutional issue by way of prohibition if the issue were inherently one of judicial power, such as the constitutional separation of powers; but it would not permit such adjudication merely for the reason that the subject matter statute was being attacked. The Court can always, of course, resort to its power of superintending control to determine constitutional questions by means of prohibition.

The second line of analysis of jurisdictional defects appears to be the better reasoned one. In the *Brand* case, decided in 1959, the Court was confronted with a constitutional attack on an administrative appeals statute permitting a trial de novo in the district court. The constitutional challenge was based upon the separation of powers doctrine. The argument was that the court in reviewing administrative determinations de novo was usurping executive prerogative. The subject matter of the action was the appeals statute; a successful constitutional attack would vitiate the statute at least in part. Yet the Supreme Court refused to decide the constitutional issue on prohibition, saying,

> Here, the proposed action, [trial de novo] if taken by respondent, would not be void or subject to collateral attack, but would merely be a matter which could be reviewed by this court on appeal.[204]

The case of *State ex rel. Hannah v. Armijo*[205] (hereinafter *Hannah I*) represents the first-mentioned line of reasoning. In *Hanna I* the district attorney was proceeding in district court on the basis of a state statute permitting removal proceedings against local school board members. The school board sought prohibition on the ground that under the state constitution only the State Board of Education could effect removal, and the statute was therefore unconstitutional on its face. Although it refused to issue the writ, the Supreme Court proceeded to the merits of the question on the assumption that without a constitutionally valid subject matter statute, there would be no jurisdiction in the lower court.

> [B]y virtue of the provisions of Article 12, § 6 of the state Constitution . . . the district court . . . [may be] without power, authority,

203. 65 N.M. 384, 338 P.2d 113 (1959).
204. *Id.* at 386, 338 P.2d at 115.
205. 37 N.M. 423, 23 P.2d 274 (1933).

> or jurisdiction to remove. This contention is a direct challenge to respondent's jurisdiction of the subject matter.[206]

Hannah I then implies that, contrary to the conclusion reached in *Brand,* a constitutional attack upon a subject matter statute, even if it does not inherently involve the judicial power, may be the basis for a writ of prohibition. Other cases appear at first blush to support *Hannah I* as the general rule in New Mexico, but upon closer analysis that case stands alone.

After the school board failed to sustain its position in *Hannah I,* the action was again commenced in the district court. This time the local board members filed an affidavit disqualifying the district judge. When he refused to recognize the constitutionality of the disqualification statute, the local board members again sought prohibition. In its second opinion in this case[207] (hereinafter *Hannah II*), the Supreme Court again agreed to decide the merits of the constitutional attack, upholding the validity of the statute. However, unlike its predecessor, *Hannah II* does not stand for the proposition that prohibition is a proper means by which to decide any constitutional challenge to a subject matter statute. Rather the Court held that whenever a judge, prejudicially interested in a case or merely alleged to be so, continues to preside over the matter, this so violates fundamental principles of Anglo-American jurisprudence that any judicial decision would be totally void and without jurisdiction.[208] The Court in *Hannah II* decided the constitutionality of the disqualification statute not because it was per se a matter of subject matter jurisdiction, but because of the unique jurisdictional nature of bias in a presiding judge.

Another case commonly associated with the principle of *Hannah I* is *Board of Commissioners of Guadalupe County v. District*

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206. *Id.* at 424, 24 P.2d at 275. This was the sole discussion of the propriety of prohibition as a vehicle to decide the constitutional question. The Court did not explore the question whether such a constitutional attack on the school board removal statute was of a truly jurisdictional nature such that it could be raised collaterally at any time. The assumption that prohibition was the proper place to reach the merits does not appear to be based on any rational theory.

207. State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

208. The Supreme Court went beyond the Constitution to what it called "natural equity" for its conclusion that for any judge to preside over a case in which he has a prejudicial interest would produce a judicial act that is null and void. *Id.* at 76, 28 P.2d at 512. The Court concluded that it was constitutional for the Legislature to extend that proposition by statute to the mere accusation of bias or prejudice. Because the nature of the constitutional issue necessarily involved the question of judicial power, the fact that the Court reached the merits of prohibition in *Hannah II* does not give rise to the broader implications of *Hanna I* where the constitutional issue had nothing inherently to do with judicial power.

Court.[209] Here, the Court decided on prohibition the constitutionality of the peremptory mandamus statute, holding that although such writs issued without notice and an opportunity to be heard, this was consonant with due process. The due process attack on the mandamus statute involved principles of in personam jurisdiction. These principles are inherently principles of judicial power. Therefore, closely read, *Board of Commissioners of Guadalupe County* does not stand for the proposition that any constitutional attack on a subject matter statute is a proper basis for prohibition.[210] In addition, the cautious approach the Supreme Court has displayed in the use of prohibition indicates that *Hannah I* is no longer strong authority. It is submitted that if the test today, as in *State ex rel. Oil Conservation Commission v. Brand,* ties prohibition to only those peculiar constitutional questions that can be raised collaterally,[211] then *Hannah I* is surely not the law and should be overruled.

Another possible way of determining whether the writ should lie is to apply the standard used in deciding whether a question can be raised for the first time on appeal. The rule is well-settled in New Mexico that on appeal only questions of subject matter jurisdiction can be raised for the first time in the appellate courts.[212] This same rule applies to constitutional questions.[213] As the Supreme Court stated in *State ex rel. Burg v. City of Albuquerque:*[214]

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209. 29 N.M. 244, 223 P. 516 (1924).

210. The consitutional attack on the subject matter statute was also an attack on the statute's assumption of in personam jurisdiction. Again, as with *Hannah II,* the constitutional question decided via prohibition inherently related to questions of judicial power. If the constitutional attack in *Board of Commissioners of Guadalupe County* had not been one concerning the defendant's rights to due process (a question here in personam jurisdiction), but rather had involved, for example, a defective statutory title violative of Article IV, Section 18 of the New Mexico Constitution, then under the principles of *Oil Conservation Comm'n v. Brand,* it would not have been proper to decide the question via prohibition.

211. Such questions must be inherently ones of jurisdiction in addition to being constitutional. In certain instances constitutional questions of administrative law that inherently attack the assertion of judicial power might be properly considered jurisdictional. *See* N.M. Const. art. III, § 1. Other such questions inherently involving judicial power might arise from a purported conflict between a legislative enactment and a provision in Article VI of the New Mexico Constitution setting forth the powers of the judiciary.

212. *See, e.g.,* Brock v. Adams, 79 N.M. 17, 439 P.2d 234 (1968); Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963). Exceptions to this rule are sometimes made where issues are of sufficient public interest or affect fundamental rights. *See* Des Georges v. Grainger, 76 N.M. 52, 412 P.2d 6 (1966); N.M. Sup. Ct. R. Prac. 11. N.M. Stat. Ann. § 21-12-11 (Interim Supp. 1974). The exceptions are not material to this discussion.

213. State *ex rel.* Burg v. City of Albuquerque, 31 N.M. 576, 249 P.242 (1926); State Highway Comm'n v. Southern Union Gas Co., 65 N.M. 217, 334 P.2d 1118 (1959); Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966); *In re* Reilly's Estate, 63 N.M. 352, 319 P.2d 1069 (1957); Miera v. State, 46 N.M. 369, 129 P.2d 334 (1942); Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

214. 31 N.M. 576, 249 P. 242 (1926).

> Constitutional questions, not raised in the regular and orderly procedure in the trial, are ordinarily rejected . . . unless the jurisdiction of the court below or that of the appellate court is involved; in which case it may be raised at any time, or on the court's own motion.[215]

The Supreme Court has refused to consider constitutional attacks on state statutes raised for the first time on appeal. In the most incisive of these cases, *Miera v. State*,[216] the defendant-state attempted to challenge for the first time on appeal the constitutionality of a statute permitting suits against the State for negligently killing sheep. The subject matter of the cause was the tort statute; if the statute was unconstitutional there was no subject matter jurisdiction. Yet the argument was not allowed to be raised on appeal. The Court, relying on *Burg*, stated that "the jurisdiction of the court below, or of the appellate court is [not] involved".[217] Therefore, the rule in New Mexico appears to be that the mere existence of a constitutional attack on a subject matter statute does not give rise to a question of subject matter jurisdiction such that it can be raised for the first time on appeal. The same rule should apply in determining whether a writ of prohibition should issue.

If a constitutional attack on the validity of a subject matter statute is alone not enough to satisfy the strict requirements of prohibition, then *a fortiori* the mere existence at trial of constitutional questions unrelated to the subject matter statute should not give rise to the issuance of a writ of prohibition. The violation of constitutional rights in lower court proceedings is usually not considered jurisdictional and should not therefore be the basis for prohibition.[218]

At first blush it may seem unduly harsh for the New Mexico

215. *Id.* at 590, 249 P. at 248 (on motion for rehearing).

216. 46 N.M. 369, 129 P.2d 334 (1942).

217. *Id.* at 375, 129 P.2d at 337.

218. *See, e.g.*, Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966). In a few cases there is dictum to the effect that prohibition can issue to prohibit the violation of constitutional rights. *See* State *ex rel.* Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948); State *ex rel.* Gutierrez v. District Court, 52 N.M. 28, 191 P.2d 334 (1948). If this were the precise holding of these cases, prohibition would be extended far beyond mere questions of jurisdiction. However, in *Prince* the Court properly refused to decide the constitutional issue for the specific reason that it did not implicate the Court's subject matter jurisdiction. The Court's reference to the lack of a violation of a constitutional right pertains to those constitutional rights which are also jurisdictional in nature, such as the failure to file a criminal complaint where such is required in the constitution. *See Ralph v. Police Court*, 84 Cal. App.2d 257, 190 P.2d 632 (1948) (cited in *Prince* at 191). *Gutierrez*, involving the state's right to a jury trial in a criminal case, really should not have been decided by means of a writ of prohibition, and it is significant that the Court explicitly noted that neither party had contested the propriety of deciding the issue via prohibition.

Supreme Court to abstain from deciding constitutional issues on prohibition unless the issue itself is inherently one of jurisdiction. However, the writ of superintending control,[219] the writ of mandamus,[220] and interlocutory appeal are also available. Prohibition is best limited to those cases clearly of a jurisdictional nature, and constitutional issues in and for themselves are usually not of this variety.

F. Defenses

In addition to showing the absence of the elements necessary for the writ to issue, the respondent may assert two other defenses.

1. Failure to Object in the Inferior Court

The first writ of prohibition sought in New Mexico was refused because the petitioner did not first seek relief in the inferior court. The Territorial Supreme Court ruled that:

> There was no trial in the justice's court, he had made no ruling on the question here complained of; no objection had been made to his proceedings, and no opportunity was afforded him to decide on his jurisdiction to try the case; the presumption is that he would have done his duty if the objection had been made. The great weight of authority is that relief must first be sought in the court below.[221]

The purpose of this rule is to provide for an efficient use of court time. If the lower court clearly has no jurisdiction, this fact should first be brought to its attention in order to conserve its time and that of the Supreme Court.

Further, once the lower court is considering whether or not it has jurisdiction, prohibition cannot be sought in the Supreme Court until the lower court makes a determination. Again, the high court assumes the lower court will correctly decide the issue. In *Board of Commissioners of Guadalupe County v. District Court,*[222] the rule was stated as follows:

> There is another matter which should have prevented us from issuing the writ, and that is that a motion to be allowed to appear and defend and show cause why the peremptory writ should not be put into operation was pending and undetermined at the time of the

219. *See* State *ex rel.* Oil Conservation Comm'n v. Brand, 65 N.M. 384, 387, 338 P.2d 113, 115 (1959).

220. *See generally* DuMars & Browde, *Mandamus in New Mexico,* 4 N.M.L.Rev. 155, 173-183 (1974).

221. Tapia v. Martinez, 4 N.M. (Gild.) 329, 333-334, 4 N.M. (John.) 165, 167, 16 P. 272, 274 (1888).

222. 29 N.M. 244, 223 P. 516 (1924).

> application to this court for the writ of prohibition. It is not within the province of this court to interfere by a writ of this character with the duties of the district court which is proceeding to hear and determine the matters before it. Until it has decided the matter, at least ordinarily, the writ should not be issued by this court. There is a spirit of confidence and respect which should at all times be entertained between courts of superior and inferior jurisdiction. And that a question pending before an inferior court will be correctly decided should always be assumed by us.[223]

In recent cases, however, the Supreme Court has paid little attention to this rule, especially when the public interest is involved. In *State ex rel. Townsend v. Court of Appeals*,[224] the Supreme Court was called upon to prohibit the Court of Appeals from considering an extraordinary writ. After deciding that the Court of Appeals had no jurisdiction or authority to issue extraordinary writs, the Supreme Court was faced with the persuasive argument that the Court of Appeals should be allowed to consider the question before the Supreme Court issued a mandate. Although the high court acknowledged the rule that prohibition will not issue unless the attention of the lower court has been called to the alleged lack of jurisdiction, the Court ruled that it would issue the writ because the remedy by appeal was not adequate and because the Court deemed it to be in the public interest to settle the question at the earliest possible time. The Court ruled that it was "not absolutely essential that the inferior court have an opportunity to pass upon the question involved."[225]

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223. *Id.* at 261, 223 P. at 521. The ruling in *Board of Comm'rs of Guadalupe Co.* was reaffirmed in State *ex rel.* Stanley v. Lujan, 42 N.M. 291, 77 P.2d 178 (1938), where the Supreme Court refused to issue a writ until the lower court had an opportunity to rule on the question.

224. 78 N.M. 71, 428 P.2d 473 (1967).

225. *Id.* at 74, 428 P.2d at 476. The Supreme Court explained in detail why the remedy by appeal was inadequate at pages 74 and 75:

> Here petitioner has no adequate remedy other than prohibition. He could, of course, ignore the writ from the court of appeals and seek to have the district judge proceed anyway, under the contention that the order was absolutely void; but this, of course, would involve many sub-questions and such action would not be in compliance with orderly procedure. The only other avenue open to the petitioner would be to either answer or attack the writ in the court of appeals, seeking to have that court quash its own writ on a jurisdictional basis. However, such an approach is fraught with dangers. If the court of appeals were to determine that it did have jurisdiction, petitioner would be virtually without remedy because, after the fact, the granting of prohibition would be even more difficult or uncertain (State Game Commission v. Tackett, 1962, 71 N.M. 400, 379 P.2d 54) and there is no provision for for an appeal or certiorari from such action. In such a situation, the petitioner would be required to try the case without the benefit of the order of the district court as to discovery, whether erroneous or not. If not satisfied with the judgment, he could then appeal, preserving for review as best he could the

Of course, when the higher court is involved in analyzing the public interest and the adequacy of a remedy by appeal, it is more likely to issue the writ based on its power of superintending control and not on a strict jurisdictional approach. Hence, the Court need not consider the strict technical defenses. However, the Court should acknowledge that it is using its superintending control power.

Once the trial court has made a factual determination that it has jurisdiction, the petitioner will not be able to convince the Supreme Court to reconsider that determination. The petitioner must rely strictly on the law. For instance, in *State Racing Commission v. McManus*[226] the Supreme Court granted a writ of prohibition against the district judge based on its power of supervisory control because the protestant had failed to exhaust his administrative remedies. However, the Court noted that the respondent exercised jurisdiction in the cause and hence, implicitly made a determination on the facts that all jurisdictional prerequisites had been met. The Court then ruled that it would be improper to review the factual determination and thus, it could not issue the writ on the basis of a lack of jurisdiction.[227] The Court then proceeded to justify the writ on the basis of its power of superintending control. Obviously this power will not be exercised in every instance.[228] *McManus* should, however, be limited to an implicit factual determination by the lower court. As long as the petition is based on a legal issue and not a factual one, such as exhaustion of administrative remedies, prohibition should lie.

In *McManus* the factual findings involved what needed to be done

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adverse effects suffered by virtue of the writ of prohibition issued by the court of appeals. Then, if the court of appeals affirmed the case, he could seek certiorari. . . . The mere statement of such a course of conduct shows its absurdity if not its futility. It is neither plain, speedy nor adequate, nor would it be in the public interest.

226. 82 N.M. 108, 476 P.2d 767 (1970).

227. It is interesting to note the Court's reasoning:

Under the rules just discussed, it was the duty of the respondent to examine the facts presented upon which his jurisdiction depended, and since respondent exercised jurisdiction, he implicitly made that determination. We cannot believe that such a determination could be successfully attacked collaterally, and thus we cannot prohibit respondent, under the authorities cited above.

Id. at 110, 476 P.2d at 769.

228. Note the following cases which have suggested that the lower court must be given an opportunity to pass on its jurisdiction before the Supreme Court will. Pickering v. Current, 16 N.M. 37, 113 P. 619 (1911); Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 510, 530-31, 38 P. 580, 588, 595 (1894) (dissenting opinions); Hubbell v. Abbott, 13 N.M. 431, 85 P. 476 (1906). Note, however, in *Lincoln-Lucky* the Court held that where the court below has no jurisdiction of the original subject matter, it is not necessary to plead to its jurisdiction as a foundation for the writ. 7 N.M. at 495, 38 P. at 583.

to exhaust administrative remedies. The usual prohibition case needs no such factual determination as it is clear that the district court does or does not have jurisdiction over the subject matter of the action. But when certain factual prerequisites must be met before the district court can acquire jurisdiction over a cause, then under *McManus* the lower court's determination of these facts is binding on the Supreme Court, at least if supported by substantial evidence.[229] Any broadening of this doctrine beyond a factual determination would render the right to prohibit nonjurisdictional acts a nullity because every court attempting to exercise jurisdiction over a matter implicity determines that it has jurisdiction.

2. Act Completed

The writ of prohibition has traditionally been denied because the act sought to be prohibited has already been performed. The following statement in High's *Treatise on Extraordinary Legal Remedies* was adopted by the Supreme Court in *State ex rel. Parks v. Ryan:*[230]

> Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy, and it issues only to prevent the commission of a future act, and not to undo an act already performed.[231]

The reason for this rule is that if the act to be prohibited has already been accomplished, there is nothing upon which the writ of prohibition can operate. In such a case the writ will be quashed because, "even if made absolute, it would afford no effectual relief to the relator . . ."[232] Thus, a prospective petitioner must act quickly in order to secure a writ.

This rule was determinative of one recent case, *State ex rel. Davis v. District Court*[233] where the trial court had already entered its order which was appealable. The Supreme Court held,

> We do not believe that this is a proper case for prohibition. Prohibition is a preventive rather than a corrective remedy, and it issues

229. The Court in *McManus* did not discuss the test that it would apply to the findings of jurisdictional facts by a district court judge because the findings were not excepted to. It may be assumed that if such findings were challenged, the test would be at least as strict as that applied to findings by the judge on other facts at trial. *See, e.g.*, McCauley v. Ray, 80 N.M. 171, 174, 453 P.2d 192, 195 (1969) (findings by the court on motion for change of venue).

230. 24 N.M. 176, 179, 173 P. 858 (1918).

231. *Id.* at 179, 173 P. at 859 (citing High § 766).

232. Hubbel v. Abbott, 13 N.M. 431, 438, 85 P. 476, 477 (1906).

233. 67 N.M. 215, 354 P.2d 145 (1960).

> only to prevent a further act and not to undo an act already performed . . . It is not the office or purpose of prohibition to vacate orders already entered.[234]

There is, however, an exception to the traditional rule which has been recognized by the New Mexico Supreme Court. It was considered and adopted in the decision of *State ex rel. Delgado v. Leaby*.[235] In *Leaby* the high court ruled that when any act remains to be completed, the writ may still properly issue, and further, the writ may undo any act already completed:

> the remedial character of a writ of prohibition is not confined merely to preventive measures, but where something remains to be done, and where it is necessary in order to effectuate the object of the writ, that which has already been done may be undone.[236]

In the *Leaby* case the petitioner had been ousted from the office of sheriff in a district court removal proceeding, and he sought the writ to reverse his ouster. Ordinarily, prohibition would not issue since the act sought to be prohibited (his ouster) was completed. But petitioner had not lost complete possession; he retained the key and other paraphernalia of the office. The Court ordered a return of the possession of the jail and prisoners, thus reversing the virtually completed ouster.

The case of *State ex rel. State Tax Commission v. District Court*[237] cast doubt on the continued viability of the traditional rule. That case was recently reaffirmed in *State Racing Commission v. McManus*[238] where it was held that even though the district court had entered its order, which the petitioner sought to prohibit, the Court in the exercise of its power of superintending control could "reverse that which has been done."[239] The Court held that it could not issue a true writ of prohibition because it could not prohibit that which had already been done; however, through the power of superintending control it could reverse the order previously entered.

The case of *State Game Commission v. Tackett*[240] also bypasses the traditional rule. The Court held that "where a writ of prohibition would issue as a matter of right had the order of the district court been threatened but not issued, we should exercise our right of

234. *Id.* at 218, 354 P.2d at 147. State *ex rel.* Alfred v. Anderson, 13 N.M. St. B.Bull: 525 (December 26, 1974).
235. 30 N.M. 221, 231 P. 197 (1924).
236. *Id.* at 227, 231 P. at 199.
237. 69 N.M. 295, 366 P.2d 143 (1961).
238. 82 N.M. 108, 476 P.2d 767 (1970).
239. *Id.* at 111, 476 P.2d 767 at 770.
240. 71 N.M. 400, 379 P.2d 54 (1963).

superintending control," and issue the writ. Although the Court found that the public interest was involved in *Tackett,* this factor does not seem determinative since the Court emphasized that the writ would issue as "a matter of right." Even so, this holding may be of limited applicability, because of the public interest factor.

An elimination or limiting of the rule seems to be more in line with the purpose of prohibition which is to stop acts without authority or power. The fine line between signing an order and merely announcing an intent to do so should not be a distinction worthy of merit. If the court acts without jurisdiction, the public interest in the efficient and orderly administration of justice demands that the court be prohibited from acting. Cases should not turn on whether a key has been retained by the petitioner. Obviously, prohibition cannot undo a wrong if it is irreversible. However, when a court acts without jurisdiction, its acts are an affront to justice whether put in writing or only stated orally, and if the court can return the parties to the status quo, the writ should issue.

This conception of the general purpose of the writ seems to have motivated the Court in *Tackett.* Although mouthing the old rule, the Court stretched it into nothingness, indicating that the Court will not be deterred by this type of obstructionism if the petitioner's case has merit.

CONCLUSION

The Territorial Supreme Court described the writ of prohibition as the most extraordinary remedy known to the common law. The early New Mexico decisions were therefore cautious, and the writ was rarely granted. Recent cases, however, have expanded the use of the writ, and the Supreme Court has at times yielded to the temptation to issue the writ when the trial court's decision was merely erroneous, rather than without jurisdiction or in excess of jurisdiction.

The Supreme Court has the power, of course, to correct mere error under its power of superintending control. It should, however, when correcting mere error, not attempt to expand the definition of jurisdiction. Any redefining of the jurisdictional quotient should be done with care and with the realization that the Court may be opening a Pandora's Box of future conflicts in other areas of law.

It is only through a continuing policy of judicial self-restraint that the Court can avoid a potentially serious threat to the fair and orderly administration of justice and yet provide a remedy when a lower court threatens actions *coram non judice.*

N.M. Const. Art VI

Sec. 3. [Supreme court; original jurisdiction; supervisory control; extraordinary writs.]

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

Cross references. — For certiorari to the court of appeals, *see* N.M. Const., art. VI, § 13, and Rule 12-502 NMRA.

For Uniform Certification of Questions of Law Act, *see* Chapter 39, Article 7 NMSA 1978.
For habeas corpus, *see* 44-1-1 NMSA 1978 et seq.
For provisions relating to mandamus, *see* 44-2-1 NMSA 1978.
For quo warranto, *see* 44-3-1 NMSA 1978.
For rule regarding writs of error, *see* Rule 12-503 NMRA.
For issuance of extraordinary writs, *see* Rule 12-504 NMRA.
Comparable provisions. — Idaho Const., art. V, § 9.
Iowa Const., art. V, § 4.
Montana Const., art. VII, § 2.
Utah Const., art. VIII, § 3.
Wyoming Const., art. V, § 3.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Certiorari to court of appeals in criminal case. — Supreme court has authority to issue writs of certiorari directed to court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met. State v. Gunzelman, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *rev'g* 1972-NMCA-166, 84 N.M. 451, 504 P.2d 1084, *overruled by* State v. Orosco, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

No power of de novo review. — Powers of appellate jurisdiction and original jurisdiction and superintending control do not include the power to review de novo the factual basis for the orders or judgments of district courts. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Lower court order imposing media ban in criminal case. — The news media has standing in the supreme court to intervene in a criminal case to question the validity of a lower court order impairing its ability to report the news. The proper approach lies in a separate action for declaratory judgment, mandamus or prohibition. State ex rel. N.M. Press Ass'n v. Kaufman, 1982-NMSC-060, 98 N.M. 261, 648 P.2d 300.

Statute allowing discovery only on supreme court order is unconstitutional. — Section 29-9-8B NMSA 1978 partially unconstitutional. The last sentence in 29-9-8B NMSA 1978, allowing the discovery of the records of the governor's organized crime prevention commission only by supreme court order, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. In re Motion for a Subpoena Duces Tecum, 1980-NMSC-010, 94 N.M. 1, 606 P.2d 539.

Attorneys' fees on settled appeal. — Where appellant and appellee compromised a case on appeal, without the intervention of their attorneys, and agreed to and prayed for dismissal of the appeal, a petition of attorneys for appellant asking court to modify district court decree to provide for attorneys' fees invoked the original jurisdiction of the supreme court in a manner not authorized by this section and could not be entertained. Thurman v. Grimes, 1931-NMSC-035, 35 N.M. 498, 1 P.2d 972.

Supreme court may order a change of venue when remanding a case. Marsh v. State, 1980-NMSC-129, 95 N.M. 224, 620 P.2d 878.

Writ of error as appropriate means for invoking collateral order doctrine. Carrillo v. Rostro, 1992-NMSC-054, 114 N.M. 607, 845 P.2d 130.

II. SUPERINTENDING CONTROL.

The district court may not, through the sanction process, limit a litigant's right to seek relief from a discovery order through a writ of superintending control or a writ of error in the supreme court. Chavez v. Lovelace Sandia Health System, 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

Superintending control explained. — The power of superintending control is the power to control the course of ordinary litigation in inferior courts, as exercised at common law by the court of kings' bench and by the use of writs specifically mentioned in the constitution, and other writs there referred to or authorized. State v. Roy, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

Power of superintending control. — The power of superintending control is the power to control the course of ordinary litigation in inferior courts, and where appropriate, the power of superintending control permits the supreme court's interposition to correct any specie of error and is not limited to jurisdictional error, and the supreme court may also exercise the power of

superintending control where it is deemed to be in the public interest to settle the question involved at the earliest moment. Kerr v. Parsons, 2016-NMSC-028.

Where the New Mexico legislature, in its 2015 general appropriation to the law office of the public defender (LOPD), specifically provided that the appropriations to the public defender department shall not be used to pay hourly reimbursement rates to contract attorneys, and where the district court entered an order requiring the LOPD to pay contract counsel hourly rates and the state to provide additional funding, nullifying the legislature's prohibition of the payment of hourly rates to indigent defense contract counsel as violative of the federal and state constitutions, based on its conclusion that the flat-fee rates paid to contract counsel by the LOPD contravene the constitutional guarantee of effective assistance of counsel, a petition for writ of superintending control was granted because it was in the public's interest to review the district court's order. Kerr v. Parsons, 2016-NMSC-028.

Not substitute for appeal. — The superintending control will not be invoked merely to perform the office of an appeal. State Game Comm'n v. Tackett, 1962-NMSC-154, 71 N.M. 400, 379 P.2d 54.

Control over administrative functions of inferior courts. — The constitutional grant of "superintending control" gives the New Mexico supreme court control over administrative functions of inferior courts. Russillo v. Scarborough, 727 F. Supp. 1402 (D.N.M. 1989), *aff'd*, 935 F.2d 1167 (10th Cir. 1991).

The supreme court has ultimate authority over administrative matters of the courts. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991), *aff'g* 727 F. Supp. 1402 (D.N.M. 1989).

The power of superintending control includes the authority to order the metropolitan court to terminate its court administrator. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991), *aff'g* 727 F. Supp. 1402 (D.N.M. 1989).

Superintending power will not be exercised except under unusual circumstances. State Game Comm'n v. Tackett, 1962-NMSC-154, 71 N.M. 400, 379 P.2d 54.

When superintending control exercised. — The supreme court's superintending control will be exercised if the remedy by appeal is wholly or substantially inadequate, or if the exercise thereof will prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays or unusual burdens in the form of expenses. State ex rel. DuBois v. Ryan, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851; Williams v. Sanders, 1969-NMSC-124, 80 N.M. 619, 459 P.2d 145; State ex rel. Anaya v. Scarborough, 1966-NMSC-009, 75 N.M. 702, 410 P.2d 732; Montoya v. McManus, 1961-NMSC-060, 68 N.M. 381, 362 P.2d 771; Rutledge v. Fort, 1986-NMSC-017, 104 N.M. 7, 715 P.2d 455, *overruled on other grounds by* Reese v. State, 1987-NMSC-079, 106 N.M. 498, 745 P.2d 1146.

Power of superintending control is distinct from appellate and original jurisdiction of supreme court; therefore, even though petitioners had taken an appeal to this court from the orders of the trial court denying their motions to set aside the amended decree, the extremely unusual circumstances of this case made petitioners' remedy by appeal substantially inadequate,

and compelled the court to exercise its superintending control. State ex rel. DuBois v. Ryan, 1973-NMSC-097, 85 N.M. 575, 514 P.2d 851.

Superintending control is limited to control over inferior courts and does not restrict legislative powers to establish procedures for workers' compensation proceedings, including the authority of the worker's compensation administrator to appoint a workers' compensation judge pro tem. Carrillo v. Compusys, Inc., 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172, cert. denied, 122 N.M. 589, 929 P.2d 981.

Duty of court to uphold respect for courts. — The duty of the court under its power of superintending control is to make certain, insofar as humanly possible, that the traditional respect and high regard in which courts generally are held will in no way be encroached upon; the courts must not only be impartial, unbiased and fair, but, in addition, no suspicions to the contrary may be permitted to creep in. State ex rel. Anaya v. Scarborough, 1966-NMSC-009, 75 N.M. 702, 410 P.2d 732.

Actions or proceedings under court's superintending control are for court alone and are not a proper consideration for the bar commission. In re Board of Comm'rs of State Bar, 1959-NMSC-028, 65 N.M. 332, 337 P.2d 400.

Inherent power in supreme court to regulate procedure. — Supreme court's power of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

The supreme court of New Mexico has superintending control over all inferior courts, and thus the power to regulate and to promulgate rules regarding the pleadings, practice and procedure affecting the judicial branch of government. Hudson v. State, 1976-NMSC-084, 89 N.M. 759, 557 P.2d 1108, cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Supreme court has a superintending control over all inferior courts as well as jurisdiction and power to issue writs of certiorari; this constitutional power and jurisdiction carries with it the power to regulate pleading, practice and procedure in inferior courts and the circumstances under which such writs, including writs of certiorari, may issue. Alexander v. Delgado, 1973-NMSC-030, 84 N.M. 717, 507 P.2d 778, *aff'g* 1972-NMCA-156, 84 N.M. 456, 504 P.2d 1089.

The power to provide rules of pleading, practice and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in the supreme court under its power of superintending control. The constitutional grant of power to issue the writs by means of which the power of superintending control is exercised comprehends and carries with it the authority to exercise such powers to the extent that it can be exerted by those writs and other processes essential to its complete exercise. State v. Roy, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

By Laws 1933, ch. 84 (38-1-1 and 38-1-2 NMSA 1978), authorizing the supreme court to promulgate rules of procedure, the legislature merely withdrew from the rule-making field

wherein it had theretofore functioned as a coordinate branch of government with the court. The act was not a delegation of legislative power, but rather a mere abdication or withdrawal from the rule-making field, and the rules promulgated thereafter were issued pursuant to the supreme court's inherent power to prescribe such rules of practice, pleading and procedure as would facilitate the administration of justice. State v. Roy, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1.

Superintending control with respect to privileges. — The supreme court's constitutional power of superintending control with respect to privileges mandates that when a statutory privilege is not consistent with a rule of the supreme court, the statutory privilege is not given effect and the constitutional or court rule privilege prevails. State v. Strauch, 2015-NMSC-009, *rev'g* 2014-NMCA-020.

Where defendant, who was charged with criminal sexual contact of a minor, claimed that his communications with his social worker were privileged communications, the supreme court held that the provisions of 61-31-24(A) NMSA 1978, that arguably create social worker evidentiary privileges cannot prevent court-ordered disclosure of communications that would be mandated by the discovery and evidence rules of the supreme court. State v. Strauch, 2015-NMSC-009, *rev'g* 2014-NMCA-020.

Establishing pretrial procedure for evaluating aggravating circumstances. — The supreme court has the inherent authority to establish a pretrial procedure for evaluating aggravating circumstances in death penalty sentencing under its power of superintending control over lower state courts. State v. Ogden, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294.

Exclusion of control by executive or legislature unconstitutional. — Any action of the executive or legislative branch of a municipal government which would preclude the supreme court or the district court from exercising its superintending or supervisory authority over the municipal court violates the state constitution. Mowrer v. Rusk, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886.

Legislature lacks power to prescribe rules of practice and procedure, although it has in the past attempted to do so. State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

Discipline of attorneys. — The inherent power of the supreme court of superintending control encompasses the authority and duty to determine what constitutes grounds for the discipline of lawyers and to discipline, for cause, any person admitted to practice law in New Mexico. Any legislative attempt to limit what conduct the supreme court may consider as grounds for imposing attorney discipline would be an unconstitutional infringement of the supreme court's authority to regulate the practice of law. In re Treinen, 2006-NMSC-013, 139 N.M. 318, 131 P.3d 1282.

Statutory rule of evidence invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalistic privilege purportedly created by former 20-1-12.1 A, 1953 Comp., is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature has no power to substitute de novo hearing for appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by the supreme court. Ammerman v. Hubbard Broad., Inc., 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Issuance of writ held appropriate. — The question of whether the state was barred by the double jeopardy clause from prosecuting an individual for driving under the influence (DWI) once the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense was one of great public importance requiring use of the supreme court's power of superintending control. State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, 120 N.M. 619, 904 P.2d 1044.

Issuance of writ held inappropriate. — Issuance of an alternative writ of superintending control restraining a district court from enforcing the portion of its sentence against a defendant awarding him meritorious good-time credit against his sentence for the period he spent in presentence confinement was inappropriate, where the state filed and then voluntarily withdrew an appeal of the district court's order and where the public interest in the orderly administration of the criminal justice system was served by another decision of the supreme court of New Mexico. State ex rel. Schiff v. Murdoch, 1986-NMSC-040, 104 N.M. 344, 721 P.2d 770.

Power of superintending control would be exercised in election contest involving office of lieutenant-governor. Montoya v. McManus, 1961-NMSC-060, 68 N.M. 381, 362 P.2d 771.

Review of interlocutory order. — The supreme court will not invoke its extraordinary power of superintending control over all inferior courts to review an interlocutory order that plaintiff was real party in interest, where there is no great hardship in forcing the parties to await review of the final judgment. Albuquerque Gas & Elec. Co. v. Curtis, 1939-NMSC-024, 43 N.M. 234, 89 P.2d 615.

Vacation of court order. — Supreme court was warranted in exercising its superintending control by vacating an order of the district court allowing an appeal from ad valorem tax valuation and enjoining the state tax commission from certifying tax assessments to county assessors, as entry of the order was an abuse of discretion under the provisions of Rules 65 and 66, N.M.R. Civ. P. (now Rules 1-065 and 1-066 NMRA). State ex rel. State Tax Comm'n v. First Judicial Dist. Court, 1961-NMSC-157, 69 N.M. 295, 366 P.2d 143.

Game commission controversy. — In a case brought to enjoin and restrain the state game commission from authorizing its permittees and licensees to go upon state leased lands for the purpose of hunting wild game, where a writ of prohibition would issue as a matter of right had the order of the district court been threatened but not issued, the supreme court should exercise its right of superintending control. State Game Comm'n v. Tackett, 1962-NMSC-154, 71 N.M. 400, 379 P.2d 54.

Removal or discipline of judges. — The board of bar commissioners of state of New Mexico and its grievance or disciplinary committee have no jurisdiction as to a complaint made against a district judge with respect to the judge's actions in rebuking a grand jury. In re Board of Comm'rs of State Bar, 1959-NMSC-028, 65 N.M. 332, 337 P.2d 400.

III. QUO WARRANTO.

Purpose of quo warranto. — Purpose of quo warranto is to ascertain whether a public officer is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim. State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

Impeachment does not preempt quo warranto. — Impeachment by the legislature does not preempt quo warranto as the exclusive means for removing a felon from public office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Felony conviction occurring during the term of an elective office. — Quo warranto is an appropriate procedure for removing an elected official when the elected official is convicted of a felony during the elected official's term of office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Jurisdiction in mandamus and quo warranto concurrent with district courts. — Under this section and N.M. Const., art. VI, § 13, the supreme and district courts each have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions in all cases, whether the proceeding was instituted by the attorney general, ex officio, in behalf of the state, or brought by some private person for the assertion of some private right. The supreme court will decline jurisdiction in absence of controlling necessity therefor, and will do so in all cases brought at instance of a private suitor. State ex rel. Owen v. Van Stone, 1912-NMSC-003, 17 N.M. 41, 121 P. 611.

Construing this section and N.M. Const., art. VI, § 13, the jurisdiction of the supreme court in quo warranto against state commissions and officers, while original, was concurrent with that of the district courts and not exclusive. State ex rel. Owen v. Van Stone, 1912-NMSC-003, 17 N.M. 41, 121 P. 611.

Liberal interpretation of quo warranto statutes. — Statutes such as those concerning quo warranto are remedial in character, and as such should be liberally interpreted to effectuate the objects intended. State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

Statute inconsistent with court's powers. — The supreme court would not give approval to the portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint, at least not if it is meant to affect the subject matter jurisdiction of the court, especially since the statute is inconsistent with Rule 12(a), N.M.R. App. P. (Civ.), (now Rule 12-504 A NMRA) since in any situation where a vacancy was filled by appointment under such reasoning the court would be shorn of its constitutional powers vis-a-vis quo warranto, and presumably, with additional bits of legislative ingenuity, of its powers to issue other extraordinary writs as well. State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

State indispensable party to quo warranto. — The state, through the attorney general, is an indispensable party plaintiff in a quo warranto proceeding to challenge the propriety of an election contest. State ex rel. Anaya v. McBride, 1975-NMSC-032, 88 N.M. 244, 539 P.2d 1006.

IV. MANDAMUS.

Mandamus against officers, boards and commissions. — The supreme court of New Mexico exercises constitutionally invested original jurisdiction in mandamus against all state officers, boards and commissions. State ex rel. Sego v. Kirkpatrick, 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975.

A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the supreme court in an original proceeding. State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

A writ of mandamus was an appropriate means of vacating an unconstitutional order of the public service commission. State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Supreme Court had original jurisdiction of writ of mandamus brought to compel governor to cease implementation of public assistance program which petitioners alleged exceeded his authority and failed to get required legislative approval. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Mandamus lies to compel performance of statutory duty only when it is clear and indisputable. Witt v. Hartman, 1970-NMSC-147, 82 N.M. 170, 477 P.2d 608.

Relevant considerations in exercising original jurisdiction in mandamus. — The New Mexico supreme court will exercise its original jurisdiction in mandamus when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be

answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as direct appeal. N.M. Bldg. and Constr. Trades Council v. Dean, 2015-NMSC-023.

Where petitioners, an alliance of craft unions representing the interests of thousands of New Mexico employees working on public works projects throughout the state, sought a writ of mandamus ordering the director of the labor relations division of the New Mexico department of workforce solutions (director) to set prevailing wage and prevailing benefit rates in accordance with the Public Works Minimum Wage Act, §§ 13-4-10 to -17 NMSA 1978, mandamus was proper because petitioners presented a purely legal issue concerning whether the director had a nondiscretionary duty to set prevailing wage and benefit rates, the director's undisputed five-year delay in setting rates in accordance with the act warranted a speedy resolution, and the avenue for appeal provided for in the act had proven not to be an adequate remedy at law. N.M. Bldg. and Constr. Trades Council v. Dean, 2015-NMSC-023.

Mandamus to restore rights or privileges. — Mandamus is defined to include an order directing the restoration to the complainant of rights or privileges of which he has been illegally deprived. State ex rel. Bird v. Apodaca, 1977-NMSC-110, 91 N.M. 279, 573 P.2d 213.

Mandamus directing district court to act. — Under its power of superintending control, supreme court could by mandamus direct district court to act, even though remedy by appeal or writ of error existed, where such remedy was entirely inadequate. State ex rel. Meyers Co. v. Raynolds, 1917-NMSC-013, 22 N.M. 473, 164 P. 830.

Mandamus was available to enforce provisions of Enabling Act in view of acceptance of act's provisions by adoption of N.M. Const., art. XXI, §§ 9 and 10. State ex rel. Shepard v. Mechem, 1952-NMSC-105, 56 N.M. 762, 250 P.2d 897.

Publication of proposed amendments. — Supreme court had original jurisdiction at instance of individual voter to mandamus secretary of state to publish proposed amendments to state constitution. Hutcheson v. Gonzales, 1937-NMSC-047, 41 N.M. 474, 71 P.2d 140.

Mandamus was proper remedy for attacking constitutionality of statute in view of the possible inadequacy of other remedies and the necessity of an early decision on question of great public importance. Thompson v. Legislative Audit Comm'n, 1968-NMSC-184, 79 N.M. 693, 448 P.2d 799.

Constitutionality of legislative act may be determined in mandamus action. State ex rel. Shepard v. Mechem, 1952-NMSC-105, 56 N.M. 762, 250 P.2d 897.

Right to tenure is not enforceable by mandamus, as in absence of positive provision of law it is not a clear legal right. Lease v. Board of Regents of N.M. State Univ., 1972-NMSC-042, 83 N.M. 781, 498 P.2d 310.

No jurisdiction to mandamus election recount by district judge. — The supreme court is without jurisdiction to mandamus a district judge to certify that a recount of ballots was made in his presence, since he is not a state officer, board or commission, or of an inferior court, but only a recount official performing a ministerial function. State ex rel. Scott v. Helmick, 1930-NMSC-103, 35 N.M. 219, 294 P. 316. But see, 1-14-21 NMSA 1978.

V. PROHIBITION.

Prohibition defined. — The writ of prohibition is best defined as an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction of a matter over which it has no control, or from going beyond its legitimate powers in a matter in which it has jurisdiction. State ex rel. Harvey v. Medler, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

State corporation commission (now public regulation commission) is not an inferior court. — Since state corporation commission (now public regulation commission) is not an "inferior court", supreme court's original jurisdiction does not extend to a prohibitory action against such commission. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 1939-NMSC-055, 43 N.M. 503, 95 P.2d 676.

When writ of prohibition issued. — Even though the issuance of a writ of prohibition is within supreme court's discretion, the writ is issued almost as a matter of right when the trial court is totally lacking in jurisdiction, or has exceeded its jurisdiction or is about to do so. When the order has already been issued, or when the court has jurisdiction but the order is erroneous, arbitrary and tyrannical, or would be gross injustice, or might result in irreparable injury, and there is no plain, speedy and adequate remedy unless it is issued, the supreme court may do so under power of superintending control by virtue of this section. State v. Zinn, 1969-NMSC-138, 80 N.M. 710, 460 P.2d 240.

If the inferior court or tribunal has jurisdiction of both the subject matter and of the person, where necessary, the writ of prohibition will not issue, but lacking such jurisdiction the writ will issue as a matter of right. State Game Comm'n v. Tackett, 1962-NMSC-154, 71 N.M. 400, 379 P.2d 54; Gilmore v. District Court, 1930-NMSC-084, 35 N.M. 157, 291 P. 295.

Where jurisdiction of both the subject matter and the parties is present, ordinarily prohibition will not issue; the question is not whether the court had a right to decide the issue in a particular way, but whether it had the right to decide it at all. State Racing Comm'n v. McManus, 1970-NMSC-134, 82 N.M. 108, 476 P.2d 767; State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 1962-NMSC-134, 70 N.M. 475, 375 P.2d 118.

Prohibition is properly invoked only against an inferior court to prevent such a court from acting either without jurisdiction or in excess of its jurisdiction. State ex rel. Bird v. Apodaca, 1977-NMSC-110, 91 N.M. 279, 573 P.2d 213.

Prohibition invokable under exceptional circumstances. — Supreme court's power of supervisory control will be invoked by writ of prohibition where the remedy by appeal is inadequate or where irreparable mischief, great, extraordinary or exceptional hardship, costly delay and unusual burdens of expense would otherwise result. State ex rel. Transcontinental Bus Serv., Inc. v. Carmody, 1949-NMSC-047, 53 N.M. 367, 208 P.2d 1073.

Judicial discretion. — Prohibition is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case; it is to be used with great caution for the furtherance of justice when none of the

ordinary remedies provided by law are applicable. State ex rel. Harvey v. Medler, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

Writ of prohibition may not be utilized for piecemeal review, or as a substitute for an appeal and an even greater violation of the judicial process would be to use it with an incomplete record to substitute supreme court's judgment for that of the trial court. State v. Zinn, 1969-NMSC-138, 80 N.M. 710, 460 P.2d 240.

Undoing of act performed is not purpose of prohibition in its usual sense. State Game Comm'n v. Tackett, 1962-NMSC-154, 71 N.M. 400, 379 P.2d 54.

Use of prohibition limited. — Generally, writ of prohibition cannot be used to correct mere irregularities, or to perform functions of an appeal or writ of error. State ex rel. Harvey v. Medler, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

Jurisdiction over state officers limited. — The supreme court's original jurisdiction over state officers is confined to mandamus and quo warranto; prohibition will not lie against the state corporation commission (now public regulation commission) at least in absence of controlling necessity therefor. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 1939-NMSC-055, 43 N.M. 503, 95 P.2d 676.

District court is an "inferior court" within meaning of this section giving to supreme court jurisdiction to grant writ of prohibition. State ex rel. Harvey v. Medler, 1914-NMSC-055, 19 N.M. 252, 142 P. 376.

Prohibition to stay court proceedings pending adjudication of constitutionality. — Where conflict existed in New Mexico judicial districts as to constitutionality of death penalty and allowing the situation to remain would result in unequal justice, a writ of prohibition to stop proceedings in conflicting cases until a determination of constitutionality could be made in the instant case was proper and would be made permanent. State ex rel. Serna v. Hodges, 1976-NMSC-033,89 N.M. 351, 552 P.2d 787, *overruled on other grounds by* State v. Rondeau, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688.

Issuance of writ proper. — The presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice, and writ of prohibition was properly issued under such circumstances. Davis v. Traub, 1977-NMSC-049, 90 N.M. 498, 565 P.2d 1015.

Although writ of prohibition should not interfere with discretion of trial judge, where respondent trial judge had not exercised his discretion but had ruled that the defendants were entitled to grand jury testimony, police reports and witness statements as a matter of law, the writ was proper. State v. Zinn, 1969-NMSC-138, 80 N.M. 710, 460 P.2d 240.

Resort to power of superintending control. — Where problem was of importance to the state, and the supreme court's refusal to entertain jurisdiction might amount to a denial of justice, it would resort to the extraordinary writ and examine the entire matter in order to determine what result should have been reached, under its power of superintending control, as a true writ of prohibition would not be the proper remedy, since the court could not prohibit that which had

already been done. State Racing Comm'n v. McManus, 1970-NMSC-134, 82 N.M. 108, 476 P.2d 767.

Expense burden insufficient rationale for writ. — Fact that fairly unusual burdens of expense will have to be borne by relators, though unfortunate, was frequently a necessary adjunct to litigation of the type involved and was therefore insufficient to warrant issuance of a writ of prohibition. State ex rel. Oil Conservation Comm'n v. Brand, 1959-NMSC-038, 65 N.M. 384, 338 P.2d 113.

Potential for wrong decision. — Fact that the district court might be about to decide matters wrongly was of no concern of the supreme court in merely investigating jurisdiction, nor was it material that the supreme court might on review be compelled to reverse the case. State ex rel. Oil Conservation Comm'n v. Brand, 1959-NMSC-038, 65 N.M. 384, 338 P.2d 113.

Writ not available. — Where judgment and order was entered in habeas corpus proceeding on June 15, 1971, requiring petitioner's unconditional release unless prior to June 30 he was allowed his right to appeal his conviction based upon a timely motion for appeal filed pro se the previous November, and due to the state's neglect the requisite order of the district court permitting an appeal came too late, being entered on June 30, and furthermore, the state did not attempt by motion to seek relief from the June 15 order until September 27, 1971, petitioner would be released; writ of prohibition seeking to prohibit his discharge was not available to the state. Rodriguez v. District Court, 1971-NMSC-101, 83 N.M. 200, 490 P.2d 458.

Person seeking writ must prove essential allegations of petition; the court will presume that the action of the inferior court was correct and within the scope of its authority. State v. Zinn, 1969-NMSC-138, 80 N.M. 710, 460 P.2d 240.

Application for writ of prohibition should recite grounds for granting of the relief to the exclusion of allegations of evidence heard by the trial court. State v. Zinn, 1969-NMSC-138, 80 N.M. 710, 460 P.2d 240.

VI. HABEAS CORPUS.

Even though a habeas corpus petitioner may not directly appeal a district court's adverse ruling to the supreme court, a habeas corpus petitioner may seek review in the supreme court by writ of certiorari. Cummings v. State, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080.

Section gives supreme court original jurisdiction in habeas corpus proceedings. Peyton v. Nord, 1968-NMSC-027, 78 N.M. 717, 437 P.2d 716.

Exercise of habeas corpus jurisdiction. — In absence of controlling necessity, the concurrent jurisdiction of this court in habeas corpus will not be exercised, and the petitioner will be relegated to an application in district court of county where he is restrained. Ex parte Nabors, 1928-NMSC-025, 33 N.M. 324, 267 P. 58.

Prisoner must apply to district court for habeas corpus before an original proceeding may be brought in the New Mexico supreme court. Cox v. Raburn, 314 F.2d 856 (10th Cir. 1963), cert. denied, 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1074 (1963).

New habeas proceeding in supreme court after petitioner's remand below. — An appeal from district court order in habeas corpus, remanding relator to sheriff's custody, will not lie in absence of statute, but relator may institute an original proceeding in habeas corpus under this section. In re Forest, 1941-NMSC-019, 45 N.M. 204, 113 P.2d 582.

Remand of petitioner by district court not res judicata. — That district court remands petitioner for habeas corpus is not a bar to, nor res judicata in, a like proceeding in supreme court. Ex parte Nabors, 1928-NMSC-025, 33 N.M. 324, 267 P. 58.

Removal or discipline of judges. — This section and N.M. Const., art. VI, § 32, provide for removal or discipline (but not recall) of any justice, judge or magistrate for willful misconduct in office, willful and persistent failure to perform his duties or habitual intemperance. 1973 Op. Att'y Gen. No. 73-03.

The superintending control of the supreme court over inferior courts affords a present avenue for removal of any municipal judge should the situation so warrant. 1973 Op. Att'y Gen. No. 73-03.

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For comment on Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), see 4 Nat. Resources J. 413 (1964).

For article, "Habeas Corpus in New Mexico," see 11 N.M. L. Rev. 291 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 72 et seq.

Propriety of federal court's considering state prisoner's petition under 28 USC § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

21 C.J.S. Courts § 12 et s

12-504. Other extraordinary writs from the Supreme Court.

A. Scope of rule. This rule governs the procedure for the issuance of all writs in the exercise of the Supreme Court's original jurisdiction except for writs of certiorari to the Court of Appeals under Rule 12-502 NMRA and the district courts under Rule 12-501 NMRA, and writs of error under Rule 12-503 NMRA.

B. Initiation of proceedings.

(1) Extraordinary writ proceedings in the exercise of the Supreme Court's original jurisdiction shall be initiated by filing with the Supreme Court clerk a verified petition of the party seeking the writ. Subject to the provisions of Rule 12-304 NMRA and Rule 23-114 NMRA, the appropriate docket fee shall accompany the petition. As used in this rule, a "verified petition" is one that contains a statement under oath that the signer has read the petition and that the statements contained in the petition are true and correct to the best of the signer's knowledge, information, and belief. The statement under oath need not be notarized. The petition shall set forth the following:

(a) the grounds on which jurisdiction of the Supreme Court is based;

(b) the circumstances making it necessary or proper to seek the writ in the Supreme Court if the petition might lawfully have been made to some other court in the first instance;

(c) the name or names of the real parties in interest, if any, if the respondent is a justice, judge, or other public officer or employee, court, board, or tribunal, purporting to act in the discharge of official duties;

(d) the ground or grounds on which the petition is based, and the facts and law supporting the same stated in concise form; and

(e) a concise statement of the relief sought.

(2) Any opinions, orders, transcripts, or other papers indicating the respondent's position on the matter in question shall be attached to the petition, if available. Any pleadings or other papers may be attached if they are necessary and appropriate to inform the Court adequately regarding the circumstances out of which the petition arises and the basis for granting relief.

(3) If the circumstances giving rise to the petition appear to the petitioner to require the Court to act on an emergency basis, the petition shall clearly be designated in its title as an "emergency" petition.

C. Proceedings and disposition.

(1) The respondent, the real parties in interest, and the attorney general may file a response to the petition. A response shall comply with the requirements of Paragraphs G and H of this rule. The Court may act on a petition prior to the filing of a response. A reply is not permitted without leave of the Court, which may be granted on a showing of good cause. A motion seeking leave to file a reply must be filed and served within seven (7) days after service of a response and must include the proposed reply.

(2) If it appears to a majority of the Court that the petition is without merit, concerns a matter more properly reviewable by appeal, or seeks relief prematurely, it may be denied summarily.

(3) If the petition is not summarily denied, the Court may direct the respondent, the real parties in interest, and the attorney general to file a response or further response to the petition, may request briefs on the issues presented in the petition, or may set a hearing on the petition, and the matter shall proceed accordingly or as otherwise ordered by the Court.

(4) If the petitioner is entitled to a writ or relief other than that requested in the petition, the petition shall not be denied, and the Court shall grant the writ or relief to which the petitioner is entitled.

D. Stays.

(1) A party filing a petition for an extraordinary writ and also seeking a stay of some action by the respondent pending disposition of the petition shall include the phrase "and Request for Stay" in the title of the petition in addition to complying with other requirements of this paragraph. The respondent, the real parties in interest, and the attorney general may file a response to the request for stay, which may be joined with a response to the petition. The Court may act on a request for stay prior to the filing of a response. A reply is not permitted without leave of the Court, which may be granted on a showing of good cause. A motion seeking leave to file a reply must be filed and served within seven (7) days after service of a response and must include the proposed reply.

(2) The Court may issue a stay to the respondent without notice to the respondent or the real parties in interest only if

(a) it clearly appears from the verified petition or by affidavit filed with the Court that immediate and irreparable injury, loss, or damage will result to the petitioner before the respondent or real parties in interest can be heard in opposition;

(b) it clearly appears from the verified petition or by affidavit filed with the Court that no loss or damage will result to the respondent or any real parties in interest, or, if loss or damage will occur, what that loss or damage will be; and

(c) the petitioner certifies in writing to the Court the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claim that notice should not be required.

(3) If a request for stay is granted under this rule, the respondent, the real parties in interest, and the attorney general may move to have the stay vacated, and the Court may act on the motion with or without notice as deemed appropriate.

E. Service. Service of all papers filed under the rule shall be made under Rule 12-307 NMRA on the petitioner, the respondent, any real parties in interest and, if the respondent is as described in Subparagraph (B)(1)(c) of this rule, the attorney general.

F. Costs and fees. In disposing of a petition or request for stay, the Court may, in its discretion, assess costs and may, as permitted by law, award attorney fees.

G. Length limitations. Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) Body of the petition defined. The body of the petition consists of headings, footnotes, quotations, a request for stay, and all other text except any cover page, table of contents, table of authorities, signature blocks, and certificate of service.

(2) Page limitation. Unless the petition complies with Subparagraph (G)(3) of this rule, the body of the petition shall not exceed twenty (20) pages; or

(3) Type-volume limitation. The body of the petition shall not exceed six thousand (6,000) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or six hundred fifty-five (655) lines, if the party uses a monospaced type style or typeface, such as Courier.

H. Statement of compliance. If the body of the petition exceeds the page limitations of Subparagraph (G)(2) of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (G)(3) of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (G)(1) of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the

statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.
[As amended, effective January 1, 1988; September 1, 1991; September 1, 1993; January 1, 1997; as amended by Supreme Court Order No. 08-8300-018, effective August 4, 2008; by Supreme Court Order No. 10-8300-027, effective December 3, 2010; as amended by Supreme Court Order No. 16-8300-011, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

Mandamus to compel records center to publish regulations. — Where the chair of the environmental improvement board and the chair of the water quality control commission each transmitted regulations to the records center for filing and publication; the records center accepted the regulations for filing and scheduled them for publication; the acting secretary of the environment department asked the records center to delay publication of the regulations pursuant to the governor's executive order which suspended all proposed and pending rules and regulations under the governor's authority for ninety days; the powers and duties of the environmental improvement board, the water quality control commission, and the records center were independent of the governor and the secretary of the environment department; and the regulations of the state records administrator mandated that regulations filed with the records center be published within a specified time frame after being submitted by the issuing authority, the records center administrator had a clear, indisputable, and mandatory duty to publish the regulations, the governor and acting secretary did not have constitutional or statutory authority to order the records center not to publish the regulations, and mandamus was the appropriate remedy to compel the records center to publish the regulations. New Energy Econ., Inc. v. Martinez, 2011-NMSC-006, 149 N.M. 207, 247 P.3d 286.

Standing to petition for writ of mandamus to compel records center to publish regulations. — Where the chair of the environmental improvement board and the chair of the water quality control commission each transmitted regulations to the records center for filing and publication; the records center accepted the regulations for filing and scheduled them for publication; the acting secretary of the environment department asked the records center to delay publication of the regulations pursuant to the governor's executive order which suspended all proposed and pending rules and regulations under the governor's authority for ninety days; and the petitioners actively participated in the administrative rule-

making proceedings and raised the issue whether the governor and the acting secretary exceeded their constitutional authority by ordering the records center, an independent agency, to breach a clear, indisputable, and mandatory duty, petitioners had standing under the great public importance doctrine to petition for a writ of mandamus to compel the records center to publish the regulations. New Energy Econ., Inc. v. Martinez, 2011-NMSC-006, 149 N.M. 207, 247 P.3d 286.

Ripeness for adjudication of petition for mandamus to compel records center to publish regulations. — Where the chair of the environmental improvement board and the chair of the water quality control commission each transmitted regulations to the records center for filing and publication; the records center accepted the regulations for filing and scheduled them for publication; the acting secretary of the environment department asked the records center to delay publication of the regulations pursuant to the governor's executive order which suspended all proposed and pending rules and regulations under the governor's authority for ninety days; and the filing of the regulations with the records center and publication in the New Mexico register controlled the right to appeal, the effective date of the regulations, and the validity and enforceability of the regulations, the dispute was ripe for adjudication in a proceeding for a writ of mandamus to compel the records center to publish the regulations. New Energy Econ., Inc. v. Martinez, 2011-NMSC-006, 149 N.M. 207, 247 P.3d 286.

Prerequisites. — Under Rule 24 of the former Supreme Court Rules, court of review should not use prerogative writs as a substitute for appeal; unless the question was of great public interest or unless requiring an appeal would have been so futile as to result in grave injustice, such writs were withheld except to prevent nonjurisdictional acts. Baca v. Burks, 1970-NMSC-055, 81 N.M. 376, 467 P.2d 392.

Since there was neither a jurisdictional question presented nor any showing that grave injustice would result if the case proceeded to trial, the matter was not one calling for the writ, and the alternative writ of prohibition having been improvidently issued was discharged under former Supreme Court Rules. Baca v. Burks, 1970-NMSC-055, 81 N.M. 376, 467 P.2d 392.

If a court had jurisdiction of both the subject matter and the parties, ordinarily prohibition would not issue under Rule 24 of former Supreme Court Rules. Two exceptions to this rule were recognized: one was where a court had acted in excess of jurisdiction, and the other was where, under supreme court's power of superintending control, refusal to act would cause irreparable mischief, exceptional

hardship, undue burdens of expense or appeal would be grossly inadequate. State ex rel. SCC v. Zinn, 1963-NMSC-048, 72 N.M. 29, 380 P.2d 182.
Even where applications or petitions were required by statute, which also provided for liberal interpretation, certain minimum requirements had to be met under former Supreme Court Rules. Roberson v. Board of Educ., 1967-NMSC-176, 78 N.M. 297, 430 P.2d 868.

Prohibition was not to be as means of obtaining piece-meal review, or as a substitute for appeal under former Supreme Court Rules. State ex rel. Anaya v. Scarborough, 1966-NMSC-009, 75 N.M. 702, 410 P.2d 732.
Prohibition was preventive rather than corrective remedy, and it would not issue to vacate orders already entered under former Supreme Court Rules. State ex rel. Davis v. District Court, 1960-NMSC-071, 67 N.M. 215, 354 P.2d 145.

Original jurisdiction of Supreme Court in mandamus proceeding. — A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the Supreme Court in an original proceeding. State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.
Relator in mandamus action could question constitutionality of statute in a proper case under former Supreme Court Rules. State ex rel. Chavez v. Evans, 1968-NMSC-167, 79 N.M. 578, 446 P.2d 445.

Final judgment. — Writ of prohibition issuing from state supreme court is final judgment within meaning of federal law, and review of all proceedings concerning such should be sought in the United States Supreme Court. Gibner v. Oman, 459 F. Supp. 436 (D.N.M. 1977).

Writ properly issued. — Where conflict in New Mexico judicial districts as to constitutionality of death penalty existed, so that allowing the situation to remain would have resulted in unequal justice, a writ of prohibition to stop proceedings in conflicting cases until a determination of constitutionality was made was proper and would be made permanent, under former Supreme Court Rules. State ex rel. Serna v. Hodges, 1976-NMSC-033, 89 N.M. 351, 552 P.2d 787, overruled on other grounds, State v. Rondeau, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688.
The question of whether the state was barred by the double jeopardy clause from prosecuting an individual for driving under the influence (DWI) once the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense was one of great public importance requiring

use of the Supreme Court's power of superintending control. State ex rel. Schwartz v. Kennedy, 1995-NMSC-069, 120 N.M. 619, 904 P.2d 1044.

Writ denied. — Since relators had plain, speedy and adequate remedy at law, prohibition did not lie under former Supreme Court Rules. Carter v. Montoya, 1966-NMSC-021, 75 N.M. 730, 410 P.2d 951.

That fairly unusual burdens of expense would have to be borne by relators, although unfortunate, was frequently a necessary adjunct to litigation of the type here involved and was therefore insufficient under former Supreme Court Rules to warrant issuance of a writ of prohibition. State ex rel. Oil Conservation Comm'n v. Brand, 1959-NMSC-038, 65 N.M. 384, 338 P.2d 113.

Fact that the district court might decide matters wrongly was of no concern of the supreme court when merely investigating the jurisdiction, nor was it material that the supreme court might on review be compelled to reverse the case, and writ of prohibition was denied under former Supreme Court Rules. State ex rel. Oil Conservation Comm'n v. Brand, 1959-NMSC-038, 65 N.M. 384, 338 P.2d 113.

Where intervenor-defendant had been ordered discharged from the custody of the warden of the penitentiary and the order was not appealed, it was accordingly final and as intervenor was being detained within the first judicial district, respondent-district court judge had jurisdiction to consider intervenor's petition for habeas corpus; the remedy of prohibition was thus not available to the state under former Supreme Court Rules. Rodriguez v. District Court, 1971-NMSC-101, 83 N.M. 200, 490 P.2d 458.

Writ of certiorari. — Appeals and writs of error were not to be compared to certiorari, and, generally speaking, the presence of the right to appeal made inappropriate and unavailable the right to certiorari under former Supreme Court Rules. Roberson v. Board of Educ., 1967-NMSC-176, 78 N.M. 297, 430 P.2d 868.

Absent exceptional circumstances, the time for application for a writ of certiorari was the same as for an appeal or writ of error. Breithaupt v. State, 1953-NMSC-012, 57 N.M. 46, 253 P.2d 585.

Amicus curiae must accept the case on the issues as raised by the parties, and cannot assume the functions of a party in mandamus proceeding. State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 1968-NMSC-117, 79 N.M. 357, 443 P.2d 850.

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M.L. Rev. 91 (1974).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 325 et seq.

Inadequacy of remedy by appeal or writ of error as affecting right to mandamus, 4 A.L.R. 632.

Propriety of certiorari to review decisions of public officer or board granting, denying or revoking permit, certificate or license required as condition of exercise of particular right or privilege, 102 A.L.R. 534.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 A.L.R. 194.

Applicability of statute of limitations or doctrine of laches to certiorari, 40 A.L.R.2d 1381.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal, 42 A.L.R.2d 995.

Statute providing for judicial review of administrative order revoking or suspending automobile driver's license as providing for trial de novo, 97 A.L.R.2d 1367.

4 C.J.S. Appeal and Error § 8 et seq.

IN THE NEW MEXICO SUPREME COURT

STATE OF NEW MEXICO ex. rel.
THE NEW MEXICO LEGISLATIVE
COUNCIL,

Petitioner,

vs. No. _____

HONORABLE SUSANA MARTINEZ,
Governor of the State of New Mexico, and
DOROTHY "DUFFY" RODRIGUEZ,
Secretary of the New Mexico Department
of Finance and Administration,

Respondents.

VERIFIED EMERGENCY PETITION FOR ORIGINAL WRIT OF MANDAMUS

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April 21, 2017

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Statement of Compliance

The New Mexico Legislative Council's Verified Emergency Petition for Writ of Mandamus complies with the limitations of Rule 12-504(G)(3). The body of the Petition uses a proportionally-spaced type style and is 3,385 words.

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

New Mexico Statutes

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New Mexico Constitution

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Other Authorities

I. Introduction.

Petitioner seeks an Extraordinary Writ from this Court pursuant to Rule 12-504 NMRA and respectfully requests that the Court act on an emergency basis. This petition is directed primarily to the Governor of New Mexico, whose line-item vetoes of the General Appropriation Act of 2017 seek to defund and thereby effectively abolish the Legislative Branch of government and all constitutionally-created and statutorily-authorized public institutions of higher education, together with several other critical constitutionally-created departments, agencies, and institutions of state government, including Carrie Tingley Hospital, the New Mexico School for the Deaf, the New Mexico School for the Blind and Visually Impaired, and the Department of Agriculture. The Governor's actions violate the New Mexico Constitution's principles of separation of powers and the checks and balances on which our system of representative democracy has been based since 1911. Petitioner requests that the Court issue an Extraordinary Writ invalidating the challenged vetoes and directing the Secretary of the Department of Finance and Administration to effectuate and administer the appropriations authorized under the improperly-vetoed provisions of the General Appropriation Act.

II. Summary of the Bases for the Writ.

The undue encroachment by one co-equal branch of government upon another, through the imposition of improvident vetoes which attempt to eviscerate

the ability of the other branch to perform its essential functions, violates the essence of the constitutional doctrine of separation of powers. In the present circumstances, the challenged line-item vetoes, which purported to remove all funding for the Legislative Branch, violate the doctrine of separation of powers and also are in derogation of Article IV of the New Mexico Constitution, which *obligates* the Legislature to fund the expenses of the Legislative, Executive, and Judicial Branches.

The Constitution also prohibits the wholesale defunding, through a purported line-item veto, of our constitutionally-enabled and statutorily-authorized institutions of higher education and other constitutionally-created departments, agencies, and state government institutions. As amplified below, a Writ of Mandamus is necessary and appropriate to invalidate the challenged vetoes and to restore the funding set forth in the General Appropriation Act.

III. Jurisdiction of the Court.

Petitioner invokes the original jurisdiction of this Court pursuant to Article VI, Section 3 of the New Mexico Constitution. This is an action to declare unconstitutional the attempted vetoes, and to compel Respondents to perform their clear, ministerial duties to carry out the duly enacted laws.

The issues set out in this Petition and in controversy between Petitioner and Respondents are of the greatest public importance and interest to the citizens of

this State. This Court has traditionally and often taken original jurisdiction under Article VI, Section 3 in such matters. *See, e.g., State ex rel. Cisneros v. Martinez,* 2015-NMSC-001, 340 P.3d 597; *State ex rel. Coll v. Carruthers,* 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380; *State ex rel. Sego v. Kirkpatrick,* 1974-NMSC-059, 86 N.M. 359, 524 P.2d 975.

Mandamus is the proper procedure "to test the constitutionality of vetoes or attempted vetoes by the Governor." *Sego,* 1974-NMSC-058, ¶ 6. Moreover, this Court has declared that a Writ of Mandamus will not be deferred until such time as the Legislature attempts to override the unsound vetoes. *Coll,* 1988-NMSC-057, ¶ 9, *quoting with approval, Colorado Gen. Assembly v. Lamm,* 704 P.2d 1371, 1377 (Colo. 1985) ("the delicate constitutional balance between the executive and the legislative branches of government would be upset if we were to hold that the legislature may not challenge a gubernatorial veto until it has attempted by a two-thirds vote to enact a law which it initially was authorized to accomplish by a simple majority").

IV. Parties.

Petitioner Legislative Council, created by NMSA 1978, Section 2-3-1 (1951), is comprised of sixteen members – eight from each house – and includes the bipartisan leadership and a proportionate number of members from the majority and minority parties. In an interim period, when the Legislature is not in session,

the Council acts on behalf of the Legislature. At its last meeting on April 12, 2017, the Council authorized the filing of this petition on behalf of the Legislature. The Council is the real party in interest, acting on behalf of the Legislative Branch, whose members represent the people of the State of New Mexico.

Respondents the Honorable Susana Martinez, Governor of the State of New Mexico, and Secretary Dorothy "Duffy" Rodriguez are named in their official capacities. Secretary Rodriguez oversees and supervises the Department of Finance and Administration concerning the expenditure of State funds authorized pursuant to duly executed appropriation acts of the State.

V. Grounds for the Petition.

A. Factual Background.

1. During the immediate past regular session of the Fifty-Third Legislature of the State of New Mexico, the Legislature duly passed with bipartisan support House Appropriations and Finance Committee Substitute for House Bills 2 and 3, officially denominated "the General Appropriation Act of 2017," *see* Exhibit A, the "General Appropriation Act."

2. In response to the passage of the General Appropriation Act, Governor Martinez undertook unprecedented executive action by purporting to line-item veto the entire appropriation for the Legislature, thereby defunding and

effectively eliminating the Legislative Branch of government. *See* Exhibit A, p. 5, lines 19-25 and p. 6, lines 1-18, line-item vetoes of General Appropriation Act.

3. As a justification for the purported evisceration of the Legislative Branch, Governor Martinez asserted that the Legislature, which appropriates for its expenses no more than one-half of one percent (0.5%) of the entire state budget, failed to impose upon itself the same level of spending reduction as the legislature had imposed on the executive agencies. Based on this erroneous reasoning,[1] the Governor attempted to justify the wholesale extinguishment of the Legislative Branch's ability to function through the following veto message:

> Throughout the legislative session, and others, I have heard a great deal of discussion about how the Legislative and Judicial branches are separate but co-equal branches of government. While true, it apparently does not apply when they are considering reductions to their budgets. Every time the Legislature imposes across-the-board reductions the Legislature exempts both itself and the Judiciary from the same level of reductions that most of our agencies face. The Legislature has done it again; they have refused to bear their fair share of the burden, despite my recommendation to reduce legislative spending at a level that is similar to the reduction for the Executive agencies. Not only did they refuse to cut spending, the Legislature added $120,000 additional

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[1] While Governor Martinez's justification for her attempt to dismantle the Legislature and its ability to function cannot withstand constitutional scrutiny under any appropriate analyses, it is noteworthy that this justification is also demonstrably incorrect. The Legislature has reduced its budget from the Fiscal Year 2016 level. *See* Exhibit B, Affidavit of Rául E. Burciaga, Director of the Legislative Council Service.

> funding to the budget for the LFC, putting that budget above its FY 17 revised operating budget.
>
> Further, its appropriations, as are those for the district courts, are done in a "lump sum" fashion while our Executive agencies are appropriated by specific categories. This certainly does not lend itself to ensuring ". . . accountability through the effective allocation of resources for all New Mexicans," to quote from the LFC's mission statement.

Exhibit C, House Executive Message No. 56 at 2.

4. In addition to defunding the Legislative Branch, Governor Martinez sought by executive fiat to extract the funding necessary for operations of the entire group of constitutionally and legislatively-authorized entities of higher education, as well as several other constitutionally-created and legislatively-authorized departments, agencies, and institutions of state government. Governor Martinez struck by line item veto all of the appropriations for these higher education institutions and other departments, agencies, and institutions. *See* Exhibit A, General Appropriation Act, line item vetoes, p. 135, line 7 through p. 163, line 1.

5. Governor Martinez's asserted basis for the wholesale elimination of the funding for higher education and other governmental entities and functions had no relationship whatsoever to the appropriation itself, which was essentially the exact amount that Governor Martinez had proposed for legislative action. *See* Exhibit D, Affidavit of David Abbey. Instead, Governor Martinez, through an

executive message, attempted to conjoin and pre-condition executive approval of all higher education funding by requiring Senate confirmation of the regents she had nominated. The message stated:

> The Senate refused to hold a hearing for nominated Regents for several higher education institutions. This is a clear violation of its constitutional duty. When the Senate appropriated three quarters of a billion dollars to these institutions, it also took the unprecedented step of refusing to hold a hearing for those responsible for the oversight of the appropriated public dollars. Both the funding for our higher education institutions and the confirmation of well-qualified regents can be addressed in the upcoming special session.

Exhibit C, House Executive Message No. 56 at 7.

6. Following this precipitous and ill-advised executive action, the Council of University Presidents cautioned Governor Martinez that the alleged line-item veto of all funding for New Mexico's constitutionally and statutorily-authorized higher education institutions would result in dire social and economic consequences and that the extraction of funding had already caused immediate and irreparable injury with respect to faculty and student recruitment and retention. The University Presidents warned that high-quality faculty members "are now looking at employment where there is more certainty in higher education" and that "there is concern that many of our brightest students will move to other states to pursue their higher education." *See* Exhibit E, Letter from Council of University Presidents to Governor Martinez, dated April 13, 2017.

B. Relevant Law.

1. Article III, Section 1 of the New Mexico Constitution articulates the general principle of separation of powers: "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial." It further defines that principle by declaring that "no person or collection of persons charged with the exercise of powers belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution is otherwise expressly directed or permitted." N.M. Const. art. III, § 1.

2. The purpose of separation of powers as a constitutional doctrine "[is] not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy." *Myers v. United States,* 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). However, from the earliest days of our nation, it was recognized that the doctrine was never intended to isolate the branches of government from one another:

> [T]he legislative, executive and judiciary powers ought to be kept as separate from, and independent of each other, as the nature of a free government will admit; or as is consistent with that chain of connections that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.

The Federalist No. 47 (Random House ed.) at 316; *see Buckley v. Valeo,* 424 U.S. 1, 120-24 (1976). As noted by Justice Jackson in his seminal opinion on the subject:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. Thus, modern courts have recognized that context is critical when examining questions of separation of powers. Often there is no formula which can be easily applied to resolve such cases; rather, hard judgments must be made to protect against the twin evils our constitutional order was designed to prevent: undue "aggrandizement" of power by one branch over another, and "encroachment" by one branch on the essential functions of another. As the Supreme Court of the United States observed in *Mistretta v. United States,* 488 U.S. 361, 382 (1989):

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed

> the outer limits of its power." Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. . . . By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.

4. Given the critical importance of separation of powers to the proper functioning of the constitutional order, it ultimately falls to this Court "to resolve conflicts between the legislative and executive branches." *State ex rel. Coll,* 1988-NMSC-057, ¶ 7. In *State ex rel. Sego*, 1974-NMSC-059, this Court acknowledged that all constitutionally conferred powers, including the executive power to veto, must be exercised consistently with constitutional restraints:

> The power of veto, like all powers constitutionally conferred upon a governmental officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever. The very concept of such absolute and unrestrained power is inconsistent with the concept of "checks and balances," which is basic to the form and structure of State government created by the people of New Mexico in their constitution, and is inconsistent with the fundamental principle that under our system of government no man is completely above the law.

Id. ¶ 5.

5. In accordance with this underlying principle of constitutional restraint, this Court in *Sego* articulated the following principles to govern the evaluation of

challenges to the exercise of the gubernatorial line-item veto under the separation of powers doctrine:

A. Although the essential power of the Governor is executive in nature, she also participates in the legislative function in so far as Article IV, Section 22 confers on her the power to veto "part or parts" or "item or items" of "any bill appropriating money." *Id.* ¶ 12.[2]

B. "The power of partial veto is . . . a negative power . . . and is not a positive power. . . . Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature . . . ." *Id.* ¶ 18.

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[2] New Mexico's item veto provision is typical of the item veto provision in most states.

> Forty-three states provide for the item veto, including every state admitted to the Union since the Civil War and every state but one west of the Mississippi. In forty-two of those states, the item veto is limited to bills making appropriations. . . . At least ten states allow governors to reduce as well as disapprove items. Many states permit governors to veto general legislation that the legislature has incorporated in an appropriations bill, although other states limit the item veto to monetary items.

Richard Briffault, *The Item Veto in State Courts*, 66 TEMPLE L. REV. 1171, 1175-76 (1993).

C. Judicial review of a line-item veto does not merely look at what the governor sought to delete, without reference to what the legislature had sought to enact. Thus, the Court in *Sego* established that "the Governor may not properly distort legislative appropriations or arrogate unto [herself] the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation." *Id.* ¶ 12.

6. The item veto provision has also been recognized as an express exception to the traditional prohibition against the exercise of legislative authority by the executive branch. *See* N.M. Att'y Gen. Op. 79-13 (1979). Although the Governor's item veto authority resides in the legislative article of the Constitution, an exercise of the item veto is constitutionally infirm where it exceeds the limits of the specific grant of authority. *See Sego,* 1974-NMSC-059, ¶ 12.

7. The effect of an item veto, or, as in this instance, the collective effect of several item vetoes, undermines the essence of separation of powers when the result is to preclude or limit the ability of another branch, a constitutional entity, or a statutorily-created entity from performing its essential functions. *See State ex rel. Brotherton v. Blankenship,* 207 S.E. 2d 421, 431 (W. Va. 1973) ("We adhere to the maxim that the judiciary department possesses the inherent power to determine its needs and to obtain the funds necessary to fulfill such needs" and "the Governor's act of effectively abolishing the aforesaid constitutional offices [of

the Treasurer and Secretary of State] is an act in excess of his constitutionally granted powers").

8. In the present case, the Governor's debilitating vetoes seek to abolish funding for the entire Legislative Branch, our institutions of higher learning, and other constitutionally-created or statutorily-authorized departments, agencies and institutions of state government. It is difficult to conceive of any circumstance where the executive has sought more "aggrandizement" of power against which the Supreme Court cautioned in *Mistretta,* 488 U.S. at 382. Consequently, Governor Martinez's attempt to eliminate the funding for, and the ability of, a co-equal branch of government and constitutionally and statutorily-created institutions to perform their essential functions constitutes a violation of separation of powers.[3]

9. In addition to a violation of the constitutional separation of powers doctrine, the improvident vetoes also violate other provisions that are critical to the function of the Legislature. As noted, the line-item veto is a quasi-legislative act authorized in the legislative article of the Constitution. As that article also provides, the Legislature is constitutionally duty-bound to fund all three branches

[3] The same type of impermissible interference with an essential governmental function has occurred as a result of the Governor's veto of the special appropriation to the Legislative Council Service for "capitol repairs, security and infrastructure upgrades." *See* Exhibit A, p. 169, lines 3-5 (vetoing appropriation for functions that are necessary to carry out the Legislative Council's statutory responsibilities under its "exclusive care, custody and maintenance of the building in which the legislature is housed." NMSA 1978, § 2-3-4 (1967).

of government, a duty which the Governor cannot abrogate through line-item veto. *See, e.g.,* N.M. Const., art. IV, §16 ("[G]eneral Appropriation bills *shall embrace* . . . appropriations for the expense of the executive, legislative and judicial departments.") (emphasis added). *See also id.* § 9 (The legislature *shall* select its own officers and employees and fix their compensation.") (emphasis added); *id.* § 10 ("Each member of the legislature *shall* receive . . . per diem" [at a constitutionally fixed rate].) (emphasis added). *See also*, NMSA 1978, § 2-3-13 (1955) requiring the Legislative Council to "fix the compensation of each employee [of the Legislative Council Service] *within the appropriations made by the legislature* for the use of the legislative council.") (emphasis added); NMSA 1978, § 2-3-8 (1955) (requiring the Legislative Council Service "to assist the legislature of the State of New Mexico in the proper performance of its constitutional functions").

10. This Court has recognized the fundamental principle that no one branch may act unilaterally to preclude another branch or other constitutional or statutory entity from performing its essential functions under the law. *See, e.g., Thompson v. Legislative Audit Comm'n,* 1968-NMSC-184, 79 N.M. 693, 448 P.2d 799 (legislature could not abolish the constitutionally established office of State Auditor, by taking away its fundamental functions or not properly funding the office); *State ex rel. Prater v. State Board of Finance,* 1955-NMSC-013, ¶11, 59

N.M. 121, 279 P.2d 1042 (were the appropriation for the Barbers' Board so reduced "as to put it out of business as effectively as if repealed . . . [it would violate] the constraining influence of Const. Art. IV, 16."); *Mowrer v. Rusk,* 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886 (it is a violation of separation of powers to allow the city executive to control court personnel).

11. In this case, the foregoing principles underlying the doctrines of separation of powers and checks and balances provide the critical protection against the encroachment of one branch of government to the detriment of another branch and for the protection of other essential functions of constitutionally or statutorily-authorized governmental entities. *See, e.g., State ex rel. Nunez v. Baynard,* 15 So.2d 649, 659 (La. Ct. App. 1943) (upholding a writ to compel the State fiscal officers to honor the relator's warrant for his salary as an Assistant District Attorney where the Governor acknowledged that "[n]o constitutional and statutory salaries can be vetoed. The judiciary cannot be vetoed. Appropriations for constitutional agencies cannot be vetoed"). New Mexico law compels the same conclusion to protect the essential functions performed by the Legislature, our institutions of higher education, and the constitutionally-created and statutorily-authorized departments, agencies and institutions of our State. Accordingly, the Governor's collective item vetoes should be stricken and declared void *ab initio* as attempted unconstitutional repeals of the Legislative Branch of government, the

entire higher education system, and other constitutionally-created and statutorily-authorized departments, agencies and institutions.

VI. The Relief Sought.

For the foregoing reasons, Petitioner respectfully requests the Court to advance this matter on its calendar and issue a Writ of Mandamus invalidating the collective item vetoes of the appropriations for the entire Legislative Branch, all of the public institutions of higher education, and other constitutionally and statutorily-authorized departments, agencies, and institutions of state government. Additionally, Petitioner requests that the Writ of Mandamus direct the reinstatement of those improvidently-vetoed items of appropriation and further direct the Secretary of the New Mexico Department of Finance to supervise and administer the expenditure of State funds pursuant to those properly enacted items of appropriation.

Respectfully submitted,

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Counsel for Petitioner

VERIFICATION

State of New Mexico)
)ss.
County of Dona Ana)

I, Senator Mary Kay Papen, President Pro Tempore of the New Mexico Senate, and Co-Chair of the Legislative Council, Relator in the foregoing Verified Petition for an Original Writ of Mandamus, being first duly sworn upon oath, state that I have read the petition and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

Sen. Mary Kay Papen,
President Pro Tempore of the New Mexico Senate

Subscribed and sworn before me, this 19th day of April, 2017

Notary Public

My Commission Expires:

January 30, 2021

OFFICIAL SEAL
ANGELA WILLIAMS
NOTARY PUBLIC-State of New Mexico
My Commission Expires 1-30-21

VERIFICATION

State of New Mexico)
)ss.
County of Santa Fe)

I, Representative Brian Egolf, Speaker of the New Mexico House of Representatives, and Co-Chair of the Legislative Council, Relator in the foregoing Verified Petition for an Original Writ of Mandamus, being first duly sworn upon oath, state that I have read the petition and that the statements contained therein are true and correct to the best of knowledge, information, and belief.

Rep. Brian Egolf, Speaker of the New Mexico House of Representatives

Subscribed and sworn before me, this 19th day of April, 2017

Notary Public

My Commission Expires:

May 24, 2018

OFFICIAL SEAL
LISA M. ORTIZ MCCUTCHEON
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 05/24/18

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, a copy of the foregoing Verified Emergency Petition for an Original Writ of Mandamus, together with the separately filed compendium of Petitioner's Exhibits in Support of its Petition, has been served by hand delivery to the offices of the Respondents and to the Attorney General as follows:

Office of the Governor,
4th Floor, State Capitol Building
Santa Fe, NM 87501

Office of the Secretary of Finance and Administration
Bataan Memorial Building
407 Galisteo Street, #166
Santa Fe, NM 87501

Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501

Thomas M. Hnasko

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NMSC No. S-1-SC-36609

KAUFMAN FIRE PROTECTION SERVICES, INC., DON KAUFMAN, THE ASSOCIATION OF COMMERCE AND INDUSTRY, NAIOP, AND THE NEW MEXICO RESTAURANT ASSOCIATION;

Petitioners,

v.

THE HONORABLE C. SHANNON BACON, in her official capacity as District Judge for the Second Judicial District, Bernalillo County, New Mexico

Respondent,

and

CITY OF ALBUQUERQUE, CITY COUNCIL OF THE CITY OF ALBUQUERQUE, NATALIE HOWARD, in her official capacity as City Clerk, ORGANIZERS IN THE LAND OF ENCHANTMENT, EL CENTRO DE IGUALDAD Y DERECHOS, OLE EDUCATION FUND, and REBECCA GLENN,

Real Parties in Interest.

RESPONSE OF REAL PARTIES IN INTEREST ORGANIZERS IN THE LAND OF ENCHANTMENT, EL CENTRO DE IGUALDAD Y DERECHOS, OLÉ EDUCATION FUND, AND REBECCA GLENN IN OPPOSITION TO EMERGENCY VERIFIED PETITION FOR WRIT OF PROHIBITION OR SUPERINTENDING CONTROL

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I. INTRODUCTION

Petitioners ask the Court, on an emergency basis, to overrule decades of precedent confirming the authority of home rule municipalities to provide for their own forms of government in their city charters, and to strike down a voter initiative provision Albuquerque has in its charter since 1917. Petitioners seek emergency relief in this Court even though Petitioners never moved in the district court for emergency relief, either by a motion for temporary restraining order or for a preliminary injunction. In addition to there being no emergency necessitating circumvention of the normal appeals process, there is no legal basis for the Petition because Albuquerque's direct voter legislation provision is constitutional. The Court should reject Petitioners' groundless, last-ditch effort to rewrite the law, and should uphold Judge Bacon's ruling that the Healthy Workforce Ordinance must appear on the ballot this October.

II. STATUTORY FRAMEWORK

The Albuquerque Charter ("the Charter") has guaranteed Albuquerque voters' right to propose and vote on legislation since the Charter was adopted in 1917.[1] Charter, Art. III, Sec. 3. Under the modern "direct legislation by voter initiative"

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[1] *See* Ex. A (1919 version of Albuquerque Charter) art. III, Sec. 4; *see also* Charter, *Historical Postscript* (identifying all amendments to Charter since adoption in 1917), available at http://www.amlegal.com/codes/client/albuquerque_nm/.

provision at Article III, Section 3, there are several steps that proponents of direct voter legislation must follow to put a measure on the municipal ballot. First, they must submit "a notice of intent to circulate a petition proposing any measure" to the City Clerk, signed by five Albuquerque voters, and also file the proposed measure with the City Clerk. Charter, Art. III, § 3(a)(1)-(2). Then, proponents must obtain a minimum number of signatures within a 60-day period. *Id.* § 3(a)(3)-(5). After the City Clerk files a certification with the Council that the petition has been signed by the required number of voters, the City Council must either: (1) approve the measure as proposed; (2) approve a modified version of the measure, in which case each version would be placed on the ballot, or (3) place the proposed measure on the ballot. *Id.* § 3(a)(6). In either scenario 2 or 3, an "election on the issues must be held at the next general election or regular municipal election." *Id.*

III. STATEMENT OF FACTS

1. Real Parties in Interest Organizers in the Land of Enchantment, OLÉ Education Fund, El Centro de Igualdad y Derechos, and Rebecca Glenn ("Intervenors") are Intervenors in the district court action and proponents and supporters of the Healthy Workforce Ordinance, a ballot initiative slated to appear on the October 2017 municipal election ballot pursuant to Article III, Section 3 of the Charter. The Healthy Workforce Ordinance, if approved by the voters, will provide Albuquerque workers the right to earn between five to seven days of sick

leave annually to recover from illness or injury or care for ill family members.

2. There is no dispute that Intervenors and other proponents of the Healthy Workforce Ordinance met all of the legal requirements for placing the ordinance on the 2017 municipal election ballot pursuant to Article III, Section 3 of the Charter. The Healthy Workforce Ordinance qualified for the ballot on August 10, 2016, after the City Clerk sent the City Council a memorandum certifying that the proponents had gathered enough verified signatures, and the City Council passed an election resolution to put it to the voters, which became effective on August 10, 2016. *See* Ex. B (July 21, 2016 memo); Ex. C (August 10, 2016 memo and excerpts from August 1, 2016 City Council resolution).

3. On April 3, 2017, over eight months later, Petitioners filed *Kaufman Fire Protection Systems Inc. v. City of Albuquerque*, No. D-202-CV-2017-02314 in the Second Judicial District Court, which was assigned to the Honorable C. Shannon Bacon. In the "relief requested" section of the complaint, Petitioners sought an injunction to keep the Healthy Workforce Ordinance off the 2017 municipal ballot. However, Petitioners never moved for an injunction or any other relief in *Kaufman Fire Protection Systems*, nor in any other case. On May 4, 2017, Intervenors moved to dismiss all claims in *Kaufman Fire Protection Systems*, including all claims related to the Healthy Workforce Ordinance. On August 11, 2017, Judge Bacon granted Intervenors' motion to dismiss all of Petitioners' claims, including

the claim Petitioners raise again here that the right to propose and vote on ballot initiatives – a right guaranteed to Albuquerque voters since 1917 – should be stricken from the Albuquerque City Charter.

4. The next Albuquerque regular municipal election will take place on Tuesday, October 3, 2017. However, absentee voting in the election has already begun. On Saturday, August 19, 2017, the City Clerk emailed the ballot to overseas voters pursuant to the Uniformed and Overseas Citizens Absentee Voting Act. *See* NMSA 1978 § 1-6B-7; *see also* Ex. D (8-18-17 TR) (Assistant City Attorney discussing statutory requirement to send ballot to voters on August 19, 2017). Regular absentee voting begins on August 29, 2017. NMSA 1978 § 3-9-4.

IV. GROUNDS FOR DENYING ISSUANCE OF THE WRIT

The Court should not exercise superintending control in this case because the district court was right to uphold the direct voter legislation provisions of the Charter.[2] The power of superintending control is "to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are

[2] A writ of prohibition also cannot issue here because Petitioners do not allege, and cannot allege, that the district court exceeded its jurisdiction by granting Intervenors' Motion to Dismiss. *See, e.g.*, *State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo*, 1962-NMSC-134, ¶ 23, 270 N.M. 475 ("jurisdiction being present of both the subject matter and the parties, ordinarily prohibition will not issue . . . the question [is] not whether the court had a right to decide the issue in a particular way, but did it have the right to decide it at all.")

applicable." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 12, 130 N.M. 144 (quoting *State ex rel. Harvey v. Medler*, 1914-NMSC-055, ¶ 23, 19 N.M. 252). "It is the settled law of this jurisdiction that the writ of supervisory control will issue only when a ruling, order, or decision of an inferior court, within its jurisdiction, (1) is erroneous; (2) is arbitrary or tyrannical; (3) does gross injustice to the petitioner; (4) may result in irreparable injury to the petitioner; (5) and there is no plain, speedy, and adequate remedy other than by issuance of the writ." *Id.* (quoting *Albuquerque Gas & Elec. Co.*, 1939-NMSC-024, ¶ 14, 43 N.M. 234).

Here, Petitioners cannot meet the first through fourth factors because Judge Bacon correctly ruled that (1) Albuquerque is a home rule municipality that may exercise all legislative powers not expressly denied by general law or charter and (2) neither the New Mexico Constitution nor any statute denies voters the power to directly legislate. [**8-11-17 ORD 7-8**] These points are discussed in subsection (A). Petitioners cannot meet the fifth factor justifying issuance of the writ – no other plain, speedy, and adequate remedy – because the 2017 municipal election has already begun, the ballot cannot be changed now, and the normal appeals process is an adequate and timely mechanism to address the legal issues that Petitioners have chosen to raise via writ. This is discussed in subsection (B).

A. The district court's ruling was correct.

Albuquerque has provided its citizens the right to propose and vote on direct

voter legislation since 1917. *See* fn.1, *supra*. Although the framers of the New Mexico Constitution chose not to provide for statewide ballot initiatives, they did not prohibit local initiatives. Therefore, when Albuquerque adopted its City Charter in 1917, its framers included the right to propose and vote on direct voter legislation at the municipal level. *Id.* That right remained in the Charter after Albuquerque chose to become a home rule municipality in 1971. Charter, art. I. The New Mexico Constitution, the Municipal Charter Act, and this Court's decisions make clear that Albuquerque's citizens retain their decades-old right to propose and vote on direct voter legislation.

1. A home rule municipality may exercise all legislative powers not expressly denied by general law or charter.

The Home Rule Amendment, which was adopted in 1970, provides that a "municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X §6(D). The Home Rule Amendment also denies home rule municipalities the power to act in three subject areas, by prohibiting:

- private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power;
- providing for a penalty greater than the penalty provided for a petty misdemeanor; and
- the imposition of a municipal tax, except a tax authorized by general law, until approved by a majority vote in the charter municipality.

Id. The power of a municipality to extend to its voters the right to directly legislate is not among the powers that the Home Rule Amendment prohibits. *Id.*

The purpose of the Home Rule Amendment "is to provide for maximum local self-government," and "liberal construction shall be given to the powers of municipalities." N.M. Const. art. X, §6(E). In *Apodaca v. Wilson*, this Court explained the purpose of the Home Rule Amendment:

> "to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent, in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs." (internal quotation and citation omitted).

1974-NMSC-071, ¶ 10, 86 N.M. 516; *see also New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 16, 138 N.M. 785 ("[T]he home rule amendment was clearly intended to devolve onto home rule municipalities remarkably broad powers . . . the express purpose and liberal construction clauses make it clear that the home rule amendment is intended to provide chartered municipalities with the utmost ability to take policymaking initiative." (citing *Home Rule Manual for N.M. Municipalities*, ch. III, § 17 (New Mexico's home rule provision is "probably among the more liberal in the nation" in terms of granting power to municipalities)).

This Court has long rejected the interpretation of the Home Rule Amendment that Petitioners advance in this case – that a municipality cannot act absent a

specific grant of legislative authority. [*See* **BIC 7, 8, 16** (arguing there is no statutory "authority" or "grant" of power from the Legislature for voter-initiated ordinances)]. This Court first rejected Petitioners' interpretation in 1974, soon after the Home Rule Amendment passed, because requiring a home rule municipality "to look to the legislature for a grant of power to act . . . would make the home rule amendment meaningless." *Apodaca*, 1974-NMSC-071, ¶ 14. In *Apodaca*, the Court also detailed how the Home Rule Amendment's "expressly denied by general law" provision altered the landscape of municipal power:

> Prior to the adoption of the home rule amendment, cities and towns looked to the general laws of the state for their power to act, and they had no power not granted them by law. The home rule amendment changed that principle of law, and home rule cities now have all power not denied them by the Constitution and general statutes; the distinction is this—before the adoption of the home rule amendment, cities and towns were compelled to point out the authority to act in the grant given them by the Legislature; since the adoption of the amendment, cities and towns look to the Constitution and general laws, not for specific grants of power, but to ascertain whether or not a specific power is denied them.

Apodaca, 1974-NMSC-071, ¶ 13 (quoting *Pitre v. Baker*, 111 S.W.2d 359, 361 (Tex. Civ. App. 1937)). Therefore, the standard governing Home Rule municipalities' authority to act, which has remained unchanged since the Home Rule Amendment passed in 1970, is that home rule municipalities may exercise all legislative functions "not expressly denied in general law." *Id.* ¶ 7; N.M. Const. art. X § 6(D). The express denial need not use the phrase "and no municipality may do otherwise" because "any New Mexico law that clearly intends to preempt a

governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary." *Casuse v. City of Gallup*, 1987-NMSC-112, ¶ 6, 106 N.M. 571. Therefore, an express denial may be explicit, or may be contained in "words or expressions which are tantamount or equivalent to such a negation." *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶ 22, 114 N.M. 627. The Court has never wavered from this position.

Petitioners incorrectly claim that *Casuse* and subsequent case law mean an express grant of municipal authority from the Legislature is now required. [**BIC 7, 8, 12-16**]. This is wrong because *Casuse* and the cases on which Petitioners rely affirm the plain-language reading of the Home Rule Amendment that this Court articulated in *Apodaca*: there must be an express denial in general law in order to curtail municipal power. In *Casuse*, this Court struck down the City of Gallup's at-large city council districting scheme because there was an "express denial" in a state statute requiring municipalities with more than 10,000 residents to elect their councilors from single-member districts in which the councilor resides. *Casuse*, 1987-NMSC-112, ¶ 8. *Id.* In *Cottrell v. Santillanes*, 1995-NMCA-090, ¶¶ 7-9, 120 N.M. 367, on which Petitioners also rely, the Court of Appeals struck down a municipal term limits law because there was an express denial in the Qualifications Clause of the Constitution. [**BIC 13-14** (discussing *Cottrell*, 1995-NMCA-090)]. Relying on this Court's decisions in *Casuse* and *Haynes*, the Court of Appeals held

that an express denial need not be "phrased in negative terms." *Cottrell*, 1995-NMCA-090 ¶¶ 9-11. Because the "the Qualifications Clause of our constitution sets out in positive terms the eligibility requirements for persons to hold any elective office within the state," it expressly denies municipal authority to limit eligibility for office through term limits. *Id.* ¶¶ 7, 9. In *In re Generic Investigation into Cable Television Servs. in State of N.M. v. N.M. State Corp. Comm'n*, 1985-NMSC-087, ¶ 20, 103 N.M. 345, on which Petitioners also rely, this Court struck down a local law regulating cable companies because there was an "express denial" in Article XI, Section 7 of the New Mexico Constitution, which explicitly grants power to the State Corporations Commission to regulate cable companies and expressly denies that authority to home rule municipalities. [**BIC 15** (citing *Cable Television Servs.* 1985-NMSC-087, ¶ 20]. Neither this Court, nor the Court of Appeals, held in any of these cases that there must be an express grant of legislative authority to the municipality, as Petitioners claim.

This Court and the Court of Appeals routinely uphold the powers of municipalities to act on matters of local concern where, as here, the power to act is not "expressly denied by general law or charter." For example, in *Haynes*, the Supreme Court held that the City of Clovis had power as a home rule municipality to pass a law that provided for seven representatives on the Clovis City Commission, even though the statewide municipal code at NMSA 1978, Section 3-

14-6(A) provided for only five. 1992-NMSC-062, ¶¶ 23-25. The Court held that the state statute was not a "general law" because the number of members on a municipal governing body was of local, rather than statewide concern. *Id.* ¶¶ 21-23. To emphasize that point, the Court asked, rhetorically, "Of what concern is it statewide what the City's residents decide as to the number of commissioners they wish to serve on their city commission?" *Id.* ¶ 21. Similarly, here, of what concern is it statewide what Albuquerque's residents decide as to whether voters can propose and vote on local ordinances? Albuquerque's decision in 1917 to include a direct voter legislation provision in its Charter reflects the principle that the "municipality itself knew better what it wanted and needed than did the state at large." *Apodaca*, 1974-NMSC-071, ¶ 10 (internal citation omitted). Many other cases illustrate the principle that New Mexico appellate courts will not invalidate an exercise of local control absent an express denial in general law. For example, in *Kane v. City of Albuquerque*, 2015-NMSC-027, ¶ 55-57, 358 P.3d 249, this Court upheld, on home rule grounds, Albuquerque's charter provision prohibiting city employees from holding elective office. The Court held there was no conflict with a state statute that prohibited restrictions on public employees engaging in political activity "except otherwise provided by law" because this carve-out permitted the charter's prohibition. *Id.* In *City of Albuquerque v. N.M. State Corp. Comm'n*, 1979-NMSC-095, ¶¶ 7, 18-21, 93 N.M. 719, the Court held that despite

an apparent conflict with statewide Motor Carrier Act, Albuquerque could contract to provide a limousine service within the city under its home rule powers because the Municipal Transit Law, which applied specifically to municipalities, did not expressly deny Albuquerque's right to contract in this area. In *Apodaca*, 1974-NMSC-071, ¶¶ 14, 22, this Court held that Albuquerque had home rule power to increase sewer and water charges and apply the increased revenue to municipal functions other than those set out in state statute, because the state statutes granting power to municipalities to levy service charges did not "expressly deny" municipalities from directing increased revenues to municipal general fund.[3]

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[3] *See also Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 18, 149 N.M. 556 (Court of Appeals upheld, on home rule grounds, Albuquerque's ordinance defining certain traffic violations as public nuisances; New Mexico's public nuisance statute was not an express denial since it did "not govern what things may constitute public nuisances"); *City of Rio Rancho v. Mazzei*, 2010-NMCA-054, ¶ 14, 148 N.M. 553 (Court of Appeals held the City of Rio Rancho had authority, as a home rule municipality, to impose a lower penalty than that imposed by statute for DWI, because the statewide DWI statutes setting a cap on days of imprisonment "do not contain any express denial of power" that limits Rio Rancho's lower penalty); *City of Santa Fe v. Smith*, 2006-NMCA-048, ¶¶ 12, 26, 139 N.M. 410 (City of Santa Fe's home rule powers gave it "authority to prohibit the drilling of a domestic well within the municipal boundaries, and [] this authority was not preempted by existing state law" even though state statute provided that upon application for an irrigation permit, the state engineer *shall* issue one); *New Mexicans for Free Enterp.*, 2006-NMCA-007, ¶ 22 (upholding Santa Fe's authority to pass a local minimum wage ordinance, because the statewide minimum wage ordinance did not "expressly den[y]" the right to set a higher local minimum wage).

2. There is no express denial of the right to adopt direct voter legislation in any New Mexico law, general or otherwise.

Petitioners tacitly admit that there is no express denial in any law of a municipality's power to provide for direct voter legislation. To distract from this insurmountable obstacle, Petitioners point to irrelevant and inapplicable provisions of law that say nothing about home rule municipalities' powers.

i. There is no express denial in the New Mexico Constitution.

No provision of the New Mexico Constitution contains an express (or implicit) denial of municipal voters' right to directly legislate. Plaintiffs' citations to Justice Mabry's "*Reminisces of 1910*" and to Articles IV and XIX of the New Mexico Constitution are irrelevant because they only concern *statewide* legislative enactments. [**BIC 7-8** (citing N.M. Const. art. IV §1; art. XIX §3)] Article IV, Section 1, exclusively concerns the state legislature,[4] and does not prohibit municipalities from passing local direct voter legislation. N.M. Const. art. IV §1. Rather, Article 4 simply does not provide for *statewide* direct voter legislation. *Id.* Article XIX, Section 3 only addresses how the constitution could be amended to provide for statewide ballot initiatives. N.M. Const. art. XIX § 3. It contains no

[4] *See, e.g.*, N.M. Const. art. IV, § 1 (vesting legislative power in the Senate and House of Representatives), N.M. Const. art. IV, § 5 (timing of regular legislative sessions); N.M. Const. art. IV § 22 ("Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval.")

denial of municipal voters' right to directly legislate on the local level. Neither constitutional provision contains "words or expressions which are tantamount or equivalent to such a negation," either, because neither provision has anything to do with how local legislation is passed. *Haynes*, 1992-NMSC-062, ¶ 22; *see also Hutcheson v. Gonzales*, 1937-NMSC-047, ¶¶ 15, 22-23, 41 N.M. 474 (Article XIX concerns how to amend the constitution and is "entirely unconnected with any other subject;" Article IV "is confined exclusively to the subject of legislation" on the statewide level; neither provision is to be applied outside of its subject area); *Ackerman v. City of Carlsbad*, 1935-NMSC-053, ¶ 24, 39 N.M. 352 (Article IV does not apply to municipalities); *City of Clovis v. North*, 1958-NMSC-077, ¶ 13, 64 N.M. 229 (same). The fact that Albuquerque has provided its citizens the right to propose and vote on direct voter legislation since 1917 further supports the conclusion that the framers' choice about statewide ballot initiatives is not relevant in the municipal context, and never has been.[5] With the passage of the Home Rule

[5] Prior to the Home Rule Amendment, two decisions of this Court also referenced municipal voters' power to pass ballot initiatives. *See City Comm'n of Albuquerque v. State ex rel. Nichols*, 1965-NMSC-104, ¶ 14, 75 N.M. 438 (quoting *Albuquerque Bus Co. v. Everly*, 1949-NMSC-058, ¶ 6, 53 N.M. 460 ("It is also the rule that provisions reserving to the people the powers of initiative and referendum are to be given a liberal construction to effectuate the policy thereby adopted. This applies equally to laws enacted to facilitate the exercise of initiative and referendum powers.")).

Amendment in 1970, the political mood concerning statewide ballot initiatives in 1910 became even less relevant. If the framers of the Home Rule Amendment or the voters had intended in 1970 to prohibit municipal direct voter legislation, then they would have prohibited it. They did not.

ii. There is no express denial in the Municipal Charter Act.

The Municipal Charter Act, NMSA 1978 § 3-15-7, contains no express denial, either. Petitioners acknowledge that it does not, but ask the Court to infer an express denial from (a) the nonexclusive list of permissible powers in the Act and (b) the fact that another statute concerning the commission-manager form of government contains more explicit language concerning direct voter legislation. [**BIC 16-17**]. However, neither statute contains an express (or implicit) denial. The Municipal Charter Act provides:

> The charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the municipality, including the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality; provided, that the charter shall not be inconsistent with the constitution of New Mexico, shall not authorize the levy of any tax not specifically authorized by the laws of the state and shall not authorize the expenditure of public funds for other than public purposes.

NMSA 1978 § 3-15-7. As Judge Bacon correctly held, this statute does not "limit the charter's scope" to any particular set of topics. [**8-11-17 ORD 8**]. Rather, the only limitation the Municipal Charter Act adds to the limitations enumerated in the Home Rule Amendment "is that the system of government 'be deemed expedient

and beneficial to the people.'" *Id.* The word "including" in the Municipal Charter Act introduces an illustrative, not restrictive, list of permissible governmental powers that a municipality may exercise. *See Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *DirecTV v. Crespin*, 224 Fed. Appx. 741, 748 (10th Cir. 2007) (describing the "normal use of 'include' as introducing an illustrative – and non-exclusive – list"); *Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308 ("The words of a statute . . . should be given their ordinary meaning absent clear and express legislative intention to the contrary.")

Furthermore, one of the examples of permitted powers in the Municipal Charter Act is the "petition and referendum of any ordinance." The phrase "petition and referendum" may be interpreted to include direct voter legislation. Black's Law Dictionary defines "referendum" as "the process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote." Black's Law Dictionary 1060 (Abridged 8th ed. 2005). This accurately describes direct voter legislation. The Superior Court of Connecticut has applied a similar definition, holding that the word "referendum" "has a popular definition broader in scope which also includes in the term initiative action, viz., (t)he determination of questions as to certain

existing or proposed legislation by reference to a vote of the people." *Morris v. Town of Newington*, 411 A.2d 939, 944 (Conn. Super. Ct. 1979) (quoting Ballentine's Law Dictionary, 3rd Ed.). No matter how one defines "petition and referendum," however, there is no question that the Municipal Charter Act does not "expressly deny" the power of the voters to directly legislate, nor does it contain any implicit prohibition.

It is irrelevant, not "dispositive," as Petitioners claim, that another New Mexico state statute contains explicit procedures for proposing and voting on ballot initiatives in the commission-manager form of government. [**BIC 18** (citing NMSA 1978 § 3-14-18)]. This argument ignores the central rule governing this case: home rule municipalities may exercise all "functions not expressly denied by general law or charter." N.M. Const. art. X, §6(D). There can be no express denial in a statute about the commission-manager form of government that has nothing to do with Albuquerque's powers as a home rule municipality. To the extent this statute is relevant to anything, it undercuts Petitioners' argument that the New Mexico Constitution prohibits local ballot initiatives. [**BIC 7-12**]. The federal equal protection case Petitioners cite for the proposition that the form of local government is relevant construes the Colorado Constitution, which, unlike the New Mexico Constitution, expressly provides Colorado voters a constitutional right to vote on ballot initiatives statewide and in home rule counties, but prohibits ballot

initiatives in non-home rule counties. [**BIC 18** (quoting *Save Palisade Fruitlands v. Todd*, 279 F. 3d 1204, 1211 (10th Cir. 2002)]. The case is unhelpful because, unlike Colorado, New Mexico's constitution and statutes say nothing about local ballot initiatives; the Home Rule Amendment and the Municipal Charter Act leave that issue to local governments.

In sum, Albuquerque's direct voter legislation provision is a lawful exercise of Albuquerque's home rule power, and Judge Bacon was correct to dismiss this count of Petitioners' complaint.

B. Filing this Petition was not the only just, speedy, and adequate remedy available to Petitioners, and the election has already begun.

Because Judge Bacon's decision is correct, Intervenors only briefly note that Petitioners also cannot meet the requirement that there be no "plain, speedy and adequate remedy" because Petitioners' claim for injunctive relief is already moot. People have already started voting in the 2017 regular municipal election; the first ballots went out to overseas absentee voters on August 19, 2017, and absentee voting opens on August 29, 2017. *See* Statement of Facts ("SOF") ¶ 4. Oddly, Petitioners elected not to inform the Court of the August 19, 2017 deadline in their Petition, even though it was looming when they filed the Petition on August 14, 2017. Furthermore, nothing prevented Petitioners from seeking the injunctive relief they request here in the district court at an earlier point over the past year, but they never did. Petitioners filed a complaint in April 2017, then amended it, and then

did nothing. SOF ¶ 3. It was *Intervenors* who moved to dismiss Petitioners' case in the district court. *Id.* At no point during the litigation in the district court did Petitioners move for an emergency hearing or an injunction, or otherwise attempt to avail themselves of a "just, speedy, and adequate" remedy in district court. *Id.* Once an election is held, claims for injunctive relief are moot. *Carter v. City of Las Cruces*, 1996-NMCA-047, ¶¶ 9-10, 121 N.M. 580. Furthermore, "[o]nce the election process has begun, absent a complete lack of authority to hold the election in the first instance, the process must not be disturbed." *State ex rel. Lewis v. Hamilton Cty. Bd. Of Elections*, 655 N.E. 2d 177, 179 (Ohio 1995) (denying writ of prohibition on the basis of laches because "[a]bsentee ballots have been distributed and a number have been voted. The hour of decision (objection) has long since come and gone."). Therefore, even if Petitioners' claims had legal merit – which they do not – there is no "speedy" injunctive remedy available here, nor any reason why the normal appeals process would be inadequate.

V. CONCLUSION

Over 14,000 Albuquerque voters signed a petition to place an earned sick days measure on the Albuquerque municipal ballot. In so doing, these voters exercised a right that has been guaranteed to the people of Albuquerque since 1917. The Court must uphold the guarantees of the Home Rule Amendment, the

Municipal Charter Act and the Albuquerque Charter by denying issuance of the writ.

Respectfully submitted,

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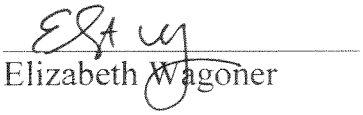
STATEMENT OF COMPLIANCE

Undersigned counsel certifies that the body of this Response, as defined in Rule 12-504(G)(1), has a total of 4935 words, is in 14-point font, is proportionately spaced, and complies with the Rule 12-504(G)(3) NMRA. The brief was created using Microsoft Word, and undersigned counsel used that program to obtain the above word count.



Elizabeth Wagoner

CERTIFICATE OF SERVICE

I hereby certify that on this this 24th day of August, 2017 the foregoing pleading was e-filed and served on counsel for all parties through the Court's electronic filing system, and I further certify that on that date I served a copy on Patrick Rogers, counsel for Petitioners, at patrogers@patrogerslaw.com, on Regina Ryanczak, counsel for Respondent, at rryanczak@nmag.gov, and on Christopher Tebo, counsel for Real Parties in Interest, at ctebo@cabq.gov.

Elizabeth Wagoner

EXHIBIT A

CHARTER

FOR

ALBUQUERQUE

New Mexico

ADOPTED
September 25th, 1917

AMENDED
July 22, 1919
October 7, 1919

80339 City Charter

PREAMBLE

We, the people of the City of Albuquerque under the authority of Chapter 86, of the Laws of 1917 of the State of New Mexico, do ordain and establish this form of government for the City of Albuquerque, N. M.

This charter shall take effect and be in force from and after the 4th day of December, 1917.

ARTICLE I.

INCORPORATION AND POWERS

The municipal corporation now existing and known as the City of Albuquerque, with its present boundaries, shall remain and continue to be a body corporate and shall possess all powers granted under the municipal corporation acts and such other powers as are consistent with the constitution of the State of New Mexico.

ARTICLE II.

THE ELECTORATE

Section 1. The right to vote for the elective officers of the City shall be enjoyed by all persons qualified as legal voters under the Constitution of the State of New Mexico.

Sec. 2. Any qualified voter shall be eligible to any elective office and may have his name placed upon the official ballot by filing with the City Clerk, not more than one month nor less than two weeks before the date of the election, a statement of his proposed candidacy, together with an affidavit signed by two other qualified voters of the City, that he is duly qualified under the law and not suffering under any legal disability, temporary or permanent. If no more candidates qualify than there are places to be filled, they shall be declared elected without a vote, upon the certificate of the City Clerk. If no candidate qualifies in the manner prescribed, the ballots shall be printed without any names, and it shall be lawful for any voter to write the names of any qualified electors upon the ballot.

Sec. 3. The ballots shall be printed by the City and shall contain the names of the candidates without party or other designation. The elective officers of the City shall consist of five Commissioners, to be elected as hereinafter provided. The candidate or candidates receiving the highest number of votes cast by the qualified voters at any election for Commission, shall be declared elected to office and the City Clerk shall issue to such candidate or candidates, so receiving such highest number of votes, a certificate of election, and such candidates so elected shall qualify and assume office as hereinafter provided.

Sec. 4. The Commission shall be the judge of the election and qualification of its members.

Sec. 5. Elections for city officers shall be on different days from those on which county, state or national elections are held.

ARTICLE III.

THE RECALL AND DIRECT LEGISLATION

Section 1. (a) Any elective officer of the City shall be subject to a recall election at any time, except as hereinafter provided. The petition for the recall election must be signed by a number of qualified voters equal in number to fifteen per cent of the total number of votes cast at the election of the officer whose recall is proposed. The election must be held within thirty days of the filing of the petition, unless a regular city election occurs within sixty days, in which case the voters shall vote on the recall at the regular election. In either case there shall be a special ballot containing the name of the officer, the position which he holds, and the dates of the beginning and termination of his official term. Below the name of the officer shall be the two phrases: "For the Recall", and "Against the Recall", one below the other, with a space after each for the placing of a cross where desired. If a majority of the ballots and a number equal to a majority of the ballots cast at the election of the officer whose recall is proposed, show a vote for the recall, the office in question shall be thenceforth vacant.

(b) If an officer is recalled as provided for above, he shall not be eligible for re-election until the term for which he was originally elected shall have expired.

(c) If a recall election results in a failure to secure a majority of votes in favor of the recall, the officer in question shall not again be subjected to recall until after the expiration of six months from the time at which the first recall election was held.

(d) Vacancies created by a recall election shall be filled in the same manner as is provided for the filling of vacancies in the governing body due to other causes; provided, that if all the Commissioners are recalled at one election, the City Clerk, or if there be no city clerk, the Judge of the District Court of the County of Bernalillo, shall within three days call an election to be held in accordance with the provisions specified in this charter for the election of Commissioners at regular elections. (Adopted at Special Election, October 7, 1919.)

Sec. 2. (a) No act, ordinance or resolution or order of the governing board of the City shall, unless it be declared an emergency measure on the ground of urgent public need, go into effect until thirty days after its passage. If at any time within the thirty days a petition signed by twenty per cent of the qualified voters is presented to the governing body, asking that the measure in question be submitted to a vote of the people for adoption or rejection, said measure shall not go into effect until an election shall have been held as petitioned. It shall be the duty of the governing body of the city to provide for such election within thirty days of the filing of the petition.

Sec. 3. (a) At such election the ballot shall contain the text of the measure in question, and below the same phrases: "For the above measure", and "Against the above measure", followed by spaces for marking with a cross the phrase desired. If a majority of the votes cast are against the measure, it shall be of no effect. If a majority of the votes cast be not against the measure, it shall go into effect forthwith.

(b) If a measure be declared an emergency measure as provided above, it shall go into effect at once, subject to repeal by an adverse majority at the recall election.

Sec. 4. (a) Upon petition of twenty per cent of the qualified voters of the City, any measure may be proposed to the governing body of the City for enactment within thirty days of the time of filing the petition containing the proposed measure. If the governing body of the City either fail to act at all, act adversely or amend the proposed measure, it shall be their duty to call an election within thirty days for submitting the measure to a vote of the pepole.

(b) At such election the ballot shall contain the proposed measure as originally submitted and the measure as amended, if amended by the governing body of the City. After each of these measures there shall be printed the words: "For" and "Against", with spaces for crosses thereafter.

(c) If a majority of the votes cast at the election are in favor of the measure in its original form or its amended form, it shall be declared in effect as adopted. If neither measure receives a majority of the votes cast, neither shall be in effect.

ARTICLE IV.

Section 1. All legal powers of the corporation shall be vested in a commission of five members elected at large in the manner specified in Article II.

Sec. 2. The term of office of said Commissioners shall be for a period of four (4) years unless sooner recalled or removed; provided, however, that the three Commissioners elected at the election held on the 20th day of November, 1917, shall hold their office until the first Tuesday after the first Monday of April, 1922, or until their successors are elected and qualified, unless sooner

removed or recalled. That on the first Tuesday after the first Monday in April, 1922, an election for Commissioners shall be held, at which three Commissioners shall be elected to succeed the three Commissioners elected at the election held on the 20th day of November, 1917 (or their successors in office), whose term of office shall be for four years unless sooner recalled or removed, or the office to which they were elected is otherwise vacated.

That in the event of the adoption of the amendments to the charter submittid at the election held on the 22nd day of July, 1919, the City Commission shall within sixty (60) days thereafter call a special election at which there shall be elected two commissioners, each of whom shall serve for a term of four years from and after the date of such election, or until their successors are elected and qualified, unless sooner recalled or removed, or unless the office to which they are elected shall be otherwise vacated; and every four (4) years after the election of such two Commissioners as herein provided for, two Commissioners shall be elected to be their successors. (Adopted at Special Election, July 22, 1919.)

Sec. 3. Any qualified voter of the City shall be eligible for election to the Commission.

Sec. 4. The Commission shall meet regularly once a week, or oftener if business requires, and shall serve without any compensation. All meetings shall be open to the public unless special considerations of a peculiar nature demand that a meeting be secret, when it can be so declared by a majority of the Commission. Publicity shall be given to the minutes of all meetings of the Commission, and the official records of the meetings shall be open to inspection at all convenient times. (Adopted at Special Election, October 7, 1919.)

Sec. 5. The Commission shall designate one justice of the peace, holding his office in one of the precincts of the City of Albuquerque, as Police Judge of the said City.

Sec. 6. The Commission shall choose its chairman and shall determine its order and procedure.

Sec. 7. It shall be the duty of the Commission to pass all ordinances and other measures conducive to the welfare of the City, and to the proper carrying out of the provisions of this charter, and to do and perform all acts required for the general welfare of the City. The Commission shall provide all offices, in addition to those herein specified, which may become necessary for the proper carrying on of the work of the City. The Commission shall appoint the chief administrative officer as hereinafter provided for and shall hold him rseponsible for the proper and efficient administration of the City government.

Sec. 8. Vacancies in the Commission shall be filled by choice of the remaining Commissioners for the period intervening between the occurrence of the vacancy and the next regular election; provided, that if such period be less than six months, no such temporary appointment shall be made.

ARTICLE V.

Section 1. There shall be employed by the Commission a chief administrative officer to be known as City Manager. He shall be employed for an indefinite term, and shall hold office until a vacancy is created by death, resignation or removal by the governing body of the City.

Sec. 2. The Manager shall be chosen solely on the basis of administrative qualifications. The choice shall not be limited by reason of former residence.

Sec. 3. The Manager shall receive an adequate salary, to be fixed by the Commission.

Sec. 4. The Manager shall be responsible to the governing body of the City for the proper administration of all the affairs of the City; all persons engaged in the administrative service of the City shall be employed and discharged by him, and he shall be charged with the enforcement and carrying out of all the ordinances, rules and regulations passed and enacted by the governing body of the City.

Sec. 5. The Manager shall prepare and submit the annual budget. He shall make recommendations to the governing body on all matters concerning the welfare of the City, and in all cases, except when clearly unnecessary or undesirable, it shall be the duty of the governing body to request the opinion of the Manager on any proposed measure. The Manager shall have a seat, but no vote, at every meeting of the governing body.

Sec. 6. The administration of the affairs of the City shall be divided into as many departments as may be deemed desirable by the governing body, each under the charge of a director employed by the Manager.

ARTICLE VI.

Section 1. Amendments to this charter may be proposed by members of the Commission, or by a petition signed by fifteen per cent of the number of voters at the last preceding election. Not less than thirty (30) nor more than forty (40) days after the filing of any proposed amendment with the Commission, it shall be submitted to the electorate for adoption or rejection.

EXHIBIT B

City of Albuquerque

Office of the City Clerk

Richard J. Berry, Mayor **Natalie Y. Howard, City Clerk**

Interoffice Memorandum

July 21, 2016

To: **Dan Lewis, Council President**

From: **Natalie Y. Howard, City Clerk**

Subject: **Certification of Petitions for Direct Legislation (amended)**

Pursuant to the provisions of Article III, Section 3 (Direct Legislation by Voter Initiative) of the City Charter, I, Natalie Y. Howard, the City Clerk of the City of Albuquerque hereby certify that my office has verified the required number of signatures to allow the proposed legislation entitled, "Healthy Workforce Ordinance,"3 to move forward to the City Council.

On May 11, 2016, I accepted the Notice of Intent to Circulate the Petition. The group initiating the direct legislation had until July 11, 2016 to circulate the petition and gather signatures. Under the provisions of §2-4-13 ROA 1994, the group delivered petitions to my office in stages and my office initiated the process of verifying signatures. (§2-4-13 (F) ROA 1994).

Under the provisions of §3-1-5 NMSA 1978, my office had ten days from the legal deadline to file the petition to verify the signatures, which we were able to accomplish well within that legal timeframe. On July 19, 2016 we completed the verification process with the following statistics:

Signatures reviewed:	18,204
Signatures approved:	14,477
Signatures rejected:	3,626
Signatures pending:	101 (pending signatures are neither approved nor rejected, indicating that the person reviewing the signatures cannot make a determination. Pending signatures are reviewed at the end of the process, if needed)

Pursuant to Article III, Section 3 (a)(6) "If the Council fails to act upon a measure so proposed within fourteen days after the City Clerk files a certification with the Council that the petition has been signed by the required number of voters, or the Council acts adversely thereon or amends it an election on the issues must be held at the next general election or regular municipal election."

cc: Richard J. Berry, Mayor
Robert J. Perry, Chief Administrative Officer
Jessica Hernandez, City Attorney
City Councilors
Jon Zaman, Director of Council Services

EXHIBIT C

City of Albuquerque

Office of the City Clerk

Richard J. Berry, Mayor **Natalie Y. Howard, City Clerk**

Interoffice Memorandum

August 10, 2016

To: CITY COUNCIL

From: NATALIE Y. HOWARD, CITY CLERK

Subject: BILL NO. R-16-82 ENACTMENT NO. R-2016-058

I hereby certify that on August 9, 2016, the Office of the City Clerk received Bill No. R-16-82 as signed by the president of the City Council, Dan Lewis. Enactment No. R-2016-058 was passed at the August 1, 2016 City Council meeting. Mayor Berry did not sign the approved Resolution within the 10 days allowed for his signature and did not exercise his veto power. Pursuant to the Albuquerque City Charter Article XI, Section 3, this Resolution is in full effect without Mayor's approval or signature. This memorandum shall be placed in the permanent file for Bill No. R-16-82.

Sincerely,

Natalie Y. Howard
City Clerk

R-2016-058

CITY OF ALBUQUERQUE
CITY COUNCIL

INTEROFFICE MEMORANDUM

TO: Richard J. Berry, Mayor

FROM: Jon K. Zaman, Director of Council Services Jon 8/2/16

SUBJECT: Transmittal of Legislation

Transmitted herewith is Bill No. R-16-82 Concerning A Special Election To Be Held In The City Of Albuquerque At The Next City General Election; To Submit To The Voters Of The City Of Albuquerque An Ordinance Proposed Pursuant To Article III, Section 3, The Direct Legislation Provision Of The City Charter, At The Next General Election To Be Held On November 8, 2016 To Approve Or Disapprove The Proposed Ordinance As Set Forth Herein; Prescribing Other Details In Connection With The Special Municipal Election (Davis), which was passed at the Council meeting of August 1, 2016 by a vote of 7 FOR AND 0 AGAINST.

Recused: Winter
Excused: Lewis

In accordance with the provisions of the City Charter, your action is respectfully requested.

JKZ:mh
Attachment

CITY of ALBUQUERQUE
TWENTY SECOND COUNCIL

COUNCIL BILL NO. R-16-82 ENACTMENT NO. R-2016-058

SPONSORED BY: Patrick Davis

RESOLUTION

CONCERNING A SPECIAL ELECTION TO BE HELD IN THE CITY OF ALBUQUERQUE AT THE NEXT CITY GENERAL ELECTION; TO SUBMIT TO THE VOTERS OF THE CITY OF ALBUQUERQUE AN ORDINANCE PROPOSED PURSUANT TO ARTICLE III, SECTION 3, THE DIRECT LEGISLATION PROVISION OF THE CITY CHARTER, AT THE NEXT GENERAL ELECTION TO BE HELD ON NOVEMBER 8, 2016 TO APPROVE OR DISAPPROVE THE PROPOSED ORDINANCE AS SET FORTH HEREIN; PRESCRIBING OTHER DETAILS IN CONNECTION WITH THE SPECIAL MUNICIPAL ELECTION.

WHEREAS, the City of Albuquerque City Charter (the "Charter") authorizes direct legislation by voter initiative provided that certain minimum requirements are satisfied, including that a minimum number of registered voters have signed the petition; and

WHEREAS, on July 21, 2016 the City Clerk filed a certification with the City Council certifying that the requisite number of signatures were obtained and verified as required by the Charter to submit the proposed ordinance set forth below (the " Proposed Ordinance") to the voters of the City of Albuquerque; and

WHEREAS, as set forth in the City Charter, when an election is required pursuant to the "direct legislation by voter initiative" process, such an election on the issues must be held at the next general election or regular municipal election; and

WHEREAS, Section 3-8-35 NMSA 1978, a portion of the Municipal Election Code, states that when a special election is required by law, an election resolution shall be adopted by the governing body calling for the election and

shall state, in part, the purpose for calling the election, the date of the election, the questions to be submitted to the voters, and whether paper ballots or voting machines will be used in the election; and

WHEREAS, the Charter requires that a Special Election be held at the next General Election, and this resolution shall serve as the election resolution required by Section 3-8-35 NMSA 1978.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

SECTION 1. On November 8, 2016, a special municipal election (the "Special Election") shall be held in Albuquerque, New Mexico. The City Clerk is instructed to coordinate with the Bernalillo County Clerk to place the following Proposed Ordinance on the ballot, and the qualified voters of the City of Albuquerque shall be permitted to vote "for" or "against" the Proposed Ordinance:

SUMMARY OF THE PROPOSED ORDINANCE

Proposing to enact the Albuquerque Healthy Workforce Ordinance such that, beginning 90 days after enactment: First, Albuquerque employers must allow employees to accrue sick leave at the rate of one hour of leave per 30 hours worked. Second, employees may use sick leave for their own or a family member's illness, injury, or medical care, or for absences related to domestic violence, sexual assault or stalking. Third, employers with 40 or more employees must allow each employee to use up to 56 hours of accrued sick leave each year, and employers with fewer than 40 employees must allow each employee to use up to 40 hours of accrued sick leave each year. Fourth, employers must notify employees of their rights and maintain records. The ordinance also provides for public enforcement, private right of action, and liquidated damages and penalties for noncompliance or retaliation.

PROPOSED ORDINANCE

An initiative Ordinance of the City of Albuquerque Amending Title 13 of the Albuquerque Municipal Code to Allow Employees to Accrue and Use Sick Leave; Establishing Procedures for Notice, Recordkeeping, and Enforcement.

WHEREAS, approximately 49% of private sector workers and 77% of part-time workers in Albuquerque lack paid sick time, which compels them to work when they should be recuperating from illness or injury and increases the risk of passing illness to others.

BE IT ORDAINED, BY THE PEOPLE OF THE CITY OF ALBUQUERQUE:

"§ 13-16-1. SHORT TITLE

This ordinance may be cited as the "Albuquerque Healthy Workforce Ordinance."

§ 13-16-2. DEFINITIONS

CITY. The City of Albuquerque.

DEPARTMENT. The Office of the City Attorney, unless the mayor designates a different agency.

DOMESTIC PARTNER. A person with whom another person maintains a household and a mutual committed relationship, without a legally recognized marriage.

EMPLOYEE. Any person an employer suffers or permits to perform work, or hires with the expectation of performing work, for monetary compensation for at least 56 hours in a year within the municipal limits of the city, including on a part-time, seasonal or temporary basis.

EMPLOYER. An EMPLOYER is as defined in Section 13-12-2 of this Code or any nonprofit organization, partnership, association, corporation, or charitable trust with a physical premises within the City of Albuquerque. EMPLOYER shall not include the State of New Mexico or any employee thereof.

FAMILY MEMBER. A spouse or domestic partner; a child, sibling, parent, grandparent, grandchild, or legal ward or guardian of the

EXHIBIT D

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

D-202-CV-2016-05539

HEALTHY WORKFORCE ABQ, et al.,

Plaintiffs,

vs.

THE CITY OF ALBUQUERQUE, et al.,

Defendants/Respondents,

and

ROXANNA MEYERS, et al.,

Intervenors.

TRANSCRIPT OF PROCEEDINGS

On the 18th of August 2017, at approximately 1:00 p.m., this matter came on for hearing before the HONORABLE ALAN MALOTT, Division XV, Judge of the Second Judicial District, State of New Mexico.

The Plaintiffs, HEALTHY WORKFORCE ABQ, et al., appeared by Counsel of Record, ELIZABETH WAGONER and TIM DAVIS, Attorneys at Law, 924 Park Avenue Southwest, Suite C, Albuquerque, New Mexico 87106.

The Defendants/Respondents, THE CITY OF ALBUQUERQUE, et al., appeared by Counsel of Record, CHRISTOPHER TEBO and KEVIN MORROW, Assistant City Attorneys, P.O. Box 2248, Albuquerque, New Mexico 87103.

The Intervenors, ROXANNA MEYERS, et al., appeared by Counsel of Record, PATRICK ROGERS, Attorney at Law, 20 First Plaza Center Northwest, Suite 725, Albuquerque, New Mexico 87102.

At which time the following proceedings were had:

August 18, 2017

(Note: In Open Court at 1:05 p.m.)

THE COURT: All right. We're convened on CV-16-5539, Healthy Workforce of Albuquerque, et al. versus City of Albuquerque, et al.

Starting over here on my left, Ms. Wagoner, let's get appearances, please.

MS. WAGONER: Elizabeth Wagoner and Tim Davis for the New Mexico Center on Law and Poverty for the Plaintiffs.

THE COURT: Thank you.

MR. TEBO: Good afternoon, Your Honor. Assistant City Attorney, Christopher Tebo, along with City Attorney Kevin Morrow. And just for the Court's information, Natalie Howard, the clerk, is here in the courtroom also.

THE COURT: Thank you.

MR. ATLER: Your Honor, Tim Atler on behalf of Councilors Benton, Davis, Gibson and Peña.

THE COURT: Thank you.

MR. ROGERS: Your Honor, good afternoon. Pat Rogers for the Intervenor.

THE COURT: Thank you.

All right. Realizing that you didn't necessarily have free choice, I appreciate everybody rushing in here. We all know why we're here. I've convened this hearing on an emergency basis, based upon the Plaintiff's Emergency Motion

for Production of the Final Ballot.

So, Mr. Tebo, let me cut to the chase. Where is the ballot?

MR. TEBO: Your Honor, notwithstanding the Court's order, there is no final ballot. There is, however -- let me explain.

THE COURT: Go ahead. I'm listening.

MR. TEBO: I saw that look. I understand.

The clerk has been working all week with AES to prove the ballot materials; in particular, for the one ballot that must be sent out tomorrow to the nonresident voters.

The proving that's been involved with the clerk has involved going through all of the language and ensuring there are no typographical errors, that everything is representing what it should be, based on the City Council's resolution, which contains all of the information that must go on the ballot.

I've spoken with the City Clerk several times about when we will have something that can be handed out which is representative. She talked to the AES vendor 20 minutes ago, and understands that by the end of the day, they hope to provide it to her, but it may be tomorrow morning, when that electronic document which is going to be sent to those overseas voters is finalized to be e-mailed because of the statutory requirement that it go out tomorrow.

What the vendor will do is the vendor will come to the clerk with a hard copy of the ballots that it has represented in the electronic form, and across that hard copy, it will say "sample" or "test." That, for all intents and purposes, is exactly what is going to be sent out tomorrow. It is not available at this moment, Your Honor, and believe me, when we saw your order, we attempted to do exactly what you asked us to do.

THE COURT: Okay.

MR. TEBO: One more thing. We're here today on a motion that I know implies that the City doesn't have the reading comprehension to understand your order of last week -- week before last. I want to represent on behalf of the City of Albuquerque and those defendants that I represent that this process that the clerk has been engaged in is exactly the process that is required to ensure that there are no typographical errors in the ballot, and that the ballot looks exactly the way the resolution requires it to. Keeping in mind, Your Honor, and you may not be aware of this, there are actually ten different types of voters, depending on what district they live in.

THE COURT: I'm familiar.

MR. TEBO: I thought you might be, but I just want to reiterate, because we're on the record and on the basis of why we're here before you today. So that's the

representation that I hope addresses your question.

If the Court orders the City to produce a document like it did by this moment or by 5 p.m., I cannot represent to you that, in fact, the City will be able to do that. What I can represent to you is that the City Clerk will be able to meet her statutory deadline tomorrow, Saturday, August 19th, for producing those ballots and getting them out electronically that the statute requires her to do for those nonresident overseas voters.

THE COURT: All right. So I have a second question, Mr. Tebo. Rather than refuse to respond to Plaintiff's inquiries, why didn't you make this explanation in a professional manner to Plaintiff's counsel? Why are we here?

MR. TEBO: Well, Your Honor, I would suggest I don't know why we're here, but I will respond to the Court's question, because I came prepared for that very question.

I've had the opportunity over the last eight-and-a-half months to interact with Ms. Wagoner, Plaintiff's counsel, and what I have learned is that when Plaintiff's counsel does not get the answer that Plaintiff's counsel wants to get, a motion follows. So the answer to your question is, basically, why didn't I respond to the Plaintiff's unreasonable request to produce something, and I quote from the e-mail, "...to ensure that the City of

THE COURT: Because they don't have a district?

MR. TEBO: Some of them may, but some of their districts' candidates might not be running. Now they know that the ballots will be going out tomorrow, and then other ballots will follow.

THE COURT: So to be clear, as to the proposed ordinance, which is my focus point --

MR. TEBO: Yes, sir.

THE COURT: -- as a judge, not necessarily as a voter, but as concerns this case, there is one form of the ballot. In other words, the ordinance appears the same on each variant of the ballot, correct?

MR. TEBO: Exactly.

THE COURT: All right. Does that answer your question, Mr. Rogers?

MR. ROGERS: No. I may have not been very clear. What I was fishing for was the number of persons who have requested an overseas ballot.

THE COURT: I think you're going to have to get that from the clerk, or from Mr. Tebo.

MR. ROGERS: So there is not just one?

MR. TEBO: Not one person, no.

THE COURT: Thank you.

All right. I have the representation of an officer of the Court, and I have that on behalf of the City, that the

A Few Relevant Supreme Court Rulings:

1. STATE EX REL. CLARK V. JOHNSON, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11

MINZNER, Justice.

{1} Petitioners filed a verified petition for writ of mandamus or writ of prohibition and declaratory judgment from this Court directed at Respondent, who is the Governor of the State of New Mexico. Attached to the petition was a copy of the "Compact and Revenue Sharing Agreement" entered into by the Governor of New Mexico with the Governor of Pojoaque Pueblo. . . .

{2} Petitioners generally contend that the Governor of New Mexico lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution. See N.M. Const. art. III, § 1 . . . .

MANDAMUS

{14} We initially consider whether, in light of the procedural posture of this case, a writ of mandamus is an appropriate remedy. Specifically, we examine three subissues: (1) whether Petitioners have standing to bring this action; (2) whether this action is properly before this Court in an original proceeding; and (3) whether a prohibitive writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official to act.

{15} In the case of *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974), a state senator sought a writ of mandamus to compel the Governor and other officials to treat as void certain partial vetoes. In considering the petitioner's standing to bring that action, we said:

> It has been clearly and firmly established that even though a private party may not have standing to invoke the power of this {*569} Court to resolve constitutional questions and enforce constitutional compliance, this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.

Id. at 363, 524 P.2d at 979. Accordingly, we did not need to consider whether the petitioner's status as a legislator, taxpayer, or citizen conferred standing in that case. In the present proceeding, two of the Petitioners are state legislators, and all three are voters and taxpayers. However, as in Sego, we need not consider whether those factors independently confer standing to bring this action because, as in Sego, the issues presented are of "great public interest and importance." Id. Petitioners assert in the present proceeding that the Governor has exercised the state legislature's authority. Their assertion presents issues of constitutional and fundamental importance; in resolving those issues, we will contribute to this State's definition of itself as sovereign. "We simply elect to confer standing on the basis of the importance of the public issues involved." Id. More limited notions of standing are not acceptable. *See id.; Hutcheson v. Gonzales*, 41 N.M. 474, 491-94, 71 P.2d 140, 151-52 (1937); see generally Charles T. DuMars &

Michael B. Browde, Mandamus in New Mexico, 4 N.M. L. Rev. 155, 170-72 (1974). We conclude that Petitioners have standing.

{16} We next consider whether this case should more properly be brought in district court or whether it is properly before this Court in an original proceeding. Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. In seeming contradiction, NMSA 1978, Section 44-2-3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:

> has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction . . . [and SCRA 12-504(B)(1)(b)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."

DuMars & Browde, supra, at 157 (quoting the predecessor to SCRA 1986, 12-504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968).

{17} As we have said, this proceeding implicates fundamental constitutional questions of great public importance. Moreover, an early resolution of this dispute is desirable. The Governor asserts, and it has not been disputed, that several of the compacting tribes are in the process of establishing and building gambling resorts and casinos. These projects entail the investment of large sums of tribal money. Capital financing for these projects may well depend upon resolution of the issue presented in this case. Moreover, the relevant facts are virtually undisputed, we perceive no additional factual questions that could be or should be answered in the district court, and the purely legal issues presented would have come eventually to this Court even if proceedings had been initiated in the district court. Accordingly, we conclude that the exercise of our original constitutional jurisdiction is appropriate in this case.

{18} The final procedural issue is whether mandamus, which normally lies to compel a government official to perform a non-discretionary act, is a proper remedy by which to enjoin the Governor from acting unconstitutionally. This Court has never "insisted upon . . . a technical approach [to the application of mandamus] where there is involved a question of great public import," *Thompson*, 79 N.M. at 694, 448 P.2d at 800, and where other remedies might be inadequate to address that question.

{19} Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood. One nineteenth century New Mexico judge characterized the authority to prohibit unlawful official conduct as implicit in the nature of mandamus. In the case of In re Sloan, 5 N.M. 590, 25 P. 930 (1891), the district court enjoined a board of county commissioners from certifying certain candidates as winners of a contested election and ordered the board to instead certify other candidates. The Territorial Supreme Court upheld the district court's granting of both a writ of mandamus and injunctive relief. Justice Freeman wrote:

> "It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining power to prevent a corresponding violation of duty."

Id. at 628, 25 P. at 942 (Freeman, J. concurring). More recent cases illustrate Justice Freeman's insight. This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action. [multiple citations omitted]

{20} As the United States Supreme Court has observed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). . . . As we said in *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer*, 104 N.M. 751, 726 P.2d 1381 (1986):

> Deeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.

We conclude that Petitioners' arguments raise allegations that support the use of prohibitory mandamus.

2. *See also* STATE EX REL. TAYLOR V. JOHNSON, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (issuing an Original Writ of Mandamus requiring the Governor and Secretary of Human Services: 1) to desist from the implementation of their public assistance changes; and 2) to administer the public assistance program in full compliance with existing law until it is constitutionally altered or amended by legislation signed into law by the Governor).

3. COBB V. N.M. STATE CANVASSING BOARD, 2006-NMSC-034, 140 N.M. 77, 140 P.3d 498

SERNA, Justice.

. . . .

II. OVERVIEW

{12} The two overarching issues in this case are: (1) whether Petitioners' case is properly within this Court's jurisdiction, and (2) whether the Election Code gives the State Canvassing

Board the authority to condition a recount and recheck on an advance payment of the entire estimated cost.

{13} We address the issue of jurisdiction in two ways. First, we address whether our denial of Petitioners' writ of mandamus, prohibition, and/or superintending control over the State Canvassing Board, or alternatively over the district court, precludes Petitioners from appellate review of the district court's order denying Petitioners' petition pursuant to Section 1-14-21 for a writ of mandamus. We hold that Petitioners are entitled to appeal the district court's order to this Court.

{14} Second, we address whether Petitioners' case is moot. This Court must decide whether a recount and recheck would be appropriate because a recount and recheck of New Mexico's 2004 presidential election is now impossible, and any change in New Mexico's 2004 presidential election results would have no effect on who is President. We reach the merits of Petitioners' appeal on well-recognized exceptions to mootness. This Court may review moot cases that present issues of (1) substantial public interest or (2) which are capable of repetition yet evading review. Under the first exception, while recognizing that conducting a recount and recheck is moot at this point, the Court notes that clarifying the provisions of the Election Code is an issue of substantial public interest. This case also satisfies the second exception: whether this case is capable of repetition yet evading review because of the short time frame associated with elections generally, and because the 2001 version of Section 1-14-15(B) is still effective, as we explain in Sections IV(B) and (C)(1).

{15} We next address the State Canvassing Board's authority under the Election Code in two steps. The first step, the 2005 amendment to Section 1-14-15(B), while not essential to Petitioners' claim under the original version of the statute, also addresses whether this case is capable of repetition yet evading review. We note that the Legislature attempted, through the 2005 amendment of Section 1-14-15(B), to grant the State Canvassing Board the discretion to condition a recount and recheck on a payment of the entire estimated cost of such procedures. That the State Canvassing Board had such discretionary authority was unclear under the previous version of Section 1-14-15(B), and this amendment appears to clarify the Legislature's intent. However, the amendment provides no guidance to the State Canvassing Board and grants it unfettered discretion in requiring payment beyond the statutorily required amount in Section 1-14-15(A), and in deciding the amount of advance payment that will be required for each application.

{16} We hold that the Legislature's amendment does not make this case moot because the 2005 amendment, on its face, is an unconstitutional delegation of legislative power. Therefore, we strike the amendment. Consequently, the 2001 version of Section 1-14-15(B) is still in effect, and the State Canvassing Board's action, requiring payment of the entire estimated cost of the recount and recheck, is capable of repetition while evading review.

{17} The second step addresses the State Canvassing Board's requirement that Petitioners first pay the entire estimated costs of the recount and recheck in advance under the original version of the statute. Under the plain language of Section 1-14-15(A), which defines the term deposit and surety bond for the purposes of Section 1-14-15(B), and in reading Section 1-14-15 as a whole,

we hold that the district court erred in not granting Petitioners relief. However, we decline to remand to the district court to order relief, because a recount and recheck is impossible at this point, and, even if a change in New Mexico's election results would occur, it would have no effect on who is the President of the United States.

. . .

NOTES

Ethical Issues on Appeal

Ethical Issues in Negotiation and Mediation

I. Puffing, Embellishing or Misrepresentation and Fraud - Where is the line?

A. Is there a higher standard for lawyers?

1. Rule 16-304 - Fairness to opposing counsel.
   Rule 16-401 - Truthfulness in statements to others.
   Rule 16-403 - Dealing with unrepresented persons.
   Matter of Stein, 143 N.M. 462 (2008) 2008-NMSC-013.

2. Malpractice claims by third parties (i.e. buyer sues a seller's attorney).

B. Correcting false factual beliefs, false impressions, and false assumptions of opposing counsel.

- Does an attorney have an obligation to correct?

C. Misapprehension of the Law - Is there an obligation to correct when you know the other side is basing a deal on a misapprehension of law.

Ex: TCA and punitive damages, or misunderstanding of caps.

D. Omissions - Attorney transacting a sale of property to unrepresented buyer.

- House on polluted, contaminated or unsafe land?
- Mineral rights you want to keep under the land?
- What to do when clients ask you to omit information.

E. Negotiation and Bargaining Traditions.

- I won't pay a penny more.
- That's my bottom line.

II. Confidentiality of Negotiations and Mediations.

- Mediation Procedures Act - Exceptions to Confidentiality
- 11-408 - limits of the rule.

III. When do we have a deal?

A. Oral Agreements - Montoya-Marlow v. Montoya, Not Reported in P.3d2011 WL 2042087 (Unpub. Ct App. 2011)

B. Agreements to agree are not generally enforceable - Padilla v. RRA, Inc., (NMCA 1997) 124 N.M. 111, 946 P.2d 1122

C. Memoranda of Understanding - Castillo v. Houvener, Unpublished, 2017 WL 1025315.

D. E-mail agreements - Basis Technology Corp. v. Amazon.com, Inc., 71 Mass.App.Ct. 298, 78 N.E.2d 952 (Ct. App. 2008).

- *Jones v. United Minerals Corp.* 993 N.M. 706, 1979 -NMSC- 103
- *Purple Lupine LLC v. Sherman & Sherman*, Unpublished, NMCA, September 30, 2014, WL 5782924

E. Formal written settlement agreements and releases.
- additional terms, conditions, releases, confidentiality and liquidated damages.
- Tax characterization of settlements - Risks of characterizing a settlement payout in a wrongful termination case, as personal injury under IRS Code Section 104 (a)(2).

- 1099s -

IV. Dealing with Unrepresented Persons.
- Rule 16-403 - Dealing with unrepresented persons.
- Rule 16-108 - Conflict of interest.
- *Spencer v. Barber*, 2013-NMSC-010

V. Bad Faith in Mediation.
- "While the Act contains exceptions to the confidentiality provision, there is no exception for use to determine whether a party participated in the mediation in good faith. See § 44–7B–5. We offer no view here as to whether the scope of the Act is intended to include rules such as LR5–205 or orders such as that entered in the present case."
- *Carlsbad v. Patterson*, 145 NM 385, 2009 -NMCA- 2005
- Threats to keep a case tied up in litigation for years - "You will be dead before you see a dime".

VI. Representing Multiple Parties in a Negotiation.
- Rule 16-108 - Conflict of interest.

VII. Ethics for lawyer-mediators - Rule 16-204 Lawyer serving as a third-party neutral.
- Mediator perceived as not neutral by one party.
- Mediator misrepresenting legal outcomes.
- Court Mediation Programs - higher duty ies for mediators?
- Divorce Mediation - Rule 16-108 - Conflict of interest.

RULE 16–102

SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

B. Representation not endorsement of client's views. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

D. Course of conduct. **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent** or misleads the tribunal. A lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RULE 16-108

CONFLICT OF INTEREST; CURRENT CLIENTS; SPECIFIC RULES

G. **Representation of two or more clients.** A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

RULE 16-304

FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:
A. unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
B. falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a witness that is prohibited by law;
C. knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
D. in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
E. in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to the justness of a cause, the credibility of a

witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
F. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 16-401

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:
A. make a false statement of material fact or law to a third person; or
B. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 16-106 of the Rules of Professional Conduct.

RULE 16-403

DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 16-404

RESPECT FOR RIGHTS OF THIRD PERSONS

A. Prohibited actions. In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Mediation Procedures Act

§ 44-7B-4. Confidentiality

Except as otherwise provided in the Mediation Procedures Act or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.

44-7B-5. Exceptions; admissibility; discovery

A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:
(1) are contained in an agreement reached by the mediation parties during a mediation, including an agreement to mediate, and the agreement is evidenced by a record signed by the mediation parties, except when parts of the agreement are designated by the mediation parties to be confidential or are confidential as otherwise provided by law;
(2) are communications that all mediation parties agree may be disclosed, as evidenced by a record signed by all mediation parties prior to or at the mediation;
(3) threaten or lead to actual violence in the mediation;
(4) reveal the intent of a mediation party to commit a felony or inflict bodily harm to the mediation party's self or another person;
(5) disprove a felony charge;
(6) are required by law to be made public or otherwise disclosed;
(7) relate to abuse, neglect or criminal activity that is not the subject of the mediation;
(8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant;
(9) relate to the administrative facts of the mediation, including:
(a) whether the mediation parties were referred to mediation;
(b) whether a mediation occurred or has terminated;
(c) the date, time and place of a mediation;
(d) the persons in attendance at a mediation; and
(e) whether a mediator received payment for the mediation; or
(10) relate to whether the parties reached a binding and enforceable settlement in the mediation.
B. Mediation communications may be disclosed if a court, after hearing in camera

and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications.

C. Mediators shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communications, except:

(1) pursuant to Paragraphs (3) through (10) of Subsection A and Paragraph (3) of Subsection D of this section; and

(2) to prove or disprove a claim of mediator misconduct or malpractice filed against a mediator.

D. Nothing in the Mediation Procedures Act shall prevent:

(1) the discovery or admissibility of any evidence that is otherwise discoverable or admissible, merely because the evidence was presented during a mediation;

(2) the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable;

(3) a court or court agency, a government or governmental subdivision, agency or instrumentality of this state or a tribal court, government or agency, when conducting a mediation program under its auspices, from ordering prior to the mediation that different or additional rules of confidentiality shall apply to the mediation; or

(4) mediation parties from agreeing in writing to additional or different confidentiality protections prior to the mediation, subject to Paragraphs (3) through (10) of Subsection A and Subsection C of this section.

26 U.S.C.A. § 104, I.R.C. § 104

§ 104(a) Compensation for injuries or sickness

(a) In general.--Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, **gross income does not include--**
(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;
(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

Effective: May 22, 2015

ABA SECTION OF DISPUTE RESOLUTION
COMMITTEE ON MEDIATOR ETHICAL GUIDANCE

SODR-2010-1

Questions:

A married couple with one minor child has decided that they would like to get an uncontested no fault divorce and want joint custody over their minor child. The parties have decided to jointly retain you as a Mediator to mediate the terms of a property settlement, custody, and support agreement. The mediation is successful, and the parties reach an agreement concerning the division of all of their property and the custody, visitation arrangements, and child support for their minor child. The parties then want the Mediator to prepare the agreement for them. Neither party wants to retain his or her own attorney to prepare the agreement or to have their attorneys review the agreement if prepared by the Mediator.

Question 1A: If the Mediator is a lawyer, should he or she prepare the agreement under these circumstances and if so, what are the ethical responsibilities and constraints, if any, that should be considered in connection with the preparation of the agreement?

Question 1B: What are the Mediator's ethical duties and responsibilities with respect to the parties under these circumstances?

Question 1C: Would the ethical considerations be different if the mediation only involved the division of property and not custody, visitation, and support for the minor child also?

Question 1D: If the Mediator was not a lawyer, are there any different ethical considerations that would apply?

Authority Referenced: Model Standards of Conduct for Mediators 2005, Preamble, Standards I(A), I(A)(2); II(B); II(C); III(A); III(D); IV(A)(1); IV(B); VI(A)(5); VI(A)(8); VI(C).

Summary:

The Committee answers the posed questions mindful of the specific context of the inquiry. It posits that the unrepresented parties in a divorce mediation specifically seek out a lawyer-mediator with the expectation that he or she will provide substantive drafting services and that the parties will not retain an attorney to review the mediator's work product or otherwise advise the parties about their legal rights. In answering the questions, the Committee does not endorse any particular style or orientation of the mediator, and it does not analyze the questions by defining the proposed services as facilitative or evaluative in nature.

The Committee also notes that the aspirational Model Standards of Practice for Family and Divorce Mediation (Family Standards) would apply to family law practitioners. It advises those practitioners to be guided first by the Family Standards, relevant provisions of which specifically permit certain drafting activities by family mediators. While it is not within the purview of this Committee to interpret the Family Standards, the Committee has provided citations in the footnotes to provisions found in those standards that are parallel to the applicable provisions of the Model Standards.[1]

Question 1A: A lawyer-mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. Arguably, before taking on any new role in the process, the mediator must explain the implications of assuming that role and get the consent of the parties to provide those services. The mediator should also advise parties of their right to consult other professionals, including lawyers, to help them make informed choices.

Question 1B: The Model Standards arguably also permit a lawyer-mediator to provide legal information to the parties. If, however, the mediator provides legal *advice* or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing the roles of legal counsel and mediator, thereby raising ethical issues under the Model Standards. At a minimum, the lawyer-mediator must disclose the implications of shifting roles and receive consent from the parties. The lawyer-mediator should also consider legal ethics provisions governing, among other things, joint representation of legal clients and the unauthorized practice of law (UPL) in a state in which the lawyer is not licensed.

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[1] MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000). The ABA House of Delegates, the Association of Family and Conciliation Courts, and the Association for Conflict Resolution approved the Family Standards. *Id.*

Question 1C: The ethical considerations do not differ under the Model Standards even if the mediation only involves the division of property.

Question 1D: The Standards would seem to allow a mediator, no matter his or her profession-of-origin, to act as a simple "scrivener" of the parties' agreement. However, given the complexity of divorce-related settlement agreements, the Committee recognizes that a mediator may likely not act simply as a scrivener in this context, except perhaps in drafting a parenting plan or a more limited aspect of the total agreement. Any drafting activity could raise concerns under the law governing the unauthorized practice of law (UPL) in each state.

Opinion:

A. Introduction.

In answering these questions, the Committee on Mediator Ethical Guidance (Committee) is applying the Model Standards, as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in 2005. The Committee is not applying any other mandatory or aspirational codes of ethics adopted by states or by other mediation organizations.

The Committee is not applying local law or codes of conduct for mediators, or any professional codes of conduct for lawyers that may be relevant,[2] but it advises the lawyer-mediator to consider their possible application. At the end of this opinion, the Committee provides some resources that may assist mediators in researching these other sources of law. Application of these sources of law to the questions posed is beyond the jurisdiction of this Committee. The Reporter's Notes to the Model Standards recognize "that a mediator's conduct may be affected by applicable law, court rules, regulations, other applicable professional rules . . . some of which may conflict with and take precedence over compliance with these Standards."[3]

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[2] In this case, the lawyer-mediator should keep in mind relevant legal ethics provisions that may come into play if the lawyer-mediator is ultimately confronted with the ethical dilemma posed by the hypothetical, particularly issues related to the joint representation of legal clients and the practice of law in a state in which the lawyer is not licensed. Relevant ethics provisions include analogs of the following ABA Model Rules of Professional Conduct: (1) Rule 1.7 Conflict of Interest: Current Clients; (2) Rule 2.4 Lawyer Serving as a Third-Party Neutral; and (3) Rule 1.6 Confidentiality of Information. An assessment of these and other legal ethics provisions is outside the scope of this Committee's jurisdiction. A lawyer-mediator may wish to seek a legal ethics advisory opinion from the relevant entity in his or her jurisdiction, or the advice of an ethics expert pursuant to Rule 1.6(b)(4) or an analogous state provision.

[3] Am. Bar Ass'n, Assn. of Conflict Res. & Am. Arb. Assn., *Reporter's Notes* §V(B) (April 10, 2005)[hereinafter *Reporter's Notes*], available at http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-april102005final.pdf.

The text of the Model Standards on which the Committee relies appears at Section D of this opinion, along with the Reporter's Notes further discussing those Standards. The Committee also provides a list of "Other Resources" at Section E of this opinion.

B. Discussion – Drafting Mediated Settlement Agreements.

Mediators working with unrepresented parties face unique challenges. Because the parties do not have the advice of counsel in the mediation session, the mediator may find that the parties turn to him or her for assistance in understanding legal concepts and consequences, or in documenting their agreement. Those challenges are heightened in a family law situation, when parties often participate in the mediation without representation and discuss sensitive issues concerning both finances and the care of children.

The Model Standards do not provide a clear answer to Questions 1A to 1D presented to the Committee.[4] At the heart of these questions is the issue of whether drafting the mediated settlement agreement or a Memorandum of Understanding (MOU) falls within the definition of mediation, and comports with the core values of mediation as expressed in the Model Standards. However, even if it does, provisions of the Model Standards may constrain who may perform this service, how they may do it, and whether activities beyond that of scrivener are permissible.

Even if the Model Standards clearly allowed the mediator to assume a drafting role, they serve only as aspirational guidelines of practice for mediators. Statutes, professional rules, regulations, court opinions, and other sources of law beyond the scope of this opinion could constrain any mediator -- whether a lawyer or a person trained in any other profession-of-origin -- from performing a drafting service on behalf of the parties. In ultimately answering the submitted questions, the mediator must consider, at a minimum, the law governing joint representation of clients by a lawyer and the law governing UPL as delineated in each state where the mediator may want to offer the drafting service to parties. [5] The Model Standards do not supersede or take precedence over these sources of law.

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[4] As noted above, the Family Standards expressly contemplate the drafting role of the mediator, whether a lawyer-mediator or a mediator with another profession-of-origin. They provide: "With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed." *Id.* at Family Standards VI.E.

[5] While beyond the scope of this opinion, the Committee points out that many states broadly define the practice of law in three typical ways:
(1) by proscribing it without defining the "practice of law"; (2) by using a circular definition in which the practice of law is what lawyers do or have done or have the skills and training to do; or (3) by listing activities that constitute the practice of law. The listed activities typically include (1) the drafting of legal instruments, forms, and pleadings; (2) giving legal advice; and (3) appearing in court

1. Definition of Mediation.

In analyzing the question presented, the Committee first considers the definition of mediation found in the Model Standards.[6] It does not expressly include the drafting or preparation of mediated settlement agreements or MOUs.[7] Instead, it defines the role of the mediator as facilitating communication, negotiation, and the voluntary decision-making of the parties. One could argue that reducing the parties' negotiation to a written agreement or MOU provides such facilitation.

2. Party Self-Determination.

Standard I(A) indicates that the parties may exercise self-determination over the process as well as over the outcome. Accordingly, the parties could decide, as a process choice, to have the mediator draft the negotiated settlement agreement or MOU. However, even in this context, a mediator "should make the parties aware of the importance of consulting other professionals to help them make informed choices."[8] Thus, a mediator who accepts responsibility for drafting an agreement or MOU, should advise the parties to have it read by a lawyer or other professional to ensure that it reflects informed choice.[9] The Reporter's Notes seem to recognize that parties receiving this advice may ignore it. Accordingly, the mediator's obligation under the Model Standards seems to end when he or she makes this recommendation to the parties.

3. Mixing Professional Roles, Mediator Competence, and Referral of Parties to Other Professionals.

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on behalf of a person. One court called the varying tests "consistent only in their inconsistency." Professor Rhode calls the UPL prohibitions "broad and largely undefined [in] scope" and covering a "breathtaking amount of common commercial activity." She also asserts that states make "[n]o attempt . . . to justify prevailing definitions."
Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1134-39 (2008).

[6] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Preamble.

[7] In contrast, the Virginia statute defines "dispute resolution services" as including the "screening and intake of disputants, conducting dispute resolution proceedings, *drafting agreements* and providing information or referral services." VA. CODE ANN. § 8.01-576.4 (2007) (emphasis added). *See also* FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.420(c) (2000) (requiring certified mediators appropriately to memorialize "the terms of any agreement reached" and to "discuss with the parties and counsel the process for formalization and implementation of the agreement"). *See also* MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.E., which specifically contemplates a drafting role for the mediator.

[8] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard I(A)(2).

[9] *Id.*

Standards VI(A)(5) and (8) deal more directly with the mixing of professional roles. Some persons would argue (and several bar committees enforcing UPL law have determined) that a mediator who serves in a drafting role has begun to engage in the practice of law. Many state statutes explicitly define the practice of law as drafting "legal instruments" which are then defined broadly to include even mediated settlement agreements and MOUs.[10] This aspect of Questions 1A to 1D is discussed generally below.

The analysis under the Model Standards consists of two parts: (1) is the mediator competent to provide the "information" by virtue of his or her training or experience; and, (2) can the mediator provide the information in a way consistent with the provisions of the Model Standards governing self-determination and impartiality.

The discussion occurs in the context of giving "information."[11] The Standard does not discuss the drafting role of the mediator. Arguably, one could distinguish between the role of the "scrivener" and the role of a legal advisor in the drafting context. As a scrivener, the mediator would simply transcribe the parties' agreement verbatim, without suggesting or adding language, including legal boilerplate clauses, that may have legal affect on the parties' agreement. However, once the mediator suggests additional language for the agreement, he or she may be mixing roles. The Model Standards would then ask the mediator to consider the two-part test set out in Model Standard VI(A)(5). The mediator would need to consider whether providing that information or advice, by suggesting additional contractual provisions, affects the self-determination of any party -- positively or negatively -- and whether it may affect the parties' perceptions of the mediator's impartiality.

Standard VI(A)(8) raises a related issue depending on whether the mediator's drafting role could be considered "an additional dispute resolution role in the same matter." Even if the parties request that the mediator draft the agreement or MOU, the mediator may need to explain the implications of that "change in process" and obtain consent to perform it. The Reporter's Notes suggest that the focus of this Standard is on "a different intervenor role," such as arbitrator, counselor, or neutral evaluator. The notes do not specify what counseling role they contemplate, whether legal, financial, or mental health. If this Standard applies, it triggers a duty on the part of the mediator to advise the parties of the implications of serving

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[10] *See, e.g.*, Proposed Decision, *In re* Resa Fremed, No. UPL 05-002 (Conn. Statewide Grievance Comm. March 9, 2006), discussed at length in Young, *supra* note 5, at 1055-1118.

[11] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard VI(A)(5).

as the agreement drafter and, specifically, to get the parties' consent to the service.[12]

The Reporter's Notes to Standard VI also suggest that a mediator must consider "additional elements for service" imposed on certain programs or practice areas, presumably by state statute, court rule, program rule, or applicable codes of professional ethics. Thus, some mediators may be precluded from drafting agreements or MOUs under these additional "elements for service."

Several Standards suggest some alternatives for the mediator. Standard VI(C) again gives the mediator an option to postpone the mediation to allow the parties sufficient time to consult with an attorney, to ensure that an attorney could attend the next session of the mediation, or to retain an attorney to draft the agreement or MOU.[13] Similarly, Standard IV(B) contemplates a co-mediation model, in which one of the mediators has the training, experience, and skills required to competently draft an agreement or MOU. The Reporter's Note to this Standard recognizes the need to protect members of the public in the mediation process.

4. Mediation Impartiality.

Finally, in determining whether the mediator may arguably "mix" roles, he or she must consider the effect of the drafting service on the parties' perceptions of the mediator's impartiality. For instance, if the mediator suggests the addition of a provision to the mediated settlement agreement, it may seem to one of the parties as showing favoritism to the other party.[14]

In addition, depending on how one defines when the mediation "terminates," taking on the drafting role could be deemed as the creation of a new relationship with the parties either during or after the mediation. This new role potentially triggers Standard III(A) governing conflicts of interest. Standard III(D) would again require the mediator to disclose the potential conflict of interest and to seek the consent of the parties before serving in that new role. The Reporter's Notes specifically contemplate the new role of "personal lawyer."

C. Conclusion: Drafting the Mediated Settlement Agreement.

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[12] For instance, attorneys serving as mediators providing this service may need to explain the legal professional rules governing joint representation and get a written waiver of any potential conflict arising from that joint representation.

[13] The Family Standards provide: "The mediator should recommend that the participants obtain independent legal representation before concluding an agreement." MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.C. They also provide: "The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed." *Id.* at Standard VI.E.

[14] MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard II(B).

The mediator posing the questions focuses most particularly on the issue of whether a lawyer-mediator can draft the mediated settlement agreement in the context of a mediation requested by unrepresented parties to a divorce. As the discussion above suggests, the mediator should be sensitive to the role he or she is playing, whether he or she is competent to provide the requested drafting service, and the parties' capacity to meaningful participate during the entire mediation, regardless of whether the mediation concerns purely financial issues or includes custody and child support issues. The fact that the mediation may involve custody and child support issues highlights the mediator's responsibility to help the parties get information about their legal rights and obligations, even at the risk of interrupting or even ending the mediation process.

The Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training. A mediator may, in drafting a mediated settlement agreement or MOU, act as a "scrivener" -- simply memorializing the parties' agreement without adding terms or operative language. The Model Standards arguably also permit a mediator to, if she has the necessary background and experience, provide legal information to the parties. If, however, the mediator puts on his or her legal counsel's hat, by giving legal advice or performing tasks typically done by legal counsel, then the mediator runs the serious risk of inappropriately mixing the role of legal counsel and mediator without disclosing the implications of that shift in roles or without getting party consent.

In addition, any drafting activity by a mediator could draw the attention of bodies regulating lawyers or those enforcing restrictions on UPL.[15]

D. Provisions of Model Standards and Reporter's Notes.

These questions implicate several provisions of the Model Standards and highlight the potential tension that exists between the different Standards.

The Committee on Mediator Ethical Guidance considered the following Standards in responding to Questions 1A to 1D posed by the mediator.

First, the revised Model Standards define mediation in the *Preamble* as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." The Reporter's Notes to the *Preamble* state: "The revised definition of mediation is not designed to exclude any mediation style or approach consistent with Standard I's

[15] For a discussion of cases analyzing scrivener's activities as an issue of UPL, see Young, *supra* note 5, at n.448.

commitment to support and respect the parties' decision-making roles in the process."[16]

Model Standard I(A) Self-Determination provides in pertinent part:

> A. A mediator **shall** conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and **informed choices as to process** and outcome.
>
> * * *
>
> 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator **should make the parties aware of the importance of consulting other professionals to help them make informed choices.**[17]

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[16] *Reporter's Notes, supra* note 3, at §V(A).

[17] Similarly, the Family Standards note that "a family mediator shall recognize that mediation is based on the principle of self-determination by the participants." MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard I. The Family Standards further explain that phrase as follows:

> A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.
> B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.
> C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.
> D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

Id. The Family Standards recommend that the mediator inform the parties that "they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process." *Id.* at Standard III. The Family Standards also address the mediator's responsibility to structure the mediation process so that the participants can make informed decisions. Those responsibilities include the following:

> A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation

(Emphasis added.)

Model Standard VI (A)(5) The Quality of the Process cautions that:

> The role of a mediator differs substantially from other professional roles. **Mixing the role of a mediator and the role of another profession is problematic** and thus, a mediator should distinguish between the roles. A mediator may provide **information** that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.[18]

(Emphasis added.)

Model Standard VI (A)(8) The Quality of the Process further provides:

> A mediator **shall** not undertake **an additional dispute resolution role** in the same matter without the consent of the parties. Before providing such service, a mediator **shall** inform the parties of the implications of **the change in process** and obtain their consent to the change. A mediator who undertakes such role assumes different

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> so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
> B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
> C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
> D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
> **E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.**

Id. at Standard VI (emphasis added). Another provision of the Family Standards encourages mediators to refer parties to other professionals, including attorneys. *Id.* at Family Standards III.4.

[18] More explicitly, the Family Standards preclude a mediator from giving legal advice. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.B. Like the Model Standards, they permit a mediator to offer the parties "information that the mediator is qualified by training or experience to provide." *Id.*

> duties and responsibilities that may be governed by other standards.

(Emphasis added.)

Model Standard VI(C) The Quality of the Process provides:

> If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator **shall** take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

(Emphasis added.)

Model Standard IV(A)(1) Competence also may apply. It provides in pertinent part:

> A. A mediator **shall** mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
>
> > 1. . . . Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence . . .
>
> B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator **shall** discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to . . . requesting appropriate assistance.

(Emphasis added.) The Reporter's Notes to this Standard provide in pertinent part: "[T]o promote public confidence in the integrity and usefulness of the [mediation] process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possess the basic competency to assist."[19] They further state:

> Standard IV(B) recognizes the situation in which a mediator . . . learns during the course of the discussions that the matters are more complex than originally anticipated and beyond his or her competency. In such

[19] *Reporter's Notes, supra* note 3, at §IV(F).

> situation, Standard IV(B) imposes a duty on that mediator to take affirmative steps with the parties to address the situation and make appropriate arrangements for serving them (perhaps through hiring co-mediators with relevant competencies . . . .)[20]

Perhaps most importantly, in the context of the questions asked by the mediator, the Reporter's Notes state:

> Additional public comments suggested that the language of the Standards include reference to an individual's meeting the qualification requirements set forth by relevant state statutes; the Joint Committee believed . . . that the Standards are considered as fundamental ethical guidelines; **particular programs or practice areas might require additional elements for service.**[21]

(Emphasis added.)

Model Standards II(B) and II(C) Impartiality provide in pertinent part:

> B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
>
> C. If at any time a mediator is unable to **conduct** a mediation in an **impartial manner**, the mediator shall withdraw.[22]

(Emphasis added.)

Model Standard III. Conflicts of Interest provides in pertinent part:

> A. A mediator **shall** avoid a conflict of interest or the appearance of a conflict of interest **during and after a mediation**. A conflict can arise from involvement by a mediator with the subject matter of the dispute . . . that reasonably raises a question of the mediator's impartiality.
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> * * *

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[20] *Id.*

[21] *Id.*

[22] The Family Standards have similar provisions governing mediator impartiality. *See* MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard IV.E.

> D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator **shall** disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

(Emphasis added.) The Reporter's Notes express concern about acting on behalf of a mediation party, party representative, witness, or some other participant in "another role (such as a personal lawyer, therapist, or consultant to their business)." The Notes caution the mediator "to make certain that entering into such new relationship does not cast doubt about the integrity of the mediation process."[23]

E. Other Resources.

The Committee suggests that mediators also consider the following resources in determining whether they may provide in the state in which they are conducting the mediation the services identified in the mediator's questions:

- The list of statutes, court rules, and case law defining the practice of law found at *Am. Bar Ass'n Task Force on the Model Definition of the Practice of Law, State Definitions of the Practice of Law* app. A (2003), *available at* http://www.abanet.org/cpr/model-def/model_def_statutes.pdf (last visited March 3, 2008).

- Am. Bar Ass'n Section of Dispute Resolution Council, *Resolution on Mediation and the Unauthorized Practice of Law* (adopted Feb. 2, 2002), *available at* http://www.abanet.org/dispute/resolution2002.pdf.

- Assoc. for Conflict Resolution Bd. of Dir., *The Authorized Practice of Mediation: Proposed Policy Statement of the Association for Conflict Resolution* 4–7 (draft Aug. 28, 2004) (identifying mediation as a practice distinct from law; listing those mediation activities a mediator should be able to conduct without engaging

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[23] *Reporter's Notes*, *supra* note 3, at §V(E). Several of these Standards use the term "shall" in defining the responsibilities of mediators. The Notes on Construction to the Model Standards provides in pertinent part:

> The use of the term "shall" in a Standard indicates that the mediator **must follow the practice described**. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Notes of Construction.

in UPL so long as they are conducted consistently with mediation's core values), *available at* http://www.acrnet.org/pdfs/upl-draftrpt-aug04.pdf.

- Assoc. for Conflict Resolution, *Report of the Task Force on the Unauthorized Practice of Law* (draft August 2002), *available at* http://www.acrnet.org/pdfs/upl-draftrpt-aug02.pdf.

- The discussion found in Young, *supra* note 5 *passim*.

- Ethics opinions issued by state regulatory bodies of the bar or of mediators relating to UPL in the context of drafting mediated settlement agreements, MOUs, or court documents, or calculating child support, including:
  - Proposed Decision, *In re* Resa Fremed, No. UPL 05-002 (Conn. Statewide Grievance Comm. March 9, 2006) (finding that a therapist-mediator had engaged in the unauthorized practice of law by preparing a MOU for a divorcing couple that covered issues of marital assets, inheritance, alimony, and a parenting plan);
  - Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 6 (June 14, 2005) (advising that a mediator cannot prepare a court order for the parties, even at the request of a judge or judicial officer, because under Georgia law preparation of a court order would constitute the practice of law; further advising that if a lawyer-mediator prepared a court order it would constitute impermissible legal advice under the mandatory ethics codes for mediators);
  - Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 7 *passim* (Jan. 3, 2007) (advising that mediation is not the practice of law; advising that court-connected mediators are expected to help parties prepare settlement agreements or MOUs; advising that "Georgia's state-created child support worksheets, schedules, Excel spreadsheet, and on-line calculator" are tools that mediators, whether lawyer or non-lawyer, may use to help parties calculate child support; advising that mediator may not make judgments for the parties about "the inputs to the calculations and deviations," but may help the parties negotiate these issues);
  - Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 137 (Dec. 1, 1993) (stating that a lawyer-mediator may draft the divorce judgment and other ancillary documents, such as promissory notes and deeds, so long as the mediator remains neutral, reflects the parties' resolution of the matter in the documents, and encourages parties to consult with independent legal counsel to review draft documents; construing language of bar rule broadly to find that "settlement agreement" can include ancillary documents that may be necessary to reflect fully the parties' resolution of the matter);
  - State Bar of Mich. Standing Comm. on Prof'l and Jud'l Ethics, Op. RI–278 (Aug. 12, 1996) (stating that a lawyer-mediator may draft MOU, must advise pro se parties to obtain independent legal advice about draft agreement, and

"should . . .discourage [party] from signing any agreement which has not been so reviewed"; further stating that a lawyer-mediator is not per se prohibited from preparing pleadings required to implement parties' MOU, but activities would be the practice of law and not mediation; accordingly, lawyer would have to comply with Michigan Rules of Professional Conduct 1.7 and 2.2 and other ethics duties);

- N.Y. State Bar Ass'n Comm. on Prof' Ethics, Op. 736 (Jan. 3, 2001) (stating that a lawyer-mediator may not draft and file separation agreement and divorce papers on behalf of spouses as joint clients unless the lawyer can satisfy the "disinterested lawyer" test of DR 5-105(c));
- Or. State Bar Ass'n Op. 1991–101 (July 1991) (stating that a lawyer-mediator may draft settlement agreement under DR5-105 if he or she advises and encourages parties to seek independent legal advice, but mediator cannot represent one or both parties in placing the agreement in the records of the court);
- Utah State Bar Ethics Advisory Opinion Comm., Op. 02–10 (Dec. 18, 2002) (advising that "a lawyer may advise a mediator on issues likely to arise in the course of the mediation but may not advise the mediator how to prepare the divorce agreement and court pleadings" even in simple, uncontested divorces because it would constitute assisting UPL; further advising that in the context of unbundled legal services, the committee would allow a lawyer to represent a divorce mediation party in the limited capacity of preparing pleadings so long as the client gave informed consent to the limited role);
- Utah State Bar Ethics Advisory Opinion Comm., Op. 05–03 (Sept. 30, 2005) (advising that a lawyer-mediator who "drafts the settlement agreement, complaint, and other pleadings to implement the settlement and obtain a divorce for the parties . . . is engaged in the practice of law and attempting to represent opposing parties in litigation." A lawyer may only do this if he satisfies a four part inquiry: "(1) The lawyer reasonably believe[s] that the representation of both parties will not adversely affect the relationship with either in this directly adverse representation. (2) The parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. (3) Both parties give fully informed consent. (4) The lawyer mediator makes known to the court the nature of his dual role."
- Va. State Bar Standing Comm. on Legal Ethics, Op. 1368 (Dec. 12, 1990),
  - "The committee believes that providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition entails the application of legal knowledge and training to the facts of the situation . . . . Therefore, under the rationale of [two earlier ethics opinions], the committee believes that such activities subject the

attorney/mediator to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation."

- "To the extent that the mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law . . . . Should, however, the mediator/lawyer provide any services beyond those of scrivener, the mediator/lawyer must meet the requirements of [the disciplinary rule], which prohibit the sharing of legal fees with a nonlawyer . . . ."

- The Florida Mediator Ethics Advisory Committee has issued sixteen advisory opinions discussing whether a mediator may mix professional roles, give legal advice, provide information, provide evaluations, or draft certain types of documents. The Florida Mediator Ethics Advisory Committee Opinions are available at http://www.flcourts.org/gen_public/adr/MEAC%20Opionions/index%20of%20opinions.shtml. *See*
  - Op. 95–002 (1995) (describing the mediator's role and the inappropriateness of a mediator giving legal advice);
  - Op. 96–002 (1996) (describing the need for a mediator to decline a court appointment when it would compromise the mediator's integrity);
  - Op. 96–003 (1997) (advising that a mediator may not advise or ask about missing claims, but may ask if a party has sought legal advice);
  - Op. 98–003 (1998) (advising that mediation is not the practice of law);
  - Op. 99–004 (1999) (discussing non-lawyer party assistance in mediation);
  - Op. 2000–009 (2001) (advising that a mediator may aid in the preparation of court forms after a mediated settlement agreement);
  - Op. 2001-003 (2001) (discussing whether a mediator may draft financial affidavits and certain pleadings);
  - Op. 2001–011 (2002) (advising that even if a mediator is trained to give information, it may be a violation of impartiality to give it);
  - Op. 2003–002 (2003) (stating a mediator does not have an ethical obligation to advise a party without an attorney);
  - Op. 2003–003 (2003), (advising that if a mediator is trained to give information, it can only be done consistent with the standards governing impartiality and party self-determination);
  - Op. 2003–007 (2003) (stating that a mediator may distribute a form describing the "basis for contesting the claim or counterclaim");
  - Op. 2003–010 (2004) (advising that a mediator must make sure an agreement is in writing and formalized appropriately);
  - Op. 2003–011 (2004) (stating that there is no exception allowing county mediators to predict how a particular court will decide a case);
  - Op. 2004–004 (2005) (advising that a mediator may assist in completing forms, but may not draft forms);

- Op. 2005–004 (2005) (stating that a mediator should not "represent either one party or both parties in any dissolution proceeding or in any matter arising out of the subject mediation.");
- Op. 2000-009 (2001) (discussing whether a mediator may prepare settlement agreements and court forms).

- Dep't of Dispute Resolution Servs., Supreme Court of Va., *Guidelines on Mediation & the Unauthorized Practice of Law* (1999), *available at* http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf (discussing legal advice and drafting activities) . The Virginia UPL Guidelines consist of several chapters posted on the Virginia Supreme Court's website.

- Alternative Dispute Resolution Section, Colo. Bar Ass'n, *Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation* (approved Jan. 12, 2007) (discussing legal advice and drafting activities), *available at* http://www.coloradomediation.org/ccmo/docs/UnauthPractLawFinal020707.pdf.

- Task Force on Mediation and the Practice of Law, N.C. Bar Ass'n Dispute Resolution Section, *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law* (1999), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/UnauthorizedPracticeofLaw.pdf (discussing legal advice and drafting activities).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 06-439 **April 12, 2006**

Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a client may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," ordinarily are not considered "false statements of material fact" within the meaning of the Model Rules[1].

In this opinion, we discuss the obligation of a lawyer to be truthful when making statements on behalf of clients in negotiations, including the specialized form of negotiation known as caucused mediation.

It is not unusual in a negotiation for a party, directly or through counsel, to make a statement in the course of communicating its position that is less than entirely forthcoming. For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $200, when, in reality, it is willing to accept as little as $150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in August 2003 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact. An example of a false statement of material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional $100 per employee, when the lawyer knows that it actually will cost only $20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

Applicable Provision of the Model Rules

The issues addressed herein are governed by Rule 4.1(a).[2] That rule prohibits a lawyer, "[i]n the course of representing a client," from knowingly making "a false statement of material fact or law to a third person." As to what constitutes a "statement of fact," Comment [2] to Rule 4.1 provides additional explanation:

2. Although Model Rule 3.3 also prohibits lawyers from knowingly making untrue statements of fact, it is not applicable in the context of a mediation or a negotiation among parties. Rule 3.3 applies only to statements made to a "tribunal." It does not apply in mediation because a mediator is not a "tribunal" as defined in Model Rule 1.0(m). Comment [5] to Model Rule 2.4 confirms the inapplicability of Rule 3.3 to mediation:

> Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3 does apply, however, to statements made to a tribunal when the tribunal itself is participating in settlement negotiations, including court-sponsored mediation in which a judge participates. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993) (Judicial Participation in Pretrial Settlement Negotiations), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 157, 161 (ABA 2000).

Rule 8.4(c), which on its face broadly proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation," does not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1. Comment [1] to Rule 4.1, for example, describes Rule 8.4 as prohibiting "misrepresentations by a lawyer other than in the course of representing a client . . . ." In addition, Comment [5] to Rule 2.4 explains that the duty of candor of "lawyers who represent clients in alternative dispute resolution processes" is governed by Rule 3.3 when the process takes place before a tribunal, and otherwise by Rule 4.1. Tellingly, no reference is made in that Comment to Rule 8.4. Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer's state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.[3]

Truthfulness in Negotiation

It has been suggested by some commentators that lawyers must act honestly and in good faith and should not accept results that are unconscionably unfair, even when they would be to the advantage of the lawyer's own client.[4] Others have embraced the position that deception is inherent in the negotiation process and that a zealous advocate should take advantage of every opportunity to advance the cause of the client through such tactics within the bounds of the law.[5] Still others have suggested that lawyers should strive to balance the

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HODES, THE LAW OF LAWYERING § 65.5 at 65-11 (3d ed. 2001). It is not necessary, however, for this Committee to delineate the precise outer boundaries of Rule 8.4(c) in the context of this opinion. Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a).

3. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98, cmt. c (2000) (hereinafter "RESTATEMENT") (citations omitted) echoes the principles underlying Comment [2] to Rule 4.1:

> Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker's state of mind.

4. *See, e.g.*, Reed Elizabeth Loder, "Moral Truthseeking and the Virtuous Negotiator," 8 *Geo. J. Legal Ethics* 45, 93-102 (1994) (principles of morality should drive legal profession toward rejection of concept that negotiation is inherently and appropriately deceptive); Alvin B. Rubin, "A Causerie on Lawyers' Ethics in Negotiation," 35 *La. L. Rev.* 577, 589, 591 (1975) (lawyer must act honestly and in good faith and may not accept a result that is unconscionably unfair to other party); Michael H. Rubin, "The Ethics of Negotiation: Are There Any?," 56 *La. L. Rev.* 447, 448 (1995) (embracing approach that ethical basis of negotiations should be truth and fair dealing, with goal being to avoid results that are unconscionably unfair to other party).

5. *See, e.g.*, Barry R. Temkin, "Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?," 18 *Geo. J. Legal Ethics* 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiation has gone too far); James J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 *Am. B. Found. Res. J.* 921, 928 (1980) (misleading other side is essence of negotiation and is all part of the game).

apparent need to be less than wholly forthcoming in negotiation against the desirability of adhering to personal ethical and moral standards.[6] Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law. Various proposals also have been advanced to change the applicable ethics rules, either by amending Rule 4.1 and its Comments, or by extending Rule 3.3 to negotiation, or by creating a parallel set of ethics rules for negotiating lawyers.[7]

Although this Committee has not addressed the precise question posed herein, we previously have opined on issues relating to lawyer candor in negotiations. For example, we stated in Formal Opinion 93-370[8] that, although a lawyer may in some circumstances ethically decline to answer a judge's questions concerning the limits of the lawyer's settlement authority in a civil matter,[9] the lawyer is not justified in lying or engaging in misrepresentations in response to such an inquiry. We observed that:

> [w]hile . . . a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel, a party's actual bottom line or the settlement authority given to a lawyer is a material fact. A deliberate misrepresentation or lie to a judge in pretrial negotiations would be improper under Rule 4.1. Model Rule 8.4(c) also prohibits a lawyer from engaging in conduct involving dishonesty,

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6. *See, e.g.*, Charles B. Craver, "Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive," 38 *S. Tex. L. Rev.* 713, 733-34 (1997) (lawyers should balance their clients' interests with their personal integrity); Van M. Pounds, "Promoting Truthfulness in Negotiation: A Mindful Approach," 40 *Willamette L. Rev.* 181, 183 (2004) (suggesting that solution to finding more truthful course in negotiation may lie in ancient Buddhist practice of "mindfulness," of "waking up and living in harmony with oneself and with the world").

7. *See, e.g.*, James J. Alfini, "Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1," 19 *N. Ill. U. L. Rev.* 255, 269-72 (1999) (author would amend Rule 4.1 to prohibit lawyers from knowingly assisting the client in "reaching a settlement agreement that is based on reliance upon a false statement of fact made by the lawyer's client" and would expressly apply Rule 3.3 to mediation); Kimberlee K. Kovach, "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation," 28 *Fordham Urb. L. J.* 935, 953-59 (2001) (urging adoption of separate code of ethics for lawyers engaged in mediation and other non-adversarial forms of ADR); Carrie Menkel-Meadow, "The Lawyer as Consensus Builder: Ethics for a New Practice," 70 *Tenn. L. Rev.* 63, 67-87, (2002) (encouraging Ethics 2000 Commission to develop rules for lawyers in alternative dispute resolution context).

8. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370, in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 160-61.

9. The opinion also concluded that it would be improper for a judge to insist that a lawyer "disclose settlement limits authorized by the lawyer's client, or the lawyer's advice to the client regarding settlement terms."

fraud, deceit, or misrepresentation, and Rule 3.3 provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. The proper response by a lawyer to improper questions from a judge is to decline to answer, not to lie or misrepresent.

Similarly, in Formal Opinion 94-387,[10] we expressed the view that a lawyer representing a claimant in a negotiation has no obligation to inform the other party that the statute of limitations has run on the client's claim, but cannot make any affirmative misrepresentations about the facts. In contrast, we stated in Formal Opinion 95-397[11] that a lawyer engaged in settlement negotiations of a pending personal injury lawsuit in which the client was the plaintiff cannot conceal the client's death, and must promptly notify opposing counsel and the court of that fact. Underlying this conclusion was the concept that the death of the client was a material fact, and that any continued communication with opposing counsel or the court would constitute an implicit misrepresentation that the client still was alive. Such a misrepresentation would be prohibited under Rule 4.1 and, with respect to the court, Rule 3.3. Opinions of the few state and local ethics committees that have addressed these issues are to the same effect.[12]

False statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have in some cases also led to professional discipline. For example, in reliance on Formal Opinion 95-397, a Kentucky lawyer was disciplined under Rule 4.1 for settling a personal injury case without disclosing that her client had died.[13] Similarly, in a situation raising issues like those presented in Formal Opinion 93-370, a New York lawyer was disciplined for

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10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (Disclosure to Opposing Party and Court that Statute of Limitations Has Run), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 253.

11. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995) (Duty to Disclose Death of Client), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1988 at 362.

12. *See* New York County Lawyers' Ass'n Committee on Prof'l Ethics Op. 731 (Sept. 1, 2003) (lawyer not obligated to reveal existence of insurance coverage during a negotiation unless disclosure is required by law; correlatively, not required to correct misapprehensions of other party attributable to outside sources regarding the client's financial resources); Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility Informal Op. 97-44 (Apr. 23, 1997) (lawyer negotiating on behalf of a client who is an undisclosed principal is not obligated to disclose the client's identity to the other party, or to disclose the fact that that other party is negotiating with a straw man); Rhode Island Supreme Court Ethics Advisory Panel Op. 94-40 (July 27, 1994) (lawyer may continue negotiations even though recent developments in Rhode Island case law may bar client's claim).

13. Kentucky Bar Ass'n v. Geisler, 938 S.W.2d 578, 579-80 (Ky. 1997); *see also* In re Warner, 851 So. 2d 1029, 1037 (La.), reh'g denied (Sept. 5, 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); Toledo Bar Ass'n v. Fell, 364 N.E.2d 872, 874 (1977) (same).

stating to opposing counsel that, to the best of his knowledge, his client's insurance coverage was limited to $200,000, when documents in his files showed that the client had $1,000,000 in coverage.[14] Affirmative misrepresentations by lawyers in negotiation also have been the basis for the imposition of litigation sanctions,[15] and the setting aside of settlement agreements,[16] as well as civil lawsuits against the lawyers themselves.[17]

In contrast, statements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.[18]

Application of the Governing Principles to Caucused Mediation

Having delineated the requisite standard of truthfulness for a lawyer engaged in the negotiation process, we proceed to consider whether a different standard should apply to a lawyer representing a client in a caucused mediation.[19]

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14. In re McGrath, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983).

15. *See* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005); Ausherman v. Bank of America Corp., 212 F. Supp. 2d 435, 443-45 (D. Md. 2002).

16. *See, e.g.*, Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (settlement agreement set aside because of lawyer's failure to disclose death of client prior to settlement); Spaulding v. Zimmerman, 116 N.W.2d 704, 709-11 (Minn. 1962) (defense counsel's failure to disclose material adverse facts relating to plaintiff's medical condition led to vacatur of settlement agreement).

17. *See, e.g.*, Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-27 (Iowa 2001) (law firm, defendant in malpractice action, allowed to assert third-party claim for equitable indemnity directly against opposing counsel who had engaged in misrepresentations during negotiations); Jeska v. Mulhall, 693 P.2d 1335, 1338-39 (1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller's lawyer for misrepresentations made during negotiations).

18. Conceivably, such statements could be viewed as violative of other provisions of the Model Rules if made in bad faith and without any intention to seek a compromise. Model Rule 4.4(a), for example, prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." Similarly, Model Rule 3.2 requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client."

19. This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c) (*see* note 2 above). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-433 (2004)

Mediation is a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputants to help them reach agreement as to some or all of the issues in controversy. Mediators assist the parties by attempting to fashion creative and integrative solutions to their problems. In the most basic form of mediation, a neutral individual meets with all of the parties simultaneously and attempts to moderate and direct their discussions and negotiations. Whatever is communicated to the mediator by a party or its counsel is heard by all other participants in the mediation. In contrast, the mediator in a caucused mediation meets privately with the parties, either individually or in aligned groups. These caucuses are confidential, and the flow of information among the parties and their counsel is controlled by the mediator subject to the agreement of the respective parties.

It has been argued that lawyers involved in caucused mediation should be held to a more exacting standard of truthfulness because a neutral is involved. The theory underlying this position is that, as in a game of "telephone," the accuracy of communication deteriorates on successive transmissions between individuals, and those distortions tend to become magnified on continued retransmission. Mediators, in turn, may from time to time reframe information as part of their efforts to achieve a resolution of the dispute. To address this phenomenon, which has been called "deception synergy," proponents of this view suggest that greater accuracy is required in statements made by the parties and their counsel in a caucused mediation than is required in face-to-face negotiations.[20]

It has also been asserted that, to the contrary, less attention need be paid to the accuracy of information being communicated in a mediation – particularly in a caucused mediation – precisely because consensual deception is intrinsic to the process. Information is imparted in confidence to the mediator, who controls the flow of information between the parties in terms of the content of the communications as well as how and when in the process it is conveyed. Supporters of this view argue that this dynamic creates a constant and agreed-upon environment of imperfect information that ultimately helps the mediator assist the parties in resolving their disputes.[21]

(Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law). In our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client. We note, in this regard, that many mediators are nonlawyers who are not subject to lawyer ethics rules. We need not address whether a lawyer should be held to a different standard of behavior than other persons serving as mediator.

20. *See generally* John W. Cooley, "Mediation Magic: Its Use and Abuse," 29 *Loy. U. Chi. L.J.* 1, 101 (1997); *see also* Jeffrey Krivis, "The Truth About Using Deception in Mediation," 20 *Alternatives to High Cost Litig.* 121 (2002).

21. Mediators are "the conductors – the orchestrators – of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential informa-

Whatever the validity may be of these competing viewpoints, the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caucused mediation context and other negotiation settings. The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts. Except for Rule 3.3, which is applicable only to statements before a "tribunal," the ethical prohibitions against lawyer misrepresentations apply equally in all environments. Nor is a lower standard of truthfulness warranted because of the consensual nature of mediation. Parties otherwise protected against lawyer misrepresentation by Rule 4.1 are not permitted to waive that protection, whether explicitly through informed consent, or implicitly by agreeing to engage in a process in which it is somehow "understood" that false statements will be made. Thus, the same standards that apply to lawyers engaged in negotiations must apply to them in the context of caucused mediation.[22]

We emphasize that, whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements "of fact," are not conveyed in language that converts them, even inadvertently, into false factual representations. For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Conclusion

Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

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tion, critical or otherwise, is developed, to what is withheld, to what is disclosed, and to when disclosure occurs." Cooley, *supra* note 20, at 6 (citing Christopher W. Moore, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 35-43 (1986)).

22. There may nevertheless be circumstances in which a greater degree of truthfulness may be required in the context of a caucused mediation in order to effectuate the goals of the client. For example, complete candor may be necessary to gain the mediator's trust or to provide the mediator with critical information regarding the client's goals or intentions so that the mediator can effectively assist the parties in forging an agreement. As one scholar has suggested, mediation, "perhaps even more than litigation, relies on candid statements of the parties regarding their needs, interests, and objectives." Menkel-Meadow, *supra* note 7, at 95. Thus, in extreme cases, a failure to be forthcoming, even though not in contravention of Rule 4.1(a), could constitute a violation of the lawyer's duty to provide competent representation under Model Rule 1.1.

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