

2017 Administrative Law Update

Friday, December 22, 2017



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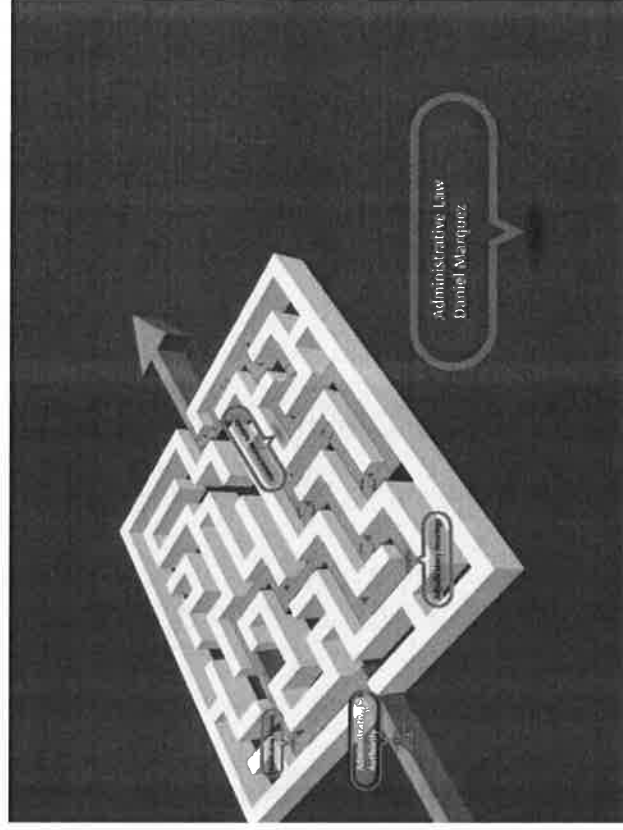
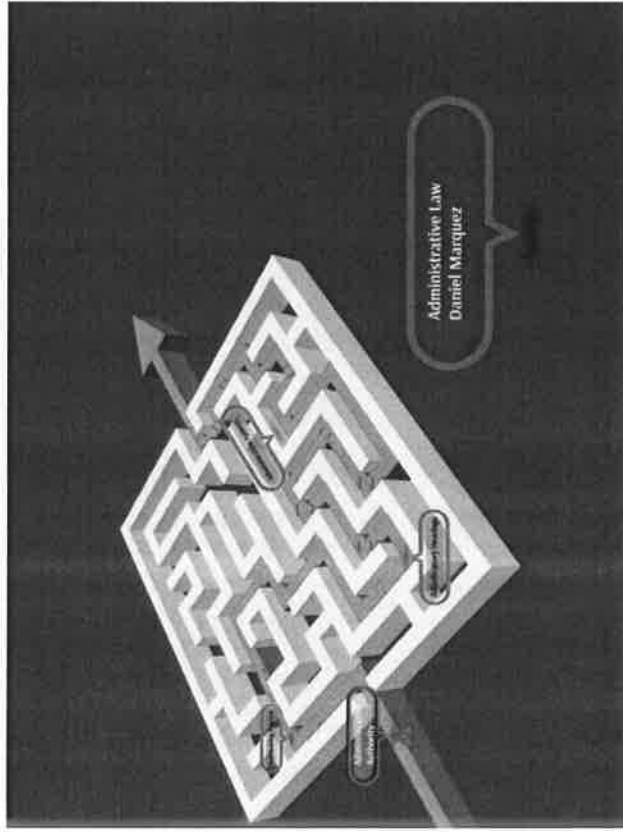
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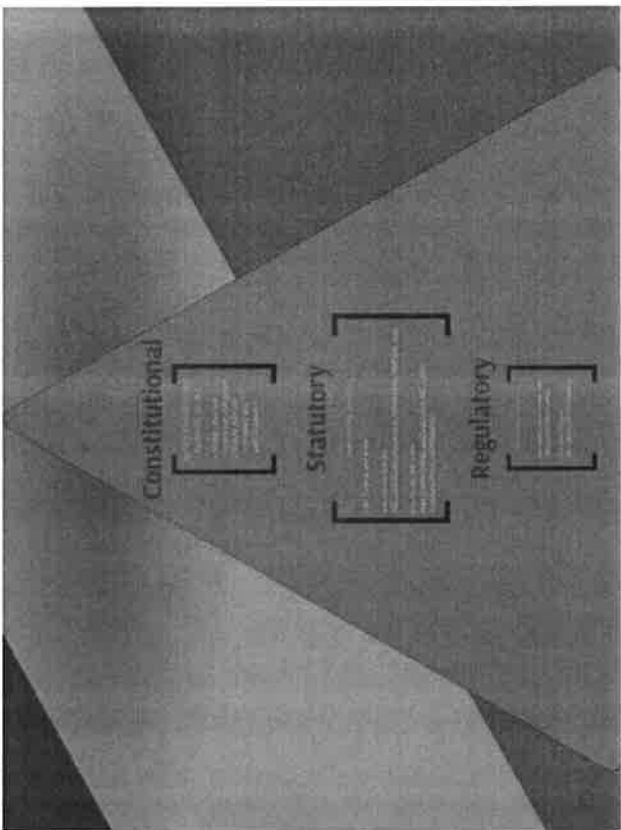
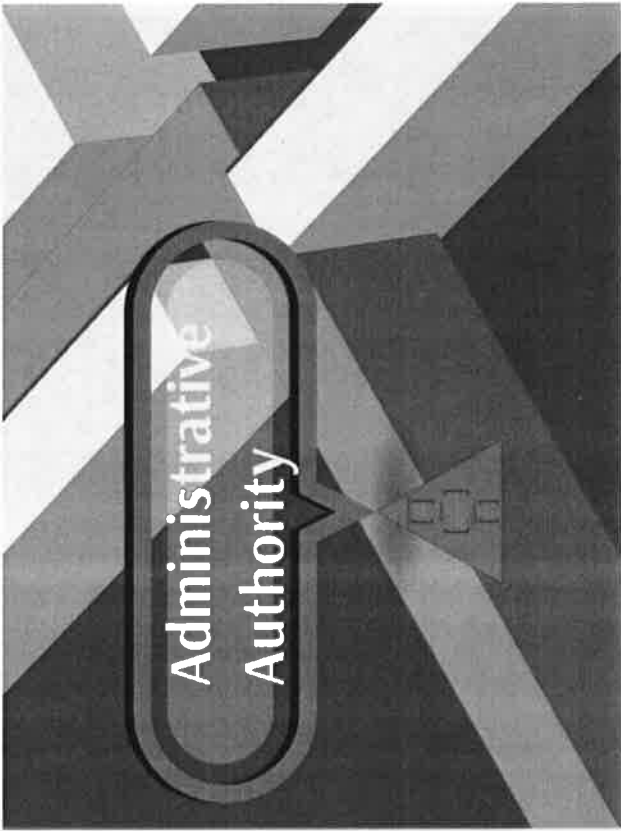
Presenter Biography

Daniel Marquez is a solo practitioner in El Paso, Texas. He is licensed to practice law in New Mexico, Texas, and California. Marquez left a career in Southern California to pursue solo practice in El Paso, Texas so that he could be closer to his family. He comes from a large family that includes 4 brothers and sisters with 6 nieces and 1 nephew. Marquez focuses on Criminal Defense and Military Court-Martial Defense. His Civil Litigation practice focuses on administrative adjudicatory hearings, primarily in the areas of military administrative separations, horse racing, Veterans Administration claims, and security clearance determinations.

Marquez is a 2004 graduate of the University of Texas at El Paso and a 2007 graduate of the University of New Mexico School of Law. Marquez serves as a judge advocate in the Marine Corps Reserves at the rank of Major.

As a Marine Judge Advocate, Marquez spent time as a Trial Counsel (Prosecutor), Senior Trial Counsel, Defense Counsel, Senior Defense Counsel, Deputy Staff Judge Advocate, and Operational Lawyer deployed to Afghanistan and Bahrain. He has conducted over a dozen formal training events for military trial attorneys at the local, regional, and national level in areas such as law enforcement interrogation techniques and tactics, false confessions, expert witness preparation, computer forensics, presenting closing arguments, conducting cross-examinations, ethics, client suicide prevention, and unlawful command influence. He currently serves as the training officer for all Marine Defense Counsel located in southern California and Western Arizona.





Agency Creation and Authority to Act

- Statute does not violate non-delegation
- Statute does not improperly vest judicial power

Constitutional

Article II, Section 2, Clause 1
- Supreme Court
- inferior courts
- judicial power

Statutory

Article I, Section 8, Clause 1
- Congress shall have the power
- to lay and collect taxes
- to regulate commerce with foreign nations
- to establish an uniform rule of naturalization
- to coin money, regulate the value thereof, and fix the standard of weights and measures
- to define and punish offenses against the laws of nations
- to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water
- to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years
- to organize, arm, and discipline the militia
- to provide and maintain a navy
- to exercise exclusive legislation over the district of Columbia
- to exercise exclusive jurisdiction over all cases arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under the authority of the United States
- to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof

Regulatory

Article I, Section 8, Clause 1
- Congress shall have the power

Statutory

Implementing Statutes

Valid Purpose and Scope

New Mexico Statutes
<http://public.nmcompcomm.us/nmptadmin/NMPublic.aspx>

New Mexico Bill Finder
https://www.nmlegis.gov/Legislation/Bill_Finder?AspxAutoDetectCookieSupport=1

Constitutional

New Mexico State Constitution

Statutory

Regulatory

Implementing Regulations

New Mexico Administrative Code
<http://164.64.110.239/nmac/>

New Mexico Register
<http://164.64.110.239/nmregister/>

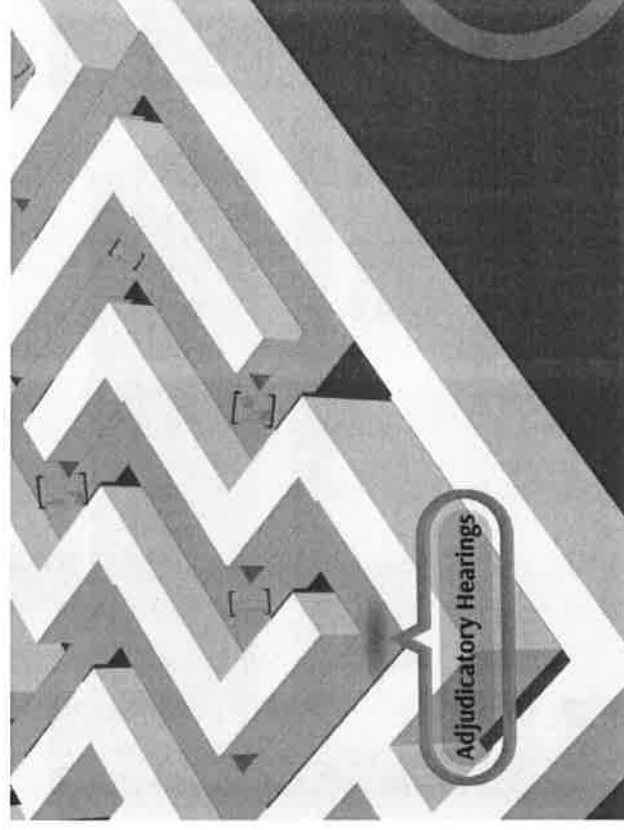


New Mexico Administrative Code, Article 12, Chapter 8

NMSA §12-8-1 thru 8-25

Notice
Concise statement of basis and purpose
Opportunity for comment
Time and place of hearing
Ex parte communications
Publication

New Mexico regulatory agencies may promulgate "reasonable regulations on professions which affect public health, morals, and safety" pursuant to the legislature's police power so long as such regulations which "place a protected property interest at risk, bear a reasonable and valid relationship to public morals, health, or safety." *Mills v. N.M. State Bd. of Psychologist Exams*, 123 N.M. 421, 426 (N.M. 1997).



Judicial Review NMSA §12-8-8

May challenge validity or applicability of judicial review in NM district court

- Santa Fe District Court
- Motion for Declaratory Judgment
- Interested Party
- Procedural and Substantive Due Process

Mathews v. Eldridge, 424 U.S. 319 (1976)

- 1) The interest at stake
- 2) The likelihood of an erroneous deprivation of the interest at stake by the procedures deployed by the agency and
- 3) the State's interest including the function and the fiscal and administrative burdens that additional or substitute procedural requirements would entail

Mathews v. Eldridge balancing

Pre-deprivation Hearings

Type of Hearing Required

Thresholds

- Individualized determination

- Protected interest

- Fair notice

- Bias



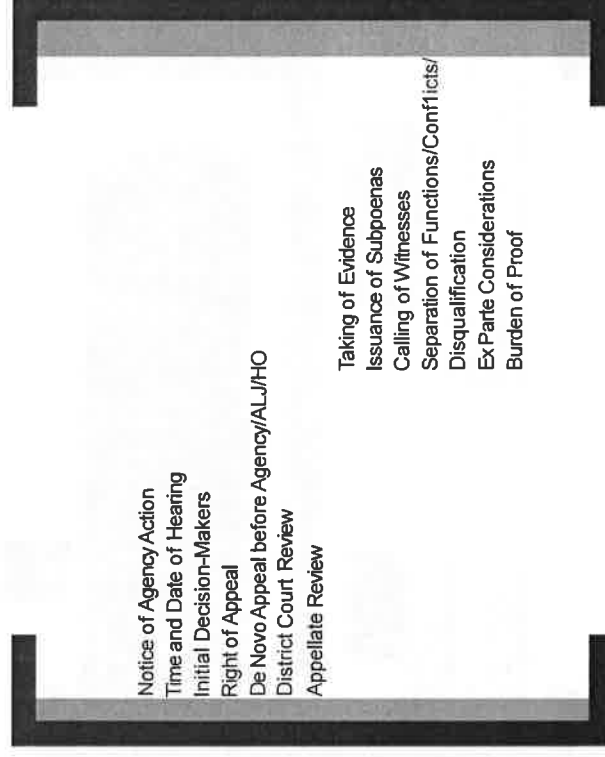
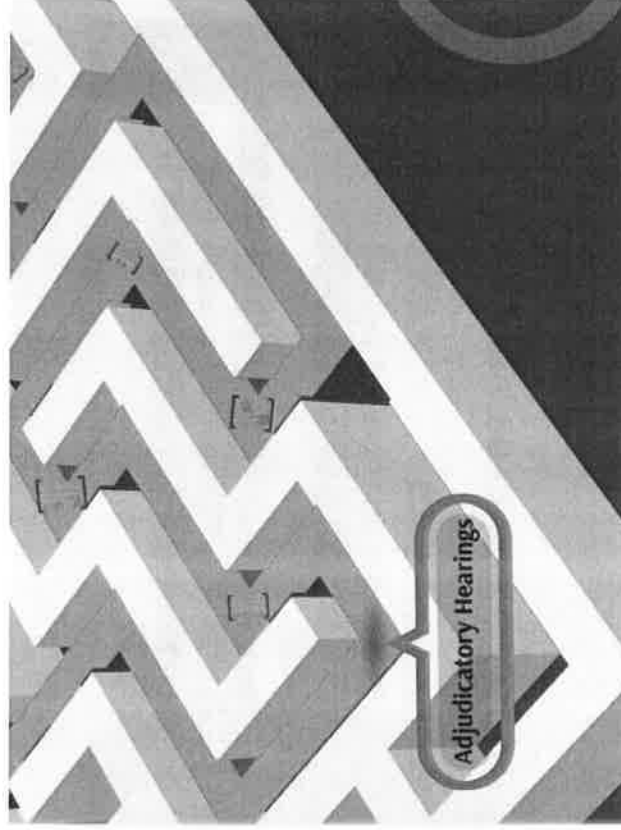
The first step in a procedural due process claim is to identify the state-created substantive right at stake and determine whether this right triggers procedural due process protections. *Garcia v. Las Vegas Med. Ctr.*, 112 N.M. 441, 444-45, 816 P2d 510, 513-14 (N.M. Ct. App. 1991).

- Government property interests
- Military
- Due to the individual's physical status
- Others
- Governmental benefits

The essential elements of the substantive due process analysis are: (1) whether the government action deprives an individual of a protected interest; (2) whether the government action is justified by a compelling government interest; and (3) whether the government action is narrowly tailored to achieve that interest.

- (1) adequate notice of the charges or basis for government action;
- (2) a right to be heard;
- (3) an opportunity to be heard by an impartial decision maker;
- (4) a right to present evidence and to cross-examine witnesses;
- (5) a right to a fair and impartial hearing;
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- (100) a right to a fair and impartial hearing;

Mathews v. City of Albuquerque, 2017 WL 431, 107 N.M. 346, 441 (N.M. Ct. App. 2017).



Taking of Evidence
Issuance of Subpoenas
Calling of Witnesses
Separation of Functions/Conflicts/
Disqualification
Ex Parte Considerations
Burden of Proof

Rules of Evidence

The rules of evidence as applied in nonjury civil actions in the district courts shall be followed. NMSA §12-8-11

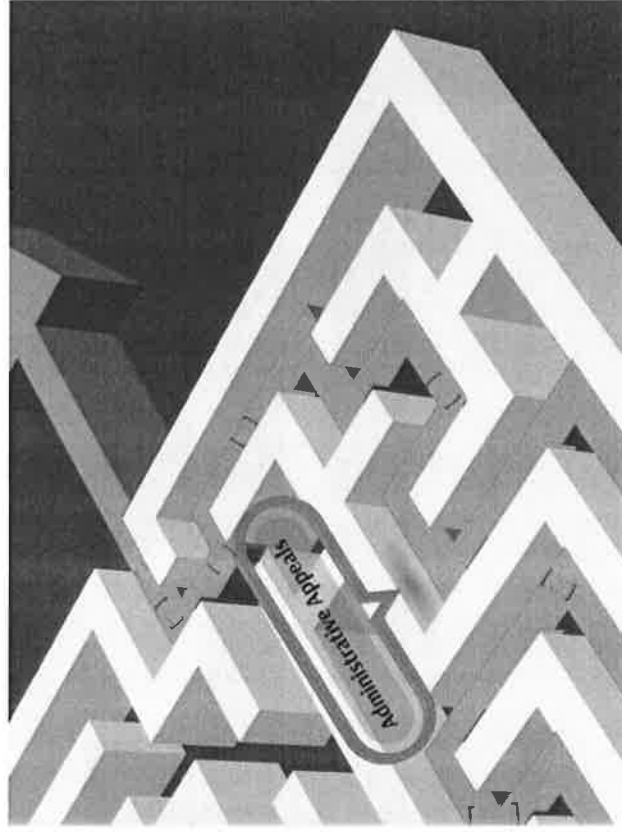
Legal Residuum Rule

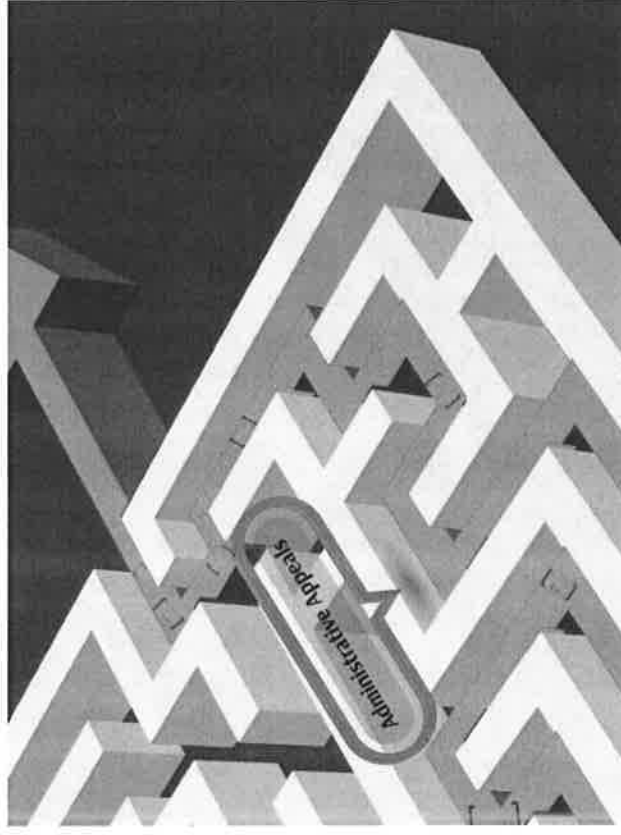
Discovery

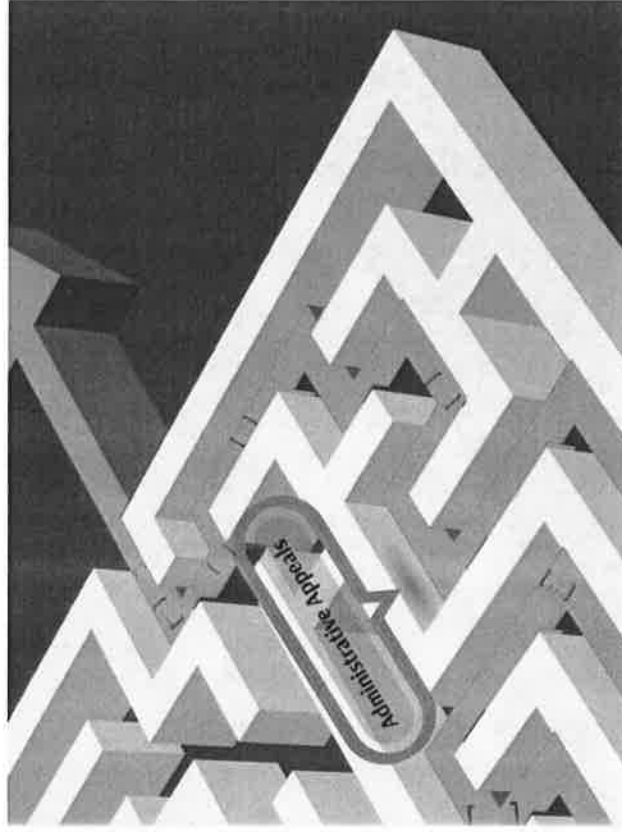
Other discovery or pretrial conferences and procedures available in the district courts may also be utilized upon demand by any party. NMSA §12-8-10
Agency must be granted specific statutory authority to issue subpoenas



The
remains of competent and admissible evidence.
- *Young v. Board of Pharmacy*, 81 N.M. 6, 452 P.2d 139 (1969).
As an example, it is not substantial support for a finding if there is no evidence in support except
- *Walker v. Walker*, 109 N.M. 124, 767 P.2d 653, 567 CtApp 1989 (if the
only support found is inadmissible hearsay, then the reviewing court may set aside the agency's
finding of denial).
- *Arizon v. State Personnel Bd.*, 107 N.M. 622, 753 P.2d 909, 913 CtApp 1989 (entire
evidence may satisfy the legal residuum rule).
NM requires competent evidence to support the findings of an administrative agency where a substantial
right is at stake.
- *Trinidad v. Employment Security Commission*, 94 N.M. 343, 610 P.2d 747 (1980).







Rule 74 Appeal—Statutory Right of Review
Rule 75 Appeal—No Statutory Right of Review

Standard of Review

- Agency cannot only review an administrative decision that determines that:
 - Agency acted fraudulently, arbitrarily or capriciously;
 - If the decision was not supported by substantial evidence;
 - Agency acted outside the scope of its authority; or
 - If the agency did not act in accordance with law.

NMRA 1-076(R) & 1-075(R) (stating the standard of review for judicial review (review of an administrative decision)).

• *City of New Mexico Public Employees' Conf. v. City of New Mexico*, 2015 NMSC-047, ¶¶10, 309 P.3d 89 (2015).

Request for Stay/TRO/Preliminary Injunction

Petition for Writ of Cert

- (1) The grounds on which jurisdiction of the district court is based
- (2) a description of the proceedings of the agency relating to the petition
- (3) the names of the parties to the agency proceedings
- (4) a concise showing that the petitioner is entitled to relief and
- (5) a concise statement of the relief sought

Filed w/in 30 days of final agency action.
If court issues writ, agency has 30 days to file record on review.
Statement of Review Issues w/in 30 days of service of record on review (25 pages)
Agency has 30 days to respond (25 pages)
Petitioner has 30 days to reply (10 pages)

Article VI § 3 of the New Mexico Constitution

Supreme Court of New Mexico shall have original jurisdiction in controversies 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, 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.

NMRA 12-514

Verified Petition for Writ of Mandamus

- (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, participating to act in the discharge of official duties.
- (d) The grounds 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.

