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Civil Practice Manual

April Land

University of New Mexico, land@law.unm.edu

Jose Martinez

University of New Mexico, martinez@law.unm.edu

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Civil Practice Manual

For

The Clinical Law Program

University of New Mexico School of Law



Professor José L. Martinez
Professor April I. Land

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Introduction

This Civil Practice Manual is a combination of many different teaching forces, influences, and experiences within the various clinical law programs that have been taught over the previous 30 years at the University of New Mexico School of Law. Certain sections have their origins in some of the early teaching materials that were created in the first civil law clinics at the law school. These materials have evolved over time and have in turn combined with other more modern teaching materials in more recent clinical programs. Other early influences and contributing experiences that are present in the Manual's order and emphasis are the teaching experiences and materials that were available and regularly used in the 1970's and 1980's that were produced by the national office of the Legal Services Corporation. These teaching and training materials were in part generated and used regularly by law professors in many early clinical law programs. Also evident in the manual is the influence of the first major law text for clinical legal education, *The Lawyering Process*, (Foundation Press, 1978), by early Legal Services pioneers and then clinical law pioneers, Professor Gary Bellow (Harvard) and Professor Bea Moulton (Arizona State University). The influence of these materials is obvious in the Manual's traditional organization and emphasis on interviewing, counseling, case planning and development, negotiation, and settlement as key legal skills. More modern influences on the Manual are evident in the manual's reliance and use of the extremely influential *MacCrate Report, Legal Education and Professional Development –An Educational Continuum*, (ABA, 1992), which should be required reading for all law students and attorneys. Also evident in the Manual is the more modern teaching emphasis on legal ethics and professionalism, which is evident throughout the manual but particularly in the sections and materials on ethics, civility, and professionalism. These last sections and materials are believed to be of particular importance for law students in contemporary clinical legal education. The other more modern influence in the materials is the presence and emphasis on ADR as a more viable dispute resolution device or alternative. The sections on the case acceptance letter, the non-acceptance letter, drafting pleadings, letter writing, and common practice areas are included to address recurring teaching areas and skills needs within existing civil clinical law programs at the University of New Mexico.

The materials in this Manual are particularly indebted to the teaching, discussion, debate, organization, and collaboration of the many law professors who have taught in civil law clinics at the University of New Mexico School of Law over the past 30 years. In particular, the authors would like to acknowledge the contributions over the years of Professor William T. MacPherson, Professor Helene Simpson, Professor J. Michael Norwood, Professor Richard A. Gonzales, and Professor Michelle Herman. Many other professors have also contributed to the materials and comments made in the manual and their contributions are also acknowledged. A kind word of appreciation and acknowledgement is also made for the editorial, technical, and word-processing support of Joseph Blecha, Dianna Ortiz, and Heather Williams. We also would like to acknowledge the generosity and cooperation of Professors J.P. Ogilvy and Karen Czapanskiy for graciously allowing us to use certain listings from their excellent clinical bibliography, *Clinical Legal Education: an Annotated Bibliography* (2ed.), Clin. L. Rev., Spring, 2001, for use in certain of the bibliographies compiled in these materials. This practice manual would not be possible without the help and cooperation of all these fine colleagues.

The materials contained in the Civil Practice Manual are designed primarily for the use of law students enrolled in the various civil practice clinics at the University of New Mexico Law School. The materials, comments, and discussions are kept deliberately simple and general. These materials are purposefully designed as a starting point for law student discussion and application of the various lawyering skills and values addressed in the manual. To the extent the materials are basic or possibly repetitive of materials, particularly rules and statutes, that may have been previously studied by some students in other law courses, apologies are given. However, experience has shown that not all clinical students have taken the same courses and discussions of the same basic materials in a clinical context have revealed many new dimensions. The decision was to include basic materials, rules, statutes, and concepts to insure that all students in the law clinic have the same basic grasp of core concepts within each area addressed. Students in the Law Clinic also tend to re-read many of these previously studied materials with a new appreciation for detail. These materials are intended as a starting point for discussions and student learning of core skills and values involved in lawyering. Additional references and materials containing more in depth discussions are provided in the form of a general bibliography at the end of most sections. These bibliographic references are provided to allow the student to learn more about each core skill or value addressed in the Manual. Finally, as in most law professor statements or writings, many of the comments, observations, charts, and sample documents are intended to provoke thought, discussion and learning on the part of the student. Students should use these materials as a basic background, checklist and practice guide for each of the many inter-related skills they must begin to master during their short visit in the law clinic. The materials also tend to track the basic pattern of classroom discussions within the various civil law clinics. Law students are encouraged to read the materials as needed and in any order that is useful to them. It is hoped these materials help students organize their learning and that they also help them as they start their introduction to professional practice and begin their journey on the path of career long learning and professional development.

Professor Jose L. Martinez
Professor April I. Land

Dedication

This Civil Practice Manual is dedicated to **Professor William T. MacPherson**, the founder and first Director of Clinical Law Programs at the University of New Mexico, for his foresight, hard-work, dedication, and commitment to high quality legal representation that got the UNM Clinical Law Program off to a solid professional and academic start. His early efforts and vision insured that the UNM Clinical Law Program would become a nationally recognized leader in clinical legal education. Professor MacPherson, started the Clinical Law Program in 1970 He retired in July 2002. This Manual is also dedicated to the memory of **Professor Helene Simpson**, an early UNM clinical law professor who died in 1983. Professor Simpson, one of the early women attorneys in the New Mexico Bar, taught law students, lawyers and fellow professors that it was possible to be a very competent and dedicated advocate and still be a decent and dignified human being. Both of these professors serve as excellent role models for all clinical law students and clinical faculty members.

AUTHORIZATION TO COPY AND USE MATERIALS FOR EDUCATIONAL PURPOSES

Authorization is hereby given to other clinical law programs and clinical law professors to copy and use these materials or portions of these materials for educational purposes within their respective clinical law programs. The only conditions to such use are that the materials be acknowledged and that the copies be furnished to law students at actual reproduction cost.

I. The Mission and History of Clinical Legal Education

The mission of Clinical Legal Education is to teach the basic legal skills and professional values that a law student needs to evolve from law student to competent lawyer and professional. Within legal education, Clinical Legal Education is a bridge between the law school and the profession. Clinical Legal Education seeks to accomplish this mission in a manner fundamentally different from traditional legal education by teaching about skills and values in a real world setting. Clinical Legal Education builds on the students' previous legal education and knowledge, and serves as a practical introduction to the legal profession. The University of New Mexico School of Law has a long standing and distinguished Clinical Program that seeks to get students started on the path of lifelong education and professional development.

In general, traditional legal education is delivered in a classroom setting by professors using the Socratic method. The majority of traditional legal education focuses on reading and discussing appellate cases. This method of traditional legal teaching gives students important, substantive, and procedural knowledge. More recently, skills courses and problem-based courses have been added to the traditional curriculum to enrich the learning experience. However, traditional classes and problem or skills classes do not adequately prepare law students for the many demands of legal practice. Clinical Legal Education has evolved to meet these professional demands and to add new and critical dimensions to the learning experience.

Clinical Legal Education generally provides the typical law student with his or her first introduction to clients, courts, adverse parties, adverse counsel, and to problems that do not fit nicely between two appellate cases. For the first time the student has individual professional responsibility for another human being. Law clinics seek to do what medical schools have been doing consistently in their clinics, which is to teach necessary professional and personal skills in a real world setting. Clinical Legal Education is the beginning and introduction to the student's future professional career. Within the law school, Clinical Legal Education provides the critical link between the theory and learning of the traditional classroom and the demands of modern practice.

Clinical Legal Education, like all general legal education, also has some inherent limitations. The major limitation facing contemporary Clinical Legal Education is that there is too much to teach about lawyering and professionalism and this must be done in a very limited period of time. With few exceptions, students come into a clinical law setting without much practical knowledge or experience. Clerkships, summer jobs, and prior life or consumer experiences are often a mixed blessing. Law students also generally arrive in law clinics in the last year or two of their formal education, and there is no well-developed program of pre-clinical courses to help prepare them for their clinical experience. Within the law clinic, most clinical courses are offered for a very limited number of credit hours and generally are restricted to a one-semester experience. Even a year long clinical program would have difficulty in addressing all the basic legal skills and values needed by young lawyers. While clinical legal education serves as a valuable and essential transition or bridge between the law school and practice, true professional or practical education merely starts in the law clinic.

In order to better understand the mission and current status of clinical legal education, one has to consider the general history of practical learning within legal education. The

following general summary should be helpful. In the very early years of the American legal experience, if one wanted to become a lawyer, that person learned about law and lawyering the same way carpenters learned about carpentry: they apprenticed themselves. Apprenticeships and self-education were the primary forms of legal education until the 1870's or later. The inspiring story of Abraham Lincoln studying law by candlelight and learning during the day from other established lawyers is part of the enduring mythology of early American legal education. With the arrival of the Langdell method of studying appellate case law and the establishment and standardization of American law schools which occurred after 1870 or so, practical learning gradually died out as a method of legal training for lawyers. By the 1940's and 1950's formal, degree based legal education had completely supplanted practical learning as a vehicle for legal study. In New Mexico admission to the bar by practical training or apprenticeship ended in the 1930's.

New Mexico established the UNM Law School in 1949 under the bleachers of Zimmerman Stadium and like other American law schools; its method of educating lawyers was the Langdell model and the Socratic method. Practical legal education almost ceased to exist as a teaching methodology. Specific substantive courses, legal theory and a rigorous program of exams and exercises in "how to think like a lawyer" completely replaced practical learning in schools. The only exceptions seemed to be volunteer work or summer clerkships. Practical legal training for lawyers became the role of law firms and the courts. Law schools did not want to be viewed as "technical or vocational schools." Practical legal education simply took place after graduation. In a simpler world with fewer lawyers, this bifurcated system of legal education probably worked. It probably also worked best in a legal community with large law firms which served as mentoring agencies. However, the world gradually changed and with it, attitudes in the academic community started to change. More law schools, more students, the need for more lawyers, along with a possibly inevitable feeling that legal education had become very disconnected with the "real world," helped to contribute to a new interest in "practical learning." This new interest in "practical learning" was slow in coming and slow in catching on in American law schools.

In the 1960's the advent of the Civil Rights era, the War on Poverty, the legal services movement, and increasing numbers of lawyers, led to new discussions about the role of lawyers in society. This in turn generated and facilitated new interest in the merits of practical learning. Law faculties also began to critically discuss the role of law schools within their communities and the legal profession. These same discussions and forces continue to play a role in the evolution of clinical education. By the late 1960's, the stage was set for the start of the clinical legal education in American law schools. The history of clinical programs at the University of New Mexico is a good example of this gradual evolution.

In 1955, the law faculty of the University of New Mexico adopted a rule requiring 20 hours of volunteer service by law students at the Albuquerque Legal Aid Society. This rule made practical experience a graduation requirement and public service a stated law school goal. However, it would be another 15 years before formal clinical legal education was taught at the law school. In 1970, the UNM Law School established a required three credit-hour course in Clinical Education under the direction of Professor William T. MacPherson, one of the pioneers in the modern clinical law movement within the United States. In this new clinical program, only students on Law Review were exempt from the clinical requirement. Eventually, with the aid of

several CLEPR grants, the UNM Clinical Law Program evolved from a small three credit-hour course to the present six-credit hour mandatory clinical requirement. These early CLEPR grants also helped fund the move of student offices from hallways into a separate dedicated clinical facility. Over the years, clinical facilities have been improved, expanded, and modernized to the point where they are a model teaching facility. In addition to Professor MacPherson, early clinical law professors were Professor Michael Norwood (1971), Professor Helene Simpson (1972), Professor Jose L. Martinez (1974), Professor Richard Gonzales (1976), and Professor Michelle Herman (1977).

During the next 30 years, the UNM Clinical Law Program became a nationally recognized leader in clinical legal education, and a model program distinguished for the quality of its education and for its program innovation and leadership. Some of the more notable innovations during these years included an experimental program providing legal services in Northern New Mexico, Centro Legal Criminal Defense Clinic, Semester in Practice (SIP), a year-long clinic, an Employment Discrimination Clinic, a Criminal Defense Clinic, a Family Law Clinic, various Community Lawyering Clinics and, more recently, the Southwest Indian Law Clinic.

The features distinguishing Clinical Legal Education at the University of New Mexico from most other clinical programs include:

- o a required six credit hour clinical program for all law students
- o a rigorous and innovative program of field experiences
- o a rigorous and required classroom component for all clinical courses
- o a modern and dedicated clinical facility
- o a variety of clinical courses offering clinical experiences in community lawyering, general civil practice, criminal law, and Native American Law
- o live client clinics
- o courses taught by tenured or tenure track professors
- o an emphasis on the use of computer technology
- o a low student/teacher ratio in all clinical courses
- o intensive one-on-one supervision of student casework and projects
- o full staff and professional support for all law students and professors
- o student practice rules in all state, federal, and many tribal courts throughout New Mexico.

In the last 30 years, Clinical Legal Education has increasingly become accepted and established in American law schools. While there is clearly room for additional progress and expansion, the outlook for clinical legal education, and for the expansion of the clinical methodology is positive. From the student's point of view, Clinical Legal Education is an increasingly valuable and welcome part of their formal education. Experience has taught that with the perspective of many years in practice, with rare exceptions, most law school alums fondly remember two law school experiences: their first year courses and their clinical experiences. The Clinical Law Program at the University of New Mexico School of Law continues to be a national leader in Clinical Legal Education.

An additional early support to the clinical education movement, which was clearly an emerging national movement was the approval and support that clinical education received from

the various state courts, particularly appellate courts when these courts adopted student practice rules. The New Mexico Supreme Court was one of the earliest state courts to adopt a universal student practice rule.

An example of the typical student practice rule in the New Mexico courts is as follows:

Rule 1-094 NMRA, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT.

RULE 1-094 Clinical Education; University of New Mexico School of Law.

Current through November 8, 2001.

Purpose. To permit a clinical program for the University of New Mexico School of Law.

Procedure. Any law student admitted to the clinical program at the University of New Mexico School of Law shall be authorized under the control and direction of the dean of the law school to advise persons and to negotiate and to appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico designated by the dean of the law school. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval. The order approving the practice by such student shall be substantially in the form approved by the Supreme Court. The law school shall report annually to the Supreme Court.

Eligible students. Any full-time student in good standing in the University of New Mexico School of Law who has received a passing grade in law school courses aggregating thirty (30) or more semester hours (or their equivalent), but who has not graduated, shall be eligible to participate in a clinical program if the student meets the academic and moral standards established by the dean of the school.

[As amended, effective May 1, 1986; January 1, 1995.]

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II. Common Clinical Methodologies

Clinical Legal Education is a teaching methodology that seeks to accomplish the same goal as more traditional legal education: to prepare law students to become competent, ethical, and professional attorneys. The teaching methods used in clinical legal education are designed to help the student meet the basic demands of live client representation and professional development. These demands include:

- the challenges of representing actual clients
- assuming professional responsibility for each client
- developing a focused application of legal research program for each client
- learning and adapting to professional advocacy
- conducting factual discovery and fact development
- dealing with an adverse party and opposing counsel
- developing a case resolution plan or strategy
- devising and mastering some type of dispute resolution mechanism
- advising the client to consider legal and practical alternatives
- learning to engage in personal and professional conduct that falls within accepted ethical, professional and institutional norms

Additionally, clinical legal education seeks to develop: student familiarity with the legal profession and its processes, student confidence and ability, the need for personal and career development; and most importantly a sense of professional public service. An important educational perspective for the law student is that while much will be learned during his or her visit in the law clinic, the majority of professional and personal development will occur in the early part of their professional lives. A good clinical education gives students a good start on the process of career development.

Within the law clinic, students will encounter some or all of the following teaching devices.

Hypothetical Problems—The simplest teaching device is the assignment of some form of hypothetical fact problem with the requirement that a solution be developed and then closely analyzed and evaluated. This is very similar to the common series of questions or problems students have encountered in casebooks. It is also similar to a professor's Socratic questions, where the professor typically seeks to bend the facts or law a bit to illustrate a fundamental concept. In a clinical setting, the same scenario is followed, however, the real education is in the application and analysis of real world factors. Real world factors would include the practical consequences of human emotions and shortcomings, the reality of a zealous opposing counsel, the reality of a crowded, expensive and maybe hostile court system, the reality of poverty, and the reality of difficult time constraints. Some hypothetical assigned problems are designed to focus on a limited skill, such as interviewing, counseling, or problem solving. In most clinical settings, hypothetical problems are the basis of either individual discussions or ideally, class discussions, where the varying student and faculty approaches illustrate the variety of ways one can approach a common problem or procedure.

Drafting Problems—Drafting Problems are a variation of Hypothetical Problems. Here the student is asked to draft a particular legal document or pleading and the resulting student product is then discussed in individual conferences or in a group setting. The test for the student is whether he or she has a command or working understanding of the underlying substantive or procedural law and whether the student's draft complies with local rules and pleading requirements. It is assumed that the student already has the necessary legal research and writing skills. The learning in this setting is usually whether the law student can move from a generalized, appellate form of legal writing, to a more focused and simple form of legal writing. Simplicity, compliance with local rules and pleading conventions, and an appropriate level of professional advocacy are usually the central themes in these exercises. These types of assignments are typically best-addressed and evaluated in individual conferences or a group setting. The goal in these types of assignments is to teach and develop specific and error free drafting, which is a critical legal skill.

Role Playing—Role Playing is a very commonly used clinical method. It is the core activity in clinical simulation exercises. In role-plays, students are assigned to assume and play the role of a client, lawyer, witness, opposing counsel, judge or any other player in a problem or case. Students can be assigned competing or conflicting roles and the actual simulation or performance can be performed out of class or in class. The clinical professor can either play one of the roles or serve as referee, judge, neutral observer, or de-briefer for the exercise. Typically, students are given a fixed set of facts, the applicable law, and an assigned role (e.g. be difficult, obstinate, outraged, reluctant, etc.) in order to focus the performance and resulting discussion on a particular practical problem, reality, or consequence. Moot court, pre-trial, trial practice, and interviewing and counseling courses are typically built around these types of exercises. Role playing exercises that are conducted outside the classroom are typically debriefed in a group setting. This is particularly useful when different groups of students are performing the same assigned problem or roles. Students may be asked to submit to the clinical professor or fellow students a written description or programmed assessment of the dynamics and outcome of the assigned problem or role. These written assessments can then be shared or contrasted as part of the training exercise. Video or audio taping of student performances can be used as an effective monitoring or replay device. In-class-simulations offer the added dimension of spontaneity and increased professorial control, and a better stop and start ability than out of class simulations. The in-class setting allows the clinical professor more control and also allows for different students to be called on to play the same or different roles. The critical factor in these exercises is that the student actors must have a clearly defined role and they must stay in role. Role playing exercises are at the core of simulation clinics. Role playing exercises are also a common and excellent device for use in live client clinics as a complement or supplement to actual cases. Role-playing and simulation are often integrated with group case discussions or grand rounds.

Moot Court and Focused Simulation Exercises—Here the clinical exercise can be approached in the same manner described in the role-playing section. However, in a live client clinic, students and their clinic professor rehearse and prepare for actual court or case proceedings. If a particular case requires a motion hearing, a negotiation session, a meeting with opposing counsel, a witness interview, or any other process or activity that can be simulated, an individual or group simulation or dress rehearsal is a useful device to prepare the inexperienced or nervous law student. All necessary roles can be assigned and the exercise run over and over as needed. This type of exercise can be particularly useful in assisting the unfamiliar or nervous law

student adapt to the courtroom or administrative environment. It also tends to minimize the possibility of law student errors in the actual proceeding. The use of videotapes of previously recorded proceedings or of actual student performances in the assigned exercise is also very common.

Observation of Live Proceedings within the law clinic, students are encouraged or required to observe common types of legal procedures such as a trials, motion hearings, arbitrations, depositions, or settlement conferences. Students may be required to do this as individuals or a part of a group. The student should attend one or more of these in some other case before participating in a simulated exercise or actual proceeding. Getting to know the temperament or mannerisms of a judge or opposing counsel can usually be determined by observation.

Client Contact and Representation—The best form of learning in clinic setting is live client representation. By dealing directly with clients, students learn many of the common challenges and rewards that clients present. Students get first hand experience with fellow human beings under legal and personal stress and learn about the demands placed on a lawyer. No amount of reading or simulation can recreate the nuance and vagaries of client representation. Clients can be individuals, groups, or entities. In a live client clinic students have to deal with another human being in a real time, real world environment. The client and their legal problems are real—students are required to learn to help clients try to resolve these problems in a practical, legal fashion. Student preparation and focus are of necessity at a very heightened level. The professor acts as mentor and supervisor to help the student fashion a course of action or solution for the client. Frequent faculty student conferences and frequent review of student plans and work product are at the core of this mentoring process. Client contact also provides the student with valuable experiences in professionalism.

Professionalism and personal skills are taught by emphasizing to the student that while the professor and student may share the representational role for the client, the law student is primarily responsible for initiating and controlling client contacts and professional representation. The client is the student's client. Students are able to act as "student attorneys" in the clinic under the supervision of a licensed faculty member by virtue of student practice rules. Under these student practice rules, students may perform all types of legal activities including court representation and are held to the same professional and ethical standards as licensed attorneys.

Grand Rounds and Group Learning—In order to organize and share learning within the clinical laboratory, clinical professors often use group learning or "grand rounds" as a technique. "Grand rounds" is a phrase taken directly from the medical school clinical practice of the training doctor taking medical students as a group to visit with and review the treatment and recovery of each patient in a small group. Each patient's illness, diagnosis, treatment, and progress towards recovery are then fully discussed by the group. In the law clinic, the professor will typically select a particular case or series of related cases to discuss in a group setting. Important facets of the case are then discussed in great detail, usually with the student assigned to the particular case making the core presentation of the case and issues. The professor then focuses the discussion on particular procedural, substantive, or practical aspects of the case. An individual case can also be used as the basis of a broader discussion of the general type of case or

of a particular area of practice. For example, if a student has an interesting or unusual divorce case or will problem, the particulars of the case will be discussed in great detail but the discussion may also include a generalized discussion of a family law based practice or of a probate practice. The purpose of these group discussions is to provide a very detailed group analysis of a particular case or procedure and at the same time provide a larger contextual discussion. These group discussions allow students to share a learning experience and encourage networking in the clinic and in later practice. During the course of a semester, the same problem or procedure can be revisited to allow case progress to be monitored and adjusted as necessary.

Where appropriate, more than one student may be assigned to a case or project as a way of teaching collaboration, networking and to try to replicate group legal practices. Students are also encouraged to seek the advice and opinions of other faculty within the clinic and the law school. Students are also taught to approach cases in a multi-disciplinary manner where appropriate. Cases and legal projects are also discussed or “brain stormed” within the larger group or in a classroom setting where appropriate as part of the “grand rounds” technique. Students are also required to constantly confer with their clients to review case planning and to insure client involvement and client-centered decision making.

Community Lawyering. Community lawyering is a type of lawyering that is frequently used in the Law Clinic to teach law students different and broader approaches to legal problem solving. In addition to using all of the other standard types of teaching methodologies and resources, community lawyering seeks to teach students broader aspects of lawyering in a community based setting. Community lawyering takes law students outside of the traditional law school setting and places them in a community setting with the objective of addressing larger community-wide or group-wide legal problems. In the various community lawyering clinics students are assigned to work with community groups or agencies to try to solve systemic types of legal problems that may affect a particular client group. In a community lawyering clinic students are challenged to think of legal problems in a wider context and work with community groups or agencies to solve community-wide legal concerns. Student interviewing and intake procedures are based at the different community sites with the expectation that they will work on group legal projects and with individual clients to address their legal problems in both a traditional and non-traditional legal manner. In addition to the normal mix of individual client cases students also work on group or community projects. Group advocacy, community legal education, legislation, agency rulemaking, community organizing, and community legal counseling are among the strategies employed. Community lawyering emphasizes the use of multi-disciplinary and team teaching approaches to legal problem solving. Within the community lawyering clinics, students will frequently work with other professionals to address community or group legal concerns. Community lawyering also emphasizes the values of *pro bono publico* legal work in a community setting.

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III. Summary of Skills To Be Learned In The Clinic

The following is a summary of some of the important basic lawyering skills students will begin to learn and develop in the clinic.

Client Interviewing. Interviewing is an essential legal skill. To develop their interviewing skills, all students will be required to interview a variety of clients with differing kinds of legal problems. This exposes students to a range of legal issues and clients. Because of the public service aspect of most clinical work, students will ordinarily interview low-income persons or groups in the kinds of cases that are appropriate for student education and handling. This focus on low-income individuals provides students with the added advantage of exposure to issues of poverty, culture, and general access to justice issues. Students are required to document all client contacts and communications. Students will also be expected to interview potential witnesses. Client interviews and counseling sessions may occasionally be directly supervised or videotaped for individual or group educational discussions. Students will also have the opportunity to interview witnesses and other legally interested parties.

Client Counseling. Client counseling is at the heart of the attorney-client relationship. As part of the case planning and development process, students will be expected to develop a specific counseling plan for each clinic client. Students are expected to develop the confidence and ability to counsel clients about the practical, legal, ethical, professional, and humane options available to the client to help resolve their legal problems. The importance of client centered lawyering, client autonomy, and collaborative problem solving is emphasized in all interviewing and counseling activities.

Fact Development and Case Planning Skills. Students will be expected to verify, investigate, preserve, research, analyze, organize, and present all of the different facts relevant to a client's case. Students must then use this information to develop a case development and resolution plan. The core of the case development and planning process consists of one-on-one student faculty supervision and interaction. Case planning and development is also a group learning activity and an opportunity for the student to develop networking skills.

Focused Legal Research and Analysis. The law clinic and its clients give students the opportunity to hone their research skills and to add needed measures of reality and practicality to their analysis and research. Live clients and opposing parties force students to constantly redefine and focus their legal work. All students are encouraged to fully utilize the most modern research devices available, such as Westlaw, Lexis, Loislaw and other Internet tools. Additional advanced legal research training is provided and required within the clinic for all law students as part of their basic clinic training. Students also learn about other relevant sources of useful information including court files, community and public agency sources, public records, and internet-based databases. Client-centered analysis is emphasized.

Legal Drafting. Live clients give law students important experience in drafting a wide variety of legal documents. All students are given the opportunity to draft basic court pleadings such as complaints, answers, discovery documents, motions, requests for hearing, trial documents, legal notices and other basic pleadings. In individual cases, students also get the opportunity to draft common legal documents such as wills, contracts, deeds, and settlements.

The emphasis in teaching how to draft pleadings is on teaching local style and on insuring compliance with local court rules. Basic drafts or outlines of the most common pleadings and forms are maintained in the clinic brief bank. However, students are strongly discouraged from blindly following available forms. Students are expected to carefully edit and tailor available legal forms to conform to the needs of the individual client and case.

A major part of teaching legal drafting in the law clinic consists of teaching effective and professional letter writing. Letter writing is a major task and practice skill for lawyers and is generally a new concept and activity for law students. Students will learn about the hazards of e-mail and how to write professionally to adverse parties or attorneys. Students will also learn about writing client letters, and opinion and counseling letters.

As required by individual cases, the more traditional skills of drafting appellate or persuasive briefs are also taught. All student pleadings and letters are reviewed and critiqued by the supervising professor. The student and professor must sign all pleadings and letters.

Practical Experience with the Courts And Administrative Agencies. A direct benefit of live client clinics is that students often appear in local courts and administrative agencies. Student authority and permission to appear is governed by student practice rules. In all formal court or agency proceedings, a faculty member must accompany students appearing on behalf of a client. Students are required to become familiar with local court rules and practices. Students may be required to observe and become familiar with a particular court, judge, or agency before appearing on behalf of a client. Student presentations to a court usually require a written plan or outline, which must be reviewed by the supervising faculty member before the actual hearing or proceeding. The clear expectation is that the student, not the professor, will conduct the presentation. The obvious benefits to the student are familiarity with a particular court environment, overcoming typical student nervousness surrounding first court appearances, and the development of professional confidence and experience.

File Management Skills. For all of their clinic work students are required to compile and maintain complete and thorough case files. Written and electronic documentation is required of all their clinic activities, including timekeeping. To assist students with their file maintenance, students are taught to use Amicus. All client files must be maintained in a standardized, uniform, organized manner designed to teach a professional and thorough file management system to the student. Systematic file reviews are regularly conducted by the assigned faculty member to monitor and insure professional representation, and to insure that the student is mastering the case-file system. Law students are required to maintain their own files to insure complete file knowledge and first hand experience with this important professional responsibility.

Law Office Management Skills. In addition to teaching the importance of professional file management, the law clinic also teaches other law office management skills to the future attorney. Among the law office management concepts to which the student is introduced and expected to master during his or her clinical experience are:

- reception area duties,
- client interview procedures,
- client eligibility and screening procedures
- conflict of interest checking procedures

- client acceptance and non-acceptance procedures
- defining scope of representation
- clarifying client costs and client duties
- file opening procedures
- professional file maintenance and documentation
- timekeeping duties
- case calendaring system
- use of office computer systems
- telephone and fax communication procedures
- internal group practice procedures
- client trust fund procedures
- file review procedures
- case closing or transferring procedures
- office etiquette and
- the importance of professional staff relationships.

In order to aid the student in understanding the law clinic's management system, students are provided with hands-on training by staff and faculty and provided with a detailed office procedures manual, located in the Clinic Website. Among the larger management issues addressed are personal time management and prioritizing skills. Upon completion of their clinical program, law students should have a very good introduction to the basic procedures needed to maintain client files and manage a small or medium sized law office.

Promotion of Alternative Dispute Resolution. ADR is taught as a core policy concept within the clinic. Students will learn to include the use of ADR devices in their case plans. Students are expected to become familiar with court annexed mediation and arbitration programs, mediation and counseling programs, settlement programs, facilitated settlements, ADR negotiation concepts, and settlement conferences. The use of ADR is a core clinic policy and ADR options are required as a part of all case planning and client counseling processes.

Use of Computer Technology. One of the new and increasingly important skills students must learn to be effective lawyers is use of computer technology. All law clinic students are provided with a personal computer and trained to use the clinic's case management system, Amicus. Students are also shown the clinic's brief bank and related computer based resource systems. Lexis, Westlaw and Loislaw database systems are available to students. Students are encouraged to use computer technology to the fullest extent possible in their casework and management tasks.

Focused Substantive Learning. Live client cases with their generally focused substantive problems allow students to focus their substantive research and knowledge within those same substantive areas. Client cases also force students to fine-tune their knowledge, especially practical knowledge, of procedural law and rules. A commonly heard statement among clinicians and student is that students "really" learn law and procedure in the clinic.

Group Lawyering and Networking. Group lawyering and networking are important skills that are emphasized and taught in the Clinic. Within each section of the Clinic, students

will occasionally be assigned to work in groups on particular case files or projects. Part of these assignments will be to make large tasks within individual files more manageable or to take advantage of particular skills or backgrounds that students may bring to the Clinic. However, a major part of these assignments will be to encourage students to start to develop group lawyering skills as a way of encouraging group lawyering as an approach to client problem solving. Group lawyering is an important way of insuring diversity of viewpoints and opinions and in maximizing the overall level of quality in the representation. Group lawyering is also used as a way to encourage a multi-disciplinary approach to client problem solving. Within the Law Clinic students are encouraged to work together in either formal or informal groups in order to share and strengthen their own learning experiences and to improve the over all quality for the client. Group lawyering is also an important skill that students can develop in their later practices. Within group lawyering clinical students are actively encouraged to network with other law students and faculty within in the Clinic and, where appropriate, outside of the Law Clinic. Developing the skills of group lawyering and networking is particularly important for students who will later practice in a solo-practitioner setting or in a small group setting.

Career Planning. Much of the students learning and experience in the Law Clinic is clearly transitional. When students work in the Clinic they are given their first opportunity to apply the various skills and knowledge they have obtained as first and second year law students in a real world setting. When students leave the Clinic they will move on to a variety of practice settings where continued learning and personal and professional growth will be important aspects of their careers. As part of their learning experience within the Law Clinic students will be called upon to study and discuss such things as professional demographics, career patterns, career specialization, issues within the profession, career satisfaction and dissatisfaction, bar membership and participation, issues in professional discipline, and growth trends and changes within the profession. In some of their Clinic classes students will be asked to discuss the legal profession generally or to concentrate on a specific area of practice in an effort to help students start to make informed decisions about their future career choices and options. Students in the Law Clinic will be provided the opportunity to begin to discuss and weigh career alternatives and options as they are given their first experiences in professional responsibility. As a first step in this planning process, students may be asked to complete a career planning worksheet and to discuss this with other students or as part of a group learning experience. This career planning worksheet can be found at the end of the next section in this manual.

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IV. Lifelong Education and Development

Background

Clinical legal education is a major step in the transition from law student to attorney. For most law students all that remains in this transitional process from student to professional are a few more law courses, graduation, the bar exam and finding a job. Many students are under the false impression that once law school is completed, that formal and informal education is mostly behind them. The assumption is that once the attorney is sworn-in to the bar, that each attorney is somehow a self-contained fully developed professional entity. Nothing could be further from the truth. Law school education and clinical legal education are simply first steps in a process of lifelong education and personal and professional development.

Clinical legal education serves as a bridge or introduction to the practical aspects and demands of the legal profession. Clinical legal education can also be seen as a bridge between the theory and rules of the classroom and demands of the real world. While much is learned within the typical clinical course, the reality is that the major portion of legal learning is obtained after graduation. Neither the law school classroom or the most rigorous clinical program can teach the young attorney all that is needed to be a truly competent professional. The vast majority of an attorney's legal education and development takes place after law school, and with only a few institutional exceptions, this educational process is almost entirely self-guided education.

The most common institutional exceptions are bar sponsored mandatory Continuing Legal Education Programs (CLE), some rare voluntary additional formal or institutional learning, and some law firm or legal agency training provided as part of one's employment. Therefore, it is essential for the law student to begin to prepare for this process of lifelong education and professional development. As a professional there will be a few educational prods but most of the truly productive professional education will be self initiated.

A good place to begin this educational process is to survey the nature of the legal profession and to list and assess the common legal skills employed by competent practitioners within the profession. Fortunately, much of this has already been done in what is known as the *MacCrate Report, Legal Education, and Professional Development—An Educational Continuum*, American Bar Association, 1992, West Edition. Students are encouraged to read this report as part of their study of the legal profession and as a part of their clinical legal education. For purposes of this manual, the following excerpts will provide the broad overview and the necessary introduction. The following slightly rearranged excerpts from the *MacCrate Report* provide a good start for this general survey of the profession and its basic legal skills and values.

An Overview of the Profession

MacCrate Report, Student Edition

Introduction

Overview of the Skills and Values Analyzed in the Statement

I. Fundamental Lawyering Skills

Skill § 1: Problem Solving

In order to develop and evaluate strategies for solving a problem or accomplishing an objective, a lawyer should be familiar with the skills and concepts involved in:

- 1.1 Identifying and Diagnosing the Problem (pp.15-17);
- 1.2 Generating Alternative Solutions and Strategies (pp. 17-18);
- 1.3 Developing A Plan of Action (p. 18);
- 1.4 Implementing the Plan (pp. 18-20);
- 1.5 Keeping the Planning Process Open to New Information and
New Ideas (pp. 20-21).

For Commentary on Skill § 1, see pp. 21-24.

Skill § 2: Legal Analysis and Reasoning

In order to analyze and apply legal rules and principles, a lawyer should be familiar with the skills and concepts involved in:

- 2.1 Identifying and Formulating Legal Issues (pp. 25-26);
- 2.2 Formulating Relevant Legal Theories (p. 26);
- 2.3 Elaborating Legal Theory (pp. 26-27);
- 2.4 Evaluating Legal Theory (pp. 27-28);
- 2.5 Criticizing and Synthesizing Legal Argumentation (pp. 28-29).

For Commentary on Skill § 2, see pp. 29-30.

Skills § 3: Legal Research

In order to identify legal issues and to research them thoroughly and efficiently, a lawyer should have:

- 3.1 Knowledge of the Nature of Legal Rules and Institutions (pp. 31-32);
- 3.2 Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research (pp. 32-34);
- 3.3 Understanding of the Process of Devising and Implementing a Coherent and Effective Research Design (pp. 34-36).

For Commentary on Skill § 3, see pp. 36-37.

Skill § 4: Factual Investigation

In order to plan, direct, and (where applicable) participate in factual investigation, a lawyer should be familiar with the skills and concepts involved in:

- 4.1 Determining the Need for Factual Investigation (p. 38);
- 4.2 Planning a Factual Investigation (pp. 38-40);
- 4.3 Implementing the Investigative Strategy (pp. 40-43);
- 4.4 Memorializing and Organizing Information in an Accessible Form (pp. 43-44);
- 4.5 Deciding Whether to Conclude the Process of Fact-Gathering (p. 44);
- 4.6 Evaluating the Information That Has Been Gathered (pp. 44-45).

For Commentary on Skill § 4, see pp. 45-46.

Skill § 5: Communication

In order to counsel clients about decisions or courses of action, a lawyer should be familiar with the skills and concepts involved in:

- 5.1 Assessing the Perspective of the Recipient of the Communication (p. 47);
- 5.2 Using Effective Methods of Communication (pp. 48-50).

For Commentary on Skill § 5, see p. 50.

Skill § 6: Counseling

In order to counsel clients about decisions or courses of action, a lawyer should be familiar with the skills and concepts involved in:

- 6.1 Establishing a Counseling Relationship That Respects the Nature and Bounds of a Lawyer's Role (pp.51-52);
- 6.2 Gathering information Relevant to the Decision to be Made (pp. 52-53);
- 6.3 Analyzing the Decision to Be Made (pp. 53-54);
- 6.4 Counseling the Client About the Decision to Be Made (pp. 54-57);
- 6.5 Ascertaining and Implementing the Client's Decisions (pp. 57-58).

For Commentary on Skill § 6, see p. 59.

Skill § 7: Negotiation

In order to negotiate in either a dispute-resolution or transactional context, a lawyer should be familiar with the skills and concepts involved in:

- 7.1 Preparing for Negotiation (pp. 60-63);
- 7.2 Conducting a Negotiation Session (pp. 63-64);
- 7.3 Counseling the Client About the Terms Obtained From the Other Side in the Negotiation and Implementing the Client's Decision (p.64).

For Commentary on Skill § 7, see p. 65-66

Skill § 8: Litigation and Alternative Dispute-Resolution Procedures

In order to employ—or to advise a client about—the options of litigation and alternative dispute-resolution, a lawyer should understand the potential functions and consequences of these processes and should have a working knowledge of the fundamentals of:

- 8.1 Litigation at the Trial-Court Level (pp. 67-70);
- 8.2 Litigation at the Appellate Level (pp70-71);
- 8.3 Advocacy in Administrative and Executive Forums (pp. 71-72);
- 8.4 Proceedings in Other Dispute-Resolution Forums (pp. 72-74).

For Commentary on Skill § 8, see pp. 74-75.

Skill § 9: Organization and Management of Legal Work

In order to practice effectively, a lawyer should be familiar with the skills and concepts required for efficient management, including:

- 9.1 Formulating Goals and Principles for Effective Practice Management (p. 76);
- 9.2 Developing Systems and Procedures to Ensure that Time, Effort, and Resources are Allocated Efficiently (p. 76);
- 9.3 Developing Systems and Procedures to Ensure that Work is Performed and Completed at the Appropriate Time (pp 76-77);
- 9.4 Developing Systems and Procedures for Effectively Working with Other People (pp. 77-78);
- 9.5 Developing Systems and Procedures for Efficiently Administering a Law Office (pp. 78);

For Commentary on Skill § 9, see p. 79.

Skill § 10: Recognizing and Resolving Ethical Dilemmas

In order to represent a client consistently with applicable ethical standards, a lawyer should be familiar with:

- 10.1 The Nature and Sources of Ethical Standards (pp. 80-82);
- 10.2 The Means by Which Ethical Standards are Enforced (pp. 82-83);
- 10.3 The Processes for Recognizing and Resolving Ethical Dilemmas (p. 83).

For Commentary of Skill § 10, see pp. 83-84.

**II. Fundamental Values of the
Profession**

Value § 1: Provision of Competent Representation

As a member of a profession dedicated to the service of clients, a lawyer should be committed to the values of:

- 1.1 Attaining a Level of Competence in One's Own Field of Practice (p. 87);
- 1.2 Maintaining a Level of Competence in One's Own Field of Practice (pp. 87-88);

- 1.3 Representing Clients in a Competent Manner (pp. 88-89);

For Commentary on Value § 1, see pp. 90-92.

Value § 2: Striving to Promote Justice, Fairness, and Morality

- 2.1 Promoting Justice, Fairness, and Morality in One's Own Daily Practice (p. 93);
- 2.2 Contributing to the Profession's Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them (p. 93);
- 2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the capacity of Law and Legal Institution to Do Justice (p. 93).

For Commentary of Value § 2, see pp. 93-95.

Value § 3: Striving to Improve the Profession

As a member of a self-governing profession, a lawyer should be committed to the values of:

- 3.1 Participating in Activities Designed to Improve the Profession (p. 96);
- 3.2 Assisting in the Training and Preparation of New Lawyers (p. 96);
- 3.3 Striving to Rid the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, or Disability, and to Rectify the Effects of These Biases (p. 96).

For Commentary on Value § 3, see pp. 96-97.

Value § 4: Professional Self-Development

As a member of a learned profession, a lawyer should be committed the values of:

- 4.1 Seeking Out and Taking Advantage of Opportunities to Increase His or Her Knowledge and Improve His or Her Skills (pp. 98-99);
- 4.2 Selecting and Maintaining employment That Will Allow the Lawyer to Develop As a Professional and To Pursue His or Her Professional and Personal Goals (p. 99).

For Commentary on Value § 4, see pp. 99-101.

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D. Overview of the Skills and Values Analyze

pp. 21 - 120

(Note: pages 21 - 120 of the MacCrate Report are not reproduced in these materials but are highly recommended reading for students. These materials provide a very broad overview of the legal profession which a law student should have as part of his or her legal training. Students are strongly encouraged to read these materials. Copies of the MacCrate Report are available in the library, the law clinic, or from individual clinical professors.)

These brief excerpts from the *MacCrate Report* should serve as a starting point of discussions on the legal profession and the necessary legal skills and values used by attorneys. Students are strongly encouraged to read the original report or the student edition. Additional recommended readings and films on the legal profession are listed in the bibliography at the end of this chapter.

E. Career Planning Worksheet

Preliminary Career Planning Worksheet

(Subject to Frequent Revision - Particularly in the next few years)

Instructions: Each student should answer each of the following questions. Your answers will be revised one or more times during the course of this semester and will be discussed in a later class. Please feel free to consult with whomever you want in preparing your answers or in referring to any outside resources.

1. Why did you come to law school? Please feel free to refer to the personal statement that you included in your application packet, in which you address the question of why. You should be admitted to law school over a very large number of equally qualified candidates.
2. What have you learned so far in law school that would assist you in achieving the personal and career goals you listed in question number 1?
3. What legal skills, knowledge, or experience do you plan to obtain in the Clinical Law Program to help train you to become a competent and professional attorney? Please list the types of cases or projects that you feel will help obtain these legal skills.

Please list the common basic lawyering skills that a young attorney must have upon graduating from law school in order to competently begin his or her professional career.

5. What other courses or skills do you plan to study before graduation, which will help you become a competent attorney in the areas of legal interest to you?
6. What areas of the law do you plan to practice in during the early part of your career?
 - a. What are your professional plans immediately upon graduation?
 - b. What is your career plan for the next five years?
 - c. What is your career plan for the next ten to twenty years?
 - d. What are the personal and professional goals you seek to accomplish by the end of your legal career?
7. Where do you plan to practice upon graduation and into the early years of your career?
8. What specific steps have you taken to secure employment and what are your early career options? Have you consulted with anyone who has worked in your area of choice or who has attempted to follow a similar career plan? Are there any market or external factors that will limit your choices?
9. Have you started to plan to take the Bar Examination in New Mexico or some other jurisdiction?
10. How do you think your professional plans will affect your personal goals and objectives or those of your family or relatives? Do you feel you ought to consult any of them in formulating your plans?

11. Do you have any information or knowledge about the stresses or pressures that are inherent in the practice of law or that are peculiar to the area of law you wish to practice in? Do you know what the common stresses in the profession are? Do you have any plans or ideas for coping or avoiding these stresses?
12. If law was not an option and you had your druthers, what career would you choose?

Why?

13. List ten things that you would like to do with your life over the next five years.

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- Norwood, J. Michael, *Scenes From the Continuum: Sustaining the MacCrate Report's Vision of Law School Education Into the Twenty-first Century*, 30 WAKE FOREST L. REV. 293 (1995).
- Rose, Jonathan, *The MacCrate Report's Restatement of Legal Education: The Need for Reflection and Horse Sense*, 44 J. LEGAL EDUC. 548 (1994).

Recommended law related books:

- Auden**, *Law Like Love*
- Burkhart**, Ch. 2
- Charles Dickens**, *Bleak House*
- Franz Kafka**, *The Trial*
- Fyodor Dostoevsky**, *Crime and Punishment*
- John Grisham**, *A Time to Kill; The Firm; The Pelican Brief, The Client, The Chamber; The Rainmaker; The Runaway Jury; The Partner; The Street Lawyer; The Testament; The Brethren; A Painted House; Skipping Christmas; The Summons; The King of Torts; Bleachers; The Last Juror*
- H. Melville**, *Billy Budd*
- Harper Lee**, *To Kill A Mockingbird*
- Herman Melville**, *Bartleby the Scrivener*
- Jack Abbott**, *In the Belly of the Beast*
- Jean Anouilh**, *Antigone*
- Jean Paul Sartre**, *The Words*

Kazuo Ishiguro, *Remains of the Day*
Margaret Atwood, *The Handmaid's Tale*
R. Bork, *The Tempting of America*
Samuel Butler, *Erewhon*
“**Slave Come to My Service**” - poetry from Sumeria, 10th century B.C.
Sophocles, *Antigone*
Thomas More, *Utopia*
Tom Wolfe, *The Bonfire of the Vanities*
Turow, Scott, *Burden of Proof; Presumed Innocent; Personal Injuries; The Laws of Our Fathers; Guilty As Charged*
Ursula le Guin, *The Dispossessed*
Walker Percy, *The Thanatos Syndrome*
William Gaddis, *A Frolic of His Own*

Recommended Law Related Films:

“**12 Angry Men**” (1957) Henry Fonda, Lee J. Cobb, Ed Begley, Sr., E.G. Marshall, Jack Klugman, Jack Warden, Martin Balsam, Robert Webber

“**A Civil Action**” (1998) John Travolta, Robert Duvall, Tony Shalhoub

“**A Few Good Men**” (1992) Tom Cruise, Jack Nicholson, Demi Moore

“**Adam's Rib**” (1949) Spencer Tracy, Katharine Hepburn, Judy Holliday

“**Anatomy of a Murder**” (1959) James Stewart, Lee Remick, Ben Gazzara, George C. Scott.

“**Billy Budd**” (1962) Robert Ryan, Peter Ustinov, Melvyn Douglas, Terence Stamp

“**Breaker Morant**” (1980) Edward Woodward, Jack Thompson, John Waters, Bryan Brown, Charles “Bud” Tingwell, Frank Wilson.

“**Erin Brockovich**” (2000) Julia Roberts, Albert Finney, Aaron Eckhart

“**Final Verdict**” (1991) Treat Williams, Glenn Ford, Olivia Burnette

“**Gideon's Trumpet**” (1980) Paul Benjamin, James Brodhead, José Ferrer, Michael Cavanaugh.

“**Hart's War**” (2002) Bruce Willis, Colin Farrell, Terrence DaShon Howard

“**I Accuse!**” (1958) José Ferrer, Anton Walbrook, Viveca Lindfors, Leo Genn.

“**I Want to Live!**” (1958) Susan Hayward, Simon Oakland, Virginia Vincent, Theodore Bikel.

“**Inherit the Wind**” (1960) Spencer Tracy, Fredric March, Gene Kelly

John Grisham films, The Firm; The Pelican Brief; The Client; The Chamber; A Time to Kill; The Rainmaker; The Gingerbread Man; Mickey

“Jagged Edge” (1985) Jeff Bridges, Glenn Close, Peter Coyote

“Judgment at Nuremberg” (1961) Spencer Tracy, Burt Lancaster, Richard Widmark, Maximilian Schell

“Kramer vs. Kramer” (1979) Dustin Hoffman, Meryl Streep, Justin Henry
“Lawyers should not marry lawyers. This is called inbreeding, from which come idiot children and more lawyers.” From: “Adam’s Rib”

“Legally Blonde” (2001) Reese Witherspoon, Luke Wilson, Selma Blair

“My Cousin Vinny” (1992) Joe Pesci, Ralph Macchio, Marisa Tomei

“Reversal of Fortune” (1990) Glenn Close, Jeremy Irons, Ron Silver

“Rules of Engagement” (2000) Tommy Lee Jones, Samuel L. Jackson, Guy Pearce

“The Caine Mutiny” (1954) Humphrey Bogart, José Ferrer, Van Johnson

“The Chamber” (1996) Chris O'Donnell, Gene Hackman, Faye Dunaway

“The Client” (1994) Susan Sarandon, Tommy Lee Jones, Mary-Louise Parker

“The Court Martial of Billy Mitchell” (1955) Gary Cooper, Charles Bickford, Ralph Bellamy

“The Devil's Advocate” (1997) Keanu Reeves, Al Pacino, Charlize Theron

“The Firm” (1993) Tom Cruise, Jeanne Tripplehorn, Gene Hackman, Hal Holbrook.

“The Fortune Cookie” (1966) Jack Lemmon, Walter Matthau, Ron Rich

“The Life and Times of Judge Roy Bean” (1972) Paul Newman, Victoria Principal, Anthony Perkins, Ava Gardner, Roddy McDowall, Tab Hunter, John Huston.

“The Paper Chase” (1973) Timothy Bottoms, Lindsay Wagner, John Houseman, Graham Beckel.

“The Rainmaker” (1997) Matt Damon, Claire Danes, Jon Voight

“The Star Chamber” (1983) Michael Douglas, Hal Holbrook, Yaphet Kotto, Sharon Gless.

“The Trial” (1963) Anthony Perkins, Jeanne Moreau, Romy Schneider, Orson Welles.

“The Verdict” (1982) Paul Newman, Charlotte Rampling, Jack Warden

“The Young Philadelphians” (1959) Paul Newman, Barbara Rush, Alexis Smith, Robert Vaughn.

“To Kill a Mockingbird” (1962) Gregory Peck, Mary Badham, Philip Alford, Brock Peters, Robert Duvall

“Witness for the Prosecution” (1957) Tyrone Power, Marlene Dietrich, Charles Laughton

“Young Mr. Lincoln” (1939) Henry Fonda, Alice Brady, Marjorie Weaver, Milburn Stone, Ward Bond.

V. Professionalism and Civility

One of the frequent comments by more experienced practitioners is that the level of professionalism among attorneys is declining and that the level of civility has taken a turn for the worse. While it is hard to gauge these kinds of generalized criticisms, it is essential that law students study and consider the different aspects of professionalism and commit to a practice that is premised on civility. Professionalism and civility are very closely interrelated. A true professional is always civil. Professionalism can probably best be defined as the approach or attitude one takes towards all of the different lawyering activities in which an attorney engages. It includes not only how one views what he or she does, but also the level of professional expectations one has about others and of legal institutions. Civility in its narrowest sense constitutes a sort of personal code that governs how one interacts with others and which helps all attorneys guide their clients through a difficult, adverse and, often competitive, legal process. Without a basic level of civility in all legal activities, the hostile, aggressive, and competitive aspects of law tend to become exaggerated. The profession becomes more of a competitive trade than a learned and civil profession. Civility and professionalism are core concepts in making law more than a trade and insuring that lawyers remain objective problem-solvers who help their clients resolve their disputes under the rule of law. Professionalism and civility also affect how the public and clients view the profession.

In the law clinic, students begin to practice professionalism and civility in their cases. Students are given primary responsibility for professional representation. The client is the student's client. For the first time, students have personal responsibility for the legal affairs of a fellow human being. Law students are also given the responsibility of having to interact with attorneys, judges, court personnel, and other legal institutions. Students are expected to act as full professionals in all their clinic activities. Professionalism and civility are topics of frequent discussion during the clinical experience.

Aspects of Professionalism

The following are some of the important aspects of professionalism that can be used as discussion points in this on-going and essential discussion of professionalism and civility within the law clinic.

Professional Education and Training. Professionalism starts with an emphasis on a commitment to excellence in law school. Students should commit themselves to mastery of all of the different subjects they study. Students should also realize that the formal legal education one receives in law school is only preparation for a career long process of learning. The majority of professional training takes place after law school. Law school is really more like an orientation and transitional phase for most lawyers. This commitment to mastery and excellence in learning includes, on the job training, specialization, CLE, and personal development and training. Formal legal education is a bare minimum in the concept of professional training.

Commitment To High Quality. In addition to loyalty, clients expect and deserve a very high quality of representation and work product from their attorneys. As licensed professionals authorized to engage in a profession for profit, attorneys have an obligation to insure that all of

their work is of the highest quality. Professional work is high quality work. Low quality or mediocre work is not professional work. This commitment to professional quality work requires the attorney to make sure all his or her work product is correct and professional in nature. It requires a system of practice and personal habits that insure review and consultation on all legal activities. At a bare minimum, if a letter, pleading or other legal document is not correct and of professional quality, that document should not be signed or sent to a third party. Attorneys must carefully edit and review all written work as a matter of course. A professional makes sure all his or her work is correct the first time and every time. Evaluative reflection of one's professional activities is also an aspect of insuring high quality and personally fulfilling professional work.

Expectation of High Quality. In addition to producing the best possible work product for every client, the true professional should also expect high quality work from others, from the courts and from the justice system. While it may be difficult to address or correct these shortcomings, attorneys should be prepared to become involved in such a way with the courts and the legal system to make sure that decisions and services are provided at the highest possible level. This requires attorneys to be vocal and to participate in meetings, court committee structures, seminars, judicial training, judicial campaigns, run for judicial office, do volunteer work and make public comments in appropriate forums to insure high quality work for the public and their clients. High quality work produces high quality responses. Very low quality work from an adversary may require a disciplinary referral. See Rules, 16-101, 16-803(A), Rules of Professional Conduct.

RULE 16-101. COMPETENCE

Rule 16-101 NMRA provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 16-803. REPORTING PROFESSIONAL MISCONDUCT

Rule 16-803(A) NMRA provides:

A. Misconduct of Other Lawyers. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The Attorney's Oath

The New Mexico oath for attorneys is as follows:

Rule 15-304 NMRA

FORM 15-304. Oath

I, _____, do solemnly swear or affirm: I will support the Constitution of the United States and the Constitution of the State of New Mexico; I will maintain the respect due to courts of justice and judicial officers; I will comply with the Rules of Professional Conduct adopted by the New Mexico Supreme Court; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval; I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged; I will never reject from any consideration personal to myself the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.

RULE 15-103. Qualifications. The qualifications for being an attorney in New Mexico are as follows:

Rule 15-103 NMRA

- A. Requirements mandatory. Licenses to practice law shall be granted only to applicants who fulfill all of the requirements of these rules.
- B. Qualifications. Every person seeking admission to practice law in New Mexico shall file a formal application as prescribed by these rules and as required by the board. Submission of the application shall constitute submission by the applicant to the jurisdiction of the New Mexico Board of Bar Examiners until a final determination upon admission of the applicant may be completed. Every applicant shall have the burden of establishing to the satisfaction of the board that the applicant possesses all of the following qualifications:
 - (1) is at least twenty-one (21) years of age;

(2) is a graduate with a juris doctor or bachelor of laws and letters degree (at the time of the bar examination for which application is made) of a law school formally accredited by the American Bar Association or is a graduate of any law school who has been engaged in the practice of law in another state or states for at least four (4) of the six (6) years immediately preceding the person's application for admission to practice in New Mexico;

(3) is a person of good moral character, physically and mentally fit to practice law;

(4) is, if ever admitted to practice in any other state or states, in good standing in such state or states;

(5) is professionally qualified for admission to the bar of New Mexico; and

(6) is in compliance with all child support and spousal support obligations imposed under a "judgment and order for support" as defined in the Parental Responsibility Act, Sections 40-5A-1 through 40-5A-13 NMSA 1978, or imposed under a child support or spousal support order entered by any other court of competent jurisdiction. If an applicant is not in compliance with a child support or spousal support obligation, the applicant will not be recommended for admission to the bar until the applicant provides the board with evidence that the applicant is in compliance with the judgment or order. If the applicant has appeared on the Human Services Department's certified list of obligors, the applicant shall submit a certified statement from the Human Services Department that the applicant is in compliance with the judgment and order for support. In all other cases, the applicant shall provide evidence acceptable to the board of compliance with all applicable child and spousal support orders.

C. Conviction; rehabilitation. A person who has been convicted of a serious crime as defined under these rules shall prove good moral character by demonstrating by clear and convincing evidence that the applicant is rehabilitated and satisfies all other requirements for good moral character.

D. Examination. All applicants shall be required to take and pass the written examination except as otherwise provided with respect to law faculty at the University of New Mexico.

Attorneys Responsibilities. Attorneys, by virtue of their professional license to counsel and represent people, are entrusted with their client's lives, property, personal rights, and future relationships. This is a major personal and professional responsibility. As an attorney, one has a fiduciary obligation to be loyal, competent, confidential, ethical, and also protect and advance the client's best interests under the rule of law. This general responsibility also extends to the judicial system, the justice system, and the profession. These differing responsibilities can sometimes conflict.

Ethical Conduct. In all of their professional activities, attorneys must act in an ethical manner under penalty of discipline, suspension, or disbarment. All attorneys must have a clear working knowledge of the rules of professional conduct and must apply these rules to their professional activities. Attorneys have a duty to inform their clients of these professional limitations and duties as appropriate. In order to insure an independent profession, all attorneys must cooperate and support the disciplinary system, which is self-imposed and self-regulated. Public and professional trust depends on rigorous adherence to the code of ethics. All attorneys should regularly read all disciplinary reports and should be aware of the common disciplinary problems and the causes of those problems.

Attorneys as Moral Agents. In advising and representing their individual clients, attorneys can act as moral agents. Attorneys can counsel their clients to “do the right thing” and to “do good.”

RULE 16-201. ADVISOR

Rule 16-201 NMRA provides

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Professional Perspective. One of the common factors in the profession is a high level of work related stress and pressure. Clients usually come to attorneys for assistance after the fact, when their lives, property, or rights are about to be significantly impacted. Clients may also bring their own set of personal demands, personal problems, and economic pressures to their attorneys. This case or client based stress is then further compounded by a high caseload of similar cases, each with its own demands and pressures. It is also important to recognize that opposing counsel and the opposing party are under the same kinds of inherent stress. Anger and hostility are frequently involved in communications. Lawyering is almost always a difficult and demanding profession. This stress and pressure has a natural and predictable impact on all attorneys and clients. It is therefore important for attorneys to understand and accept this reality and to learn how to cope with the inherent stress and pressure of practicing law.

A good attorney understands how stress and pressure affects him or her and creates a program for controlling and containing this stress. A good attorney also recognizes that opposing counsel and his or her client also are being subjected to this stress and will sometimes act out in response to the stress. All attorneys should understand that a certain amount of hostility, aggressiveness, and occasional rude conduct is the result of stress. Angry or hostile communications almost always provoke a similar kind of response and a sort of cycle can develop that colors and impedes the entire problem solving process.

A truly professional attorney tries to avoid generating anger or hostility and tries to explain or understand anger and hostility when it is encountered. Angry or hostile communications should almost never be sent. Professional understanding and compassion are important professional qualities. A wise attorney finds ways to reduce the natural level of stress

inherent in every case. A good attorney is professional, objective and not too personally involved with the client or the case. When personal involvement or ego levels become high in a case or a client, then it is probably time to consider associating other counsel to assist or withdrawing from a matter. A program for controlling and managing stress and pressure is the hallmark of a true professional. This includes stress and pressure that comes from outside one's professional life.

Attorneys As Decent Advocates. In their representation and advocacy on behalf of a client, an attorney can be a decent and honorable advocate. Instead of a purely “zealous” advocacy, attorneys can ethically engage in a wise tempered advocacy. Clients cannot demand that an attorney be overly zealous. In fact, the Code of Professional Conduct has removed the requirement of zealous advocacy. A good attorney understands his or her client’s emotions and motivations and also understands the impact that the adversary system has on the client, the attorney, opposing counsel, the opposing party and on third parties. Attorneys can decline to engage in conduct that harms others. A wise attorney has compassion, understanding, and tolerance of all persons caught up in the adversary system.

Attorneys must be Civil. In their dealings with others, particularly in the adversary system, attorneys must be civil with each other and all other parties. Complaints about uncivil behavior on the part of attorneys are very common. While individuals may differ in how they define civility, several professional organizations have attempted to establish certain minimal guidelines for civil conduct in the legal profession. These are reprinted below and students are strongly encouraged to carefully read and abide by these general guidelines.

The New Mexico the Attorney’s Creed developed by the New Mexico State Bar Association follows.

A Lawyer's Creed of Professionalism of the State Bar of New Mexico

- A. In all matters: “My Word is My Bond”
- B. With Respect To My Clients:
 - 1. I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice;
 - 2. I will endeavor to achieve my client's lawful objectives in business transactions, in litigation and in all other matters, as expeditiously and economically as possible;
 - 3. In appropriate cases, I will counsel my client with respect to mediation, arbitration, and other alternative methods of resolving disputes;
 - 4. I will advise my client against pursuing any course of action that is without merit and against insisting on tactics, which are intended to delay resolution of the matter or to harass or drain the financial resources of the opposing party;
 - 5. I will advise my client that civility and courtesy are not to be equated with weakness;

6. While I must abide by my client's decision concerning the objectiveness of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

7. I will keep my client informed about the progress of the case and the costs and fees being incurred;

8. I will charge only a reasonable attorney's fee for services rendered;

9. I will be courteous to and considerate of my client at all times.

C. With respect to opposing parties and their counsel:

1. I will endeavor to be courteous and civil, both in oral and in written communications;

2. I will not knowingly make statements of fact or of law that are untrue;

3. In litigation proceedings, I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

4. I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings and I will cooperate with opposing counsel when scheduling changes are requested;

5. I will refrain from utilizing litigation, delaying tactics, or any other course of conduct to harass the opposing party;

6. I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

7. In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from disrespect;

8. I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will unfairly limit the other party's opportunity to respond;

9. In the preparation of documents and in negotiations, I will concentrate on matters of substance and content;

10. I will clearly identify, for other counsel or parties, all changes that I have made in documents submitted to me for review.

D. With respect to the courts and other tribunals:

1. I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

2. Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid

litigation and to resolve litigation that has actually commenced;

3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit or are superfluous;

4. I will refrain from filing frivolous motions;

5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and, if appropriate, the court (or other tribunal) as early as possible;

8. Before dates for hearings or trials are set--or, if that is not feasible, immediately after such dates have been set--I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;

10. I will be punctual in attending court hearings, conferences, and depositions;

11. I will at all times be respectful toward and candid with the Court;

12. I will avoid the appearance of impropriety.

E. With respect to the public and to our system of justice:

1. I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

2. I will endeavor to keep myself current in the areas in which I practice and, when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

3. I will be mindful of my obligation, as a member of a self-regulating profession, to be an active participant, when appropriate, in the disciplinary process;

4. I will be mindful of the need to protect the image of the legal profession in the eyes of the public and particularly will be so guided when considering methods and contents of advertising or other public communications;

5. I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.

In a similar document, the Committee on Civility of the Seventh Federal Judicial Circuit recommended the following:

FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT

Hon. Marvin E. Aspen, U.S. District Judge, Northern District of Illinois, Chairman.

William A. Montgomery, Schiff Hardin & Waite, Chicago, Illinois, Secretary

David E. Beckwith, Foley & Lardner, Milwaukee, Wisconsin; George N. Leighton, Earl L. Neal & Associates, Chicago, Illinois; Hon. Larry J. McKinney, U.S. District Judge, Southern District of Indiana; Bernard J. Nussbaum, Sonnenschein Nath & Rosenthal, Chicago, Illinois; Nancy Schaefer, Schaefer, Rosenwein, & Fleming, Chicago, Illinois; Hon. John C. Shabaz, U.S. District Judge, Western District of Wisconsin; Stephen W. Terry, Jr., Baker & Daniels, Indianapolis, Indiana, Committee Members

*Cornelia H. Tuite, Cole, Grasso, Fencl & Skinner, Ltd., Chicago, Illinois. Reporter.
June 1992*

APPENDIX A

PROPOSED STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges, we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of, resolving disputes rationally, peacefully, and efficiently.

Such conduct tends to delay and often to deny justice.

The following standards are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make a mutual and firm commitment to these standards. Voluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.

These standards shall not be used as a basis for litigation or for sanctions or penalties. Nothing in these standards supersedes or detracts from existing disciplinary codes or alters existing standards of conduct against which lawyer negligence may be determined.

These standards should be reviewed and followed by all judges and lawyers participating in any proceeding in this Circuit. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards.

Lawyers' Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.
2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.
3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.
4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.
5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client's lawful interests.
6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.
7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.
9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.
10. We will not use any form of discovery or discovery scheduling as a means of harassment.
11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.
12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.
16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.
17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.
18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.
19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.
20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.
23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.
24. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.
25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party.
26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.
27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.
28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.
29. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.
30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsels to the court.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.
2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.
3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.
5. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.
6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.
7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.
8. We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.
3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial and studied analysis and consideration.
7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.
8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.
9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes, which a lawyer represents.
10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.
11. We will not adopt procedures that needlessly increase litigation expense.
12. We will bring to lawyers' attention uncivil conduct, which we observe.

Participation in Bar Activities. Attorneys are more than advocates for individual clients or client-groups; attorneys are also members of a self-governing professional group that plays an essential role in the development of law and the administration of justice within society. The collective voice of attorneys on a local, regional and national level is very important. Therefore, it is essential that all attorneys participate in local, state and national bar associations and lawyer affinity groups. Lawyers groups have an important voice in advocating for wise, just and progressive reform both within the bar and within society generally. Attorneys should be encouraged to form new collective groups to address the variety of social and legal issues that arise during their careers. Vigorous bar associations are also important to insure effective self-regulation and to assist the courts in formulating codes of conduct and practice. During the clinical experience, students are encouraged to attend Bar meetings and to explore the different affinity groups within the profession.

Create Individual Professional Plans. An attorney's skills, knowledge, wisdom and abilities continue to develop and mature over an entire career. Each attorney should try to

develop and frequently modify a career or professional development plan. Learning and professional development should continue over a lifetime. A major part of any career plan should include personal fulfillment, family commitment, and meeting personal and family obligations. Career satisfaction is a major component of a professional career plan. Students are encouraged to discuss their career goals and develop plans among themselves and with their supervisor.

Awareness of Professional Stress. All attorneys should be aware that the professional life and obligations of an attorney produce very predictable stress and patterns of human reaction. As human beings attorneys need to know that uncontrolled or unaddressed stress will have a negative impact on their professional lives, on the professional lives of their colleagues, and on their personal lives. All attorneys should be aware of the common symptoms of alcohol and substance abuse, as well as methods and programs of treatment. Attorneys should also be aware of the close interrelationship between un-addressed professional and personal stress and bar disciplinary problems. Attorneys also need to keep economic pressures and concerns in check. Economic pressures and forces within the profession are a constant source of stress. Students need to be mindful of the need to create a strategy for addressing and coping with the inevitable and inherent stresses in the profession.

Support for Pro Bono Public Services. The notion that attorneys have a professional obligation to perform regular uncompensated public service is not new. Over the years, the organized bar has moved closer and closer towards mandatory programs for attorney public service. The current debate is mostly whether public service should be entirely voluntary or mandatory. As the notion of public service develops, all attorneys should commit to some sort of personal program of public service. This program of public service can take many forms from direct service, to financial support, to support of bar sponsored programs. The professional bar has a long history of providing and advocating for *pro bono publico* services for disadvantaged members of society. High quality legal representation and access to justice should not depend on financial ability. Every lawyer should make sure that his professional program includes some form of public service.

Attorneys as Guardians of Constitutional and Individual Rights. In line with the professions support for *pro bono publico* services, attorneys have developed a historical and natural role as protectors of constitutional and individual rights. All attorneys need to insure that this role continues to develop and that the rights of all persons are fully respected and enforced under the rule of law. Law students should also be aware that in certain cases the adverse attorney may be providing this type of service to his or her client. In the law clinic, many of the public service cases and projects fall into this category of professional service. Students are encouraged to discuss and suggest additional types of cases and projects while they are in the law clinic. This type of public service lawyering should also be carried into later professional practice.

Awareness of Public Attitudes and Criticisms. The legal profession is a very visible and important profession. The professional and personal activities of lawyers and judges are often in the public forum. Attorneys should be aware of this phenomenon and should conduct themselves in a way that reflects positively on the profession. Many criticisms of attorneys and their roles in different public activities are often justified. This will probably never change. Attorneys are naturally involved in almost all public controversies. All lawyers need to work to

educate the public about the issues and policies involved in these controversies in order to insure that there is full and fair discussion. Attorneys may even have an obligation to step forward and speak to make sure that public discussion is not one-sided. Each attorney should strive to create a positive role model or frame of reference for the public. Public service programs and public education are ways to help create a more positive image for attorneys.

Participation in Public Education on Law Related Issues. Public education on important legal issues and controversies is essential to public understanding of the legal profession. In addition, attorney and judicial disciplinary procedures need to be more open and public, so that the public develops confidence in self-regulation and discipline. All attorneys should volunteer to help in public education and public forum discussions that involve legal issues and improve legal understanding. All attorneys should be concerned about the impact of attorney jokes and unrealistic portrayals of attorneys and the legal system in the media. Attorneys should speak out when there is an unfair or incorrect portrayal of attorneys or the courts. Students in the law clinic are encouraged to participate in and to create public education projects.

The items listed and discussed above are just some of the general aspects of professionalism that are often discussed within the legal profession and in the law clinic. Students should ask if there are other aspects of professionalism that need to be discussed? The larger question is what factors differentiate a true professional from a novice, an amateur, or a tradesperson. Are these factors different for boxers, musicians, carpenters, accountants, doctors, or attorneys? Students should also be aware that professionalism is a life long topic of discussion.

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VI. Legal Interviewing

Introduction

Legal interviewing of clients, witnesses, or other persons with information is an essential skill for an attorney. It is a skill not often formally taught or studied. When a course in interviewing is offered, it is probably not high on the typical law student's list of course priorities. It is also a subject area in which many students feel they may already possess adequate skills. Some students may also feel they will learn or master this skill later in their practice or that it is relatively unimportant. In the law clinic, legal interviewing is viewed as an essential attorney skill that must be seriously studied and repeatedly practiced in order to master. Study and practice clearly make one better. The reality for lawyers is that no matter what their area of practice or specialty, good interviewing technique is an essential and repeatedly utilized skill.

In the law clinic, legal interviewing is generally the subject of one or more classes, usually supplemented by simulation exercises, as well as a series of closely supervised live client interviews. All students will interview a number of potential clients as part of the case acceptance and evaluation process. Clinic students will also interview or re-interview clients and witnesses as part of their case handling or client representation experience. All interviews must be summarized and evaluated by the student in a formal memorandum. The interview memorandum is then reviewed by the supervising professor and discussed with the student. On occasion, initial interviews of potential clients and clients are also videotaped and the videotaped interview is then reviewed and critiqued by the professor and student. Clients who are videotaped must give prior consent to the videotaping and all client videotapes are covered by attorney-client privilege. The important point for the law student is that interviewing is an essential skill that must be studied, practiced, and developed.

Interviewing as Process. For the law student learning about interviewing, two concepts are critical. The first is that interviewing is a process. It is rare that all needed or useful information is gathered in one interview or encounter. In order to get all needed information and a true understanding about a given situation or person, more than one interview is usually required. This is particularly true in the attorney-client relationship and in the critical witness situation. The second is that the most critical ingredients to good interviewing are listening, observing and evaluating. Accurate recording and reporting, while important factors, are generally secondary goals that can be adequately addressed outside the actual interview.

Listening and observing are clearly more important, particularly in initial interviews, than is note-taking. In an initial interview, careful listening to what is being said and how things are being said can provide vital information to the interviewer. Careful observation can disclose important non-verbal communication. Careful listening and careful observation can then be combined with the necessary factual information to get a better assessment of the client or witness. A related technique that is central to careful listening is the concept of "active listening."

Learning to Listen. Active listening can be summarized as the technique of the interviewer carefully interacting with the interviewee, with a series of careful and limited short

questions designed to test or develop the information being given. An example would be to repeat or summarize key facts or information at the appropriate point in the interview to test or probe the information from the person being interviewed. Simple examples would be such things as: repeating key words or phrases, “You were hit four different times?” Another example would be summarizing client conclusions or implications, for example, “How are you sure your case-worker is being vindictive?” The essential ingredient in active listening is the non-judgmental repetition of information that is being provided, and then carefully evaluating the response.

The Initial Interview

In the law clinic, law students will be given the opportunity and challenge of interviewing numerous clients, witnesses, and other persons, as a learning and practice exercise. Most interviews will be with potential clients and existing clients. Persons seeking legal representation by the clinic will be the most common and maybe the best learning experience. These are generally referred to as initial interviews. An outline of how to prepare for these interviews follows. Much of what is said can also be applied to other types of interviews.

Pre-Interview Preparation

Understanding the Client Base. Most clinic clients are low-income persons and many come from diverse socio-economic and cultural backgrounds. Some of the clients come from discrete low-income groups, for example homeless persons or undocumented immigrants. Most law students come from different backgrounds or have had only limited exposure to these potential client groups. This requires the law student to become as knowledgeable as possible about the client and the client group before the interview. Students should carefully guard against stereotyping and generalizing about clients and client groups. Some client information is generally available in the client intake sheet, if one has been prepared. If the potential client falls within a common client grouping, such as “homeless person”, “battered spouse”, “undocumented worker”, “juvenile offender”, the student should try to get as much background or demographic information as possible. If the potential client is referred to the clinic by a particular agency or group, the student should get general background information from the group or agency about commonly encountered legal issues or problems.

It is also very likely the supervising law professor, other clinic students, possibly even previous students, have worked with the particular group or agency. A short pre-interview conversation can either provide useful background information or provide useful leads. Other useful sources of background information can be topical practice manuals and legal or non-legal publications. The Internet may also provide useful background information. The essential point here is that the student should try to learn as much about the client and his “client group” as possible before the interview. Much of this information is general background information and much of it will be inapplicable to a particular client. Students should educate themselves as much as possible before the initial interview.

The student should be aware that certain client groups might also have certain common or recurring problems in addition to the stated legal problem. For example, low-income persons in addition to the “contract dispute,” might also have a public benefits problem. Likewise, the

“domestic violence” victim probably also has a safe shelter and counseling and support group need. Students should adopt a holistic approach to initial interviews. Clients often have legal problems other than the particular legal problem presented to the interviewer.

Client Intake Sheet and Type of Legal Problem. The student will often have a completed client intake sheet and a general characterization of the potential client’s legal problem, for example, “divorce,” “will,” “contract dispute.” The client intake sheet also provides certain specific information, e.g. name, address, phone number, adverse party, summary of client resources, type of dispute, etc. This is very useful to the student. The intake sheet gives the student a very general sense of who the client is and their overall financial situation. During the initial interview, the student should try to verify the accuracy of this basic information.

The intake form also provides an important effort to try to characterize the type of legal problem the potential client wishes to discuss. Unless the student is familiar with the law in a given area, e.g., “divorce,” “wills,” “contracts,” “deportation problem,” the student’s first effort should be to learn as much about the substantive area involved as possible. Obvious sources of information are, applicable statutes, rules, case-law, practice manuals, the supervising professor, the clinic brief-bank, other law students in the clinic, professors who teach in the area, and in carefully limited circumstances, outside specialists in the area. When consulting outside specialists, a special effort must be made to avoid potential conflicts of interest and to observe strict client confidentiality.

Practice manuals are a particularly good source for pre-interview preparation. There are practice manuals in virtually all common practice fields and almost all have checklists or guides for common issues or problems within the given specialty. For example, in the fields of “divorce,” “wills,” “contracts,” and “immigration,” there are excellent general practice manuals available. The clinic brief bank and its templates and forms are also a good source of general practice information.

Students are cautioned that the primary purpose of the initial interview is to listen. Students should be careful not to allow the background information or legal research to narrow their view of the client’s potential legal problems. In certain situations, a student may be more able to listen carefully without the investment in background information and research.

Try To Anticipate Document or Evidence Needs. Students are encouraged to call the potential client before the actual interview. For example, in a “contract dispute,” clients often forget to bring the contract. In any situation where the document is critical to the dispute, it is a good idea for the student to call the prospective client before the interview to make sure that he or she brings the necessary “contract” or other necessary documents. This pre-interview telephone conversation should not become a substitute for the interview. It should merely be an introduction and a reminder to bring documents that may be needed or useful.

Conflicts Check. Conflicts Check. Checking to insure against professional conflicts of interest is a critical first interview, and pre-interview process. Before the interview the law student should check the conflict of interest check form to make sure it has been filled out and to check for potential conflicts. During the interview the student should also make sure all questions have been filled out and necessary follow up questions asked. Each student should be

completely aware of all questions on the questionnaire and of the clinic's conflicts policies. Professional conflicts of interest are a serious professional and mal-practice issue. In general, students are referred to Rules 16-107, 16-108, 16-109, 16-110, 16-111, 16-112, and 16-402, New Mexico Rules of Professional Conduct for a listing of the common areas that create a conflict of interest for an attorney. Any suspected conflicts of interest or questions about potential conflicts should be fully discussed with the supervising professor. Students should also be aware that their own outside employment, previous, present and future can create conflicts of interest with existing and prospective clients. At the beginning of each semester, students should disclose previous legal employment to the supervising faculty member to avoid any job related conflicts. If legal employment changes during the semester students should make a similar disclosure.

Do Some Basic Legal Research. The client intake sheet will usually have a short description or characterization of the client's general legal problem. Examples would be: "divorce," "landlord tenant," and "contract dispute." If the student has not taken the appropriate background course, it would be wise to do some basic legal research in the general area. The student should read the applicable statutes, case law, or practice manual. Other useful sources of background information would be the supervising professor, other clinic students, or the professor teaching the general course. In general, a student should make sure he or she has some general legal knowledge of the substantive area to be discussed. At a bare minimum, the prospective client will expect some preliminary legal advice.

The Initial Interview. The following is a list of factors a student should consider in all interviews, but especially in initial interviews.

Review the client intake sheet and conflicts check form. Make sure both forms are correct and completely filled out by the end of the interview. Make sure you ask all questions you may have about these forms.

Dress Professionally. Regardless of how informal the law school environment may become, clinic students should always dress professionally to interview clients. Coats and ties for men and dresses and appropriate office attire for women are still the norm. Potential and existing clients have a socially instilled mind-set of how a "real" attorney dresses. Normal student attire usually does not conform to this expectation. Even when the relationship is already established and formalities are more relaxed, law students are cautioned to dress professionally.

Always be on time! The client expects professional service and attention. Being late to the initial interview is not a good way to start a professional relationship. If exigent matters do make you late, always apologize. If you know before the scheduled interview that you must be late, preferably call the client or speak to the clinic receptionist to insure your delay is addressed. If you only have a limited time for the interview, make sure you state this early in the interview in order to avoid creating the impression that you are abruptly cutting off the interview. If you do not have time to listen to everything the client wants to discuss, make sure you arrange to complete the interview. The sooner you schedule a follow-up interview or conversation the better. An important aspect of the professional relationship is that the client has a strong need to feel the attorney is listening and that the client has had the opportunity to say everything they want to say.

Who Should Be There? As an aspect of attorney client confidentiality, in most interviews absent some clearly defined personal or legal need, all legal interviews should only involve the client and the attorney. The presence of any third parties may lead to a waiver of the attorney client privilege.

The reality is, clients often bring family members or friends to legal interviews. The law student must make an initial determination of who must or can be there. Obviously, client consent is essential for anyone to be present at any confidential conversation. Clients bring friends or relatives for moral support, to serve as interpreters, or even as witnesses to certain events. Sometimes the outsider is just being helpful.

Given the need for strict confidentiality and the need for frank discussions, the rule is, unless there is some legal need, only the potential client and the attorney should be present for interviews. If interpreters are required, clinic staff should be used since attorney client privilege extends beyond attorneys to law clinic staff. If a third party must be present, client consent should be clear. The expectation of confidentiality should be clearly explained to the third party. Under no circumstances should adverse parties, important witnesses, or potentially adverse parties be present during attorney-client interviews. A typical example of this last situation is often encountered in family law cases where both the client and the soon to be ex-spouse appear for the initial interview. If one is to be the client, the other must be excluded from the interview. Another example is where a child brings an elderly parent in for a will and then tells the attorney what the parent wants to do. Even when only the potential client is present, the student should be alert for the presence of “ghosts” in the interview. This is where the third party is not present, but their actions or influence are obvious. An example would be a juvenile case where the juvenile client tells the interviewer, “my parents told me to do this.” In legal interviews, “ghosts” can be as much of a problem for the attorney as third parties who want to be present during the interview. Client confidentiality is essential in all interviews.

Meeting, Greeting, Seating. The student should greet the client in a warm, professional, and appropriate manner. First impressions are critical in a relationship. Appropriate “ice-breaking” and friendly conversation is a normal and expected human activity among strangers. It is also vital to pay attention to the first statements made by the client, even if they are made during this “ice-breaking” conversation. Most interviews are generally low-key, business like conversations. However, if a person is upset or grieving, overly friendly conversation may not be appropriate.

Usually, the student meets the new client in the reception area and guides the client to the assigned interview room. A friendly introduction and handshake is usually a good start. Once at the interview room the student should make sure the client is comfortable and start the conversation. Unless the conversation is particularly friendly, it is probably best to start the initial interview by directly addressing the legal issues presented. A simple: “Hello, my name is _____. I’m the law student assigned to your case. How can I help you?” The potential client then will usually start with a narrative of why they have come to the law clinic. This also starts the “listening” process.

Let The Client Do Most of the Initial Speaking. Once you have introduced yourself, it is best to let the client introduce himself or herself, place themselves in context and in a very

general way define the context of their legal problem. This important early information gives the interviewer critical information on client capacity, client articulateness, the presence of any intense grief or anger, and a very rough sense of the level of importance of this legal problem to the client. This first open-ended communication is part of the “listening” process for the interviewer. This first part also provides valuable information to the student on how the rest of the half-hour to one-hour initial interview may have to be conducted. A good rule of thumb is to let the client do almost all of the talking for at least the first half of the interview.

Discuss Attorney-Client Essentials Early. At the appropriate moment in the early conversation, the law student should communicate certain essential attorney-client information. The student should make sure the potential client understands that the interviewer is a law student acting under the supervision of a law professor. The student should not create the impression that he or she is a fully licensed attorney. Some discussion of the student practice rule is appropriate. Confidentiality and attorney-client privilege should also be explained to the client. This is particularly important if the interview is being videotaped. The student should make sure that potential client understands that the initial interview is to determine whether the Law Clinic will undertake representation. Formal client representation is conditioned on case acceptance and a signed case acceptance letter. Some discussion of client eligibility and the case selection process is always appropriate. Client fees, attorney fees, and client costs should also be explained. Clients are generally somewhat apprehensive of high legal costs and fees. These last two items might be discussed at the end of the interview, but this information should be communicated to all clients during the initial interview.

Is The Client Already Represented? Speaking to a potential client who is represented by counsel can cause major professional misunderstandings. Whether a prospective client has been previously represented or more importantly is currently being represented in the same matter is important information. In a frequent number of interviews, the student may discover that the potential client has spoken to another attorney from the intake form or from the client’s comments. A simple question, “Have you discussed this matter with another lawyer?” will generally suffice. If the answer is “yes” or seems to be yes, the student should follow up and determine if another attorney was merely consulted or if in fact there is an attorney client relationship with some other attorney. These areas are quite often gray. If the student cannot get a clear answer, this matter should be fully discussed with the supervising attorney, and in the appropriate case with the other attorney before formal representation is undertaken. If the potential client is already represented by another attorney in the same matter, the student should end the interview until any professional conflict or misunderstanding is clarified. Rule 16-402, Rules of Professional Responsibility, provides:

RULE 16-402. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership, or other entity about the subject matter of the representation even though the corporation, partnership, or entity itself is represented by counsel.

Let The Client Vent. The typical legal client comes to the clinic under some degree of individual stress. The larger the legal problem and the greater the potential consequences are to the client, the greater the degree of probable stress. Some types of legal problems have inherent levels of high stress, for example, divorce cases, domestic violence cases and certain criminal cases. It is clear that persons who are angry, hostile, grief-stricken, or hurt have a difficult time being objective or focusing their communication at the level required by an attorney. As long as the client is in this state, it is difficult for the attorney to get useful information or get the client to make an informed decision. It is therefore essential for the attorney to let, or even help, the client get over this emotional state. In the initial interview, the potential client may exhibit these types of emotions. This is a normal response to the stresses posed by many common problems.

Divorce, domestic violence, job loss, and severe economic threats are common legal problems that may trigger strong emotions. Ordinarily, the attorney should not proceed until these emotions are at a low enough level to allow effective communication and rational decision-making by the client. One of the best devices, especially in an initial interview, is to let the client vent. For many humans, venting of anger is a common part of complete communication. For the attorney, anger and grief must be acknowledged and dealt with as part of the client's overall problem. Low-level stress and common stress typically pass in one or two sessions. Intense or high level stress requires a longer period of time and may even require referral to a professional counselor. In legal interviews, the student should make sure communication or decision-making is not unduly clouded by stress or anger.

Ask for All Documents. As mentioned before, clients often forget to bring or obtain needed legal documents to an initial interview. If the student has not called the client before the interview, the student should ask the client to provide the necessary documents by a set time and date. If the client does have needed documents, the student should obtain them, and after the interview is concluded, the copies should be made and the originals delivered to the client or placed in a safe place. The student should also try to anticipate if there might be other sources for needed documents in the possession of others. The same process should be followed here. If the client can obtain them, he or she should be asked to do so. Most legal cases involve documents, evidence, or other materials essential to a proper legal evaluation. If needed documents are not available, the student should make sure the client understands legal evaluation of the case or case acceptance may be dependent on receipt of these documents.

Review The Court File. In cases where the potential client is involved in on-going litigation, either as a party or a witness, the student should always review the court file before

undertaking representation. The court file can be very revealing. Reviews of the court file will not only disclose the legal issues, but will also disclose the relationship of the parties, the number of attorneys who have previously provided representation in the case, and any hidden problems of which the client may be unaware. If the court file reveals litigation has been prolonged, complex, or acrimonious, these might be reasons not to undertake representation.

Fight The Urge To Take Notes. In initial interviews, “listening” and “active listening” are generally more important than accurate notes. While some note taking is needed in all interviews, in the initial interview listening to what is being said and how things are said is more important. Note taking should generally be deferred to the second half of the initial interview and most of the interview committed to memory. Note taking, and especially detailed note taking, can be a major barrier to initial communication and understanding. What the attorney writes may become a distraction to the client’s narrative. The student should jot down major points and essential names and addresses. Full attention and concentration should be given to the client. After the interview is concluded, the student should immediately type out the facts as given by the client in the intake interview memorandum. If certain facts are unclear, a telephone call or a follow-up interview will correct the situation.

Avoid Being Judgmental. In many legal interviews, the student will encounter human behavior or conduct that is unusual, perhaps even silly, and possibly even conduct that offends the student’s own values or lifestyle. Clients need a basic level of compassion, empathy, and understanding in order to establish a level of trust and confidence in the attorney. In the initial interview, the student should fight any tendency to be judgmental. Comments such as, “that’s foolish,” “why did you do this,” “didn’t you think before you acted,” or other judgmental comments should be strictly avoided. Remember, what may be obvious, prudent, or wise to the student may not be so to the client. In a related matter, since many of the law clinic’s potential clients are low-income persons, overriding issues such as poverty, drug-use, or homelessness may severely limit the potential clients options or behavior. Any language or conduct that is interpreted to be judgmental by the client will impede the formation of a positive attorney-client relationship.

Understand Your Legal Limitations. The law student should accept and understand that he or she is a law student in a learning environment. The student should make sure that the potential client understands this. Similarly, the student should not create the false impression that he or she is in fact an attorney. The professor- student relationship and the close supervision and review process in the law clinic should be discussed to alleviate any client concerns.

Giving Preliminary Advice. The majority of clients want some legal advice and positive assurances during the initial interview. This is a very natural human tendency. Prior to the interview, the typical client has probably reviewed and rehearsed their situation and the facts several times. The one thing they most want to hear is that they will be fine and that their legal situation can be favorably resolved very quickly. Experience and reality have taught that satisfying both of these objectives during a thirty minute, one-sided review of a possibly complex legal or factual matter may be impossible. While the law student should be supportive and understanding, a little bit of healthy skepticism should always be present. It is always easy to agree with a client’s position or goals, but it may not always be safe. The obvious tempering factor is that the law student is still a student. While the student may have some relevant

substantive knowledge, for example, they may have completed the family law course, they almost always lack some real world or procedural experience. Therefore, giving desired preliminary advice is a difficult problem for law students. If the student has a clear understanding of the relevant substantive law and the facts are relatively clear, then the student is probably safe in giving some very basic, preliminary and general advice, so long as it is conditioned on the facts and law actually being presented.

Similarly, if some matter is clearly within the realm of “common sense,” the student should feel comfortable in giving simple obvious advice. For example, a student may tell a client not to drive when it is obvious that the client’s license has been suspended. Some general definitional and characterization advice is probably always safe, but a student should be very careful in reaching any firm legal conclusions. Under no circumstances should a student promise or “warrant” a particular result or outcome. Students should be aware that facts usually need to be confirmed or developed and all cases require some legal research before any legal opinions are formed. All legal advice and counseling must also be reviewed and approved by the supervising faculty member before it is given.

Don’t Be Afraid to Admit You Don’t Know. In many client interview situations, the law student will have taken the appropriate background course or have some experience in the relevant substantive area. This, of course, should help and might be something the student would communicate to the prospective client. However, in many situations the client will have a problem in an unknown substantive area or will ask questions outside of the student’s knowledge or experience. In these situations, the best and safest course of action is for the student to admit he or she does not know the answer. The next thing to do is to assure the client that the question will be discussed with the supervising professor or researched and that the client’s question or concern will be answered. The real danger in these situations is that the student may fake knowledge or experience and may misinform the client. Since law and procedure is generally “gray,” there is nothing wrong for the student or lawyer to tell the client, “I don’t know the answer, but I will research the matter and tell you what I find out.” The student should then make sure the unanswered question is answered.

Explain The Case Acceptance Process. In addition to feeling someone has “listened” to his or her story and that there is some empathy and understanding, the typical prospective client wants immediate legal action and “acceptance.” While this immediate “acceptance” of a legal case or cause may be possible in later legal practice, in the law clinic all cases must first be reviewed by the supervising professor and also approved by the clinic faculty as a group. This process, and the time limitations involved should be explained to the prospective client. If legal research or additional documentation or investigation is required before the case-screening process can be completed, this time and labor limitation should also be clearly explained to the prospective client. Under normal or typical circumstances, the case review process should be completed within seven working days of the interview. If for some reason the process should take a day or two longer, the law student should call the prospective client by telephone to explain any delays. If any delays are anticipated, such as holidays or other clinic related demands, this should be explained to the client.

If during the interview, the prospective client discloses any immediate emergency or deadline requirements, such as the statute of limitations or an immediate hearing, the student

should immediately communicate this emergency aspect of the case directly to the supervising attorney. In all cases, the student should clearly communicate to the prospective client that legal representation will not begin until a case acceptance letter is signed and returned by the client and all clinic fees or litigation costs are paid. Finally, since many prospective clients are truly indigent, the law student should be aware that law clinic fees could be waived for good cause by the supervising professor and the clinic director. In cases where a fee waiver is granted, this should be noted in the client's file.

Write Your Intake Memorandum Immediately. Upon conclusion of the interview, the law student should write the intake memorandum as soon as possible. The format for the intake memorandum is in the clinic brief bank. The facts and important impressions of the client's case are freshest in the student's mind immediately after the interview. Unless the facts are very vivid or unusual, the accuracy probably fades quickly. The intake memorandum should be as factually detailed as possible. It should include a statement of the client's legal problems, client goals, an assessment of the client, a proposed course of legal resolution, basic legal research including legal authority, and a recommendation of case acceptance or non-acceptance.

The major parameters for case acceptance by the law clinic follow. Client eligibility and case type are primary considerations. The law clinic does not accept fee generating cases, cases in which the client has access to other legal services, felony defense cases, and cases outside Bernalillo County. In general, to be accepted a particular case must have educational value, be a type of case appropriate for student handling, not be unduly complex or time consuming, be in the law clinic's present and future resources to handle, and be compatible with the law student's current and future caseload obligations. Cases that cannot be concluded within one or two semesters require special consideration of future clinic resources and competency. Student caseload, caseload mix, and the supervising professor's educational plan for the semester are also important factors. Finally, while the law clinic would like to help as many persons as possible, the reality is that only a limited number of persons can be helped. The other limiting reality is that the current law student is only in the law clinic for one semester and a different student and professor will replace him or her at the end of the current semester. Students are also reminded that each section in the law clinic will have slightly different caseloads and caseload selection guidelines.

Do The Legal Research. In addition to summarizing the facts and providing supporting documentation, all intake memorandums should explain the legal problem, propose a course of legal action, and include a clear reference to applicable law. Applicable statutory law, court rules, local court rules, case law, and any other governing law need to be clearly researched and stated before the memorandum is submitted to the supervising faculty member. In more complicated or unclear legal situations, a complete and separate legal memorandum or brief should be completed. This may slow or complicate the case acceptance process. No intake memorandum should be submitted without a reference to applicable law, a proposed course of legal representation, and an assessment of probable legal outcome. Every intake memorandum must also have the law student's proposal of case acceptance or non-acceptance, with a draft of an appropriate letter to the proposed client.

Write the Proposed Acceptance or Non-Acceptance Letter. A case acceptance or non-acceptance letter must be sent out in every case where a client has requested legal representation

or advice by the law clinic. A common area of tension between professor and student is caused when a student proposes a course of conduct or arrives at legal conclusions without the necessary reference to legal authority. If the law student is unsure where to start, he or she should confer with the supervising faculty member.

Follow Up on Case Acceptance Letters. All case acceptance letters should clearly notify the client of case acceptance, provide a clear and detailed statement of the scope of representation (including all limitations), state clearly what costs or fees the client must pay, and set a clear deadline by which the client must sign and return the acceptance letter. If representation is contingent on payment of certain fees or costs, this should be clearly stated. The deadline for a response should be reasonable and practical. If the client has not returned the acceptance letter by the deadline, the law student should promptly write a non-acceptance letter to the client, rescinding the earlier letter. In a case where the prospective client has serious practical or financial problems, it is a good idea for the law student to call the prospective client about any difficulties. In no circumstances should a case acceptance letter be open-ended on the time to accept, or left beyond the deadline without a letter withdrawing the earlier acceptance. The status of all prospective clients regarding case acceptance or non-acceptance, should be clear and in writing at all times. A sample case acceptance letter is provided below.

Provide A Referral For Rejected Cases. In cases where the decision has been to decline representation, the non-acceptance letter should be promptly mailed to the applicant. If there is any emergency aspect to the case, the law student would be wise to also call the applicant and inform him or her of the decision to decline representation. A prospective applicant with any kind of legal emergency should not be in a state of false hope of clinical representation. The reason for non-acceptance should be clearly stated in the letter. In addition, with the approval of the supervising faculty member, the law student might consider giving some very limited practical or obvious legal advice. In all situations where the clinic is not agreeing to represent a person, the student should always try to refer the prospective client to another attorney or agency that can possibly help with their problems. The law clinic receptionist maintains a complete list of available alternative agencies and co-operating attorneys. If the client's problem appears to be a non-legal problem, a referral to a social service or affinity group should be considered. A good lawyer should try to help even those he or she cannot represent. All non-acceptance letters should include language that encourages the applicant to seek other legal advice or counseling if the client desires or could be helped by an attorney. If the reason for non-acceptance is high caseload with the law clinic, the student should consider recommending that the applicant reapply later.

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VII. The Case Acceptance Letter

Introduction

The case acceptance letter is a critical and often overlooked item of legal drafting in the law clinic and perhaps the legal profession. It is that all important first piece of legal correspondence between the attorney and the client that not only defines the larger parameters of the contractual relationship but also sets the tone for an evolving attorney-client relationship. Law students should be aware that, as a contractual matter, no formal written document is required to establish an attorney-client relationship. An attorney-client relationship can be established orally. Malpractice and discipline cases are filled with examples of attorney-client relationships that were created with no written documents. Many cases indicate that an attorney-client relationship exists when the client believes that an attorney-client relationship was created. Good professional practice and almost all professional liability policies require that all prospective clients be sent either an acceptance letter or a non-acceptance letter. The policy in the Law Clinic is to send such letters to all prospective clients for both reasons.

Letters of acceptance present special challenges for the attorney because they define both the professional relationship and address the key contractual terms for the law clinic's clients. Poorly drafted letters present recurring problems for law students and professors. In the law clinic, the letter of acceptance is the primary if not the exclusive contractual document between the law clinic and its clients. Accordingly, these letters must be carefully drafted to avoid these recurring problems of definition and intent, both in the clinic but also in later practice. Given the limited ability of one letter to accurately define all necessary and common contractual terms between a law firm and its clients, many law firms have adopted standardized attorney-client contracts, or even specialized agreements for particular types of cases. While a separate more detailed agreement may be a better general document, given that the Law Clinic does not charge attorney fees or costs and therefore does not have a more commercial relationship with its clients, the case acceptance letter is probably safely utilized as the primary contractual document. In later practice, law students would be wise to consider a more formal written document, for their attorney-client agreements. Examples of these types of documents exist in different specialized practice books.

The best way to think of the case acceptance letter is as a basic bilateral agreement between the law firm and the client. It should define the mutual obligations of both parties and it should try to anticipate common issues or tensions that will or may arise during the course of the contract and relationship. The common drafting problems that exist in law clinic letters of acceptance are: defining what will be done, defining and limiting the scope of representation, setting some kind of timetable or guidelines, stating attorney expectations for the client, and establishing responsibility for costs and fees to be paid by the client. If the letter establishes a relationship with more than one person, the letter should also address any conflicts that may arise. Each of these potential issues should be carefully considered when a case acceptance letter is being drafted.

Define What Will Be Done

Almost all letters of acceptance start with a positive introductory statement such as, “I am happy to inform you that the UNM Law Clinic has agreed to legally represent you in_____.” This is generally a nice positive tone piece, but the important point is filling in the blank and in drafting the following definitional sentences. All acceptance letters should clearly define what the Law Clinic is undertaking to do, who will do what, and where and against whom any legal action will be taken. This scenario assumes some sort of litigation case, but administrative cases, or other types of research or advocacy situations raise the same issues. The letter should clearly state what the attorney is undertaking to do. Rough examples of these types of activities would be, “...to file a divorce action against your spouse Bill Smith”, “...to investigate and research the potential liability of your landlord, Bill Smith, for damage to your furniture caused by leaky plumbing at the ABC Apartments on March 10, 20__”, “...draft and submit articles of incorporation as a New Mexico non-profit corporation for Amigos Del Rio and draft and submit a federal Form 1023, Application for Tax Exempt Status, to the Internal Revenue Service”, or “...research the legal requirements to file a probate action in Montana for your deceased father, Bill Smith.” Each of these examples gives a fairly clear general statement of what will be done, but a good acceptance letter requires more.

All letters should explain the process involved, who will undertake the representation, when this will be done and include a probable time frame for major events, including completion of representation. Consideration of timeframe and completion of representation are particularly important in the Law Clinic for cases that will not or cannot be completed within one semester. It is certain that in these types of cases other law students and other law professors will take over the representation. This is a common area of tension and dissatisfaction for multi-semester clinic clients. The good acceptance letter should address this reality. Each of the above examples involves slightly different timeframes and processes. Each acceptance letter should be drafted specifically to address the different circumstances in each client’s case.

Define And Limit the Scope of Representation

The most common problem in student drafted case acceptance letters is that they are almost always open-ended and contain no language limiting or properly defining the scope of representation undertaken by the Law Clinic. The most common example would be the “represent you in your divorce” letter. “Represent you in your divorce” is very substantively and procedurally open-ended. This kind of open-ended letter will almost always result in some later attorney client misunderstandings and ill will. “Divorce” is very broad. Does this involve possible multiple divorce actions in other counties or jurisdictions? Does this involve representation in appeals? All legal matters involve some potential for appeal if a case is resolved unfavorably to the client. Does this representation include representation in enforcing the resulting divorce decree or resolving predictable future child support enforcement issues or child custody disputes? Experience has shown that clients almost always take the broader view, and “representation” includes the appeal and post decree enforcement issues. Later students and professors also have great difficulty in resisting a truly assertive client. When one adds in several law students and several law professors over different semesters and the possibility of oral modifications, the scope of the Law Clinics professional responsibility can become a major

problem. This scenario should alert the law student that he or she needs to have a good understanding of the procedural and practical problems that may arise in any given representation and that limiting or clarifying language should always be used and that all of the common or predictable events should be addressed.

Perhaps the following sentences are one example of how the scope of representation can be limited:

The law clinic will represent you in preparing and filing an action for dissolution of your marriage to Bill Smith. This representation will include representation in attempting to resolve present disputes between you and Mr. Smith regarding child custody, child support, and division of your community property. This lawsuit will be filed in Bernalillo County. Representation by the UNM Law Clinic will not include any representation outside of Bernalillo County, or any legal representation beyond entry of the final decree of dissolution in Bernalillo County. This representation does not include representation in any appeals from the District Court nor does it include representation in any post decree enforcement of the decree of dissolution, or orders involving child support, child custody, or division of property. Any representation by the UNM Law Clinic in any other matter or in any matter not included in this agreement will require a separate written agreement.

What should be apparent to the student is that a detailed knowledge of marriage law, divorce procedure and probable human behavior is necessary in drafting the portion of the acceptance letter that defines scope of representation. A clear, unambiguous statement of what the Law Clinic will or will not do during the probable life of the attorney-client relationship is essential to a good letter.

State Attorney Expectations Clearly

As mentioned above, the agreement between an attorney and client is a bilateral agreement that establishes mutual obligations. The attorney promises and undertakes to do certain things and in exchange, the client agrees to the representation and also promises to do certain things. Since the Law Clinic does not charge attorney fees and only charges nominal administrative fees, the contractual aspects of charging and collecting attorney fees and representational costs as a condition of representation are not discussed directly. The law student should ponder the very real implications of this added and very important dimension for their future law practices. Fee and payment expectations should be stated very clearly. No matter what the type of representation the attorney and client relationship is interdependent. Each has to do what he or she has promised or is inherently necessary to the task so that the other may do or get what they seek.

One of the more obvious attorney-client expectations is that the clients provide the attorney with certain information or documents as a precondition to the attorney's ability to do something, for example, legally analyze a situation, or draft a needed document. Most case acceptance letters do not address this obvious expectation. Each of the hypothetical cases set out above have document or information requirements that the client must fulfill in order for the law student to begin or complete the representation. In the "divorce" scenario the attorney needs a complete listing, valuation, and characterization of all debts and property in order to draft the

petition for dissolution and more importantly to draft the proposed marital settlement agreement. Without this information, all legal work is on hold.

Perhaps the following language would be appropriate.

“In order for me to draft the petition for dissolution of marriage and the proposed marital settlement agreement it will be necessary that you complete the enclosed divorce worksheet completely and provide me with a copy of the deed and mortgage to the family home. Please make sure you list all debts and property you know of and that all requested information regarding each debt is provided. Please call me if you have a question with regard to a particular debt or item of property. If I do not receive the completed worksheet by October 15, 20__, I will have to delay the filling of the petition for dissolution until early November. I look forward to receiving these materials so I may begin drafting these documents. I will review the drafts of all legal documents with you before I file or serve them.”

The student should carefully consider the appropriate language one would use in the incorporation/tax exempt application hypothetical which is set out above because it is even more client dependent.

State the Legal Costs and Fees Clearly

Clinic administrative fees or their waiver should be clearly addressed in the acceptance letter. If the \$50.00 case acceptance fee is required and it is then not paid by a certain date, the case will not be accepted and the prospective client will likely receive a case non-acceptance letter and will have to reapply for representation. Usually this is not a major problem, but the result of not returning a signed copy of the letter by a certain date should be addressed. The consequences of not paying the case acceptance fees should be stated.

Another major problem in Law clinic representation letters is a general failure to accurately state or estimate court costs, filing fees and other probable representational expenses, such as publication fees. For most of these items the often-unstated attorney expectation is that the service cannot be incurred or contracted until the necessary monies are in the individual clients trust account. Experience has also taught that client checks must clear the bank before the needed item can be ordered and this normally takes about seven working days. All reasonably anticipated representational costs must be correctly estimated and then stated clearly in the acceptance letter. If the attorney's understanding is that certain funds must be paid before work is to be done, the case acceptance letter should clearly state this.

In the “divorce” example, a reasonable estimate of client expenses would be the district court filing fee, the service of process fee, a possible Court Clinic fee if the case must be referred to the Court Clinic, and possibly other fees for documents copies and an appraisal of the family home. How much does this total? Can it be paid in installments or as the case progresses? The student should discuss all of these different factors with the supervising faculty member as the acceptance letter is being drafted. A phrase such as, “You will be responsible for all court costs and fees”, is probably too general. The incorporation/tax exempt hypothetical requires the added element of different costs and different timing. In the “simple will” hypothetical, the statement, “You will be responsible for all court costs and fees”, is probably a bit misleading and confusing

to a prospective will client because most will drafting cases have no fees. If all costs and fees are not estimated and payment expectations clearly stated in the acceptance letter, the law student is creating a natural area for potential misunderstanding. In their consideration of representational costs all students should also be aware of court rules providing for free process or payment schedules. Students with questions regarding free process or indigency petitions should consult the local court rules.

Multi-Semester Cases

Within the law clinic, it is likely that a majority of initial interview cases cannot be resolved in one semester, therefore in almost all situations the law student must inform the prospective client that his or her case will of necessity be assigned to another law student and professor at the end of the current term. Clients should have a clear understanding of this, because this is a frequent source of tension for clinic clients and successive students and professors. A case that will clearly go beyond two or three semesters should be carefully screened for this reason before being accepted. In all cases, the acceptance letter should give some general statement of the timeframe for completion of the representation. The following example may be helpful:

“I will represent you during the fall semester. My work will be supervised by Professor Land. During the fall semester, I will draft the petition for dissolution of marriage and file and serve it on Mr. Smith. I will also draft a proposed marital settlement agreement, which will be served on Mr. Smith by October 25, 20___. If Mr. Smith agrees to all terms of the proposed settlement agreement by November 25, 20___, it is then very likely that I can obtain a final decree and complete your representation by December 15, 20___. If Mr. Smith does not agree to the proposed settlement or decides to litigate either child custody or child support as he has indicated to you that he will, your case will have to be transferred to another law student and professor for the spring semester. I will be available to work on your case until December 15, 20___. The Law Clinic will be closed between December 22, 20___ and January 10, 20___. The new student assigned to your case will contact you by mail and telephone after January 10th. It is my hope that Mr. Smith will agree to our proposed settlement and that your case can be completed by December 15, 20___.”

A good acceptance letter might also address what will happen in a client’s case during school holidays or between semesters.

Personalize Every Acceptance Letter

Every acceptance letter should be very carefully crafted to address each client’s different legal situation. The use of a standardized form letter in all cases is strongly discouraged. Each client acceptance letter should also address each of the major points discussed above as well as any unique demands in a particular case. As it is being drafted, every case acceptance letter should be viewed as the essential first step in creating a positive and fully informed attorney-client relationship. A good case acceptance letter should start the attorney-client relationship on a good note and should protect both the client and the attorney.

Follow-up on Every Case Acceptance Letter

Once the case acceptance letter has been approved and counter-signed by the faculty member, the student should calendar the acceptance deadline within the student's own time file and then make sure the acceptance letter is either signed and returned by the stated deadline or else is not signed and returned. In an appropriate case, it is acceptable for the student to call the prospective client and inquire if the letter has been received or if there are any questions by the client. These telephone contacts must be logged and summarized in the client file as they are made. Students should also be aware holidays, mail problems, language difficulties, or other extenuating circumstances may make it difficult for prospective clinic clients to return the acceptance letter on the exact deadline date. In an appropriate case, the student may want to consult with the assigned faculty member to extend the acceptance deadline. Ideally, these external factors should be considered when drafting the acceptance letter.

The student should also normally anticipate the possibility of non-acceptance by the client. The consequences of non-acceptance by the deadline should be explained in the original letter. Additionally if the matter is legally urgent and it is clear that the advice of counsel is in the legal best interests of the potential client, it is important for the student to state clearly that if the potential client does not want the clinic to represent them that they should consult another attorney. In cases that fall within this last category, it is also a good practice to send a follow-up letter confirming that the case acceptance letter was not returned by the deadline, that the law clinic will not be providing representation and that another attorney be consulted. Files should be promptly and appropriately closed when the case acceptance letter is not returned by the stated deadline. Likewise, when a case acceptance letter is returned by the stated deadline the student should make sure the client's file is opened as an active clinic file and the client is promptly contacted, preferably by mail confirming case acceptance and outlining the first steps that will be taken in the course of representation. Case acceptance letters should be acted upon promptly and not be allowed to remain outstanding during the course of a semester. The deadline date for acceptance or non-acceptance should be reasonably chosen and clear and should be acted upon accordingly.

Send Any Needed Representational Letters

In certain circumstances, such as bankruptcy cases, debtor-creditor cases where repossession or a lawsuit may be imminent, landlord-tenant cases, credit card collection cases, or cases where the adverse party is represented by counsel, it may be necessary and appropriate for the law student to send out a letter confirming law clinic representation and asking that all future correspondence and communication be to the law student and faculty member as legal counsel. These letters need not take any final or determinative legal position. They merely serve as notice of representation of a particular client by counsel. Representational letters are commonly utilized and often help to establish a new order of communication. Representational letters are also typically used as an informal way of gaining more time for a client to contemplate and plan the next steps in a legal matter. They are also an important way to stop debtor harassment and agency abuses.

Sample Case Acceptance Letter

An example of an acceptance letter follows:

June 15, 2002

Heather Jones
1111 Fox Dr. NW
Albuquerque, NM 87159

Dear Ms. Jones:

This letter is in regard to our meeting on July 5, 2002. I want to thank you for promptly bringing in the additional documents I requested by telephone. These additional documents helped in the evaluation of your case. I am pleased to inform you that the UNM Clinical Law Program has agreed to accept your case for the purpose of representing you in obtaining a divorce from your husband, Phillip R. Jones. Our legal representation will be limited to matters directly related to obtaining a decree dissolving your marriage to Phillip Jones and to resolving the issues of child custody and visitation, child support, and division of marital property and debts. The Law Clinic will represent you in filing a petition for dissolution of marriage to be filed in the Second Judicial District Court of Bernalillo county and will represent you until a final decree is obtained. This representation will be limited to matters before the local District Court and will not include any post-decree enforcement issues or any appeals that may be necessary from the trial court. Any representation beyond obtaining the decree of dissolution or resolving the issues listed in this letter will require a separate written agreement between you and the Law Clinic.

Because the UNM Law Clinic will only represent you in dissolving your marriage to Phillip Jones, I must also inform you that the UNM Law clinic will be unable to represent you in your ongoing disputes with your first husband, Tim Smith. These proceedings are in Dona Ana County, New Mexico and it is the policy of the Law Clinic not to accept cases outside of Bernalillo County. If you wish to have legal representation in that matter, you will have to obtain other counsel to represent you. If you do want legal representation against Mr. Smith, I would recommend that you speak to an attorney of your choice in Las Cruces. If you cannot locate an attorney the telephone number for the Lawyers Referral Service in Las Cruces is (505) 222-5555. With regard to the back child support owed to you and your children by Mr. Smith you may wish to contact the New Mexico Child Support Enforcement Bureau at (505) 333-5555. The Child Support Enforcement Bureau has offices in Albuquerque and it may be possible for you to collect the child support arrearages without having to travel to Las Cruces. This bureau can only help you with child support issues, therefore if you wish to address the visitation and custody issues between you and Mr. Smith you will have to hire a Las Cruces attorney or represent yourself. Please let me know if you have any questions with regard to why the UNM Law Clinic cannot represent you in your dispute with Mr. Smith or with regard to hiring an attorney to represent you in Las Cruces.

With regard to your divorce from Mr. Jones, I will represent you as a law student working under the supervision of a licensed attorney of the UNM Clinical Law Program. My

supervisor is Professor April Land who will review all of my work and she will accompany us in the event there are any court hearings in your case. I will work on your case until the end of the summer semester, which ends August 1, 2002. If matters pertaining to your divorce from Mr. Jones have not been resolved by this date, your case will be transferred to a new clinical law student and professor for the fall semester, which begins on August 23, 2002. Given the fact that the Petition for Dissolution of Marriage will not be filed until early July, it is certain that your case will be transferred to a new student in the fall semester. While it is my hope that your case can be fully resolved during the fall semester, it may be necessary to transfer your case to a new law student at the end of the fall semester in December, 2002. Normally a case with issues such as yours will take three to six months to finally resolve.

As we discussed during our meeting, the Clinic's representation is contingent upon payment of a \$50.00 case acceptance fee. You will also be responsible for any and all costs associated with your case, such as court filing fees. I will inform you of any costs as far in advance as possible. Since it is clear in your case that a Petition for Dissolution will be filed in early July, I must inform you that there will be a court filing fee of \$137.00 and a service of process fee of \$30.00, for a total of \$167.00. In order to file the petition in early July as planned, it will be necessary for you to pay these fees to the UNM Law Clinic by July 6, 2002. This amount will be placed in your trust account and paid out by the Law Clinic as the expenses are incurred. As we discussed in your interview given the fact that you are working and that you have a modest amount of savings, it is unlikely that the District Court will waive these fees. It is also anticipated that there may be additional costs of about \$400.00 for the possible future appraisal of the family home if this becomes necessary. Please call me if paying these filing and service fees will cause you or your family any hardship.

To enable the Clinic to begin representation, please sign, date, and return this letter, along with your \$50.00 case acceptance fee by June 25, 2002. If I have not received a response from you by June 25, 2002 I will assume you have decided not to proceed with your action for divorce from Mr. Jones and your file will be closed. I have enclosed a self-addressed, postage prepaid envelope for your convenience. A copy of this letter is also enclosed for your records. Once you return this acceptance letter and pay the case acceptance fee I will begin to draft the Petition for Dissolution and other necessary papers which I anticipate can be signed and filed by July 10, 2002 as we discussed in our initial meeting. Once the petition and other papers are filed they can be served on Mr. Jones within a matter of days. I have already made arrangements to have the necessary papers served promptly at his home in Bernalillo, New Mexico. I look forward to working with you to resolve your case.

Please call me if you have any questions regarding this letter or acceptance of your case.

Sincerely

Sally Student
Law Practice Student
SS:HW
Enclosure

Reviewed and approved by,

April Land
Supervising Attorney

I have read this letter and agree to representation by the Clinical Law Program under the terms and conditions described in it.

Client Name Date

VIII. The Non Acceptance Case Letter

Introduction

While the case acceptance letter is hopefully the start of a happy and positive attorney-client relationship, the non-acceptance letter may be the direct opposite. However, the non-acceptance letter is equally important. As with the case acceptance letter, good professional practice and all malpractice policies require that a non-acceptance letter be sent out to all prospective clients that will not be legally represented as well as to all other persons whom the lawyer encounters who may have the impression or belief that representation does or may exist. A postage stamp and a simple letter can prevent many a law-firm disaster, and even do some professional good. All clients who are interviewed by clinic students and who will not be represented must be written and informed that their case will not be accepted. The non-acceptance letter makes sure no express or implied attorney-client relationship is created.

The non-acceptance letter should start by thanking the person for coming to the Law Clinic seeking representation. It should give a general statement of the matter discussed and considered with some specificity, and should clearly and unequivocally state that the Law Clinic will not legally represent the person in the matter that was discussed. A good non-acceptance letter will then also go on to recommend other attorneys or agencies that may be able to assist the applicant. This referral is a matter of good public service and prudence. If you cannot help the prospective client send them to someone, or suggest someone who can. The clinic receptionist maintains a large list of attorney referral services, a list of cooperating attorneys and a comprehensive list of social service agencies. If the rejected case is one where clear legal harm may result, where legal rights, personal rights or property rights may be adversely affected, where third parties may be injured, where strong public policy issues may be involved, or a personal emergency is possible, the student should also clearly state that the person ought to consult another attorney.

The recommendation that a person should consult another attorney is probably a safe and necessary statement in all non-acceptance letters. This is particularly true where a statute of limitations or a court-imposed deadline is about to pass. Potential statute of limitations issues should be considered in all interviews and addressed in all non-acceptance situations. In certain specialized cases, a referral to a particular attorney in a specialized field may be made. Before this is done, the student should consult the assigned faculty member to insure that the case and the particular referral are appropriate. The safer practice is probably to list a series of specialist attorneys and let the potential client decide which particular attorney to consult.

It is also important that the letter have a good professional tone. This is particularly important in the student's later professional practice. Even though the potential client may be disappointed, he or she may return later with a case the law firm can accept. In addition, all client documents should be returned to the applicant, after necessary documents have been copied for the applicant file.

Students are reminded that from the moment of the first interview until the non-acceptance is effective, a limited form of attorney-client relationship is formed. All conversations, all documents, including the fact that the person has applied for

representation are covered by attorney-client privilege and requirements of confidentiality. This applies into the future as well. Finally, it may also be good professional practice, where appropriate, for the non-acceptance letter to include very basic, obvious or common sense advice. On this last point, a word of warning is appropriate; the rules of attorney malpractice will apply to all advice given even in a non-acceptance letter. All advice given must be correct. The more prudent course is probably not to give any legal advice. Any questions about whether or not any legal advice should be given should be discussed with the supervising faculty member.

SAMPLE CASE NON-ACCEPTANCE LETTER

An example of a non-acceptance letter follows:

June 15, 2002

Mrs. Peggy Smith
1234 Cumbre Del Sueno N.E.
Rancho Alegre, New Mexico 87131

Dear Mrs. Smith:

Thank you very much for coming to the UNM Law Clinic on June 10, 2002 to discuss possible legal representation regarding the filing of a law suit for personal injuries and property damage which you received in an automobile collision with Henry Ford on July 4, 2001. It was very nice speaking with you regarding your desire to file suit against Mr. Ford and his insurance company, Acme Underwriters. It is clear to me that this collision has caused you considerable damages and I can clearly understand your frustration with Acme Underwriters. I have reviewed your file with my supervising attorney and I must regrettably inform you that the UNM Law Clinic will not be able to represent you or your daughter, Amanda in your claim against Mr. Ford or Acme Underwriters.

It is the policy of the UNM Law Clinic not to represent clients in fee generating cases. A fee generating case is a case in which a private attorney can collect a fee directly from any proceeds or recovery from the case. Personal injury cases such as yours are normally and routinely handled by private attorneys for a contingency fee to be paid from the recovery in the case. It is also clear that given the complexity of the liability claims involved and the severe nature if the personal injuries received by you and your daughter, that this is not the type of case that is appropriate for student handling. Given the complex nature of your case it is my advice that you seek the representation of an attorney who is experienced in handling difficult automobile liability and insurance claims such as yours. I understand that you have spoken to a number of attorneys and that so far they have been reluctant to represent you. I would strongly advise that you speak to other attorneys regarding representation.

I would recommend that you call the Albuquerque Lawyers Referral service at (505) 123-4567 and ask that you be referred to an experienced personal injury attorney. You may also want to look at the attorneys who are listed in the yellow pages of the telephone directory. I would recommend that you speak to at least two or three attorneys to help you determine who can best handle your case. I have also spoken to my supervising professor and she has informed me that three attorneys who specialize in complex liability and insurance claims are Mary Doe (505) 321-9999, Bill Smith (505) 888-0001 and Henry Roe (505) 777-5555. You may wish to call any or all three of these attorneys. I am confident that if they cannot represent you that they may be able to refer you to an attorney who can handle your case.

Finally, I would like to mention that the statute of limitations for personal injury claims in New Mexico is three years from the date of the injury. Therefore, if you wish to file a claim against Mr. Ford or Acme Underwriters you must file lawsuit against them by no later than July 4, 2004. Therefore, I strongly recommend that you obtain representation by counsel and that you file any claim or lawsuit well before July 4, 2004. It is clearly in your best interests and those of your daughter that you obtain representation by an experienced attorney.

I do wish that the UNM Law Clinic could have been of further assistance to you and I wish you luck in finding representation. I do feel confident that if you speak to a few more attorneys that you will secure representation for you and your daughter. Good luck in pursuing your claim against Mr. Ford and Acme Underwriting. If as we discussed in our initial meeting you do decide to change your daughters name when she reaches the age of 14 next May, please feel free to reapply for representation for the name change. Your daughters name change is a type of case the Law Clinic may handle. Thank you for considering the UNM Law Clinic.

Sincerely Yours,

Reviewed and Approved,

Sally Student
Student Attorney

April Land
Supervising Attorney

List of Common Referral Agencies

A list of the most common referral agencies for the Law Clinic follows. A more complete list and more detailed information about particular agencies are maintained by the clinic receptionist. Students are also welcome to suggest new referral agencies for the Law Clinic.

Common Community Legal Services Resources

American Civil Liberties Union- P.O Box, Albuquerque, NM 87198 (505) 266-5915
Helps people determine whether their constitutional rights have been violated. Takes on cases with precedent setting significance.

Court Clinic- P.O Box 488 Albuquerque, NM 87103 (505) 841-7409

Helps people in court appointed mediation, for timesharing, residence and custody issues. Will also do an advisory consultation if parents cannot reach an agreement.

Domestic Violence-415 Stanford NE #3228 Albuquerque, NM (505) 841-6737

2nd Judicial District court domestic violence division provides legal services for respondents for domestic relations contempt hearings, also provides temporary restraining orders to family members due to domestic violence.

Landlord/Tenant Hotline- 134 Harvard NE, Albuquerque, NM 87131 (505) 256-9442

Information regarding landlord/tenant disputes, no legal services provided.

Lawyers Care Expanded- 5121 Masthead NE, Albuquerque, NM 87109 (505) 797-6066

An agency of the State Bar of New Mexico. Matches attorneys with clients. Will set up a 30 minute consultation with an attorney for \$25.00 plus tax.

Lawyer Referral For The Elderly- 5121 Masthead NE, Albuquerque, NM (505) 797-6005
(800) 876-6657

Provides legal services for those 55 years and over for NM residents outside Bernalillo county.

Lawyer Referral Service- 400-Gold SW, Albuquerque, NM 87102 (505) 243-2615

(800) 876-6227

An agency of the Albuquerque Bar Association. Matches attorneys with clients. Will set up a 30 minute consultation with an attorney for \$25.00 plus tax.

Legal Aid Society of Albuquerque- 121 Tijeras suite 3100, Albuquerque, NM (505) 243-7871

Provides free legal services to low income residents of Bernalillo county in AFDC, Food Stamps, State disability benefits, Medicaid, SSI, unemployment benefits, Sec 8 housing, landlord/tenant, foreclosures, uncontested divorces, and domestic matters where violence or custodial interference has occurred. Services not provided are DWI, Criminal, child support, personal injury, workers compensation and paternity.

Legal Facs-540 Chama NE #10 Albuquerque, NM 87102 (505) 265-0417

Provides legal services to low income Bernalillo county residents. Volunteer attorneys also help with forms and instructions for handling your own cases in district court, e.g. child support, custody, divorce, name change, support/custody when parties are not married, civil cases, tenant disputes. Do not do restraining orders, legal separations, criminal bankruptcy, traffic or DWI

Senior Citizens Law Office- 3117 Silver Albuquerque NM 87106 (505) 265-2300

Provides Legal services to Bernalillo county residents age 60 and over in civil matters.

New Mexico State Public Defender- 505 Central Ave NW Albuquerque NM 87102 (505) 841-5100 Provides criminal defense for indigent persons charged with criminal offenses in the New Mexico state courts.

Federal Public Defender- 111 Lomas N.W. Albuquerque, NM 87102. (505) 346-2489 Provides legal defense for indigent persons accused of crimes in the Federal Courts.

A list of other referral agencies and a list of private attorneys willing to consider the referral of specific types of cases is maintained by the Clinic Receptionist. Students having any questions about referring clients to a particular agency or attorney should consult with their supervising faculty member or the clinic receptionist regarding a proposed referral.

IX. Case Planning and Development

Once the prospective client's case has been accepted, the law student can begin his or her work to develop the client's case. Case development is a critical step in starting to plan and organize the client's case. The case development process is also an important part of developing an overall case handling and case resolution strategy.

Fact Development

Gather the Documents and Physical Evidence

The first task within case development should be to assemble all needed or useful documents and all other evidence. The best first source would of course be the client. In simple cases such as a sale of goods or the lease of an apartment, the client probably has the essential sale or lease documents and may have already provided them. In a more complex case such as a potential bankruptcy or a 501 (c) (3), the client, aided or guided by the law student, may have to assemble many historical documents or generate some court documents. In either case, it is clear that the work cannot proceed until the needed documents are assembled and evaluated. A good first step in every case is usually to assemble all documents that the client or student may think is relevant to the case. In cases that have multiple documents, it is also a good idea to start a document log to keep track of documents.

Visit the Scene

In other cases where the physical condition of some location or some physical object is or may be in question, the law student is well advised to visit the scene in question and possibly take needed photographs or measurements. A good example of this would be an auto accident case or a damaged apartment case. In the auto accident case before and after photographs of the damaged vehicle are very important. The scene of the accident would be equally important to show how the accident may have occurred. In the damaged apartment case, the actual condition of the apartment can be preserved very easily. When thinking of photographs, the law student should be aware of the wonderful utility of digital cameras and modern hand held video cameras. In each case, a student should begin his or her document organization by making a document log of existing documents. The document log should include possible documents, who has control of each document, and the legal or practical relevance of each document or item. A similar list should be made for witnesses. Where documents or other items are not in the control or access of the client the law student should develop a practical or legal strategy for obtaining these items. Copies of all documents should be placed in the client file along with an index and summary of each document.

List and Locate Witnesses

Witnesses present a slightly different task for the law student. A list similar to that made for documents should be generated. Again, the client is an important first source for potential witnesses. The student should ask the client for the names, addresses, and telephone numbers of all persons having any knowledge of the issues in the case. Other good sources for potential witnesses are any reports that may have been made, and people referred to in case documents. A simple rule of thumb is that: all important or essential witnesses should be interviewed as part of

the case preparation process. Many of the comments made regarding the client interview process would apply here. Where the witness is identified with the client, usually the client can help arrange the interview. Where the witness is either neutral or adverse to the client, it is essential that the law student fully identify himself or herself. This includes telling the witness that the interviewer is a law student and that the student represents the client.

While personal interviews are always best, the use of the telephone, where appropriate, is acceptable. As in all interviews, a healthy dose of skepticism does not hurt. Where witnesses must be located, the usual sources such as telephone directories, city directories, public records, or public registries are a good first source. Internet searches are an increasingly useful source of addresses, telephone numbers, and other information. For example, Lexis has a sophisticated search engine for finding people and assets. Where witnesses are uncooperative or legally unavailable, the rules of formal discovery offer a possible solution. All witness interviews must be summarized or recorded and a witness list and index generated for the case file. Once all of the documents have been assembled and all available witnesses interviewed, this information needs to be combined and evaluated as apart of a case action plan. The client should be informed and involved in all steps of the fact development process.

Cases Requiring Expert Testimony

Experience has taught that a special word of warning is needed for cases in which it is essential to prove the condition or value of some item. Examples of these types of cases are transmission repair cases, auto repair cases, roof repair or home repair cases, and any case involving a medical condition. In these cases, the underlying condition or its causes are not within the normal course of knowledge or understanding of the ordinary person. These cases will require either an expert opinion or the opinion of a person with specialized knowledge. When a client has this type of a case, the student should always get the expert evaluation or opinion before he or she takes a hard legal position, especially the filing of any lawsuit. Get the expert opinion first then make the legal claim. Law students are also cautioned that self-taught or self-educated clients are generally not perceived as being neutral. On the other hand, law suits against auto mechanics or roofers always have a built-in adverse party, who is an expert. A final word of caution is that expert opinions or evaluations cost money and this is a client paid expense. Experience has also taught that the clinic should not contract with an expert r until the cost for the opinion have been paid, or the amount is on deposit in the client's trust fund account.

Legal Research

Once the facts in a given case are somewhat clear, meaning that certain facts have been verified and weaknesses or strengths in the client's factual case have been identified, the law student can begin the necessary legal research. Some of this legal research may have already been done in an earlier stage or even as the fact development process is going on.

One of the first tasks for the student is how to focus the legal research. Generally, this consists of placing the client's case in one or more legal categories, such as tort or contract. However, as the student already knows, many of these legal labels overlap. A good way to start is to first try to organize the fact situation into as many legal categories as suggest themselves to the student. The student should then review the facts and consult with the assigned faculty

member or with other clinic students in their clinical group. Another source for a systematic legal evaluation can be found in topical practice books. Once there is a sense of agreement on what legal issues are raised by a particular fact pattern, or at least there is a sense of confidence as to what the issues are, then the student can start to complete the necessary legal research.

The topic of legal research is beyond the confines of this manual, but by their third year, all law students should have good basic research skills. Reference librarians are a good source for legal research guidance. The central point is that all cases should be fully researched and all legal opinions or positions legally validated or verified. Every clinic case should be legally researched, before any legal advice or counseling is given to the client. Once the facts are fairly well established and the legal research is completed, then the student can begin to formulate a legal opinion and start to counsel the client. As a matter of course, almost every client case should have one or more legal memoranda, setting forth the legal issues and analysis.

All law students should remember that facts and law often change over a period of time. Both the fact development and legal research aspects of the case should remain flexible and be revisited every time there is a new development in the case or the case law.

Network As Needed

One of the clear teaching methodologies within the law clinic is inter-group discussion, learning, and teaching students to routinely network with other associates or outside counsel as a way to insure competent and excellent client representation. A good resource for legal, procedural, or practical information for the student is simple networking within the clinic. The obvious and probable order of networking resources available to the student are as follows: the supervising faculty member, fellow students in the same clinical section, fellow students in other clinical sections, other law school faculty members, and outside attorneys who are willing to consult. When consulting outside of the actual law clinic students are reminded of the need for client confidentiality and the avoidance of conflicts of interest. All contacts outside the clinic should first be cleared with the supervising faculty members and the consultant advised of the expectation of confidentiality. The one possible exception is that non-clinic law school faculty members are considered as “of counsel” to the clinic. The expectation of confidentiality should still be expressed to non-clinical faculty members. Networking can occur at any stage of case handling. Any networking activities should be logged and memorialized in the client file. The supervising faculty member should always clear any consultation outside the law school community before it takes place. Students should also feel free to ask that a particular case be discussed in small group meetings.

Develop a Case Resolution Strategy

Every case development plan should have a case resolution strategy. From case intake to case closing the law student should constantly seek to find or create a way to economically, legally and practically resolve the client's case, ideally in a manner that achieves the client's goals and desires. Cases should be handled in a professional and efficient manner and should not be allowed to linger. The student and professor should constantly try to move a case towards resolution. One way to do this is to view cases from a management point of view as generic and always make sure some procedure or device is included in the planning process to insure some kind of final resolution of the dispute. In a case that is amenable to resolution through litigation, this means making sure a hearing or trial is set as early as possible to insure movement towards resolution and ultimate resolution. In non-litigation cases, it means setting a series of realistic goals and timetables for certain events, including case closure, to take place.

Typical Civil Case Resolution Approaches

It may be helpful to take a generic look at how civil disputes are generally resolved within the legal system. In a very general way, legal disputes are typically resolved in one of the following manners, possibly in the order stated:

The parties resolve the matter among themselves, without attorney representation.

The matter is not resolved. One party gives in or one party disappears.

The dispute just "disappears."

The parties resolve the matter among themselves with the aid or counsel of one or more attorneys who "remain behind the scene."

The parties resolve the matter among themselves. Attorneys are formally involved in the negotiations and help the parties settle. This is a simple private settlement, usually with some sort of settlement document.

Some sort of formal complaint or demand is filed with a court, agency, or institution.

The court, agency, or institution has some sort of dispute resolution procedures in place. The last procedure being some sort of final hearing or ruling that may be subject to review on appeal.

Attorneys are more typically involved and guide the parties through the dispute resolution procedures.

The court, agency, or institution has some sort of pre-trial or pre-hearing procedures.

The court, agency, or institution also has some sort of settlement procedures short of hearing or trial.

If the parties cannot settle the case through institutional settlement procedures the court, agency or institution will resolve the matter for the parties by hearing or trial.

The typical result of a hearing or trial is one “winner” and one “loser.” Although what is a “winner” or “loser” can be debated.

The court or agency can be fast-track, highly controlled and directed like the federal district courts, less fast-track, more party controlled like state district courts, or fairly informal like Metropolitan Court or some administrative agencies.

After the final hearing or trial post-judgment enforcement mechanisms kick-in.

Appeal by the loser is a possibility, repeating some of the earlier dispute resolution mechanisms.

The parties to resolve the dispute use some sort of private ADR mechanism. This is generally available at all times under all options listed including appeal.

Private settlement by the parties is usually an option at any time.

Loser of the hearing or trial appeals to a reviewing court or agency.

The basis for appeal is usually limited.

Some sort of settlement procedures is available.

If settlement procedures fail, then reviewing court or agency will resolve the appeal.

There is again usually one “winner” and one “loser.”

Further appeals may be possible but second or third appeals are even more circumscribed.

Post- judgment enforcement procedures again apply.

If money is involved the matter may be mooted out by an extraordinary procedure such as bankruptcy or death at any point.

Students should consider these general comments as a guide in developing a case resolution plan that lays out the client’s practical and legal options all the way from doing nothing, to private settlement, through litigation and through possible appeals. All possible legal and procedural options should be explored and explained to the client. The key point is that ultimate legal resolution of the case in one manner or another should be included in all case planning.

Setting Time Tables, Goals and Providing for Frequent Review

One of the consistent themes in law office management is that cases should be actively moved towards closure. Virtually all cases can be resolved in an economical and orderly fashion and within a reasonable period. One of the main impediments to orderly case resolution within a law office is the natural tendency to place a case “on the back-burner” or to let the case set its own natural timetable.

One method of minimizing this tendency to procrastinate is to set a clear and realistic timetable for every major event in the case planning process and then to stick to the timetable, unless there are extraordinary reasons not to do so. Another method is to require frequent review of all cases for compliance with planning and case resolution deadlines. Within the law clinic students are required to formally review every open case with the supervising faculty member at least every four weeks or sooner. These file reviews are intended not only to insure a high quality of representation and work product but also to insure that cases are actively being moved towards closure.

Given the fact that multi-semester representation may not be in the clinic client’s best interests, students are encouraged to take the initiative in moving cases towards resolution. As examples of this, if counsel cannot agree on certain procedural or substantive matters and only a judge can resolve the dispute between the parties, students are encouraged to set the matter for hearing at the earliest opportunity. Getting disputed matters resolved in a prompt manner is in the clinic client’s general best interests. Students should also include their own personal plans such as vacations, holidays, and the academic calendar into case planning. Cases should be constantly moved towards resolution.

Case Planning Should Include an ADR Component

Given the reality that the vast majority of civil disputes are resolved through some sort of settlement or ADR device without a final trial or hearing, it is imperative that law students include an ADR or settlement alternative in all case resolution plans. A list of ADR or settlement devices that a student may want to consider in the case development plan is as follows:

Activities, procedures, or counseling that may help defuse the natural or inherent hostility or animosity that may be involved in the dispute. How can the level of background tension be reduced to manageable levels?

Private settlement of the dispute by the parties themselves.

Private settlement by the parties with attorneys in the background.

Private settlement aided or directed by attorneys or other professionals.

Private professional ADR services, without attorneys.

Filing a formal complaint or claim and using institutional ADR or settlement procedures that are available or required, e.g. Court Clinic, settlement conferences, mediation or conciliation procedures.

Designing a settlement plan or program built around institutional procedural devices.

Mediation.

Binding arbitration.

Non-binding arbitration.

Partial Arbitration.

Settlement facilitation.

Wise person consultation.

Court Annexed ADR procedures.

Summary jury trial.

Binding partial fact determinations.

Private advisory opinions.

Pre-final hearing settlement procedures, formal or informal.

During trial settlement initiatives.

Appellate level ADR.

Case Planning and Development Chart. The following chart may help students in their case planning and analysis. Students are reminded that each case is unique and all cases should be treated separately. Case planning and development is also an on-going process and case plans should be constantly reviewed and modified.

Case Planning and Development Chart

Client Name: _____ Assigned Student: _____

Case number: _____ Supervising Faculty: _____

Scope of Client Representation: _____

Adverse Party: _____

Adverse Attorney: _____

Impacted or Involved Third Parties: _____

Third Party Attorneys: _____

General Nature of Legal Dispute: _____

Applicable Law: _____

Brief Factual Summary of Dispute: _____

Client Goals, Interests, and Objectives: _____

Adverse Party Goals, Interests, and Objectives: _____

Third Party Impact or Involvement: _____

Special Case Sensitivities or Warnings: _____

Disputed Facts: _____

Disputed Law: _____

List and Summary Key Witnesses: _____

List and Summary of Evidence: _____

Required Experts or External Legal Consultations Required: _____

Available Formal Legal Forums (including jurisdiction and venue): _____

Realistic Timelines: _____

Estimate of Costs: _____

Filing, and Service Requirements for Available Forums: _____

Case Settlement Plan and Prospects: _____

ADR Alternatives Available: _____

Case Handling and Case Resolution Recommendations: _____

Client Counseling Plan: _____

Client Comments or Reservations: _____

Timelines and Goals for Major Case Activities: _____

Multi-Semester Aspects and Adjustments: _____

Settlement Deadlines: _____

Litigation Deadlines: _____

Probabilities for Appeal: _____

Case Review and Monitoring Schedule: _____

Estimated Date for Case Closure: _____

Summary of Manner of Probable Final Case Resolution: _____

Any Special Comments or Warnings about the Case or Client: _____

Student Signature and Date

Faculty Approval and Date

X. Client Counseling

Introduction

Client counseling is the essence of the attorney client relationship. In the attorney client relationship, the client has come to the attorney seeking the benefits of his or her experience, knowledge, expertise, and practical wisdom to solve some kind of human problem. In this relationship, the client expects loyalty, understanding, professionalism, empathy, advocacy, competency, good legal advice, and success. In return, the attorney expects the client to be truthful, cooperative, to satisfy certain basic contractual obligations and also hopes for success. Client counseling is the point where these different expectations intersect.

Client counseling is the process by which the attorney helps the client decide which legal and practical path is best for the client. The client must make the ultimate decisions, because it is the client's life, property or other interests that are at stake. In most situations the attorney's role is to help furnish alternatives and to help the client to select from among these alternatives. For client counseling to be effective, there has to be a mutual sense of confidence and trust. In other words, there must first be an effective and positive attorney client relationship. The better the attorney client relationship, the easier it is to professionally counsel the client. Good professional client counseling makes it easier for a client to make good decisions in his or her case. Good client counseling also requires open, candid, and effective communication between attorney and client.

From a purely mechanical viewpoint, the typical clinical case is ready for the counseling phase when the fact development and legal research phases are more or less complete. Once all the facts are understood and the law is relatively clear, the law student and the client can begin a dialogue on how a given legal matter should be addressed or resolved. In this process, one should be aware that facts and law are always subject to some change and to differing interpretations. Similarly, the student should be aware that client counseling is an on-going process that starts when the client first comes in for an interview and only ends when the representation is completed. Like other stages in the attorney client relationship, some cases are easily counseled because the legal course is clear; in other cases the choices for the client are many and often conflicting. These last cases require much more counseling. In some cases, preliminary legal or practical advice may have already been given. Part of the counseling process should include a reevaluation of any preliminary advice that has been given. In the typical case, the process of educating the client, defining alternatives, and helping the client make good case decisions will probably require several meetings and letters. As a general proposition, clients may not be ready to make fully informed decisions at an early stage in their case.

Similarly, in a typical case, the law student may not be ready to give good legal advice until the facts and law are relatively well settled and the supervising faculty member has been consulted. One reality of the fact or case development stage is that facts and law may change a bit. As the facts and law in a case change, legal opinions and advice may also have to change. Hopefully, these changes in direction are not abrupt or drastic. When these changes are drastic or abrupt, the law student is well advised to carefully explain the reasons for these abrupt changes in position. This reality of change as the case develops, helps explain why many lawyers are cautious or tentative in giving advice or counseling in the early stages of the case.

Finally, legal counseling may occasionally have to be a hasty process. This is because external factors such as pleading deadlines or other time-based forces may limit the amount of time available to the attorney to carefully weigh and deliberate. In certain limited situations, a client may have to make a critical decision in a very short period of time. In these emergency situations, the student should make sure that the supervising faculty member is fully advised and consulted before any definitive legal advice is given. In all cases, the student and faculty member should develop a separate counseling plan or program for each client.

Counseling, like interviewing, is a process that will require practice for the student to become more proficient. Like interviewing, good client counseling is a process that generally requires several meetings and discussions before the client can decide a particular matter or decide on a course of conduct. Each case should have a counseling plan. A good counseling plan or program will focus on the best legal and practical interests of the client and insure that there is client autonomy in the decision making process.

The Counseling Plan

In every clinic case, the student and faculty member should work together to develop a client counseling plan or program for the client. In simple cases, the counseling plan or program will be obvious or common sense. In other, more complicated cases, the client will have to make important decisions concerning the different alternatives that are available so that the attorney can pursue the desired course of conduct. Every case should have a counseling plan that, at a minimum, includes the following basic components, careful fact evaluation, through legal and procedural research, identification of the practical, legal and procedural alternatives available to the client, evaluation by the client of the different alternatives and interests involved, consideration of any possible ethical limitations, and a time-based process for the client to make needed decisions or choices. A chart for the student to evaluate these factors is included below. Each client case will require a distinctive counseling plan.

The Ethical Dimensions

The Rules of Professional Conduct provide a good starting point for all counseling plans. These rules and comments provide broad general guidance on the limitations of what may be counseled. Where appropriate the client should be informed of the limitations placed on the attorney by these guidelines.

Rule 16-201 provides:

Rule 16-201. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The ABA comments to section 16-201 provide as follows:

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When a client experienced in legal matters makes such a request, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems in the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems in the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 16-102. Scope of Representation

A. Client's Decisions. A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Paragraphs C, D and E, and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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.

C. Limitation of Representation. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

D. Course of Conduct. A lawyer shall not engage, or counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or which misleads the court, but a lawyer may 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.

E. Consultation on Limitations of Assistance. When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

The comment to Section 16-102 provides:

Scope of Representation

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer

is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to *Rule 16-114 NMRA*.

Independence from Client's Views or Activities

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement

for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

See Rule 16-101 NMRA.

Although Paragraph C does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by Rule 16-105(B) NMRA.

All agreements concerning the scope of representation must accord with the Rules of Professional Conduct and other law. See e.g., Rules 16-101, 16-108 and 16-506 NMRA.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6 Rule [16-106 NMRA]. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent.

Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) [D] applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.

Paragraph (d) [D] does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) [D] recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule 16-104 Communication

Status of Matters. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Client's Informed Decision-Making. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 16-301 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 16-404 Respect For Rights of Third Persons

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.

Law and Procedure As a Limitation on Client Options

Another broad limitation on what advice may be given in a particular case is created by the law applicable to the client's case. In most cases, the facts in a client's case will tend to cast the case into one or more defined categories of law, for example "landlord tenant law," "criminal law," or some very specialized area of law such as Section 501(c) (3) of the Internal Revenue Code. In almost all legal situations, some statute, rule, or case law will tend to limit or define the general area of decision making for the client. An applicable statute or regulation will require certain things to be done or prescribe certain consequences when certain facts are present. Case law will generally define some general principal of law and then declare that in a particular fact pattern a certain result is required.

However, as law students have already realized, with rare exceptions, the “law” is generally a gray, porous kind of guideline. Almost all statements of law have exceptions or definitional issues and almost all facts are at least debatable. This is in a way a blessing and a curse. The client usually has a socialized belief that “law” is clear and fixed and that almost all cases can be decisively predicted. When the lawyer begins the legal education process that is involved in all cases, this grayness can be a source of client frustration. However, for a client to be able to make an informed decision, he or she must first understand the applicable legal principles and associated “grayness.” Therefore, the attorney has a responsibility to educate the client regarding the applicable law. This is best accomplished by giving each client a copy of the applicable law and then explaining the law and any complexities.

Ideally, every case should include a legal research memorandum for the client and an explanatory meeting with the client. In many simple cases this may consist of a copy of a basic statute, rule or case that may apply. The important point is that the client must understand that his or her case is being resolved in an ordered way under existing rules of law, or an effort is being made to change existing law in an orderly manner. In almost all cases, applicable law will provide the student with a good general outline of what must be addressed in the counseling process. Any advice on the law that applies should also include a clear explanation of legal procedures and legal processes that may be involved. Every legal procedure in turn requires some sort of documentation or pleadings and involves time and money. This should also be carefully explained to the client.

Practical, Moral and Social Dimensions

Good legal counseling also requires that the attorney go beyond or “outside” the law to consider practical, moral or social considerations that may apply. The best examples of practical consequences that should be considered in all cases are costs, and the natural consequences of a particular legal action. Cost is probably the more obvious of the two. Every legal case involves attorney fees, legal or transactional costs, possible unknown costs to the client, and in certain circumstances, imposed costs if the case is lost. In every case, all the different costs associated with each alternative should be assessed and the client informed. If the actual costs exceed the actual benefits to be received, then a particular alternative is probably not very viable. It does not make very good sense to spend \$1000 to recover \$100. Experience also teaches that attorneys should be very cautious of clients who are willing to incur large costs to pursue a legal principle. In every case one should consider the costs of a possible loss. While all clients and lawyers believe they will prevail, in many legal situations, if one does not prevail, certain costs can be shifted to the “loser.”

Similarly, some “costs” may not be readily apparent to the client or may be future costs. An example of this is two merchants who have a long business relationship, or who anticipate future business relationships. For one of them to insist on being proven “right” in a small dispute may be “penny wise and pound foolish.” If it is clear that these two individuals will or must deal with each other in the future, the “future costs,” including good will should be fully evaluated. Another example would be where a student with a month to month tenancy, comes in seeking legal advice over a minor, negotiable landlord obligation. If the client likes the premises and the rent is relatively cheap, both the law student and the client should consider the long term consequences of aggressively pursuing a minor legal point. A simple example of the moral or

social dimensions of a particular course of legal conduct involves the routine request of an elderly client seeking to “disown” one or more of their children in a will. This can easily and legally be done, but future consequences on the parent and the children or the extended family should be carefully weighed before it is done. This simple legal act has clear future consequences and costs beyond those that are obvious.

A good legal counselor will also look at the “whole” client and try to address any conditions or influences that may exist or that may be contributing or causal factors in the underlying legal problem. If there are obvious factors such as personal counseling issues, substance abuse, family dysfunction, or severe financial limitations, these factors need to be assessed and evaluated in the counseling process. Any course of conduct that is chosen may be doomed to failure if these overriding factors are not addressed. Finally, a good legal counselor will also try to prevent or anticipate future legal problems. Preventative law, like preventative medicine for doctors is a hallmark of the good practitioner. If adverse parties must deal with each other in the future, or probably will deal with each other, the client should consider the impact of a certain course of conduct on those future relationships. Divorcing parents with minor children provides a good example. They will have to deal with each other until their minor children become adults and probably well beyond.

Common Counseling Problems Or Issues

Every client has a particular and specialized counseling need. However, there are several commonly recurring counseling problems that the law student will encounter in the law clinic and in future practice.

Client is still in the Venting or Emotional Stage. As the law student will soon discover, clients rarely see attorneys before a legal problem arises. Likewise, many times the visit to the lawyer is a “crisis” or “emergency” for the client and even very late in the case the client is still very emotionally affected by the legal problem. As in the interviewing stage, good communication and good client decision-making cannot take place until the venting or emotional stage is over, or, at least at a manageable level. In cases where the emotional overlay is serious and disruptive, a referral to a professional counselor or therapist may be necessary before effective legal counseling can take place. In most situations, the passage of time is itself a good healer and delaying or parceling of legal advice may be appropriate. In cases where the level of emotional involvement is not severe or has diminished to acceptable levels, the law student may also be able to provide some appropriate stress or practical counseling to the client in order to get past the venting stage. However, clients with serious or severe emotional or mental issues should always be referred to professional counselors or therapists.

One good approach is to address the causes or reasons for the stress directly and to acknowledge or empathize with the emotional response. The student might consider asking the client directly to explain why he or she feels so strongly or is so affected by certain facts or conditions. This will clearly help the law student to better understand the client and sometimes simply “talking about something” helps minimize the reaction. Knowing that certain facts or conditions cause a particular emotional response on the part of the client may also allow the student to counsel a result or solution that avoids or minimizes these kinds of events in the future. Dividing the counseling or decision-making process into several sessions or into a

graduated series of sessions may be a way to control the distractions of a client who still has strong emotional reactions to parts of his or her case. Good decision-making by the client is generally conditioned on an objective and composed client.

The Real Problem is Not Legal. On occasion, the law student will encounter a client who either does not have a true “legal” problem or who has other overwhelming non-legal problems that must be addressed. The stereotypical situation is where a client has a minor legal problem such as a traffic ticket, or a dispute with a neighbor, and it is apparent to the attorney that the “real” underlying problem is that the client needs professional counseling or therapy. Another example would be where there is a legal problem such as a landlord tenant or debt problem that can be easily addressed legally, but it is apparent that the underlying issue for the client is substance abuse or dependence. In both of these situations, the student would be wise to address any legal problem in the usual manner, and then to address the underlying problem. Unless the student has a unique background or specialized training, the appropriate counseling response is to refer the client for specialized care by a person or agency that deals with the particular problem involved. Students are cautioned that their counseling should stay focused on legal problems and that clients requiring specialized counseling should be referred to specialists.

On the other hand, students are encouraged to look at the “whole” client and to consider a wide range of options, including non-legal options. . An example of this would be where an adult child lives with an elderly parent and there are serious internal disagreements or family issues. The legal solutions of an eviction action or partition action can solve the immediate “legal” problems, but family counseling or referral to a trained mediator may be best. It should be clear to the lawyer that the non-legal issues may be more important to the client than the purely legal issues. The decision of the relative importance of legal or non-legal issues is for the client to determine.

In all cases where a student feels there may be important “non-legal” issues, these issues should be carefully discussed with the faculty member and a clear plan of referral or counseling developed where appropriate. An attorney can get into serious difficulty if he or she tries to counsel outside of his or her experience and training.

You are the Lawyer. You Decide for Me. Making important decisions can be difficult for most human beings. Having an “expert” make those decisions can sometimes be easier for the client. One of the most commonly encountered problems for lawyers in the counseling process is that the client wants the attorney to make the decision for them. After all that is what “they are paying the big bucks for.” The problem with this approach is that roles are being reversed and the attorney may be getting himself or herself into a professional trap. The core of client counseling is that the client must make the decisions. The role of the attorney is to chart out the alternatives and then make sure the client makes a fully informed and volitional decision. When the client says, “you decide”, this shows a need for more counseling. The professional trap for the lawyer is that when a particular matter turns out wrong, or with hindsight a “better” decision could have been made, if the lawyer truly made the decision, then responsibility for the result becomes “my lawyers fault”. A lawyer may counsel which alternative he or she feels may be best or wisest, but in all cases, the lawyer must take steps to make sure the decision is that of the client. An indecisive client needs more counseling and in certain circumstances, may benefit from a second opinion.

Get A Second Opinion When Appropriate

A second opinion may help the client make a more informed decision. In the legal profession, second opinions are probably underutilized as a general matter. Law students in particular can use the second opinion as an effective learning device. Second opinions or consultations allow the student to view specific legal problems from a broader and different perspective. A second opinion can also be very useful to the client. It can demonstrate to the law student and client that opinions differ even among experienced professionals. The second opinion may disclose additional concerns or may focus the more important concerns for the client. A second opinion on an important issue will also inform the client that there is no clear “right” or “wrong” decision, and that the client must of necessity exercise some risk or judgment in these larger decisions.

Formal second opinions will probably involve attorney fees for the client and therefore, second opinions should only be obtained in cases involving important or complex issues. In a sense, the supervising faculty member provides a form of second opinion for the student in the typical case. In an appropriate case, the student and professor may want to meet with the client to discuss their own differences of opinion. But, in specialized or more complex areas of the law, more informal “mentoring” types of second opinions can probably be obtained from the private bar for free. Law school alums and friends represent a valuable resource of experience and perspective for the clinic’s clients. A faculty member may be an important source for a free or low-cost second opinion.

When the case is difficult, the decision very important to the client, or the client is having great difficulty in choosing from the available alternatives, a second opinion may help the client make the best decision in his or her case. Every faculty member either knows or can locate highly experienced local practitioners who would be willing to give a second opinion, or at a minimum some informal networking type of advice to the student and the client.

Defining Alternatives for the Client

In order for the client to be able to make a good and wise decision, he or she must clearly understand and comprehend the various alternatives available and the costs and benefits imposed by each different choice. This requires the law student to chart each and every alternative, or important decision a client must make, and clearly explain the inter-relationship of each choice.

In many clinic cases the issues are few or simple and the range of decisions to be made by the client are limited. But in other cases, the issues may be complex, several and closely interrelated. In many cases the long term consequences or implications may be as important or more important to the client than the immediate or short-term issues. A good simple example of this is a divorce case with some property issues and young children. Here, all of the issues are interrelated and the long-term consequences to both parties, and the children are impacted by how the different issues are resolved. How the client decides to address or resolve issues such as division of property, allocation of the family home, spousal support, pension or retirement benefits, child support and child visitation are all interrelated issues. Just the fact that the parties must likely interact and “share” child rearing and child support duties into the future, requires the client and attorney to more carefully evaluate the consequences of each decision. If one adds a

background of a high level of anger or hurt, low income and domestic violence to the hypothetical case, the counseling issues become more complex. This present and future complexity requires the law student to make sure the client considers his or her legal problems from a broader perspective that includes not only present choices but also probable future consequences.

Basic Outline For A Counseling Plan

A good place for the law student to begin to formulate a counseling plan or program for the client is for the student to list each important legal or procedural issue the client must address or decide. Next to each legal issue the student should place a short but inclusive statement of the law or legal principle that will be used to decide each issue. This short summary of the law will in turn identify certain sub-issues that must also be resolved. The next list should include a short statement and assessment of the facts that apply to each issue. The student is cautioned to be objective and realistic in this assessment because facts are probably the softest or most malleable part of the case. Few facts are “clear” and all facts can be debated or used in a contradictory way by the opposing party. Next to each issue the client must decide, the student should list the clients position or goals and in a separate column the client’s short-term and long-term interests for each goal. This simple chart can serve as an outline of the client’s entire case and can also be useful in later settlement or litigation stages of the case.

In addressing client “goals” and interests” the student should be aware that client goals and interests are often quite different. In a narrow way a “goal” can be defined as what the client would like, whereas the client’s interest consists of facts or factors that are either in his or her short-term or long-term interests in a positive or negative way. The term “interest” involves a practical evaluation of why a particular decision may be good or bad for the client. A simple example would be a client who is adamant that he or she be awarded the family home, subject to the mortgage. This may be a clear and legally attainable “goal”, but if other facts in the case or the clients background disclose that the client is unable to afford the mortgage, taxes, and maintenance costs, careful consideration of his or her long-term financial “interests” may require or even mandate the consideration of other less attractive alternatives, such as a sale or even that the other party receive the family home. Similarly, in a divorce involving children, especially very young children, it is clear that the client and the soon to be ex-spouse will have to interact on a responsible basis for many years into the future. Accordingly, a good legal counselor should make sure this future “interest” is evaluated by the client in all decisions. Finally, the law student should make sure that required legal procedures, the time required for resolution, costs, time value of money or possession, ADR alternatives, the likelihood of future disputes, and future dispute resolution be factored into the cost-benefit analysis of the client. Only after the client has considered all of the available legal and practical alternatives, is he or she ready to make an informed decision about his or her case. A simple chart to accomplish this would be as follows:

Client Counseling Worksheet

CLIENT COUNSELING WORKSHEET

Client Name: _____

Case File No.: _____

General Client Objectives _____
(type of case or general client objectives)

Sub-issues _____

Any external or overriding issues? Explain in detail. _____

Adverse Party _____

General Objectives of the Adverse Party _____

Relationship between client and adverse party _____

Involvement or impact of any third party _____

Counseling Matrix

| Legal or Procedural Alternatives. List by Number. | Applicable Law | Applicable Facts State whether facts are disputed | Alternatives Available to Client. Include ADR processes. | Short Term or Immediate Costs of Alternatives, Consequences or Benefits. | Long Term Costs, Consequences Benefits, or Relationships | Client Decision or Preferences |
|---|----------------|---|--|--|--|--------------------------------|
| 1. | | | | | | |
| 2. | | | | | | |
| 3. | | | | | | |
| 4. | | | | | | |

Summarize student legal or procedural recommendations to client.

Are there any legal or ethical limitations on client's objectives?

Are there any future relationships between client and adverse party?

Is an ADR dispute resolution mechanism appropriate for certain issues or disputes?

Is case appropriate for a second opinion or consultation?

Time, cost, and effort involved in resolving this dispute in a non-ADR manner:

Summary of Client Counseling Process to be utilized by student including timelines.

List any outside counseling, therapy, educational programs or referrals that are to be recommended to the client.

Counseling Recommendations to the client:

Differing Value Systems and “Unwise” Decisions

In counseling the client, the student is reminded that all important decisions must be made by the client. The student should also be aware that the client may place different values on certain items or facts and that ultimately the client must live with the result or outcome. If the client is competent and fully advised of the alternatives, he or she is legally entitled to make a decision that the attorney would not personally make.

A general word of caution is appropriate where a client is making what the attorney feels is an “unwise” decision. In these situations, the student is well advised to set out the alternatives available to the client in writing, confirm the legal advice on each alternative, and confirm that the client is making a particular decision. This may seem a bit defensive, but if the decision is important, costly, or presents future risks to the client, the prospect of a future malpractice or disciplinary claim is high. The same is true where the client wants to do something that is not typical or that may have some clearly adverse impact on a third party. Simple examples of this that a student may encounter in the clinic are clients who want to disown children, or a divorce client who wants to give all property to the other spouse out of guilt or charity. In these situations, the student should make sure the client is fully counseled and that the client's specific decision is documented by letter.

Finally, in extreme cases if the client is making a truly “foolish” or “harmful” decision, the attorney should consider the possibility of ending the representation and recommending that other counsel be retained. These kinds of situations are also ripe for a neutral second opinion. All cases in which the student and the client have significant differences in the decision being made by the client should be carefully documented, and fully discussed with the supervising faculty member. Students are reminded that after appropriate counseling, clients are entitled to make different or even “unwise” decisions. The case belongs to the client and not to the attorney.

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XI. Alternative Dispute Resolution

At all stages of client representation, clinic students should consider the positive problem solving opportunities offered by Alternative Dispute Resolution (ADR) techniques. ADR is one of the new, rapidly growing approaches to client problem solving in the legal profession. ADR and its innovative and pragmatic approach to problem solving has created a whole new set of alternatives for the client and the attorney. Within the past 30 years, ADR has started to change the ways that lawyers and institutions look at problem solving. ADR techniques have been widely adopted by courts and administrative agencies. ADR has become a separate and specialized teaching area in almost all law schools. As with courses in Interviewing and Counseling, courses in ADR are highly recommended for all law students. ADR and its concepts have become important enough that ADR as a problem solving approach has become a part of the UNM law Clinics basic policy.

The UNM Law Clinic's ADR policy is as follows:

Clinical ADR Policy Statement

Introduction to the Use of Alternative Means of Dispute Resolution in the Clinic

In your clinical experience this semester, you will be asked to analyze your cases for possible disposition through a variety of means of dispute resolution. The alternatives available range along a continuum in terms of coerciveness, formality, force, and effect. The term "alternative dispute resolution," as it has come to be known, generally is used to refer to the processes and approaches between the extremes of traditional litigation and negotiation.

Alternative Dispute Resolution, often called by its acronym "ADR," is not a new phenomenon. Forms of arbitration and mediation have been used in the United States since colonial times. Negotiated settlements have resolved matters in litigation for centuries. The past twenty years, however, have seen an astonishing growth of ADR in both the public and private sectors. Courts have developed a variety of mandatory and voluntary ADR programs, corporations and law firms have created ADR divisions, and private dispute resolution has become a growing professional service industry. The explosion of ADR programs has been matched by the creation of a panoply of novel dispute resolution procedures the variety of which is limited only by the imaginations of the participants.

The phenomenal growth of ADR has not been confined to the resolution of disputes. The field of dispute prevention has enjoyed a parallel growth in ADR with a focus on transactional planning before disputes arise. Developments include programs for identifying unsafe or illegal practices, as well as aids to

building consensus and reaching agreements about future relationships. In dispute prevention, the parties work to create guidelines, principles, and rules to govern future conduct through contracts, treaties, and other agreements. Often the use of a skilled intermediary can assist in such diverse dispute resolution processes as collective bargaining, the negotiation of commercial contracts, international treaties, and the negotiation of the form and content of proposed legislation or governmental regulations.

The basic forms of ADR can be divided into those that represent variations on classic adjudications and those that represent variations on assisted negotiations. Arbitration and private judging are the two forms of ADR that are offshoots of classic adjudication. The key feature of adjudication, arbitration, and private judging is that the responsibility for deciding the outcome rests with the neutral, not with the parties. In arbitration the parties agree, or are required by contract or statute, to submit their dispute to a neutral party whom they have selected to make a decision. Arbitration is typically faster, less formal, and less costly than court adjudication. Arbitration is frequently used in commercial, construction, insurance, and consumer disputes, as well as in the labor field. Private judging constitutes another process where the parties submit their disputes for decision by a neutral third party. Most frequently, the neutral is a retired judge, the process uses formal rules of evidence and procedure and, in some states, and the decision of the neutral is entered as a judgment of the court and is appealable.

The forms of ADR that constitute assisted negotiations include mediations, conciliations, facilitated settlements, neutral experts, mini-trial, and summary jury trials. In mediation, conciliation, and settlement facilitation, a neutral third party helps the disputants to negotiate, but does not decide the outcome. Instead, the responsibility for resolving the dispute and the terms of resolution lies with the parties themselves. In mediation, the neutral works with the parties to improve their communication and problem definition skills so that they can find a resolution that satisfies them. Conciliation is a less formal process, more explicitly aimed at preserving relationships. Settlement facilitation involves both the parties and their lawyers in a process that often focuses on money damages and seeks to find a mutually acceptable dollar amount, which is sufficient to end the dispute.

Neutral experts, mini-trials, and summary jury trials are all forms of ADR which give the parties access to information on the strength and value of their cases as seen by a neutral, the jurors, or their opponents. This information is not a binding decision, but an aid to improving the parties' abilities to

negotiate and decide their own resolution. The presentation of abbreviated evidence and the advisory opinion of the expert or jury are followed by assisted negotiations, which use the information gained in the process to encourage realistic evaluation and settlement.

There are many other ADR processes, most of which combine aspects of these more basic forms. These hybrid processes are designed to meet the needs of disputants or types of disputes on a more individual basis. One of the major advantages of ADR is the flexibility with which processes can be created and combined to fit particular circumstances.

To use ADR effectively, it is important to select or devise a process appropriate for the particular dispute and disputants involved. In the context of the cases you will be handling at the Clinic, the procedures you are most likely to consider are: mediation, settlement facilitation, and variations of arbitration.

Arbitration: Arbitration is a process in which the parties engage a neutral person, or sometimes a panel of neutral people, to hear arguments, consider evidence, and make a decision regarding their dispute. Arbitration comes in many forms: mandatory, voluntary, court annexed, private, binding, and non-binding.

Lawyers Role: The role of the lawyer in arbitration is similar to the lawyer's role in formal court proceedings. First, unless arbitration is mandated by contract or court rule, the lawyer should evaluate whether the case is suitable for arbitration. Then the lawyer should counsel the client about what form of arbitration might be appropriate. Because arbitration is a speedy, informal process which usually takes place early in the resolution of a dispute, the lawyer should accelerate informal fact investigation and discovery to prepare adequately for arbitration. Finally, the lawyer should select an arbitrator, using national or local arbitration services and gathering information from lawyers who have used particular arbitrators. Because one of the advantages of private arbitration is the ability to select the decision-maker, the lawyer should take care to collect sufficient information to make a knowledgeable choice of who will serve as arbitrator in a particular case. Names of arbitrators and arbitration organizations can be obtained from state and national bar associations (which frequently have alternative dispute resolution committees), from law schools (where arbitration and ADR are part of most curricula), and from law libraries which carry ADR and arbitration publications and telephone directories.

Appropriate Cases: Cases in which it would be helpful for the decision-maker to have particular subject matter expertise; cases in which the parties would benefit from quicker disposition than that available through the courts; cases in which the parties would benefit from a confidential as opposed to a public process; cases in which the parties want a third party to decide the matter, but want to retain some control over the disposition (e.g., final offer or high-low arbitration options).

Mediation: Mediation is a process in which the parties to a dispute, with or without their lawyers, meet with a neutral third party who helps them explore issues, develop options, consider alternatives, and reach a consensual settlement. Mediation can be either voluntary or court ordered. The mediator is not a decision-maker, so the process is binding only if the parties reach an enforceable agreement.

Lawyers Role: The lawyer's function in representing a client in mediation can take several forms, including instructing the client about mediation; preparing the client to participate effectively in mediation; selecting the mediator; representing the client in the mediation itself; counseling the client during mediation; reviewing agreements reached in mediation; drafting mediated agreements; and incorporating the mediated agreements into court orders. Basic to all of these functions is sound mastery of the mediation process. The lawyer must understand mediation to determine whether it is appropriate for a particular client or dispute. Familiarity with mediation is also necessary for the lawyer to explain the process to the client, so that the client can decide whether or not to engage in it. Additionally, the lawyer should understand the mechanics of mediation to help the client participate more effectively in the process. Finally, the lawyer should be able to explain the mediation process to an opponent and persuade that opponent to try it. The lawyer also should know enough to select the best type of mediation for a particular dispute; to counsel the client throughout mediation; to represent the client in the mediation itself; to help the client understand the costs of alternatives to a mediated agreement; and to review all agreements from mediation before their execution. This review should encompass legal consequences, fairness, completeness, clarity, workability, and enforceability.

Advantages: There are many advantages to getting parties together to solve a problem. It increases the likelihood of achieving mutually beneficial solutions. Settlement momentum builds so that parties are more likely to move beyond

unreasonable positions. The tactical foxholing and shift in positions that sometimes occurs in settlement negotiations outside of mediation also can be avoided. Solutions are devised that could not have been thought of by either party independently. Cases are less likely to get bogged down in legal technicalities that drain parties of time, energy, and money. Emphasis is on pragmatic problem-solving.

Appropriate Cases: Cases in which the parties have an ongoing relationship can be particularly well suited to mediation if there is a desire to preserve or rebuild the relationship. Likewise, businesses may be motivated to mediate with dissatisfied customers because of the potential for a relationship in the future or because of reputation concerns. Cases in which there is a dispute over goods that can be repaired or exchanged or the complaint can be responded to on other non-monetary bases also are good candidates for mediation because the parties have more bargaining options. Typically, parties tend to be more amenable to such non-monetary solutions earlier rather than later in disputes. Try to avoid repossessions by third parties (e.g., banks or credit companies) so that the original parties to the dispute can attempt settlement with a broad range of possible options for resolution.

Settlement Facilitation: Settlement facilitation is a process where a third party, usually with substantial expertise in the subject matter of the dispute, assists the lawyers and their clients to negotiate a resolution. Typically, settlement facilitation is used in cases where litigation has commenced and enough discovery has been completed to allow both sides to estimate the value of the case. Most often the settlement facilitator serves as a shuttle diplomat meeting separately with each side, challenging their case valuations, and relaying offers back and forth.

Lawyer's Role: The role of the lawyer in settlement facilitation is to prepare the case for negotiation, including facts, law, and valuation, to analyze the costs, risks, and benefits of proceeding to litigation if the case does not settle, and to counsel the client on the strengths and weaknesses of the case.

Appropriate Cases: When negotiations have broken down or deadlocked; when either party is reluctant to present a settlement offer without first hearing an offer from the other side; when the parties are reluctant to negotiate for fear that they are too far apart; when the parties do not want to meet face-to-face, but could benefit from neutral intervention.

Hybrid Models: In addition to the basic forms of ADR listed above the student should be aware that different hybrids of these basic forms have developed. These are: assisted negotiation, internal grievance procedures, conciliation, fact-finding mediation, mediation/arbitration, advisory arbitration, last offer arbitration, court administered arbitration, advisory opinions, early neutral evaluations, moderated settlement conferences, mini-trials, summary jury trials, evaluative mediation, special masters, special hearing officers or commissioners, and private judging. There are no doubt more hybrids or combinations of the basic ADR techniques and law students are encouraged to be creative in constructing innovative techniques that help solve their clients legal and practical problems. Students are also reminded that ADR techniques can also be used for only a part of the client's case and can be mixed or incorporated with traditional dispute resolution devices by agreement.

Court Annexed ADR Procedures

Over the past 20 years throughout the United States, almost all courts have adopted ADR procedures as a way to either replace or supplement the traditional adversarial system of litigation. New Mexico is no different. New Mexico federal, state and tribal courts all utilize some form of ADR to aid the parties before them to resolve their disputes in a fair, efficient and economical manner. The federal and state courts in particular have made certain ADR based procedures a required procedural step before trial or as part of the litigation system. Almost all tribal courts in New Mexico utilize some form of traditional dispute resolution similar to ADR, and the Navajo Tribal Court in particular has led the way with its peacemaking procedures.

In the law clinic, each student needs to have some familiarity with each of the common court annexed ADR procedures. The procedures in the Second Judicial District offer good examples of the most common ADR procedures.

ADR In the Second Judicial District Court

ADR in Child Custody, Visitation and Parenting Issues; The Court Clinic Process, and other ADR Requirements.

The Second Judicial District Court Clinic is a court created mediation program, which is staffed by neutral, professionally trained counselors and psychologists. This mediation service is provided to litigants in the district on a scaled fee basis and is limited to issues of child custody, child visitation or other parenting issues, not including child support issues. While there are some opt-out provisions in the rules, the vast majority of child visitation or custody disputes must go through the Court Clinic Process before the District Court will address the underlying issues. The only other way to avoid the Court Clinic process in these kinds of issues is for the parties to agree on these issues, or pay for a private evaluation, which few of our clients can afford.

The Court Clinic provides five basic kinds of services:

- An Orientation Program which is mandatory for all participating parties,
- A Priority Consultation (PC), which is a limited emergency basis service to address interim custody or timesharing issues,
- A Mediation Process to help the parties resolve their own custody or visitation issues,
- An Advisory Consultation (AC) process where the Court Clinic conducts an evaluation and serves as an expert witness to the Court, and
- Custody Evaluations in limited circumstances for the parties use.

Cases with a history of domestic violence should be handled under special protocols. If your client has been involved in domestic violence, it is important to provide the client with a copy of the protocols so that the client can request that the protocols be followed.

All cases must be referred to the Court Clinic by a specific Court Clinic Referral Order (see local form LR-2, Form T), whether the parties stipulate or are ordered to participate. All fees must be paid before the Court Clinic process begins. Law students with clients going through the Court Clinic process should become familiar with three Court Clinic documents, 1) the brochure on Services Provided by the Court Clinic, 2) the Time Sharing Guidelines, and 3) the Court Clinic Domestic Violence Protocols. The student should consult with his or her supervisor before preparing the client to go to the Court Clinic.

Attorneys are not allowed to participate when the client attends the Court Clinic sessions, but it is very important to prepare the client for the Court Clinic process, and to contact the Court clinician assigned to the case. The preparation of the client should include informing the client that the focus of the sessions must be upon the best interest of the child. Clients must be cautioned that while the sessions may appear to be a therapy session, or an opportunity to discuss personal problems and conflicts, the Court Clinician will be evaluating the parties' conduct. The student should contact the assigned court clinician after a session to provide any necessary additional information, and to develop a sense of the court clinician's impression of the case. The student should attempt to form a working relationship with the court clinician, and keep the court clinician informed of any new developments.

Students must also be familiar with the court rules applicable to the Court Clinic. These rules follow.

Local Rule, LR2-504, Child Custody; Parent Plans; Binding Arbitration
COURT CLINIC MEDIATION PROGRAM AND OTHER SERVICES FOR CHILD-RELATED DISPUTES

Mediation Program Established. Pursuant to Sections 40-12-1 NMSA 1978 et seq., the second judicial district elected to establish and will continue to maintain a domestic relations mediation program to assist the court, parents and other interested

parties to determine the best interests of children involved in domestic relations cases. The program shall be administered and services provided by the second judicial district court clinic.

Mandatory Referral. Unless otherwise ordered by the court upon stipulation of the parties or for good cause shown, in every case involving a dispute over any child-related issue except child support the court shall enter an order referring the parties to the court clinic for non-confidential mediation. In the alternative or in addition to an order for mediation, the court may order that the parties submit to other court clinic services including but not limited to advisory consultation, priority consultation, evaluation and decision-making. Except for initial mediations and advisory consultations the court will not order court clinic services simply upon stipulation of the parties, and shall require a showing of good cause.

Submission of Order. Within thirty (30) days after service of the petition or promptly after learning of any dispute over any child-related issue, the petitioner shall present to the assigned judge a proposed order referring the parties to the court clinic. The order shall be in the form set forth in LR2-Form T. If the signatures of all parties entitled to notice cannot be obtained, the petitioner shall request a hearing in the manner set forth in Second Judicial District Local Rules, Rule LR2-123. After the hearing, both parties shall be responsible for providing an endorsed copy of the order to the court clinic.

Required Information Sheet. Prior to filing the court clinic referral order, the parties shall complete a court clinic information sheet in the form set forth in LR2-Form U, and attach such sheet to the order. Referral orders shall not be filed unless the sheet is attached, and no mediations or other court clinic services shall begin until the order is filed.

Fees. The parties shall pay all court clinic fees before any services are provided.

Scheduling Services. After the court clinic referral order is filed, the clinic will contact the parties to schedule all services except priority consultations. With respect to priority consultations, the actual parties along with their counsel, if any, shall contact the clinic in person immediately after the order is filed.

Clinic Requested Hearings. In any case in which a court clinic referral order has been filed, the clinic may request a hearing

or status conference by filing a request for hearing in the manner set forth in Second Judicial District Local Rules, Rule LR2-123. The clinic shall mail or deliver a copy of such request to all parties entitled to notice.

Modification. Any party may file a motion to modify or supplement the order of referral. The order shall continue in effect while such motion is pending.

Policies and Procedures. All court clinic written policies and procedures, including those regarding scheduling, shall be available for review by parties and the general public upon request.

Referral to Other Providers. Upon agreement of the parties or for good cause shown, the court may order that the parties be referred for mediation and other services to a qualified service provider other than the court clinic.

The order shall be in a form similar to the form set forth in LR2-Form T.

Providers as Witnesses. Court clinic staff and other persons who have provided services pursuant to this rule may be called as witnesses pursuant to NMRA, New Mexico Rules of Evidence.

Out-of-District Referrals. Parties in out-of-district cases may receive services from the court clinic provided the referral order is signed by both the assigned out-of-district judge and the second judicial district presiding domestic relations court judge. As a condition of filing the order, the parties shall pay a thirty dollar (\$30.00) fee to the clerk. This filing fee shall be in addition to any assessment fees.

Local Rule 1-124 NMRA, Domestic Relations Mediation Act Programs

1-124. Child custody; parenting plans; binding arbitration.

A. **Parenting plan required.** If a domestic relations proceeding involves custody or visitation of minor children, the parties shall attempt to agree upon and file a joint parenting plan pursuant to Section 40-4-9.1 NMSA 1978 within sixty (60) days of the filing of the petition for dissolution.

B. **Binding arbitration.** If the parties have not filed a parenting plan, the parties may agree to submit issues involving custody or visitation to binding arbitration pursuant to Section 40-4-7.2 NMSA 1978.

C. **Mediation.** If the parties have not agreed to a parenting plan or to binding arbitration pursuant to Paragraphs A or B of this rule, the court may refer the matter to family counseling or mediation prior to holding a hearing on child custody or visitation.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Local Rule 1-125 NMRA, Domestic Relations Mediation Act

1-125. Domestic Relations Mediation Act programs.

A. **Applicability.** This rule shall apply only to domestic relations proceedings that involve custody, periods of parental responsibility or visitation of minor children pending in a judicial district that has established a domestic relations mediation program pursuant to the Domestic Relations Mediation Act.

B. **Referral by court.** If the parties to a domestic relations action involving minor children have not filed a parenting plan pursuant to Section 40-4-9.1 NMSA 1978, unless binding arbitration is pending pursuant to Section 40-4-7.2 NMSA 1978, the court may order the parties to:

attend a general information session;
meet with a counselor designated by the court;
participate in mediation;
participate in priority consultation pursuant to this rule; or
(5) participate in advisory consultation pursuant to this rule.

C. **Mediation; parenting plan.** If the court orders the parties to participate in mediation, if the mediation is successful, the counselor or mediator shall prepare a parenting plan which shall be submitted to the parties and their respective counsel for approval. When the parenting plan has been signed it shall be submitted to the court for approval together with an order approving it.

D. **Priority consultation.** The court may refer the parties to a priority consultation pursuant to the Domestic Relations Mediation Act. Upon conclusion of a priority consultation, the consultant shall prepare written recommendations to the court, which shall be filed with the court and served on the parties. If a party does not agree with the recommendations, within eleven (11) days of the filing of the priority consultation recommendations, the party shall file a motion specifically describing the reasons for the party's objections to the recommendations. The party's objections shall be served on all

other parties. The opposing party may file a written response within eleven (11) days after the date of service of the objections. No reply may be filed. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

E. Advisory consultations. The court may enter an order requiring the parties to submit to an advisory consultation. The order shall be substantially in the form approved by the Supreme Court. At the conclusion of an advisory consultation, a report shall be prepared and served on each party.

The person preparing the report shall also prepare and file with the court written recommendations. The written recommendations filed with the court shall not contain the basis for the recommendations.

If a party does not agree with the recommendations, within eleven (11) days of the filing of the advisory consultation recommendations, the party shall file a motion specifically describing the reasons for the party's objections to the recommendations. The party's objections shall be served on all other parties. The opposing party may file a written response within eleven (11) days after service of the objections. No reply may be filed. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

F. Privileges. All communications made by any person who participates in mediation proceedings pursuant to this rule are privileged except that there is no privilege for information derived from such communications which a participant is required by law to report to a law enforcement officer or state agency. [Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Students must also be aware that if parties are not able to reach agreement on parenting issues within 60 days of filing a petition, the case may be referred to either voluntary binding arbitration or to other ADR procedures. The provisions regarding this process are set forth in the following rules:

ADR in Other Civil Cases in the Second Judicial District Court

The local rules for the Second Judicial District also provide for Court Annexed Arbitration and Settlement Facilitation as follows:

COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION PROGRAMS GENERALLY

- A. **Purpose.** The purpose of this district's court-annexed alternative dispute resolution programs is the early, fair, efficient, cost-effective and informal resolution of disputes. Nothing in the rules governing these programs shall be construed to discourage or prohibit parties from stipulating to private alternative dispute resolution.
- B. **Administration.** These programs shall be administered by a court alternatives director appointed by the court. The court may appoint standing committees of judges, lawyers, and others to provide guidance and assistance.
- C. **Order Required.** All referrals to these programs require the filing of a written court order.
- D. **Limitation.** The number of cases referred to these programs shall necessarily be limited by the number of attorneys and other professionals available to provide alternative dispute resolution services under court-appointment, and the sufficiency of court resources to administer the programs.
- E. **Immunity.** Attorneys and other persons appointed by the court to serve as settlement facilitators, arbitrators, mediators or in other such roles pursuant to the rules governing this district's court-annexed alternative dispute resolution programs, are appointed to serve as arms of the court and as such are immune from liability for conduct within the scope of their appointment.
- F. **Forms.** When available, applicable court forms shall be used. Forms shall be available through the court alternatives director.

Local Rule, LR2-602 Settlement Facilitation Program

SETTLEMENT FACILITATION PROGRAM

a. Scope. The court may, pursuant to Rule 1-016 NMRA, refer cases to settlement conferences conducted by court-appointed settlement facilitators on an ad hoc basis throughout the year and during periodic "settlement weeks" scheduled by the court. The court will generally hold a "settlement week" during September every year.

b. Application. This rule applies to civil cases, whether jury or non-jury, except for cases in the following categories:

Appeals
 Extraordinary writs
 Court-annexed arbitration program, pending cases
 Adoption
 Commitment
 Conservatorship
 Guardianship
 Student Loan

Election
Tax

This rule does not apply to disputes where a law suit has not yet been filed.

c. Referral Upon Request. Any party at any time may request referral to a settlement conference by motion or letter directed to the assigned judge. The letter may be ex parte. The letter should include the following:

- (1) Case number and caption;
- (2) Estimated time required for conference;
- (3) Whether other parties know request is being made;
- (4) Whether other parties agree conference is appropriate;
- (5) Brief list of pending issues;
- (6) Type of facilitator or facilitator team preferred, e.g., judge, attorney, psychologist or other professional, judge/attorney, judge/psychologist, attorney/psychologist, attorney/attorney; and
- (7) Names of all parties entitled to notice and any other persons who should be present at the conference, along with law firm, address, telephone number and capacity, e.g., attorney for petitioner, witness for respondent.

The assigned judge will determine whether to grant the request for referral.

The assigned judge may refuse to grant a request even if all parties agree to a settlement conference.

d. Referral Upon Judge's Own Motion. The assigned judge at any time and without agreement of the parties may refer a case to a settlement conference.

Referral Order. In all cases to be referred, whether upon party's request or judge's motion, the court will complete and file an order requiring a settlement conference, appointing a settlement facilitator or facilitators, and setting a deadline for the conference, and will mail or deliver endorsed copies to the facilitator(s) and all parties entitled to notice. The order shall not indicate whether the referral was made upon a party's request or the judge's motion. The order may be modified only by subsequent written court order.

f. Time, Place and Deadline for Settlement Conference. Unless set by the referral order, the time(s) and place(s) of the settlement conference shall be set by the settlement facilitator(s) within a deadline set by the court. Any party or

facilitator may request an extension of the deadline by motion directed to the assigned judge.

g. Attendance. The following shall attend and be present in person during the entire conference: each party of record including parties represented by counsel; each counsel of record who will be trying the case; and, for each party, the person or persons with complete authority to settle the case including but not limited to insurance company representatives and guardians ad litem. This provision may be waived only by written order of the assigned judge. The court may refuse to grant a motion to waive attendance even if all parties agree to the motion. Upon motion of any party or its own motion, the court shall impose sanctions for failure to attend the settlement conference or have present all necessary parties or their representatives with settlement authority, except upon a showing of good cause.

h. Settlement Conference Information. At least five (5) days prior to the conference, all parties shall provide the facilitator(s) with the information listed below. This information shall not be filed with the court nor in any way be made part of the court record, and at the providing party's discretion, need not be produced to other parties. Upon motion of any party or its own motion, the court may impose sanctions for failure to provide the information to the facilitator(s).

- (1) Case number and caption;
- (2) Brief description of the case; in domestic relations cases include date of marriage, separation and divorce, names, ages, occupations and current annual incomes of parties, and names and ages of children;
- (3) Description of the relief sought;
- (4) List of pending factual issues;
- (5) List of pending legal issues;
- (6) List of all remaining discovery;
- (7) List of any pending dispositive motions;
- (8) Estimate of costs and attorney fees through trial;
- (9) The last offer made to other parties; and
- (10) Copies of case law, statutes, pleadings, exhibits, orders and any other information which would be helpful to the facilitator(s).

i. Good Faith Participation. Parties shall participate in good faith in settlement conferences. Good faith participation includes but is not limited to sufficiently preparing for the conference and engaging in meaningful negotiations during the conference. Upon motion of any party or its own motion, the court may award attorney fees and costs for failure to participate in good faith.

j. Canceling Conferences. Settlement conferences may be cancelled only by written court order. By motion, any party may request that a settlement conference be cancelled. By letter to the assigned judge, the facilitator may request that a conference be cancelled.

k. Choice of Settlement Facilitator. The court will choose the settlement facilitator from a list of facilitators maintained by the court. The court will consider any recommendations made by the parties. The parties may present to the assigned judge a stipulated order appointing any licensed attorney or other qualified person as facilitator. Judges shall not act as facilitators in their own cases.

l. Replacement of Settlement Facilitator. By letter to the assigned judge with a copy to all parties and facilitators, any party or facilitator may request that the facilitator be replaced. The party or the facilitator requesting replacement need not provide an explanation. Upon approval of the assigned judge, the facilitator will be replaced; the court will choose the replacement facilitator from the court's list and will complete and file an amended referral order and mail or deliver endorsed copies to all parties entitled to notice; or, the parties may present to the assigned judge a stipulated order appointing any licensed attorney or other qualified person.

m. Compensation to Settlement Facilitator. Compensation shall not be required for any settlement facilitator for a settlement conference conducted as part of a settlement week. The court may order the parties to pay reasonable compensation to the facilitator for a settlement conference not conducted as part of a settlement week. Judges shall not receive compensation for serving as settlement facilitators.

LR2-603, Court-Annexed Arbitration

COURT-ANNEXED ARBITRATION

Section I: General Provisions.

A. Application. This rule applies to civil cases, whether jury or non-jury, except for cases in the following categories:

Appeals
Uniform Arbitration Act
Extraordinary writs
Adoption
Commitment
Conservatorship
Guardianship
Probate

Children's Code
Domestic relations
Workers' compensation
Student loan
Driver's license
Election
Tax

A. Court Hearings. If a court hearing is required regarding any aspect of arbitration prior to referral or any matter during referral, the court shall set and hear the matter promptly after the matter is brought to the attention of the assigned judge by request for hearing or by the court alternatives director.

B. "At Issue" Required. All cases referred to arbitration must be "at issue" prior to referral. For purposes of this rule, a case is "at issue" when at least one answer to the complaint has been filed. Answers to cross-claims, counterclaims and third-party complaints need not have been filed. Service on all parties need not have been made.

Section II: Mandatory Referral.

A. Types of Cases for Mandatory Referral. All cases, jury and non-jury, shall be referred to arbitration where no party seeks relief other than a money judgment and no party seeks an amount in excess of twenty-five thousand dollars (\$25,000.00) from any party or combination of parties, exclusive of punitive damages, interest, costs and attorney fees.

B. Mandatory Certification. In all cases filed on or after the effective date of this rule, any party filing a complaint, counterclaim, cross-claim, third-party complaint or any other pleading, in which affirmative relief is requested, shall file and serve concurrently with the pleading for affirmative relief, a separate certification indicating whether the party is or is not seeking relief other than a money judgment and whether the amount sought exceeds or does not exceed twenty-five thousand dollars (\$25,000.00) exclusive of punitive damages, interest, costs and attorney fees. The certification shall be a good faith attempt to state the type and amount of relief to be sought at trial and shall not act as a limitation on relief.

C. Review of Certification; Referral Order. Within thirty (30) days after a case is at issue, the court will review the court file, including the certifications filed, to determine whether

referral to arbitration is mandated by Section II(A) of this rule. If so mandated, the court will prepare and file an order referring the case to arbitration, and mail or deliver endorsed copies of the order to all parties entitled to notice. The court on its own motion may postpone filing a referral order if it appears from the court file that the case may be resolved upon a pending motion for judgment on the pleadings or other pending dispositive motion. If referral is not mandated, no order will be entered.

D. **Failure to File Certification.** If a party fails to file a certification, the court after written notice may impose an appropriate sanction including but not limited to dismissing the party's complaint without prejudice. The court in its discretion may impose such sanction without hearing.

E. **Referral Upon Motion.** At any time after a case is at issue and notwithstanding any certifications filed, upon a party's motion or the court's own motion, the court may enter an order referring the case to arbitration provided the court finds that the requirements of Section II(A) are met. The court in its discretion may enter such an order without hearing.

F. **Denial of Referral.** Notwithstanding a finding that the requirements of Section II(A) have been met, at any time prior to referral, upon a party's or the court's own motion, the court for good cause may deny referral to arbitration. The court in its discretion may enter such an order without hearing.

Section III: Permissive Referral. Any case may be referred to arbitration where the parties stipulate to arbitration. The court may require the parties to stipulate to an arbitrator as set forth in Subsection IV(C)(3) of this rule.

Section IV: Arbitrators.

A. **Arbitrator Pool.** The court will maintain a pool from which arbitrators will be appointed. The pool shall include all active members of the State Bar of New Mexico who have been licensed to practice law for five (5) or more years and who are residents of or have an office in Bernalillo County. Other attorneys licensed for five or more years, including inactive attorneys, out-of-Bernalillo County attorneys and out-of-state attorneys, may be included in the pool upon written request to the court alternatives director. The chief judge for good cause may remove an attorney from the arbitrator pool either temporarily or permanently. Such removal may be upon the court's own motion and without notice to the attorney, or upon written request to the court alternatives director. The court will periodically review

the pool of arbitrators for completeness and accuracy, and may require any member of the State Bar of New Mexico to submit information necessary for this purpose. The court will provide written notice to attorneys as they are added to the pool, either by letter or notice published in the Bar Bulletin.

B. Training. The court may require any attorney who is part of the arbitrator pool to attend arbitrator training.

C. Appointment to Case. After a case is referred to arbitration, an attorney shall be appointed as arbitrator by the filing of a court order upon either random selection, court selection or stipulation. With appointments upon random or court selection, the court will file an order appointing the arbitrator and mail or deliver endorsed copies to the arbitrator and all parties entitled to notice. With stipulations, the parties shall file the order of appointment.

(1) Random Selection.

(a) Notice of Choices. Within ten (10) days after a case is referred to arbitration, the court alternatives director will mail to all parties a notice listing three (3) attorneys as choices for arbitrator. The three attorneys shall be selected at random from the arbitrator pool except that none of the three may be employed by the same law firm as any of the other three or as any counsel in the case. The notice of choices shall not be filed with the clerk.

(b) Peremptory Strikes. Within seven (7) days after the notice of choices is mailed, each party may peremptorily strike one attorney by written notice to the court alternatives director. A maximum of two strikes will be counted altogether; a maximum of one strike will be counted for each side, e.g., all plaintiffs or defendants or third-party defendants; strikes will be counted in the order received. The first attorney remaining after strikes are counted shall be appointed. The period for making strikes shall not be extended. The notice of strikes shall not be filed with the clerk.

(2) Court Selection. For good cause, the court may select an arbitrator rather than provide the parties with a notice of choices.

(3) Stipulation. The parties may stipulate to the appointment of any licensed attorney, whether or not part of the pool and with any length of experience, by stipulated order filed within seven (7) days after the notice of choices is mailed, or within

seven days after a vacancy is created by order of excusal or otherwise. The stipulated order must be approved by all parties and by the proposed arbitrator. Approval of counsel and the proposed arbitrator may be telephonic; approval of parties pro se must be by signature. The court or the proposed arbitrator may require the parties to pay compensation at the arbitrator's usual hourly fee.

(4) Excusal; Conflicts Check. Promptly upon appointment, the arbitrator shall attempt to discern any conflicts of interest in hearing the case and shall notify the parties thereof. Upon discovery of a conflict of interest in hearing a case, an arbitrator shall file a motion for excusal. Upon a party's, the arbitrator's or the court's own motion, the court for good cause may order that the arbitrator be excused from appointment to the case. The court in its discretion may enter such an order without hearing.

(5) Vacancy. Vacancies caused by excusal or otherwise shall be filled by appointment of the first of the remaining three choices or if none remains, by appointment of an attorney selected by the court, or the parties may stipulate to a replacement as provided in Subsection IV(C)(3).

D. **Compensation.** The court shall compensate arbitrators in the amount of one hundred dollars (\$100.00) per case. An arbitrator is entitled to compensation when the arbitrator files an award or the arbitration proceedings are otherwise concluded or when the arbitrator is excused from appointment. The arbitrator shall submit a written request for compensation to the court alternatives director within thirty (30) days after the arbitrator is entitled to compensation. Failure to submit a request shall be deemed a waiver of compensation. Arbitrators compensated by the parties pursuant to Subsection IV(C)(3) shall not be compensated by the court.

Section V: Procedures During Referral.

A. General.

(1) Court Jurisdiction. The assigned judge continues to have jurisdiction over a case during referral to arbitration. In general, however, the assigned judge should not hear any matters after an arbitrator is appointed except the judge may hear the following:

Motions to excuse the arbitrator

Motions to withdraw referral to arbitration
Motions for sanctions pursuant to Subsection V(A)(5)
Motions for free process
Motions regarding attorney representation
Motions to add new parties
Motions to set aside default or any other judgment
Motions to compel settlement
Any post-judgment enforcement and execution matters
Requests for settlement conference pursuant to Second Judicial
District Local Rules, Rule LR2-602.

After a case is referred to arbitration and before an arbitrator is appointed, the court in its discretion may vacate any pending hearings on matters that may be heard by the arbitrator, and may set hearings on matters needing immediate consideration.

(1) Arbitrator Jurisdiction, Powers, Duties. The arbitrator's jurisdiction begins when the order of appointment is filed and continues until the arbitrator is excused or until ten (10) days after an award is filed or until the arbitration proceedings are otherwise concluded, whichever period is shorter. While the arbitrator has jurisdiction, the arbitrator's decisions shall be considered equivalent to court orders. The arbitrator may decide all issues of fact and law unless specifically prohibited by this rule or court order. The arbitrator shall consider the efficient, cost-effective and informal resolution of the case as a factor in all the arbitrator's decisions and in all aspects of the arbitrator's management of the case. The arbitrator may limit discovery whenever appropriate. The arbitrator may administer oaths. With the exception of contempt, the arbitrator may enter appropriate sanctions including sanctions pursuant to Rules 1-016, 1-030 and 1-037 NMRA, or any other Supreme Court rule, sanctions for failure to comply with any of the provisions of this rule, and sanctions for failure to comply with any of the arbitrator's decisions. Upon agreement of the parties, the arbitrator may serve as a mediator or settlement facilitator. The arbitrator's jurisdiction, powers and duties may not be delegated. The arbitrator must personally conduct the hearings and trial, and must personally sign decisions and the award.

(2) Supreme Court and Local Rules. All Supreme Court rules including rules of civil procedure (including Rule 1-006(D)

NMRA) and rules of evidence, and all second judicial district local rules, apply during referral to arbitration unless specifically waived by written court order or the arbitrator. The arbitrator may waive rules of evidence only upon agreement of the parties.

(3) Good Faith Participation. All parties shall participate in good faith in the arbitration proceedings. The arbitrator may enter an award of default or of dismissal against any party failing to participate in good faith or reflect the failure in the award. In any such award, the arbitrator shall include a certification that the party failed to participate in good faith.

The court shall consider such certification when deciding attorney fees, costs and interest on appeal, or when considering whether to set aside the default.

(4) 120-Day Deadline; Sanction. Within one hundred twenty (120) days after the arbitrator is appointed, the arbitrator shall file an award unless the arbitration proceedings have otherwise been concluded. Upon a party's, the arbitrator's or the court's own motion, the court for good cause may extend the one hundred twenty day (120) period. The court in its discretion may enter such an order without hearing. If the arbitrator or a party fails to comply with this provision, the court after written notice may impose an appropriate sanction including but not limited to requiring the arbitrator or party to pay a penalty into the second judicial district arbitration fund.

(5) Filing Papers. Any motion or other paper to be heard or otherwise considered by the arbitrator shall not be filed with the court. The arbitrator shall not file any decisions except for the award. Upon a party's or the court's own motion, the court may order that an inappropriately filed paper be stricken. The court in its discretion may enter such an order without hearing. Failure to submit a motion to strike shall be deemed waiver of any prejudice caused by a paper inappropriately filed.

(6) Court File: Review, Copy. The arbitrator may review the court file at any time during regular court hours. The court shall provide the arbitrator a copy of the file or portions of the file at no cost upon request; requests shall be made to the court alternatives director.

(7) Summonses; Subpoenae. The clerk shall issue summonses and subpoenae in cases referred to arbitration in the same manner as

with other civil cases. Such summonses and subpoenae shall be served and enforceable as provided by law.

(8) Record of Proceeding. Any party to an arbitration proceeding, at the party's own expense, may engage a certified court reporter to make a record of testimony given at an arbitration proceeding for use as allowed by the New Mexico Rules of Evidence. A copy of the record may be obtained by any other party to the arbitration proceeding in the same manner that deposition copies are obtained. Costs associated with making the record or obtaining a copy of it shall not be recoverable.

(9) Withdrawal of Referral. At any time after a case is referred to arbitration, upon a party's, the arbitrator's or the court's own motion, the court for good cause may order that the referral to arbitration be withdrawn and the case be returned to the court's docket. The court in its discretion may enter such an order without hearing.

B. Hearings; Trial.

(1) Place, Date and Time. The arbitrator shall set an appropriate place, date and time for all hearings and trial. Hearings shall be set during regular business hours except upon agreement of the parties. The arbitrator may conduct hearings by telephone.

(2) Notice. The arbitrator shall provide twenty (20) days written notice of trial. The arbitrator shall provide five (5) days notice, in writing or by telephone, of all other hearings. Notice of trial or hearings may be waived by the parties.

(3) Requests for Hearing. Unless otherwise directed by the arbitrator, parties may request hearings informally, by letter or telephone, provided the requesting party notifies all other parties as well as the arbitrator. The arbitrator may decide motions and other preliminary matters on written submissions.

(4) Statement of Witnesses, Exhibits. No later than ten (10) days prior to trial, each party shall serve upon all other parties a statement listing all the exhibits and witnesses the party may use and briefly describing the matters about which each witness will be called to testify. The arbitrator may waive this provision.

(5) Return of Exhibits and Depositions. After an award is filed or the arbitration proceedings are otherwise concluded, the arbitrator shall return all exhibits and depositions to the submitting party.

C. Evidentiary Exceptions. The following exceptions apply during referral to arbitration.

- (1) Depositions. The arbitrator may hear testimony by deposition.
- (2) Documentary Evidence. The following documents, if relevant, shall be admitted in evidence without further proof provided a copy of said documents is served upon all parties no later than ten (10) days prior to the hearing or trial:
 - (a) Estimates and bills for services and products, if dated and itemized.
 - (b) Reports of experts, if dated and signed.
 - (c) Records and reports as described in Rule 11-803, Paragraphs (F), (H), (I), (K), (L), and (N) through (R) NMRA.

D. Award.

- (1) Final Decision; Scope. The arbitrator's final decision shall be called an "award". The award shall clearly set forth the amount awarded to each party and address all pending claims, attorney fees, costs and interest as allowed by law, including any required award of costs pursuant to Rule 1-068 NMRA. The award may be an award of default, dismissal, summary judgment or money damages.
- (2) Amount. The amount of the award shall be limited only by the evidence and shall not be limited by the circumstances under which the case was referred to arbitration.
- (3) Filing. Unless the parties agree otherwise, within ten (10) days after the last hearing, the arbitrator shall file an award with the clerk and serve copies on all parties entitled to notice. If an arbitrator fails to comply with this provision, the court after written notice may impose an appropriate sanction including but not limited to requiring the arbitrator to pay a penalty into the second judicial district's arbitration fund.
- (4) Amended Award. Within ten (10) days after an award is filed, the arbitrator may file an amended award. Copies shall be served on all parties entitled to notice.
- (5) Binding Award. At any time before the award is filed, the parties may file with the clerk a stipulation that the award will be binding and that the right to appeal the award is waived.

(6) Judgment on Award. If no appeal is taken and the time for appeal has expired or the right to appeal has been waived or the appeal has been voluntarily dismissed, the court shall prepare and file a judgment or final order adopting that part of the award not appealed as a judgment or final order of the court, and mail or deliver endorsed copies to all parties entitled to notice. Such judgment or final order shall be enforceable and binding as any other judgment or final order.

Section VI: Appeal.

Right to Appeal. Any party of record at the time the arbitrator's award is filed may appeal the award, except that a party may not appeal an award of default, including an award of default entered pursuant to Section V(A)(4) of this rule. An award of default shall only be set aside pursuant to Rules 1-055 and 1-060 NMRA.

Procedures to Appeal.

(1) Notice of Appeal. To exercise the right to appeal, a party must file a "notice of appeal from arbitration" with the clerk within fifteen (15) days after the award or an amended award, is filed. The period for filing the notice shall not be extended. A copy of the notice of appeal shall be served on all parties entitled to notice. Cross-appeals are not required.

(2) Voluntary Dismissal. At any time after filing a notice of appeal and before trial before the assigned judge, a party may withdraw the appeal by filing a notice of voluntary appeal dismissal. A copy of the notice shall be served on all parties.

Procedures on Appeal.

(1) Docket Status. After a notice of appeal is filed, the case shall be returned to the same status on the assigned judge's docket that it had prior to referral to arbitration. Requests for trial must be submitted as required by local rule.

(2) De Novo Proceedings. All appeals shall be in the form of de novo proceedings before the assigned judge. No reference shall be made to any of the arbitrator's decisions including the award. Neither the arbitrator nor the court alternatives director shall be permitted to testify about the arbitration proceedings. Promptly after the notice of appeal is filed and until disposition of the appeal, the court shall seal the award.

(3) Discovery. Any discovery obtained while the case was referred to arbitration may be used in the de novo proceedings.

D. Award of Fees, Costs and Interest Against Appellant. If the court makes a decision on the merits which is the same as or less favorable to the appellant than the arbitrator's award, the court shall order that the appellant pay all other parties' expenses incurred during the appeal including but not limited to reasonable attorney fees, costs and pre-judgment interest dating from the arbitration award. The court for good cause shown may waive this provision; the court shall state the basis for its good cause finding on the record.

All of these local rules require a specific form of order, and students should familiarize themselves with these form orders, which are found in the local rules. In addition, brochures describing each program in detail are available from the local office of Court Alternatives.

Bernalillo County Metropolitan Court – ADR Procedure.

A brochure describing the Bernalillo County Metropolitan Court provides the following information on its mediation services.

We utilize professionally trained mediators who volunteer their time: Varies between 80-120 mediators. Usually, two co-mediators are scheduled for each mediation; however, sometimes one mediator is scheduled when it's a less complex low dollar debt collection case. Mediations can last from 20 minutes up to three hours or more, depending on the case. Additional mediation sessions are available, when needed and agreed to by the parties. We also provide follow-up when a mediated agreement breaks down or is not being complied with. This happens about 5-8% of the time.

Referral/Pre-Screening Process: The Mediation Division pre-screens all *answered* civil complaints (except restitution/evictions) and selects approximately 60% to be scheduled for mediation. Mediation is a *voluntary process*. If either party does not wish to mediate, we cancel the mediation and ask the assigned judge to set the case for hearing. If a case is *not selected* for mediation, the parties can still request mediation and one will be scheduled. Judges can also refer cases to mediation. Generally, parties are willing to try mediation before going to court. Judges can also refer criminal cases to mediation at the judge's discretion. Kinds of cases might include property damage, harassment, assault/battery, neighbor-to-neighbor disputes, etc. *Remember, we utilize a non-directive, facilitative form of*

mediation. If the parties require guidance, counseling, educational programs, etc., mediation might not be appropriate. We also don't typically mediate domestic violence cases due to the tremendous power imbalance that can exist. Our goal is for mediation to be a harmless process.

Mediation Division Synopsis

Where We Conduct Mediations: We have a large mediation conference room available and also utilize the jury room and all three courtrooms at 111 Lomas NW, 2nd Floor.

Average agreement rate: Varies between 65-80%. Judges are advised by disposition whether or not the parties were able to reach an agreement. If an agreement is reached, a copy is attached to the disposition. There are also many cases that resolve *after* mediation, but before court.

We conduct approximately 900 mediations per year.

The Program Director also conducts phone mediations/facilitations/shuttle negotiations.

Other Activities of the Division/Program:

Conduct various trainings, workshops and round tables for our mediators. This helps ensure quality as well as providing some form of compensation to the mediators.

Provide observation opportunities for adult mediation students as a part of their training.
Conduct field trips for peer mediators from various APS elementary and mid-schools.

Provide consultation and training for various individuals/groups, both resident and nonresident, in the field of mediation and in particular court-annexed mediation.

Settlement Conferences in the New Mexico Supreme Court and the New Mexico Court of Appeals

The New Mexico Court of Appeals and the Supreme Court may provide for Settlement Conferences as follows:

Rule 12-313 of the New Mexico Rules of Appellate Procedure:

SETTLEMENT CONFERENCES

The appellate court may, by procedures adopted by it from time to time, hold settlement conferences to facilitate the settlement of cases pending on appeal.

The following information is sent to litigants in the Rule 12-313 mediation process. The information provided is applicable to almost any mediation process.

Appellate Court Mediation Brochure

May 6, 2003

The New Mexico Court of Appeals

**MEDIATION CONFERENCE PROCEDURES AND
SUGGESTIONS FOR EFFECTIVE MEDIATION
REPRESENTATION**

The Appellate Mediation Office conducts mediation conferences under Rule 12-313NMRA 2003 and Ct. App. Order No. 1-24. The conferences are designed to reduce the time and expense of civil appeals by addressing any matter that may aid in their disposition. The conferences offer parties and their counsel confidential, risk-free opportunities to communicate about underlying interests, self-evaluate their cases, and explore possibilities for voluntary settlements with an informed, neutral mediator.

Case Selection

Any civil matter pending before the Court is eligible except appeals in which one of the parties is incarcerated or in which a non-attorney is a pro se party* and in cases involving the revocation of a driver's license, a petition for extraordinary relief, or an appeal arising out of the Mental Health and Developmental Disabilities Code and the Children's Code. The Mediation Office will select cases at random from the pool of eligible appeals, and other cases may be referred by the Court to the program either before or after briefing. Additionally, counsel for either party may request a mediation conference by contacting the Mediation Office in writing. Such requests will be kept confidential and generally accepted in any eligible civil appeal.

Conference Scheduling and Format

Counsel receive a Mediation Conference Notice advising them of the date and time of the conference and whether it is to be held by telephone or in person. If a mistake is made or if it would better serve the purposes of the conference to have different or additional attorneys participate, notified counsel should promptly advise the office. The participating attorneys should be those on whose judgment the clients rely when making decisions. Anyone with an unavoidable scheduling conflict may ask that the conference be rescheduled; the Mediation Office will then provide one or more alternate dates and ask the attorney with the conflict to get the other participants to agree on a new date.

Most conferences are conducted by telephone, with the Court initiating the call, in order to make the process as inexpensive as possible. Participation is mandatory,* meaning that lead counsel are required to participate in the process. Clients are welcome to participate actively in all phases of the mediation process. Opposing counsel are encouraged to discuss the value of having clients participate and of holding the conference in person. Clients may participate by telephone from locations other than an attorney's office. At the mediator's discretion, conferences may be conducted in person. In-person conferences are typically held at the Court of Appeals in Santa Fe and at the State Bar Center in Albuquerque.¹

The mediator begins the conference by explaining the mediation process. He may inquire whether any procedural questions or problems can be resolved by agreement. Each side then discusses its perspectives on the conflict. Often, through an examination of the problem that goes beyond the appellate issues, the participants are able to identify important needs and values that underlie the dispute. The legal issues may be directly discussed. However, the purpose is not to decide or reach a conclusion about the merits of the appeal, but rather to facilitate an understanding of the issues and an evaluation of the risks and opportunities for each side. Candid examinations of the case can help the parties reach consensus on a settlement value.

Counsel should allow two hours for the initial conference. In some cases the discussions may go no further; in other cases proposals are generated that require further review. As a result, the mediator may schedule follow-up conferences to fully pursue all opportunities for settlement.

Extensions of Time

The times on appeal are not suspended upon notice of a mediation conference. However, the Court recognizes that a case's settlement potential may decline as substantial funds are expended on an appeal. In order to moderate such expenditures in appropriate cases while settlement is being considered, counsel are encouraged to orally request the mediator to grant an extension of time for filing proof of satisfactory arrangements for the cost of the transcript of proceedings and for filing briefs. Such requests may be made before, during, and after a scheduled conference. The mediator has complete authority to grant such extensions of time. No formal motions are required.

¹ Appeals in which one or more parties are not represented by counsel are not included in the mandatory program. However, a mediation conference may be scheduled in such cases where all parties, both those unrepresented as well as those represented, voluntarily consent to participate.

What Participants Can Expect

The mediator typically probes for each party's underlying needs and interests in an effort to help the parties create and explore options for resolving the dispute. The mediator may lead a considered and sometimes detailed exploration of the cases' merits, depending on the extent to which the participants place importance on their ability to predict how the Court of Appeals would resolve the appeal. Additionally, the mediator also may invite discussion of related trial court cases, frequently in an attempt to achieve a global settlement of various lawsuits or proceedings.

What the Court Expects from Counsel

Mediation is most productive when counsel are conversant with the pertinent facts and law in a case and are fully aware of their clients' interests, goals, and needs. Sessions are not productive when counsel present and maintain extreme positions and engage in hard, bottom-line bargaining. Counsel should obtain advance authority from their clients to make those commitments as may reasonably be anticipated. By developing and discussing a realistic view of the consequences of not reaching an agreement, counsel can obtain the authority to settle the case if the mediation results in a settlement opportunity that is favorable to the client. Experience has shown that in most cases there is substantial movement from prior settlement positions. Counsel are strongly urged to consider having their clients present or available by phone at the time of the conferences.

Mandatory Participation--Voluntary Settlement

Although mediation conferences are relatively informal, they are official proceedings of the Court and the Court may require all parties to participate. The mediation process is nonbinding, so no settlement is reached unless all parties fully consent.

Confidentiality

The Court, by rule and verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the mediator, is disclosed to anyone on the Court of Appeals or any other court that might address the case's merits. The Court will not reveal any request by counsel for mediation without the requesting party's permission. Ex parte communications are also confidential except to the extent disclosure is authorized. This confidentiality rule applies in all cases including those referred for mediation by a panel.

How to Prepare for a Mediation Conference

- Prepare thoroughly (as if you were going to a hearing or a trial) with the ultimate goal of resolving the dispute in mind. Make a candid assessment of the respective strengths and weaknesses of both sides' legal positions. Be prepared to suggest an approach for the mediator to take in an attempt to settle the case (e.g. "problem" to be resolved, sequence of issues). Understand your client's priority of interests. Imagine creative solutions.

- Understand the rules of the Court and the role of the mediator.
- Advise the mediator if you believe it might be helpful to invite the participation of an entity who is not a party to the appeal.
- Consider contacting opposing counsel in advance of the conference as a means to establish a positive working relationship.
- Consider the principal-agent issues (e.g. incentives, roles, information) that may impact on each side's behavior.

The “Authority” Issue in Mediation

- If “having the right person involved in the negotiation” has been a problem in the past, raise the issue with the mediator before the mediation session. Obtain a clear understanding of who will be present at the mediation and what authority they will have.
- If your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the mediator in advance.
- Understand whether the person has authority to decide or to “report and recommend” a proposed settlement to a superior.
- Have someone with authority present or available.

How to Work with the Mediator

- Follow the mediator's cues. Anticipate questions such as: (1) What happened? (2) How do you feel about the situation and what underlying needs would you like have satisfied? (3) What do you want from the mediation in terms of priorities, interests, results?
- If the mediator asks you to restate a point, be patient. The mediator may be asking you questions for clarification or to elicit information that the other party needs to hear.
- Articulate legal, factual, and practical information that can be used to reality-test the other party's expectations.
- Use the mediator to point out settlement options and reality-test your client's expectations. Be candid and realistic about your “worst case.”
- Use the mediator to suggest your proposals or to offer proposals as options “not owned by anyone.”

- Confer with the mediator as to how or when to make proposals or settlement offers. Consider: What is your outcome analysis? What is a fair settlement analysis (range) in light of it? Is this a reasonable move in relation to where you have been and where you are going?
- Confer with the mediator as to the best strategy towards closure and whether and when it is advisable to offer a “bottom-line” figure or a “best and last” proposal.
- Use the mediator to guide you in ascertaining whether there are impasses that take time to work out or whether the other side is intractable and the mediation should be terminated. If you must deadlock, know precisely why you have been unable to settle and what must change before the impasse can be broken.
- Be patient and persistent. Each mediation has its own rhythm and pace.

The Role of Case Evaluation in the Mediation

- Mediation is not designed for “deciding past rights and past wrongs”--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- After problems have become lawsuits there is often the desire by the parties and counsel to have a third-party tell them “how they are going to do” in the case. The mediator will address that desire in such a way that does not blunt the overall objectives of mediation and unnecessarily narrow the focus but rather gives the parties and counsel some assistance, or tools, for them to better evaluate their case. In this part of the mediation process “self realization is the best form of persuasion.”
- The mediator will not predict how the court will rule in a particular case, but rather attempt to clarify the tensions surrounding the issues on appeal.
- The mediator may provide objective court information--how the court operates. The mediator may discuss generally how a case gets assigned to a non-summary calendar, the probabilities of the case being decided by a formal opinion, time lines, and generic reversal rates.
- The mediator may discuss some of the court’s decision-making components such as the standards of review and preservation of error.
- The mediator may discuss the various outcome options and how they may relate to the course of the litigation: (1) So what if you win? (2) So what if you lose? (3) Where is the money? (4) Does a resolution of the legal issues solve your problem? (5) Are you potentially headed for an inconclusive result?

Elements of Effective Communication

- A skillful presentation is not necessarily “conciliatory.” There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the “common ground” that the parties may have in seeking to resolve the situation.
- Let your client speak if you believe it appropriate, and let your client respond directly to questions from the mediator or the other side, if you are prepared to do so.
- Effectively use what you have developed in prior proceedings: prior rulings, deposition testimony, key documents, and any admissions.
- Do not be antagonistic to the opposing party. Save your comments on personality problems and the conduct of parties or their counsel in the case for private discussion with the mediator.
- Do not “draw a line in the sand” in your initial comments.
- When opposing participants are speaking: let them talk without argument or interruption; consider this an opportunity to learn new facts; use this as an opportunity to have the other side describe “what it really wants” in the dispute rather than restate its legal position; ascertain if the other side has a hierarchy of true interests; look for common ground; assess the other party’s weaknesses; and listen carefully to what the other side is saying and even repeat back what the other side is saying to convince them that you have heard their position. If a settlement proposal is made at the conclusion of an initial presentation, do not reject it out-of-hand. Given the fluid nature of many mediations, lawyers and clients may be presented with settlement possibilities (or proposals) that they had not considered at the outset.

Private Conferences with the Mediator

- Be clear about what information you expect the mediator to treat as confidential.
- Ask the mediator for more information about the other party’s position.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the case; (4) discuss the other party’s needs or interests; (5) discuss what information the mediator can use to do “reality-testing” of other party’s expectations and position.
- Use “downtime”--when the mediator is having a private conference with the other side--to review your client’s interests in light of any new information and any historical information that may have become important and to “brainstorm” about possible solutions with your client and any co-counsel.

Mediation Don'ts

- Don't prevent the mediator from talking to your client (even with you present) or from talking with all the parties.
- Don't be afraid to ask for a moment during the mediation to speak privately with your client.
- Don't base your settlement strategy on how well you are going to do in a particular court.
- Don't take a backward step. If you offered a specific dollar amount prior to mediation, but came to mediation with a lower amount in hand, you injure your credibility.
- Don't accuse the opposing party or their counsel of "bad faith" during a mediation just because their settlement posture did not live up to your expectation.
- Don't burn your bridges during mediation. Your case may take an unexpected turn for the worse as it develops, and you may wish to re-initiate settlement discussions.

Telephone Conference Mechanics

The telephone mediation conference will be conducted using a commercial system that is accessible over any touch tone telephone. The following information is designed to let you know what to expect while using the system and to give you some navigation tips in advance. While most of this information will be repeated during the conference, it may be helpful to have this page handy. After the mediator establishes personal contact he will "admit" you to the telephone meeting. The system will ask you to *very briefly* state your first and last name and press #. If you are presented with a menu of additional options, press _ to enter the main meeting. A recording of your name will be broadcast to those already in attendance and you will join them. Depending on the sequence of calls, you may have to wait for several minutes while the mediator calls and connects all of the necessary participants.

At some point during the conference the mediator may divide the participants into breakout sessions to enable private discussions. The mediator will instruct the participants to press #, _, and then a number (1-9) for their specific breakout session. Once all the participants are present in a breakout session the mediator will lock the session by pressing #, _, and _ . (A breakout session can be unlocked by pressing the same keys -- #, _, and _.) In order to take a roll call of the persons present and test for security, you may press #, _, and _ at anytime. To return to the main meeting from a breakout session, press #,_, and 0.

Further information is available *from the Appellate Mediation Office, New Mexico Court of Appeals, Box 2008, Santa Fe, New Mexico 87504. Telephone 505-827-3694. Fax 505-827-6642.*

Settlement Conferences in the Federal District Court for New Mexico

Settlement conferences in the Federal District Court for the District of New Mexico are provided for in the following District Court rule.

Local Rule, LR-CV 16.2, Settlement Conferences

Settlement Conferences.

(a) In every civil case the parties must participate in a settlement conference with a Judge unless otherwise ordered by the Court. Cases excepted from this rule are listed under D.N.M.LR-Civ. 16.3.

(b) In every bankruptcy adversary proceeding filed in Bankruptcy Court, the parties must participate in a settlement conference with members of the bankruptcy facilitation panel unless otherwise ordered by the Bankruptcy Court.

(c) For each party, at least two persons must attend settlement conferences:

the attorney who will try the case; and
the party or designated representative with final settlement authority, other than an attorney of record.

(d) A request to be excused must be made in writing to the Court at least five (5) calendar days before the conference.

(e) Evidence of settlement offers made, and of statements made, at the settlement conference, regardless of whether made in written, oral or graphic form, will be inadmissible as provided in Fed.R.Evid. 408. Statements which are made by any party to the Judge who is conducting the settlement conference, and which are identified by that party as confidential, will not be disclosed by the Judge to any other party. The Judge who is conducting the settlement conference may not reveal to the trial judge any information about offers made, or about statements made, by any party at the settlement conference, other than whether the case was or was not settled.

(f) Within five (5) days of notice of assignment of a member of the bankruptcy facilitation panel to facilitate an adversary proceeding in Bankruptcy Court, any party may move the Court to disqualify the panel member based on the standards set forth in 28 U.S.C. s 455.

ADR in New Mexico Tribal and Pueblo Courts

Almost all tribal courts in New Mexico utilize some form of ADR in their court systems with the most common forms being traditional ADR as practiced by the tribe and diversion programs.

The most well known form of ADR in tribal courts is the "peace making" processes regularly utilized by the Navajo Tribal Courts. This "peace making" process is well know and highly studied. The following excerpts from the Navajo Nations Peacemaker Court Rules give a good sense of the Peacemaker Court concepts.

Peacemaker Court Rules

Rule 1.1 provides:

Purposes.

These rules fix the practice and procedure for the handling of disputes among members of the Navajo Tribe by the intervention of members of the community where the dispute arises. These rules are intended to give formal support, structure and enforcement to traditional Navajo methods of resolving disputes through mediation and the use of traditional ways without the imposition of judges or lawyers.

Rule 1.3 provides:

Establishment of Peacemaker Court.

The Peacemaker Court of the Navajo Nation is hereby established as a department of the district court of each judicial district of the Navajo Nation. The trial judge of each judicial district shall supervise the activities of the Peacemaker Court of the district and shall exercise supervisory control over any Peacemaker appointed pursuant to these rules.

Rule 1.4 provides:

Scope.

A judge of the Navajo Nation may appoint a Peacemaker in a community where the parties to the dispute are members of the Navajo Tribe and where the matter in dispute involves certain personal and community relationships including, but not limited to, the following:

- a. Marital disputes and disputes involving family strife;
- b. Disputes among parents and children;
- c. Minor disputes between neighbors as to community problems such as nuisances, animal trespass or annoyance, disorderly conduct, breaches of the peace and like matters;
- d. Alcohol use or abuse by family members or neighbors;
- e. Sexual misconduct;

- f. Conduct causing harm, annoyance or disunity in the immediate community and chapter;
- g. Minor community business transactions of a sum of \$1,500 or less;
- h. Any other matter which the District Court finds should or can be resolved through the use of the Peacemaker Court.

Rule 1.7 provides:

These rules will be interpreted liberally and informally with the goal of providing fair, informal, inexpensive and traditional means of resolving local disputes in the communities of the Navajo Nation. The rules will be used and applied in as close accordance with Navajo tradition and custom as is possible.

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XII. Negotiation and Settlement

Settlement as the Predominant Dispute Resolution Device

Settlement is almost a way of life for attorneys and negotiation is the critical skill in settlement. Lawyers spend a large part of their time negotiating at one level or another. In fact, settlement is the predominant dispute resolution device in the American legal system. Studies and experience have shown that the vast majority of legal disputes are ultimately settled without a formal trial or administrative hearing. Rough estimates indicate that over 80 percent of all civil claims ultimately settle. In the criminal field the pattern is exactly the same, plea-bargaining disposes of 90 to 95 percent of all criminal cases filed. In addition, in the typical legal practice attorneys constantly negotiate and settle a wide variety of procedural and substantive disputes on an almost daily basis. The recent impact of ADR and its policies of collaborative and cooperative dispute resolution in the legal system will probably accelerate these settlement trends. As illustrated by the previous section in this Manual, courts and administrative agencies have adopted or incorporated formal settlement or ADR devices in an effort to further reduce the number of adjudicated cases. Almost all courts and agencies actively promote settlement as a formal pretrial device. This settlement pattern is common to most areas of practice, and students need to become skilled negotiators. Law students are, therefore, strongly encouraged to formally study the art and skill of negotiation. A good place for the student to begin this study is to read one of the leading books on negotiation, *Getting to Yes: Negotiating Agreement Without Giving In*, by R. Fisher and W. Ury, (Penguin, 1991).

Basic Settlement Concepts

In the field of negotiation, there are several core concepts that the law student needs to understand. The first is that negotiation theory is divided into two models, the first and older model is competitive or power based negotiation, the second and more modern model, greatly influenced by the ADR movement, is collaborative or cooperative negotiation. Competitive negotiation is based on the traditional competitive attorney role where one tries to negotiate from a position of power or strength with an emphasis on adversarial leverage. Collaborative or cooperative negotiation, while still somewhat competitive is not adversarial. The collaborative model is based on each lawyer adopting a cooperative problem-solving role in an effort to resolve a mutual or shared problem. The reality is that in practice many lawyers utilize a hybrid of these two models or switch between models as appropriate. A wise attorney is able to recognize and adapt to these changes.

The second core concept is that for settlement to occur there needs to be some form of compromise on the part of each party to the dispute. Compromise requires an exchange of something of value by each party. Each party to the dispute needs to take something from the process or not give up something for the process to work. . A “take it or leave it” or “all or nothing” approach (Bulwarism) does not generally work unless there is absolute power on one side. For settlement to occur the process must involve an actual or perceived exchange of some bargained for item that is valued. There must be some gain or even a cutting of losses for each party. Negotiation is this process of exchange or compromise. For negotiation to work the exchange of items or values must be rational. That is, there must be communication and some sort of advocacy or educational process to get the parties to compromise and agree to settle a

disputed claim on some basis that each party views as practical and fair. Fairness, actual or perceived, is a key ingredient in almost all negotiations.

Another core concept is that if the vast majority of civil or criminal claims are ultimately going to be settled or plea-bargained, then negotiation and settlement concepts and strategies need to be a key part of all legal planning and case activity. Negotiation and settlement strategies and considerations need to be involved and applied in all letters, pleadings, conferences and communications on behalf of the client because the parties will inevitably reach the negotiation stage. If the usual high probability for settlement exists, either formally or informally, then the subtle process of negotiation as a skill needs to be involved from the very first letter, and included in all other legal activities. Students should also be aware that negotiation and settlement can occur at any stage of a legal case including the appellate stage. In simple one-dimensional cases it can occur very early in the case possibly involving only a telephone call or letter. In more complex cases, it may be an ongoing case-long process involving many letters, telephone calls and several formal settlement conferences or discussions. Finally, almost all litigation systems require some form of formal negotiation or settlement procedures before any trial or hearing occurs.

The lawyer must accept that settlement of all or part of a case is highly probable in almost all cases. While negotiation can be viewed as a separate and distinct part of the case planning process, negotiation will be most successful if it is made a part of all case activities. A good case plan includes a serious evaluation of all settlement possibilities and strategies.

The last core concept is that the key to effective negotiation is preparation. Preparation starts with a thorough analysis of the bargaining range available to all parties to the dispute. Preparation also includes recognition that cases will only settle when all parties have access to all of the facts and the applicable law. Preparation for negotiation also requires client authority, participation and assistance.

Negotiation Preparation and Planning

The following are basic steps a student should take in preparing to negotiate or settle a case.

Client Authority

All negotiations must begin with client authority. The underlying legal case and the authority to settle or compromise all or part of the case belongs to the client. Except for the most minor details, the law is fairly clear that an attorney has no inherent authority to settle or compromise the client's case simply by virtue of being the attorney. The Rules of Professional Conduct also require the attorney to abide by the client's decision to settle a particular matter. As a matter of contract law the client must either authorize the attorney as agent or approve or ratify any proposed settlement. This means that the attorney must fully discuss the possibility of negotiation and settlement of all cases with the client at a very early stage in the attorney client relationship. Attorneys should be extra cautious of clients who refuse to discuss the possibility of settlement. These clients probably require additional counseling and education.

In the appropriate case the initial interview may be good place for the attorney to begin these discussions about settlement and authority. It is also clear that the attorney must keep the client fully advised of the progress of negotiations once client authority to negotiate and potentially settle is obtained. In more complex cases, as the case nears final agreement, the client needs to be intimately involved in the process and all details of the settlement. The attorney needs to guard against the possibility of enduring a long and arduous negotiation process only to have the client withdraw authority at the last moment. Client participation and information is one way to avoid last minute problems. Rule one in preparing to negotiate a case is to get client authority and to keep the client fully informed and involved in the process of negotiation. Students are reminded that before a client can be in a position to grant this authority he or she must have a good understanding of all the legal and factual issues in the case and of all dispute resolution options, including the advantages or disadvantages of litigation or non-settlement alternatives. Client education and counseling on all available options is the best way to get client authority.

Assessing The Bargaining Range

An obvious place to start negotiation preparation is to assess the relative strengths or weaknesses of the client's case and the opposing parties case. This assessment requires an objective, realistic and practical evaluation of the facts, the law, the relative bargaining position of each party, and some prediction of probable outcomes for all settlement and non-settlement alternatives. This analysis must be done for all sides of the case and carefully explained to the client. If objectivity or experience is a problem for the student, this is a good opportunity for mentoring or obtaining an outside opinion.

Evaluating Strengths or Weaknesses On Each Side of the Case or Issue

A checklist of common factors to be evaluated during the basic preparation process is as follows:

Facts

- Law
- Policy
- Nature of each party's basic claim
- Possible litigation forums
- Possible Settlement or ADR procedures
- Probable or possible outcome in each settlement or non-settlement strategy or forum
- Inherent factual equities for one side or the other
- Inherent sympathies or possible negative factors for each party
- Precedent value of other similar previously resolved cases
- Possibility of local court or jury bias
- Resources available to each party
- Availability of witnesses and access to other evidence
- Detailed estimate of time, costs, and effort to be expended by each party under each resolution alternative
- Are there any savings or avoided future costs?
- Is there any ego or strong personal involvement by either party?

Is this a “principle” or precedent case for either party?
Are any third party’s involved or affected?
Are there any multiplier, publicity, or reputation factors involved?
Is there a need to educate or counsel either party or opposing counsel?
Do the parties have the same information?
Do both parties have all needed information?
Is there anything that will help start discussions?

Assessing Attorney Abilities For Each Side

Students should carefully consider each of the following factors on both sides of the case as part of their basic negotiation preparations.

Skill Level
Experience level
Level of Preparation
Fee Arrangement
Resources
Style of Presentation or Personality
Personal investment in case
Ego involvement
Other relationships to current client
Impact of this case on caseload or other cases or other clients
Honesty and Trustworthiness
General Reputation

Once these and any other applicable factors are evaluated, the student should try to establish the probable bargaining range for the case on each issue in the case. In multiple issue cases, the student should also be aware that issues are interrelated. However, it is important to recognize that it may be possible to negotiate and settle some issues and litigate or otherwise resolve remaining issues.

The bargaining range of a case can be viewed as the complete spectrum of all possible results that exist between the point where one party wins or gets everything he or she is asking for, and the opposing point where the other party wins or gets everything he or she is asking for. Between these two opposite points, one can chart several intermediate points or positions. These intervening points can be viewed as particular results or outcomes or as values. Ideally, each party would like to get “everything.” This is only possible where one either wins everything or has a position of absolute power. For any case to settle each party must in fact get something of value in order to agree to a compromise. Unless your client is in the “absolute power” position, every negotiation needs to be focused on ways to accomplish this compromise and exchange. It is this exchange and how it takes place that is the negotiation process. It is also possible to create new options, which accommodate both parties’ needs in creative ways.

Defining and Establishing Units of Value

Within the bargaining range, attorneys will exchange units or items of value in exchange for something their client values. Each party receives something of value. Typical items or units of value, which can be exchanged, include:

| | |
|-----------------------------------|--|
| Money | Closure Finality |
| Money saved | Status or Power |
| Time value of money | Reputation |
| Costs avoided | Future Relationships or considerations |
| Litigation costs saved or avoided | Past considerations |
| Attorney fees saved or avoided | Psychological or emotional values |
| Start-up costs | Possible “Winner” or “loser” labels |
| Time | Apologies |
| Preparation costs | Precedent value of a litigation result |
| Energy | Confidentiality or privacy |
| Time pressures | Practicality |
| Deadlines | Common sense |
| Emotional costs | Fairness |
| Settlement Costs | Justice |
| Settlement Benefits | Equality |
| Client Interests | Morality |
| Third Party Interests | Sympathy |
| Personal Values | Doing the Right Thing |

Educating Opposing Counsel and the Parties

Each case should be evaluated for the presence or absence of any of these typical units of value and an appropriate settlement strategy or plan devised to discuss the principled exchange of these units by the parties. The student should be aware that except in simple or single issue cases, most cases will involve some kind of bargaining process or a series of exchanges before the case can settle. One major and common impediment to early settlement is a lack of factual information or law on the part of one side to the dispute. One has to realize that a case will probably not settle until the parties are in relative agreement on what law applies to each issue and the facts show a need to settle. Until the facts are fairly clear to both sides, the need to settle will remain debatable. It is generally in the best interests of the moving party to a negotiation to make sure all parties have the necessary underlying facts and law needed to justify the settlement. Full disclosure of all known facts may be a good way to insure that serious settlement discussions begin. It is clearly in the best interest of the moving party in a negotiation to make sure that the opposing party has all of the facts and applicable law. It is also clear that in an otherwise equal bargaining situation, a case will not easily settle unless the reasons for settling, the “why” (generally facts and Law), are also clear.

The First Offer and the “Why”

Since settlement is a very high probability in most cases and since settlement procedures are becoming routine in filed cases, there should no longer be any fear to “make the first offer.” If a case has “settlement” written all over it, then it is a waste of client time and resources to delay negotiations. It does not connote weakness or fear to make the first settlement offer. Making the first offer allows the party making the offer to initiate and to some extent control the timing of the settlement dialogue. Early settlement of settleable cases is in the best financial and emotional interests of the client. Postponing or delaying settlement discussions increases client costs and increases attorney involvement in a case.

All cases should be evaluated for early and efficient settlement possibilities. In making the first offer, it is important to plan for the probable exchange and compromise pattern that will emerge once discussions begin or counter-offers are exchanged and discussed. This series of exchanges and concessions is called the concession pattern and the various points where the parties stop and agree are called commitment points. All of these moves in the total bargaining range need to be principled, justified, and planned.

The most common “justification” is exchanging a position or something of value for something of “equal” value. One should normally not give up something unless something is received in exchange. Every move or concession in the pattern must be rational and justified. Every offer or counter offer needs to be fully explained. The “why” of why some point or the whole case should be settled must be clear in all negotiations for negotiations to begin or proceed. Included in the “why” are persuasion, advocacy, and each attorney’s style of negotiation. If one can make an objective, rational, fact based, law based, practical and fair statement of why a particular point or case should be settled, the “why” is fairly clear. A common impediment to effective negotiations is a failure to adequately explain or justify “why” it is in the best interests of both party’s to compromise and settle.

The Negotiation Plan

In each case that is to be negotiated, the law student should draft a separate negotiation plan addressing all of the different factors involved in a case and especially why a case should settle. An outline of a basic negotiation plan is as follows:

For Each Claim or Issue, Chart the Following

| Claim or Issue | Clients Position | Adverse Party's Position | Settlement Factors | Settlement Strategy | Non-Settlement Alternatives | Reasons For Settlement |
|----------------|-------------------|---------------------------|--------------------|---------------------|---|------------------------|
| Applicable Law | Clients Interests | Adverse Party's Interests | | | Cost or Benefit for each Settlement or Non-settlement Alternative | |

Common Negotiation Devices

The following are among the various common negotiation devices or techniques used by attorneys to begin the negotiation process or as part of the negotiation process. The law student should consider using one or more of these devices as part of their overall negotiation strategy.

- Discuss Settlement as an option in initial demand letters
- Give a settlement option with a deadline prior to filing a lawsuit
- Request a referral to mediation or settlement facilitation in your prayer for relief
- Make settlement overtures in key pieces of correspondence
- Make the first offer
- Prepare a settlement brochure
- Adopt an early conciliatory tone in all communications
- Suggest a settlement agenda or timetable
- Request an early settlement or status conference from the court or agency
- Make an early offer of judgment
- Schedule some early informal conferences
- Use a private mediator or settlement facilitator
- Suggest early neutral evaluation
- Try to resolve only part of the case first
- Try to get an arbitration agreement
- Hire a private judge or neutral expert
- Connect settlement offers to work or procedural deadlines
- Disclose all factual information voluntarily
- Make formal discovery sequential
- Request additional formal settlement conferences
- Use the pretrial conference as a settlement device
- Volunteer to draft the settlement documents
- Offer an apology
- Do lunch
- Play golf
- Be patient, professional, and understanding
- Set a high professional standard for yourself and your client
- Educate your client about the benefits of settlement
- Educate your client about non-settlement alternatives
- Make sure that your client's behavior is conducive to settlement
- Be creative

Things Not To Do In Negotiations

These are things one ought not to do if one is seriously pursuing negotiation and settlement.

- Misstate the law or facts
- Bluff
- Puff
- Be dishonest
- Be unprofessional
- Be inflexible
- Be abusive, hostile or judgmental
- Be a jerk
- Stop the communication process
- Label parties as a winner or loser
- Respond in kind
- Feign Anger
- Cause deadlock
- Use threats or threats of retaliation
- Sacrifice your reputation
- Badmouth your client
- Allow your client to engage in counter-productive behavior

The Negotiation Process

The typical legal negotiation pattern is best described by G. Williams in his excellent book, *Legal Negotiation and Settlement*, West Publishing Co. (1983), at pp.70-72, as follows:

Stages of the Negotiation Process

A. Stage One: Orientation and Positioning

1. Orientation

- a. Opposing attorneys begin dealing with each other.
- b. Relationships are defined and established.

2. Positioning

- a. Negotiators talk primarily about the strengths or merits of their side of the case (often in very general terms).
- b. Negotiators work to establish their opening positions. Possible positions include:

- (i) Maximalist Position. Asking more (sometimes much more) than you expect to obtain.
- (ii) Equitable Position. Taking a position fair to both sides.
- (iii) Integrative Position. Presenting or seeking to discover alternative solutions to the problem as a means of putting together the most attractive package for all concerned.

c. Each side creates the illusion of being inalterably committed to the opening position.

d. Time span of this phase is usually measured in months or years.

B. Stage Two: Argumentation

1. Each side seeks to present its case in the strategically most favorable light.

2. Each side seeks to discover the real position of the other, while trying to avoid disclosing its own real position:

a. Issues become more clearly defined.

b. Strengths and weaknesses of each side become more apparent.

3. Each side seeks to discover and reduce the real position of the other.

4. The expectations of each side about what can be obtained in the case undergo substantial changes.

5. Concessions are made by one or both sides.

C. Stage Three: Emergence and Crisis

1. Negotiators come under pressure of approaching deadlines.

2. Each side realizes that one or both of them must make major concessions, present new alternatives, or admit deadlock and resort to trial.

3. Each side seeks and gives clues about areas in which concessions might be given.

4. New alternatives are proposed; concessions are made.

5. Crisis is reached:

a. Neither side wants to give any more.

b. Both sides are wary of being exploited or taken advantage of.

c. Both sides have given up more than they would like.

d. Both sides know they must stop somewhere.

e. The deadline is upon them; one of the parties must accept the other's final offer or there is a breakdown and impasse.

f. The client worries whether to accept the attorney's recommendation to settle.

D. Stage Four: Agreement or Final Breakdown

1. If the parties agree to a settlement, Stage Four includes:

a. Working out the final details of the agreement.

b. Justifying and reinforcing each other and the clients about the desirability of the agreement.

If the negotiations break down and are not revived, the case goes to trial.

Finalizing The Settlement

As a particular issue or the entire case is being settled, the first thing a student should do is confirm the exact terms of settlement. Before the final handshake is given, the student must make sure both parties are actually in agreement on all disputed issues that are being settled. A simple way to do this is to list all of the items either orally or in writing upon which the parties have agreed prior to leaving the negotiation session. This short summarization will help avoid many future misunderstandings or attempts to renegotiate.

A settlement is not a settlement until it is written and signed by the parties or the attorneys, read into the record in open court, or in certain circumstances approved by the court. While parties can agree in principle on a wide range of issues, the details of crafting a written settlement agreement can raise issues that were not anticipated. Drafting the formal settlement documents can be a final sticking point in the settlement process. A common problem in the final stages of the settlement process is that the parties agree that they have settled, and then disagree on the specific terms of the settlement. As final settlement approaches, drafting of the necessary documents and even specific wording for particular items needs to be discussed and resolved as each issue is resolved. Post settlement disagreement over documents or wording in documents is also often used by “lawyers” as a way to renegotiate certain issues. A wise attorney makes sure that the formalization process is discussed and resolved before the final handshake.

Therefore, it is critical that a settlement agreement be drafted and signed promptly once parties have reached an agreement. It may be advantageous for the student to volunteer to draft the settlement documents as a way of ensuring that the settlement agreement is prepared promptly, and that all terms agreed upon are included. It also gives the student an opportunity to write and possibly control the first draft of some of the written details, which may not have been anticipated. However, it is also important to draw to the attention of opposing counsel to any changes or additions to avoid breakdown of the settlement. In complex cases, it is not unusual for there to be several exchanges of proposed settlement documents.

In court cases that are settled, the student should promptly notify the secretary of the judge assigned to the case that a settlement has been reached. In an appropriate case, including cases with a history of contentiousness, the student is well advised to read all of the settlement terms into the court record before formal settlement documents are drafted and submitted. This will tend to prevent contentious lawyers or parties from renegeing on certain details or reopening the settlement. In all court cases, settlement documents or dismissal documents must usually be filed with the court. As noted above, in certain circumstances, such as domestic relations settlements, the court must give final approval to the settlement agreement. In these cases, any settlement is not final until the court, in fact, approves the settlement.

As any case approaches settlement, the assigned student should carefully consider the types of formal documents that may be required and the timing and logistics of getting all necessary parties to sign the documents. In settlements that provide for future performance of certain terms, or where the settling parties must interact in the future, the student would be wise to include some provisions that will help resolve any future disagreements between the parties or that provide for future enforcement of the settlement agreement. ADR devices such as arbitration or mediation can be ideal and economical dispute resolution devices for post-settlement

disagreements. The student is reminded that in most situations a settlement agreement is just a contract. If one party does not perform, the usual remedy is a lawsuit to enforce the settlement agreement. Students are cautioned against substituting a future dispute for the present dispute.

Once settlement documents have been signed, and, if necessary, filed, copies should be distributed to all interested parties. As a matter of professional courtesy and relationship-building in the Bar, students may want to consider sending a letter to opposing counsel thanking them for their constructive participation in the settlement process. Students are reminded that in small communities, or specialized practice areas, it is inevitable that the same parties or attorneys will be involved in future matters. Therefore, courteous, professional, and civil behavior in negotiation can have a profound effect on future encounters between attorneys and their clients.

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XIII. Drafting Basic Pleadings

By the completion of the Clinical semester, every student should know how to draft basic civil pleadings such as a simple complaint, an answer or basic civil motions. Most students spend considerable time and energy searching for the “magic” form when in fact, if they follow basic, simple rules of civil pleading, form-books are almost never required. The one possible exception is that students may use Clinic computer templates as forms. Even when using computer templates, students must remember to edit, tailor and update every pleading. Forms and form books should be used only as a guide and every pleading should be carefully edited. All basic pleadings can be drafted by following the basic rules of civil procedure, checking local rules, using simple language, and common sense.

The following materials are provided to walk the law student through some of the basic pleading they will be drafting during their semester in The Law Clinic.

The Simple Form Complaint And Answer

The Metropolitan Court Civil Complaint form is a good place to begin the practice of drafting simple pleadings.. Form 4-201 permits the use of the simplest, most basic form of notice pleading in that Court. A more complex, attorney drafted form of a pleading is allowed but not required. And Form 4-202 is as follows:

The Simple Form Complaint

Form 4-202. Civil Complaint

STATE OF NEW MEXICO
IN THE _____ COURT No. _____
_____ COUNTY

_____ Plaintiff
against
_____ Defendant

CIVIL COMPLAINT

1. Plaintiff or defendant resides, or may be found in, or the cause of action arose in this county.

2. Plaintiff claims from Defendant the amount of \$_____. Plaintiff also claims interest and court costs. Plaintiff claims from Defendant personal property of the value of \$_____, which is described as follows:

3. Plaintiff's claim arises from the following event or transaction:

4. Trial by jury is (not) demanded. [If a jury is demanded, an additional cost must be paid upon filing.]

5. An audio recording of the trial is (not) demanded. [If you do not request an audio recording, your right to appeal may be limited.]

_____, ____.

Signed

Name [print]

Address [print]

City, State and Zip Code [print]

Telephone Number

The Simple Answer

Metropolitan Court Rule 3-302 (G) provides:

Rule 3-302. Defenses; Answer

- A.** Answer; When Filed. The defendant shall file his answer on or before the appearance date stated in the summons.
- B.** Defenses; How Presented. The answer shall describe in concise and simple language the reasons why the defendant denies the claim of the plaintiff, and any defenses he may have to the claim of the plaintiff. Defenses shall be raised in the answer. A party may file a motion to have the answer clarified or explained. On the filing of such motion, the judge may, in his discretion, require a more explicit answer or order a pretrial conference to clarify the issues.
- C.** Permissive Counterclaim or Setoff. If the defendant possesses a claim or claims against the plaintiff at the time the action is begun, they may be asserted in the answer as a counterclaim or setoff. The facts and circumstances giving rise to the claim or claims shall be briefly described.

- D. Nature of Claim and Amount Claimed. The nature of the defendant's claim or claims and the total sum claimed shall comply with applicable law. A claim which exceeds the jurisdiction of the metropolitan court shall be amended by the defendant prior to trial to conform to the court's jurisdiction or shall be dismissed without prejudice.
- E. Compulsory Counterclaim. There shall be no compulsory counterclaim.

Form 4-302, Answer To Civil Complaint

STATE OF NEW MEXICO
 IN THE _____ COURT No. _____
 _____ COUNTY
 _____, Plaintiff

against

_____, Defendant

ANSWER TO CIVIL COMPLAINT

1. The amount of damages claimed by Plaintiff is not owed because _____

Or

1. The personal property claimed by Plaintiff should not be turned over to Plaintiff because:

-
2. *[If applicable]* Defendant asserts the following counterclaim or set-off against Plaintiff:

-
3. Trial by jury is (not) demanded. *[If Plaintiff has already demanded trial by jury, as indicated in the complaint, a jury will be provided automatically and you need not fill*

in this item. If Plaintiff has not demanded trial by jury, you may do so here, but if you do you must pay an additional cost upon filing this answer.]

An audio recording of the trial is (not) demanded. *[If you do not request an audio recording, your right to appeal may be limited.]*

Signed

Name [print]

Address [print]

City, State and Zip Code [print]

Telephone Number

(This Answer must be filed with the court on or before the date set in the Summons.)

These simple fill-in-the-blank type of forms would probably also serve in the District court, but a little more drafting formality is advised for attorneys in that court.

The student should become familiar with all of the other basic civil forms used in the Metropolitan Court and in other courts. These are found in Volume I of the New Mexico Rules Annotated. A list of basic civil forms, approved by the New Mexico Supreme Court for use in all courts, is as follows:

List of Civil Forms Approved by the New Mexico Supreme Court.

Article 1. General Provisions.

- 4-101. Notice of [excusal] facts requiring recusal (constitution or code of conduct).
- 4-102. Certificate of excusal or recusal.
- 4-103. Notice of excusal.
- 4-104. Notice of recusal.

Article 2. Commencement of Action.

- 4-201. Civil complaint.
- 4-202. Civil complaint.
- 4-203. Complaint in forcible entry or unlawful detainer.
- 4-204. Civil summons.
- 4-205. Civil complaint for interpleader.
- 4-206. Summons.
- 4-207. Notice and receipt of summons and complaint notice.
- 4-208. Notice and acknowledgment of receipt of summons and complaint.
- 4-211. Recompiled
- 4-212. Recompiled
- 4-213. Attorney's certificate.
- 4-221. Certificate of service.

Article 3. Pleadings and Motions.

- 4-301. Answer to civil complaint.
- 4-302. Answer to civil complaint.
- 4-303. Motion for judgment on the pleadings.
- 4-304. Stipulation of dismissal.
- 4-305. Notice of dismissal of complaint.
- 4-306. Order dismissing action for failure to prosecute.
- 4-306A. Motion to dismiss action and order.
- 4-307. Notice of pretrial conference.
- 4-308. Order to interplead.

Article 4. Parties.

- 4-401. Notice of trial.

Article 5. Discovery and Pretrial Matters.

- 4-501. Motion for production.
- 4-502. Order of production.
- 4-503. Subpoena.
- 4-504. Subpoena.
- 4-505. Subpoena.
- 4-506. Scheduling order.
- 4-507. Scheduling order.

Article 6. Trials.

4-601. Subpoena for jury service.

Article 7. Judgment and Appeal.

4-701. Judgment.

4-702. Motion for default judgment.

4-703. Default judgment; judgment on the pleadings.

4-704. Motion to set aside default judgment.

4-705. Order setting aside default judgment and giving notice of trial date.

4-706. Satisfaction of judgment.

4-707. Notice of appeal.

4-707A. Appeal bond.

4-708. Title page of transcript of civil proceedings.

4-709. Order declaring judgment of this court satisfied in full.

4-710. Order setting aside judgment, order or writ of this court.

Article 8. Special Proceedings.

4-801. Writ of execution.

4-801A. Writ of execution.

4-802. Writ of execution in forcible entry or detainer.

4-803. Claim of exemptions on execution.

4-804. Order on claim of exemption and order to pay in execution proceedings.

4-805. Application for writ of garnishment.

4-806. Writ of garnishment.

4-807. Answer by garnishee.

4-808. Notice of right to claim exemptions (garnishment).

4-808A. Notice of right to claim exemptions from execution.

4-809. Claim of exemption from garnishment.

4-810. Motion for default judgment against garnishee.

4-810A. Notice of dispute and request for hearing

4-811. Judgment on writ of garnishment, claim of exemption and order to pay.

4-812. Judgment on writ of garnishment, claim of exemption and order to pay.

4-813. Default judgment against garnishee.

4-814. Release of garnishment.

4-815. Sheriff's report of sale of seized property.

4-820. Certificate of Dean of law school

4-821. Order approving clinical law student appearance

4-830. Writ of certiorari.

Article 9. Statutory Proceedings.

4-901. Three-day notice of nonpayment of rent (Uniform Owner-Resident Relations Act).

4-901A. Three-day notice of substantial violation of rental agreement (Uniform Owner-Resident Relations Act).

4-902. Seven-day notice of noncompliance with rental agreement (other than failure to pay rent) (Uniform Owner-Resident Relations Act).

4-902A. Resident's seven-day notice of abatement or termination of rental agreement (Uniform Owner-Resident Relations Act).

4-903. Thirty-day notice to terminate rental agreement (Uniform Owner-Resident Relations Act).

4-904. Petition by owner for restitution (Uniform Owner-Resident Relations Act).

4-905. Summons and notice of trial on petition for writ of restitution (Uniform Owner-Resident Relations Act).

4-906. Petition by resident for relief (Uniform Owner-Resident Relations Act).

4-907. Answer to petition for restitution (Uniform Owner-Resident Relations Act).

4-908. Withdrawn.

4-909. Judgment for restitution.

4-910. Withdrawn.

4-911. Withdrawn.

4-912. Withdrawn.

4-913. Writ of restitution (Restitution to owner) (Uniform Owner-Resident Relations Act).

4-914. Writ of restitution (Restitution to resident) (Uniform Owner-Resident Relations Act).

4-915. Petition for post-judgment writ of replevin.

4-916. Post-judgment writ of replevin.

4-921. Three-day notice of nonpayment of rent (Mobile Home Park Act).

4-922. [Thirty-day notice] [sixty-day notice] to quit (Mobile Home Park Act).

4-923. Petition by landlord for termination of tenancy and judgment of possession (Mobile Home Park Act).

4-924. Summons and notice of trial on petition for termination of tenancy (Mobile Home Park Act).

4-925. Answer to petition for termination of tenancy (Mobile Home Park Act).

4-926. Judgment for possession (Mobile Home Park Act).

4-927. Notice of judgment (Mobile Home Park Act).

4-928. Notice to lienholder of mobile home judgment (Mobile Home Park Act).

4-929. Writ of restitution (Mobile Home Park Act).

4-961. Petition for order of protection from domestic abuse.

4-961A. Service of process information for petition for order of protection from domestic abuse and petition for emergency order protection.

- 4-961B. Request for order to omit petitioner's address and telephone number from petition, to place references to petitioner's address under seal and for an order providing alternative means of service on petitioner.
- 4-962. Response to petition for order of protection from domestic abuse.
- 4-962A. Counter-petition for order of protection from domestic abuse.
- 4-963. Temporary order of protection and order to appear.
- 4-963A. Temporary order of protection against petitioner and order to appear.
- 4-964. Order to appeal.
- 4-965. Order of protection, mutual, non-mutual.
- 4-966. Order of protection against the petitioner. [Withdrawn.]
- 4-966A. Withdrawn
- 4-967. Custody, support and division of property order attachment.
- 4-968. Application to modify, terminate or renew the order of protection from domestic abuse.
- 4-970. Stipulated order of protection against respondent.
- 4-971. Stipulated order of protection against petitioner.
- 4-972. Petition for emergency order of protection from domestic abuse.
- 4-973. Emergency order of protection against respondent.

In addition to these primarily attorney-use forms, students are reminded that the New Mexico Supreme Court has also approved a large number of *pro se* forms for court use these are generally found as forms 4A-100 to 4A-363 and can be found at www.supremecourt.nm.org. These forms are primarily for *pro se* domestic relations use but they can be used as general guides for attorney-drafted forms. Students are advised to carefully tailor these forms if they are used in clinic cases.

The Complaint and Answer in State District Court

The Complaint

Rule 1-008 (A), N.M. Rules of Civil Procedure provides:

. GENERAL RULES OF PLEADING

A. Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain:

(1) proper allegations of venue, provided the name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff and it shall not be necessary to state a venue in the body of the complaint or in any subsequent pleading;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for judgment for the relief to which he deems himself entitled.

Relief in the alternative or of several different types may be demanded.

B. Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 1-011.

C. Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in

bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

D. Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

E. Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 1-011.

F. Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

The important substance of the rule 1-008 is that in addition to venue and a prayer for relief...” only a short, plain statement of the claim showing the pleader is entitled to relief” is required. The rule means what it says.

Sample Civil Complaint

A simple form of civil complaint for use in State District Court involving the sale of a defective automobile would be as follows:

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

**(NOTE: Leave upper Right-hand
corner blank. Approx. 3" x 3" for
case number and court endorsement
stamp)**

Dianna Montes, Plaintiff

v.

NO. CV _____

Heather Casey, dba Smiley's Auto Sales, Defendant.

COMPLAINT FOR MONEY DAMAGES AND RESCISSION

Plaintiff for her complaint states:

1. Plaintiff is a resident of Bernalillo County, New Mexico.
2. Defendant is a resident of Bernalillo County, New Mexico.
3. All transactions upon which this complaint is based occurred in Bernalillo County, New Mexico.
4. Defendant Heather Casey is the owner and manager of Smiley's Auto Sales located at 2211 Menaul NE, Albuquerque, NM.
5. On April 1, 2002, Plaintiff purchased a 1990 Honda Accord EX for \$2,000.00 from Defendant..
6. Defendant told Plaintiff that the 1990 Honda was in good condition was a low mileage and a one owner car. Defendant also told Plaintiff that the car would have a 30-day warranty for repairs.
7. Plaintiff relied on these statements and purchased the 1990 Honda on April 1, 2002.
8. On April 3, 2002, the 1990 Honda broke down on I-40. Plaintiff then called Defendant, Heather Casey, and requested that the vehicle be repaired under the warranty.
9. Defendant, Heather Casey refused to repair the vehicle.
10. Defendant's refusal to repair the 1990 Honda was a breach of contract.
11. Plaintiff was damaged by this breach of contract.

12. Defendant's sales representations violated the New Mexico Unfair Trade Practices Act, Section 57-12-1, NMSA.

13. Defendant's representations as to the condition, mileage, and prior ownership of the 1990 Honda were false and were made in a willful, reckless, or negligent manner.

14. Plaintiff was damaged by these representations.

WHEREFORE, Plaintiff requests that the Court enter judgment against Defendant and award Plaintiff the following damages and relief:

1. Damages for breach of contract.
2. Damages for breach of warranty.
3. Damages under the New Mexico Unfair Trade Practices Act.
4. Attorney's fees and Court costs
5. Rescind the contract between Plaintiff and Defendant.
6. Punitive damages for fraud and misrepresentation.
7. Such other relief as is allowed by law.

Clarita W. Nuñez
Attorney for Plaintiff
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, New Mexico 87131-1431
(505) 277-5265

Rose Bell
Practicing Law Student

NOTE: Since this is an initial pleading there is no certificate of mailing. All pleadings after the initial pleading may be served by mail and a certificate of mailing or service added to those pleadings in the lower left-hand corner of the document.

This sample complaint, with some modification, should serve as a good model for most simple civil cases. All that is required is a short plain statement showing that the pleader is

entitled to relief. In a more complex case, or in a case where it is important and appropriate to tell a more detailed story, it may be appropriate to provide much more background detail. Another situation where more detail would be useful is in a situation where the facts are complex and the pleader wants to force the party answering to admit or deny each and every fact plead. In this type of complaint each important and distinct fact would be plead in a separate paragraph. A more detailed complaint also creates the opportunity to tell the client's story in a more persuasive way. As a rule, judges do not like infinitely detailed or prolix complaints.

An example of a more detailed and hopefully better-organized complaint using the same hypothetical car case set out above would be as follows:

More Complex Civil Complaint

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

Dianna Montes, Plaintiff

v.

NO. CV-_____

Heather Casey, dba Smiley's Auto Sales, Defendant.

COMPLAINT FOR MONEY DAMAGES AND RECISSION

Plaintiff for her complaint states:

COUNT I – BREACH OF CONTRACT

1. Plaintiff is a resident of Bernalillo County, New Mexico.
2. Defendant is a resident of Bernalillo County, New Mexico.
3. All transactions upon which this complaint is based occurred in Bernalillo County, New Mexico.
4. Defendant Heather Casey is the owner and manager of Smiley's Auto Sales located at 2211 Menaul NE, Albuquerque, NM. Smiley's Auto Sales is a sole proprietorship owned and operated by defendant Heather Casey.
5. On April 1, 2002, Plaintiff purchased a 1990 Honda Accord EX for \$2,000.00. Plaintiff paid \$500.00 as a down payment and signed a contract to pay the remaining balance of \$1,500.00,

plus interest, in 36 equal monthly payments. A copy of this purchase agreement is attached to the complaint as Exhibit A. A copy of Plaintiff's check number 344 in the amount of \$500.00 is attached as Exhibit B.

6. Prior to the purchase of the 1990 Honda Accord, Plaintiff had been looking at a 1991 Toyota Camry that was advertised to be on clearance sale for \$1,000.00. Defendant, Heather Casey, was the salesperson Plaintiff dealt with. Defendant Heather Casey stated that the Toyota in question was in "poor condition" and recommended that the 1990 Honda Accord was "a better car."

7. Defendant, Heather Casey, told Plaintiff that the 1990 Honda was in "very good condition," was a "low mileage" and "a one owner car." At the time of purchase the odometer on the 1990 Honda showed a mileage of 47,621 miles. Defendant, Heather Casey, also informed Plaintiff that due to the "very good condition" of the car that Smiley's Auto Sales would give a full 30-day warranty for all repairs. A copy of the odometer statement given to Plaintiff by Defendant is attached as exhibit C.

8. Based on the representations made by Defendant, Heather Casey, Plaintiff purchased the 1990 Honda Accord EX as evidenced by the purchase agreement in Exhibit A.

9. Plaintiff took possession of the 1990 Honda on April 1, 2002. On April 3, 2002, the 1990 Honda stalled on I-40 while Plaintiff was driving to work. Plaintiff immediately called Defendant, Heather Casey, and requested that the vehicle be towed to Smiley's Auto Sales and that the vehicle be repaired under the 30-day warranty. Defendant, Heather Casey, refused to authorize the towing of the vehicle and asked Plaintiff to get the car repaired at her own expense and that they would "talk" about the repair costs once the repairs were completed.

10. Plaintiff had the 1990 Honda towed to Amanda's Garage in Albuquerque, New Mexico. Plaintiff requested that a repair estimate be prepared. On April 4, 2002 the manager of Amanda's Garage informed Plaintiff that the cooling system on the Honda had failed and that the engine was severely damaged and must be overhauled. The manager also informed Plaintiff that the 1990 Honda had also been previously wrecked and that the odometer had been tampered with. Amanda's Garage estimated the total cost to repair the car to be \$2,700.56. A copy of the written repair estimate is attached to the Complaint as Exhibit D.

11. Plaintiff checked with the New Mexico Department of Motor Vehicles and was informed that the 1990 Honda had been owned by 4 previous owners and that it had last been sold to Heather Casey on January 15, 2002 with an odometer reading of 160,000 miles. A copy of the Bill of Sale for the 1990 Honda dated January 15, 2002 and the odometer statement are hereby attached to the complaint as Exhibit E.

12. Plaintiff informed Defendant, Heather Casey, of the cost of repairs and mailed a copy of the written estimate to Defendant on April 4, 2002. Defendant, Heather Casey, refused to pay for the repairs at Amanda's Garage, stating that Smiley's Auto Sales was not responsible for the repairs and that they were too costly. Plaintiff then asked Defendant to have the car towed to Smiley's Auto Sales or to a garage of her choice to have the repairs made. Defendant, Heather Casey, refused to do so. Plaintiff requested that Defendant repair the 1990 Honda several times by

telephone and each time Defendant, Heather Casey, refused, stating that Plaintiff was responsible for the damage to the car's engine.

13. Defendant's sale of a defective and nonconforming 1990 Honda constituted a failure of consideration and a breach of contract.

14. Defendant's refusal to honor the 30-day repair warranty constituted a breach of contract.

Plaintiff was damaged by this breach of contract.

COUNT II – VIOLATION OF THE UNFAIR BUSINESS PRACTICES ACT

Plaintiff hereby incorporates by reference the allegations made in paragraphs 1 thru 12 above.

15. Defendants conduct in selling a high mileage, altered, previously wrecked vehicle while representing the vehicle to be in very good condition, low mileage and one owner when it was otherwise constitutes a violation of the New Mexico Unfair Trade Practices Act, Section 57-12-1, NMSA. Defendant engaged in unfair and deceptive trade practices, the sale of the vehicle in its known condition was unconscionable, or the value paid for the vehicle was in fact grossly disproportionate to its value, in violation of Sections 57-12-2(D),(7),(14),(15),(17), 57-12-2(e)(1)and (2), and 57-12-3, NMSA.

16. Plaintiff was damaged as a result of Defendant's violation of the New Mexico Unfair Trade Practices Act.

COUNT III – FRAUD

Plaintiff hereby incorporates by reference the allegations made in paragraphs 1 thru 12 above.

17. When Defendant made the representations as to the condition, mileage and previous ownership of the 1990 Honda, Defendant acted willfully, recklessly or negligently. The factual representations made by Defendant were false.

18. Plaintiff relied on the representations made by Defendant.

19. Plaintiff was damaged by these representations.

20. Attachments A, B, C, D, and E to this complaint are true and accurate copies of each original document.

WHEREFORE, Plaintiff requests that the Court enter judgment against Defendant and award Plaintiff the following damages and relief:

1. Compensatory damages for breach of contract.
2. Compensatory and consequential damages for breach of warranty.

3. Compensatory and statutory damages under the New Mexico Unfair Trade Practices Act.
4. Attorney's fees and Court costs under the Unfair Trade Practices Act or as allowed by law.
5. Declare the contract between Plaintiff and Defendant to be void and rescinded.
6. Punitive damages for fraud and misrepresentation.
7. Such other relief as is allowed by law.

Clarita W. Nuñez
Attorney for Plaintiff
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, New Mexico 87131-1431
(505) 277-5265

Rose Bell
Practicing Law Student

When drafting a pleading, students should also be familiar with Rule 1-009, which provides as follows:

Rule 1-009. Pleading Special Matters

A. Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly in the pleader's knowledge.

B. Fraud, Mistake and Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

C. Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have

occurred. A denial of performance or occurrence shall be made specifically and with particularity.

D. Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

E. Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

F. Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

G. Special Damage. When items of special damage are claimed, they shall be specifically stated.

H. Statutes. It shall not be necessary in any pleading to set forth any statute, public or private or any special matter thereof, but it shall be sufficient for the party to allege therein that the act was done by authority of such statute, or contrary to the provisions thereof, naming the subject matter of such statute, or referring thereto in some general term with convenient certainty.

I. Copy to Be Served. When any instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be served with the pleading, if in the power or control of the party wishing to use the same. A copy of such instrument of writing need not be filed with the district court.

Attachments to a Complaint

In general, within the limits of relevance and common sense a party may attach to a complaint any document he or she desires. Typical examples are leases, contracts, deeds, maps, or other key documents. These are usually identified as an exhibit (Exhibit A, Exhibit B, etc.), attached to the complaint, incorporated by reference and alleged to be a true and accurate copy of the original, in order to force an admission or denial as to authenticity and relevance. Attachments to pleadings are not evidence at trial unless formally admitted. Attachments to a complaint should generally be kept at a minimum. Local rules also limit or direct how attachments may be attached to a pleading.

Complaints Seeking Injunctive Relief

Finally, in those rare cases that require a request for injunctive relief the pleader must conform to requirements of Rule 1-066. The key factor in asking for injunctive relief in a pleading is that the civil complaint must allege enough facts to establish that...”irreparable and immediate damage will result.” Students should become familiar with the requirements of Rule 1-066. In injunction cases it is typical for two affidavits to be attached as exhibits to the Complaint, one from the client on immediate and irreparable harm and the other from the attorney on notice issues as required by rule 1-066.

The Summons

The summons form, with the appropriate caption, is drafted by the attorney, and then is officially issued (stamped and signed) by the court clerk when the complaint is filed. A copy of the summons is stapled to the front of the complaint, which is then served on the defendant or respondent. **Do not serve the original summons. It must be returned to the court upon service.**

The served copy of the summons is notice to the defendant that he or she must answer the complaint or petition within a fixed time on penalty of default. The summons is really a form of court order, which requires an answer. The return on the **original** summons (the back page or last section) is then completed by the person serving the complaint and summons and the original is then filed with the clerk of the court. This return provides proof to the court that service was completed. A copy of the original, completed, and filed summons should be made and placed in the client file. Students should contemplate what happens when a complaint is served without a summons or the return is not completed and filed with the court. Students should become very familiar with the attached basic summons forms and the different types of service set out in the return portion of the summons.

Form 4-206. Summons

STATE OF NEW MEXICO
IN THE DISTRICT COURT
_____ JUDICIAL DISTRICT
_____, Plaintiff
against No. _____
_____, Defendant

SUMMONS

THE STATE OF NEW MEXICO

TO: _____, Defendant(s)

ADDRESS: _____

GREETINGS:

You are hereby directed to serve a pleading or motion in response to the complaint within thirty (30) days after service of this summons, and file the same, all as provided by law.

You are notified that, unless you serve and file a responsive pleading or motion, the plaintiff will apply to the court for the relief demanded in the complaint.

Attorney or attorneys for plaintiff:

Address of attorneys for plaintiff:
(or of plaintiff, if no attorney)

WITNESS the Honorable _____, district judge of the _____ judicial district court of the State of New Mexico, and the seal of the district court of _____ County, this ___ day of _____, ____.

Clerk
By _____
Deputy

Form 4-207.

STATE OF NEW MEXICO

IN THE DISTRICT COURT

_____ (JUDICIAL DISTRICT) No. _____

_____, Plaintiff

against

_____, Defendant

NOTICE AND RECEIPT OF SUMMONS AND COMPLAINT NOTICE

TO:

ADDRESS:

The enclosed summons and complaint are served pursuant to Rule 1-004 of the New Mexico Rules of Civil Procedure.

You must sign and date the receipt. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your position or title.

If you do not complete and return the form to the above court within twenty (20) days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within thirty (30) days of the date upon which this notice was mailed, which appears below. If you fail to do so, judgment by default may be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Receipt of Summons and Complaint was mailed on the _____ day of _____, _____ .

Signature

Date of Signature

RECEIPT OF SUMMONS AND COMPLAINT

I received a copy of the summons and complaint in the above-captioned matter at (insert address).

Signature

Relationship to Entity/

Authority to Receive

Service of Process

Date of Signature

[Adopted, effective August 1, 1989.]

Form 4-208.

STATE OF NEW MEXICO

_____ COURT No. _____

_____ (COUNTY)

_____, Plaintiff

v.

_____, Defendant

NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

TO: _____

ADDRESS:

The enclosed summons, complaint, answer form, two copies of this notice and acknowledgment of receipt of summons and a postage prepaid return envelope are served pursuant to the rules of civil procedure.

You must sign and date the receipt. If you are served on behalf of a corporation, unincorporated association (including a partnership) or other entity, you must indicate under your signature your relationship, position or title. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your relationship, position or title.

You must complete and return one copy of the completed form to the sender within twenty (20) days of the date upon which this notice was mailed. This date appears below. If you fail to complete and return this form to the sender within twenty (20) days plus three (3) days for mailing, you may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law. It must be received by the sender within twenty-three (23) days from the date it was mailed to you.

A stamped and addressed envelope has been included with this notice. You may use this envelope to return this form to the sender.

In addition to completing this form and returning it to the sender, you must also answer the complaint and file an answer with the court within twenty- three (23) days from the date this notice was mailed to you. This date appears below. An answer form has been included with this notice for your use. If an answer is not filed with the court a default judgment may be granted for the relief demanded in the complaint.

I declare, under penalty of perjury, that the complaint, an answer form, two copies of this notice and acknowledgment of receipt of summons and complaint and a postage prepaid return envelope were mailed on the _____ day of _____ , _____ from

_____ (place of mailing).

Signature of person mailing

Date of signature

RECEIPT OF SUMMONS AND COMPLAINT

I received a copy of the summons and complaint.

I understand that a judgment may be entered against me (or the party on whose behalf I received service) if I do not file an answer to the complaint with the court within twenty-three (23) days from the date this notice was mailed to me.

Signature of defendant or defendant's attorney

Position or title

Date of signature

(To be completed prior to filing with the clerk of the court. Proof of service is required for each party.)

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a copy of the complaint, an answer form, two copies of this notice and acknowledgment of receipt of summons and complaint and a postage prepaid return envelope were served by mail on the following persons or entities on this _____ day of _____, _____ :

(1) _____
(Name of party)

(Address)

(2) _____
(Name of party)

(Address)

Signature of person mailing pleadings

Date of signature

Subscribed and sworn to
before me this _____
day of _____, _____

Judge, notary or other officer
authorized to administer oaths

Official title

The Answer

On occasion students are required to file an answer to a civil complaint on behalf of a clinic client. In general, the same basic rules of pleading that apply to civil complaints apply to answers.

Rule 1-008, NMRCP, provides:

RULE 1-008. GENERAL RULES OF PLEADING

A. (omitted)

B. Defenses. Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 1-011.

C. Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

D. Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the

amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

E. Pleading to Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 1-011.

F. Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Sample Civil Answer

A sample answer to the earlier sample complaint in the same car case is as follows:

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

Dianna Montes, Plaintiff

v.

NO. CV _____

Heather Casey, dba Smiley's Auto Sales, Defendant.

ANSWER TO COMPLAINT FOR DAMAGES AND RESCISSION

Defendant, Heather Casey, answers Plaintiff's Complaint as follows:

1. Defendant admits the allegations in paragraphs 1, 2, 3, 4, 5.
2. Defendant denies the allegations in paragraphs 6, 7, 8, 9, 12, 13, 15, 16, 17, 18, 21.

3. Defendant is without sufficient knowledge to admit or deny the allegations in paragraphs 10, 11, 20 in Plaintiff's complaint, and the same are hereby denied.

First Affirmative Defense

Defendant as a separate and affirmative defense states that all damages caused to the 1990 Honda purchased by Plaintiff from Defendant were caused by Plaintiff. The damages to the motor of the 1990 Honda were caused by Plaintiff operating the vehicle without adequate coolant. Plaintiff failed to check and maintain the coolant level in the 1990 Honda before operating it. Plaintiff's negligent or intentional failure to check and maintain the coolant level in the 1990 Honda caused the engine to overheat. Plaintiff further failed to check and maintain the engine oil level in the 1990 Honda and this contributed to the overheating condition and resulting damage.

Second Affirmative Defense

Under paragraph 28 (b) (3) of the Vehicle Purchase Agreement, in the event of mechanical problems within the limited warranty provided to Plaintiff by Defendant, Plaintiff was required to tow the 1990 Honda at her own expense to Smiley's Auto Sales for repair or evaluation of the car. The repair warranty applies only to repairs performed by Smiley's Auto Sales and not to any repairs provided by any other repair shop. Plaintiff by taking the 1990 Honda for repairs at Amanda's Garage breached the requirements of paragraph 28(b)(3) of the contract. Plaintiff was required to deliver the car at her own expense to Smiley's Auto Sales for repair. Plaintiff failed or refused to deliver to Smiley's Auto Sales.

Renee Smith
Smith, Jones and Gonzales
Attorneys for Defendant
5678 Central SE
Albuquerque, NM 87102
(505) 555-0324

I hereby certify that a copy of this answer was
Mailed first class postage prepaid to Plaintiff's
attorney, at 1117 Stanford NE,
Albuquerque, New Mexico, 87131,
This _____ day of _____ 200____.

S/_____
Renee Smith
Attorney for Defendant
5678 Central SE
Albuquerque, NM 87102
(505) 555-0324

Students should note that in the Answer, the Certificate of Service was added to the pleading at the lower left hand corner and was signed by the defendant's attorney. The

Certificate of Service must be included in all pleadings and motions after the initial pleading (i.e. the Complaint or Petition) and is proof of service of that pleading. This certificate must appear on all subsequent pleadings.

Basic Motion Practice

A motion is simply a request to the court by any party to a lawsuit asking the court to exercise its discretion in a particular way, to rule a certain way or to order a court official or other party under its control to do something. The extent and limits of the court's power and jurisdiction is inherent in every motion. Hypothetically, anything within a court's discretion or power can be addressed by way of a motion. The number of different types of motions is very large and limited mostly by tradition and lack of creativity and imagination. Motions can be oral or written. In the less formal courts such as the Metropolitan or Magistrate Courts, motion practice tends to be oral, although written motions are clearly allowed. In the more formal courts of record, such as State District Courts or the Federal District Court, motion practice is mostly written. Some oral motions are permitted during the course of hearings or trials. The better form of motion practice for attorneys in any court is in written form.

List of Common Motions

A list of the most common motions encountered in district court practice is as follows:

| | |
|---|--|
| Motion for Free Process | Motion for Partial Summary Judgment |
| Motion to Quash The Summons | Motion for Summary Judgment |
| Motion for Alias Summons | Motion to Allow Interlocutory Appeal |
| Motion to Quash Subpoena | Motion to Schedule a Settlement Conference |
| Motion to Dismiss the Complaint or Petition | Motion to Approve Settlement on Behalf of a Minor |
| Motion for Judgment on the Pleadings | Motion to Establish Interim Support |
| Motion to Extend the Time to Answer | Motion to Increase Child Support |
| Motion to Amend the Complaint | Motion to Modify Child Visitation |
| Motion to Amend the Answer | Motion for Court Clinic Referral Order |
| Motion to Intervene | Motion for Appointment of Special Master |
| Motion to Consolidate Cases | Motion to Schedule Pretrial Conference |
| Motion to Appoint Guardian Ad Litem | Motion <i>In Limine</i> to Exclude or Limit Evidence |
| Motion to Seal the Record | Motion for Directed Verdict |
| Motion to Join Additional Parties | Motion for a New Trial |
| Motion to Withdraw as Counsel | Motion for Presentment Hearing |
| Motion For Protective Order in Discovery | Motion to Reconsider Judgment |
| Motion to Compel Discovery | |
| Motion for Discovery Sanctions | |
| Motion to Permit a Videotaped Deposition | |

The above list is limited and the list of matters that are subject to a formal motion is almost limitless. The only limits on motion practice are whether the court has discretion or jurisdiction over a requested matter and whether the matter is relevant to the case.

Court Rules Defining New Mexico Motion Practice

Almost all courts have formal rules governing motion practice and their own local rules. While many local rules are similar, each judicial district or court has its own slightly different local rules. Before drafting and filing any motion, the student should first check for compliance

with any local rules. A word of warning is also in order: some judges have their own individual motion requirements. While this is rare, it is something else the student should check. A good source of information about a judge's preferences or requirements is the judge's secretary. A simple pre-filing telephone call should provide the needed information. Students should understand the differences in motion practice in the Metropolitan Court, the Second Judicial District Court, and the Federal District Court. Students should master these differences by the end of their clinical program.

The rules for motion practice in each of these courts are as follows.

Metropolitan Court Rule 3-301 (G), Rules of Civil Procedure for the Metropolitan Court, provides:

Motions. Written motions are not allowed except when permitted by these rules or required by the nature of the proceedings.

State District Court Rule 1-007 (B) provides:

RULE 1-007. PLEADINGS ALLOWED; FORM OF MOTIONS

A. . . .(omitted)

B. Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

C. Demurrers, Pleas, etc., Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

Local court rules for the Second Judicial District

Local Rule LR2-123 provides:

LR2-123. OPPOSED MOTIONS AND OTHER OPPOSED MATTERS; FILING; HEARINGS

A. Presentment for Filing. As a condition of filing, all opposed motions, objections and other opposed matters requiring a hearing (hereinafter "motions") shall be presented to the clerk with the following:

(1) A copy of the motion, along with any required and other attachments to the motion, for the assigned judge;

(2) An original request for hearing in the form set forth in LR2-Form G, along with a copy of the request for the assigned judge;

(3) An original notice of hearing in the form set forth in LR2-Form H and sufficient copies for all parties entitled to notice; and, notice.

B. Service of Request. The movant shall serve copies of the request for hearing on all parties entitled to notice.

C. Filing; Forwarding to Judge. The clerk will file the motion and request for hearing, and endorse a copy of each for the assigned judge. The clerk shall forward the endorsed copies, the original notice of hearing and copies, and the envelopes, to the assigned judge.

D. Notice of Hearing. The assigned judge's staff will complete and file the notice of hearing, and mail or deliver copies to all parties entitled to notice, adding to the envelopes the court address as the return address, or the judge may direct the movant to complete this process.

E. General Exceptions. The clerk also shall file opposed motions presented without a request for hearing, notice of hearing or stamped, addressed envelopes, in the following circumstances:

(1) Prior to presentment to the clerk, the movant has delivered a copy of the motion and the request, the original and copies of

the notice of hearing, and envelopes, to the assigned judge's office, and receipt is indicated on the original motion by initials of the judge's staff.

(2) The motion has been approved for filing by the assigned judge's staff in circumstances other than those set forth in Subsection E(1) above;

(3) The motion is presented with a signed order disposing of the matter; or,

(4) The motion is presented with a proposed order in which the date and time of the hearing will be entered, such as an order to show cause or temporary restraining order.

F. Exception for Motions Requiring Fifteen Minutes or Less in Criminal, Delinquency and Need-of-Supervision Cases. All motions in criminal, delinquency and need-of-supervision cases, requiring fifteen minutes or less for hearing, shall be presented only with sufficient copies of the motion for all parties entitled to notice. The clerk, at the time of filing, will stamp a hearing date and time on the original and copies of the motion. The movant shall serve a copy of the motion with the hearing date and time indicated, on all parties entitled to notice. With criminal cases, motions for Monday hearings must be filed by the preceding Monday; motions for Friday hearings must be filed by the preceding Friday. Any motions filed after these deadlines will be scheduled on the next regular calendar, unless otherwise ordered by the court.

G. Required Attachments. With all motions requiring an evidentiary hearing, a list of witnesses shall be attached to the motion. With motions filed in domestic relations cases, a Rule 1-099 NMRA, certificate shall be attached as required by Second Judicial District Local Rules, Rule LR2-132.

H. Requests Alone. A request for hearing may be filed without a motion provided the request is presented with a notice of hearing, copies and envelopes. A copy of the request shall be served on all parties entitled to notice.

Local Rule LR2-124 provides:

LR2-124. UNOPPOSED MOTIONS AND OTHER UNOPPOSED MATTERS; FILING

A. Presentment for Filing. As a condition of filing, all unopposed motions and other unopposed matters (hereinafter "motions") shall be presented to the clerk with the following: (1) A copy of the motion, along with any required and other attachments to the motion, for the assigned judge; and (2) An original proposed order disposing of the motion approved by all parties entitled to notice; approval of counsel may be indicated as telephonic approval; approval of a party pro se must be indicated by the party's signature on the proposed order.

B. Filing; Forwarding to Judge. The clerk will file the motion and endorse a copy for the assigned judge. The clerk shall forward the endorsed copy of the motion and the original proposed order to the assigned judge for consideration.

C. Signed Orders; Filing; Copies. The movant shall retrieve and file the order promptly after it is signed, and shall mail or deliver endorsed copies to all parties entitled to notice. The court takes no responsibility for the filing of orders.

D. Required Attachments. With motions filed in domestic relations cases, a Rule 1-099 NMRA, certificate shall be attached as required by Second Judicial District Local Rules, Rule LR2-132.

Motions Requiring Use of Court Approved Forms

Students are cautioned that the following motions require a Court approved form for the motion, order and supporting documents in the Second Judicial District. Motion for Free Process (LR2-Form A), Motion to Withdraw (LR2 Form E). Entry of Appearance By Substitute Counsel or Party Pro Se (LR2 Form F), Request For Hearing (LR2 Form G), Notice of Hearing (LR2 Form H), Praecipe (LR2 Form I), Rule 1-009 Certificate (LR2 Form J), Rule 16, Pretrial Scheduling Order (LR2-Form K), Final Pretrial Order (LR 2-Form L), Court clinic Referral Order (LR2-Form T), and Court Clinic Information Sheet (LR2-Form U). These and related supporting documents must be in the required court approved form. Students should become familiar with all these required forms and documents. Students are also advised that different judicial districts have their own required forms for different motions that can be found in Volume 2 of the New Mexico Rules Annotated.

Sample Forms

Sample-Commonly Used Motion Form

A sample of a simple state court motion would be as follows:

Dianna Montes, Plaintiff

v.

CV-2002-0555

Heather Casey, dba Smiley's Auto Sales, Defendant.

Motion To Amend Complaint

Pursuant to NMRCP, Rule 1-015 (A), Plaintiff, hereby moves the Court for leave to amend her complaint. As grounds for this motion Plaintiff states:

1. Plaintiff has sought the concurrence of counsel for Defendant to this amendment before filing this motion. Counsel for Defendant objects to this motion to amend.
2. More than 20 days have passed since the complaint was served and Plaintiff asks for leave of this court to amend her complaint.
3. In her complaint against Defendant Plaintiff inadvertently failed to allege a cause of action against Defendant under the Federal Motor Vehicle Odometer Act, 49 USCA Section 2701, *et seq.* under the Federal Motor Vehicle Odometer Act. Section 49 USCA 2710 (b) grants state courts concurrent jurisdiction in damage actions for violations of that act.
4. Plaintiff alleges Defendant violated the provisions of the Federal Motor Vehicle Odometer Act and is entitled to damages under that act.
5. Amendment of Plaintiff's complaint will serve the interests of justice and will not delay the proceedings.

Plaintiff respectfully requests the Court to allow her to amend her complaint.

Respectfully submitted,

Clarita Nunez
Attorney for Plaintiff
UNM Clinical Law Program
1117 Stanford N.E.
Albuquerque, New Mexico 87131
(505) 277-5265

Rose Bell
Practicing Law Student

Certificate of Service

I certify that a copy of this
Request for Hearing was mailed to
Defendant, Heather Casey,
this ____ Day of _____, 2002.

Attorney for Plaintiff

Students should note that if the legal research had been done correctly before the complaint was drafted and filed, this motion to amend the complaint would have been unnecessary. Students should also note that this type of amendment also uses up a little bit of good will with the court and opposing counsel. Students might want to give a little thought to the cover letter that will be sent to opposing counsel when this motion and request for hearing are mailed.

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

Dianna Montes, Plaintiff

v.

CV- 2002-0555

Heather Casey, dba Smiley's Auto Sales, Defendant.

Request For Hearing

1. Assigned Judge: The Honorable William J. Wise
2. Type of Case Civil Damage Action
3. Jury: Non-jury: X
4. Dates of hearing presently set: __None__
5. Specific matter(s) to be heard upon this request: Motion to Amend Complaint
6. Estimated total time required: 10 Minutes
7. Attach separate sheet(s) listing name, firm, capacity, address, and telephone number of all parties entitled to notice.

Clarita Nunez
Attorney for Plaintiff
UNM Clinical Law Program
1117 Stanford N.E.
Albuquerque, New Mexico 87131
(505) 277-5265

Rose Bell
Practicing Law Student

I certify that a copy of this
Request for Hearing was mailed to
Defendant, Heather Casey,
this ____ Day of _____, 2002.

Attorney for Plaintiff

List of Parties Entitled To Notice

Clarita Nunez and Rose Bell
Attorneys for Plaintiff
UNM Clinical Law Program
1117 Stanford N.E.
Albuquerque, New Mexico 87131

Renee Smith
Attorney for Defendant
5544 Dodger Way
Albuquerque, New Mexico 87119

Students should first note that the Motion to Amend and the Request for Hearing are both mailed at the time of filing to opposing counsel. It is probably best to mail them immediately after filing so that opposing counsel's copy is endorsed, i.e. shows the date of filing with the court. The last item of note is that students should be realistic in the amount of time requested for the actual hearing. In this case ten minutes, five for each side, should be more than adequate for this motion to be argued. Ordinarily, the more time one requests the further a matter is set into the future on the judge's calendar. This is due to most judges having a crowded motion calendar.

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

Dianna Montes, Plaintiff

v.

CV-2002-0555

Heather Casey, dba Smiley's Auto Sales, Defendant.

NOTICE OF HEARING

A hearing in this case is set before the Honorable William J. Wise as follows:

Date of hearing: _____

Time of hearing: _____

Length of hearing: 10 min.

Place of hearing: Second Judicial District Courthouse, 400 Lomas N.W. Albuquerque, New Mexico

Matter(s) to be heard: Motion to amend Complaint

THE HONORABLE William J. Wise

By _____

Notice mailed or delivered on date of filing to parties listed on attached sheet.

Parties Entitled To Notice

Clarita Nunez and Rose Bell
Attorneys for Plaintiff
UNM Clinical Law Program
1117 Stanford N.E.
Albuquerque, New Mexico 87131

Renee Smith
Attorney for Defendant
5544 Dodger Way
Albuquerque, New Mexico 87119

Students should note that the two stamped envelopes addressed to the parties entitled to notice must be attached to the Notice of Hearing. The envelope must NOT have a return address. The judge's clerk or secretary will schedule the hearing, fill in the blank spaces on the Notice of Hearing, stamp the Court's return address on the envelope and mail the Notice of Hearing to e

How to File a Motion and Request a Hearing in the Second Judicial District Court. or The Zen of Motion Practice in State District Court in Bernalillo County

In the Second Judicial District Court the method for filing, serving and setting the motion for hearing is set out in local rules LR2-123, LR2-124, and LR2-125. A summary of these steps follows. Students must become very familiar with the content of these rules.

These steps should be carefully followed when filing a motion and requesting a hearing in the Second Judicial District Court, Bernalillo County. A similar method may be followed in other state judicial districts. Students should consult the local rules for each judicial district court before filing a motion and requesting a hearing.

Pre-Filing Activities.

1. Draft the Motion. Check to see if local rules require a certain form or format for the particular motion.
2. Get the Motion signed by the student and reviewed and signed by the supervising faculty member.
3. Make sure all attached affidavits, if any, are signed and notarized and that all attachments are complete and attached.
4. Make the necessary number of copies. Usually, four copies of each document will be required. One copy for the client file, one for the client, one for the adverse party, and one extra copy. Notice that if more than one adverse party is involved in the case or additional parties are entitled to notice more than four copies are needed.
5. Keep original document on top. Keep all similar documents clipped together. Make needed copies at the law school. The clerk's office charges \$.35 per page for copies and does not provide immediate service.
6. Remember all Domestic Relations Motions must also have a Rule 1-099 Certificate, also known as a SCRA form. See LR2-Form J in Local Rules.
7. Draft and sign an original Request for Hearing Form. See LR2-Form G. Attach a List of Parties Entitled to Notice to the Request For Hearing Form. It is best for the Request for Hearing to indicate the dates that the Clinic will be closed for intersession, and request that the hearing not be set during that time,(unless the client would be prejudiced by the delay in the hearing). It is important to carefully consider the amount of time that you request for a hearing. Keep in mind that, in general, the longer the time needed for the hearing, the longer it will take to get hearing date. However, it is important to estimate as accurately as possible because Judges will be relying on the amount of time set forth in your Request.

8. Draft and sign an original Notice of Hearing Form. See LR2-Form H. Note that the assigned judge's secretary or clerk will fill in the date and time of the hearing on the form and also sign the form before mailing it to the parties. Attach a List of Parties Entitled To Notice sheet to the Notice of Hearing Form
9. Fill out and sign the required Certificate of Service in the lower left-hand corner of the Motion and the Request For Hearing before making copies. Note: The Certificate of Service on the Notice of Hearing is completed by the Judge's clerk or secretary when it is later mailed by that person.
10. Make the necessary number of copies of the Request For Hearing Form and the Notice of Hearing Form including attachments.
Original copies of all documents go to the Court file when filed
Keep the originals and copies of each separate type of document clipped together. The court clerk will ask for each type of document, one stack at a time.
11. Prepare a stamped, self-addressed envelope for each Party Entitled To Notice, including the UNM Law Clinic. The envelopes should **not** have a return address in the upper left hand corner.
12. Draft a cover letter for mailing copies of all filed documents to the adverse party or attorney, as the rules of service require.
13. You are now ready to drive to the Courthouse and file all these documents with the Court Clerk

Whew! You are also very tired by now. Filing a motion or a pleading is a very basic legal task. However, the student has to perform all of these steps correctly or else the Court Clerk will likely refuse to file the documents and another trip to the law clinic and the Court Clerks office will be required. Learn to do it right!

14. Check all your work before you drive to the Courthouse. This is a good opportunity to meet with the supervising professor.

Actual Filing Procedures

15. Go to the Courthouse at 400 Lomas NW to file your Motion at the appropriate Clerk's office. Remember domestic relations cases (DR cases) are filed in the Domestic Relations Division on the second floor of the courthouse. General civil cases (CV cases) are filed with Civil Division, which is on the first floor. Probate division cases and criminal cases have different clerks in the same office on the first floor of the courthouse. Juvenile cases are filed at the Children's Court, which is at 5100 2d Street. All students should know where these different offices are located.

16. When you go to the correct Clerks office, wait your turn and hand the documents to the Court Clerk one stack at a time. Motion and copies first. Request for Hearing and copies next, and so on. It is important to be very courteous to the Clerks, even if the clerk is being difficult or is incorrect on a issue. Not only is this basic human courtesy, but also you should not underestimate how invaluable a good relationship with the clerks, and the judge's secretaries can be to your law practice.

17. The Court Clerk will then take each stack of paper. File stamp the original, keep it for the official court file, and then stamp and "endorse" each copy. He or she will then return all copies to you for service and distribution to the file and client. The Court Clerk will then follow the same procedure with each separate stack of documents.

18. You then take one document from each stack and serve or distribute them accordingly.

19. This is the point when you mail "endorsed" copies of all three different documents to the opposing party or counsel with the previously drafted cover letter. It is a good idea to send an "endorsed" copy of the pleadings to your client at this point so that the client's file is current and shows the date each pleading was filed. It is also very important that the file copy of all pleadings be an "endorsed" copy as opposed to an un-endorsed copy.

Warning: If any of this was not done correctly or according to "clerk's law" some or all of these steps must be repeated.

A truly professional attorney knows how to do all of this and does it all correctly every time.

A simple pictorial version of all of the above can be found in the last section of the Local Rules Handbook provided to every student carrel.

Post Filing Activities

1. Once the Motion and supporting documents are filed, the Request For Hearing and The Notice of Hearing are sent by the court clerk to the assigned judge's office. The Judge's secretary or clerk then looks at the Judge's calendar and schedules the motion for hearing. That person then fills out the date and time of the hearing on the Notice of Hearing and a copy of that notice is then mailed to all persons entitled to notice in the stamped, addressed envelopes.

2. When the Notice of Hearing is received at the Law Clinic the student should then calendar the matter for hearing, notify the supervising faculty member and client of the hearing, and then begin to prepare for the actual hearing. If the matter requires an emergency hearing, it is a good idea to call the judge's secretary to confer about when the judge may have time for the hearing. Also, if it seems likely that the hearing would be set during intersession based on the timing of the motion, it might be a good idea to contact the judge's secretary and ask them to take note of the request that the hearing not be set during intersession.

Form of Papers and Attachments to Pleadings. Students are referred to LR2-118 and LR-119 for the local pleading and form requirements in the Second Judicial District. All students should know what a signature block is, what signatures must be notarized and about the black ink requirement.

Federal District Court for New Mexico

FRCP, Rule 7 provides:

Rule 7. Pleadings Allowed; Form of Motions

(a). (omitted)

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Local Civil Rules United States District Court District of New Mexico

Local RULE LR-Civ. 7. Motion Practice

7.1 Writing Requirement; Opposition.

(a) A motion must be in writing and state with particularity the grounds and the relief sought. A party may adopt by reference another party's motion or other paper by making specific reference to the filing date and docket number of such motion or other paper. Movant must determine whether a motion is opposed. An attorney's motion to withdraw from representation of a party must follow the procedure provided in D.N.M.LR-Civ. 83.8.

(b) A motion, response, or reply must include a certificate of service on each party. The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion. The failure to file and serve a reply in support of a motion within the time prescribed for doing so constitutes consent that briefing on the motion is complete.

7.2 Unopposed Motions; Case Management Deadlines.

An unopposed motion must be accompanied by a proposed order approved by each party. A non-dispositive motion which alters or affects case management deadlines requires approval of the assigned Magistrate Judge, as provided in D.N.M.LR-Civ. 16.1.

7.3 Opposed Motions Where Each Party is Represented by an Attorney.

(a) Movant must file and serve on all parties a copy of the motion, any brief in support of the motion, affidavits, and other papers related to the motion. Two copies of a response that is not filed electronically must be served on the movant.

(b) Except in cases in which filing is accomplished electronically, upon completion of briefing, the movant must submit to the Clerk, as a package for transmission to the assigned Judge, one additional copy of all papers related to the motion. In all cases, upon the completion of briefing, the movant must file and serve on each party a Notice of Completion of Briefing. The Notice of Completion of Briefing must identify by date of filing and docket number the motion which is ready for decision and all briefs or other papers which have been filed relating to that motion.

7.4 Opposed Motions Where Any Party Appears Pro Se.

(a) Movant must request concurrence of each party, at least three (3) working days before filing a motion. Movant must recite that concurrence was refused or explain why concurrence could not be obtained. A motion that omits recitation of a good-faith request for concurrence may be summarily denied.

(b) In inmate cases, movant need not determine whether the motion is opposed.

(c) Movant must file and serve on all parties' copies of the motion, supporting brief, affidavits and other papers related to the motion. The response and reply must be filed and served on all parties.

7.5 Form of Motion and Related Evidence.

(a) A motion, response or reply must cite authority in support of the legal positions advanced. Movant's authority may be submitted in a separate brief filed and served contemporaneously with the motion.

(b) Movant must submit evidence, in the form of affidavits, deposition excerpts, or other documents, in support of allegations of fact.

7.6 Timing of and Restrictions on Responses and Replies.

(a) **Timing.** A response must be served within fourteen (14) calendar days after service of the motion. A reply must be served within fourteen (14) calendar days after service of the response. These time periods are computed in accordance with FED. R. CIV. P. 6(a) and (c) and may be extended by agreement of all parties. If an extension of time is opposed, the party seeking the extension must file a separate motion within the applicable 14-day period. An extension of briefing time must not interfere with established case management deadlines.

(b) **Surreply.** The filing of a surreply requires leave of the Court.

(c) **Expedited Briefing.** When the Court orders an expedited briefing schedule, briefs and any supporting papers must be served on each party by the most expeditious reasonable method of service.

(d) **Cases With Briefing Schedule Set by Court (Bankruptcy or Social Security Appeals).** The parties will be given a briefing schedule by the Clerk or by the Court. Timing of responses and replies must conform with the briefing schedule unless all parties agree otherwise.

7.7 Length of Motion and Brief. The length of a motion or, if a separate brief is filed in support of a motion, the combined length of a motion and supporting brief, must not exceed twenty-seven (27) double-spaced pages. A response brief must not exceed

twenty-four (24) double-spaced pages. A reply brief must not exceed twelve (12) double-spaced pages.

7.8 Oral Argument.

(a) When Allowed. A motion will be decided on the briefs unless the Court sets oral argument.

(b) Hearing by Telephone Conference. The Court may permit hearing by telephone conference. The party requesting a telephonic hearing must initiate the call and pay the expense. The requesting party must provide to the Court and all participants copies of all documents necessary for the hearing. The documents must be delivered before the hearing by the most expeditious reasonable method of service.

Withdrawal of Documents. A party may withdraw a document from consideration by the Court by filing and serving a notice of withdrawal which specifically identifies the document being withdrawn. Withdrawal requires consent of all other parties or approval of the Court.

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XIV. Letter Writing

Letters as a Basic Part of Practice

Many law students come to law school with the idea that they will be trial lawyers when they graduate. The reality is that while most lawyers will try a few cases during their career, only a few will in fact specialize in trial work. Likewise, when law students arrive in law school the predominant teaching methodology is centered on use of the appellate case. The reality is that most lawyers will do very little appellate work during their career and only a few lawyers will specialize in appellate work. Legal drafting is also thought of as consisting primarily of trial court pleadings, appellate briefs and other specialized legal documents. Most law schools teach a great deal about how to draft a good appellate brief, how to draft certain pleadings and on occasion how to draft selected formal legal documents, such as legal memoranda, wills, deeds, and contracts. Only a very small part, if any, of the legal education process is dedicated to improving letter-writing skills. However, all lawyers, no matter what their field of specialty or type of practice, will write legal letters as a regular and important part of their professional practice. In fact, for almost all lawyers, legal letters constitute the largest part of their professional writing. Law students should recognize that legal letters are as important as pleadings, appellate briefs or specialized documents in modern practice.

The Importance of Legal Letters

Letters are involved in everything a lawyer does. A truly professional lawyer writes high quality, well-edited, professional letters every time, because he or she understands that effective letter writing skills are connected to everything he or she does on behalf of a client. Every letter sent is a professional calling card, and every letter carries a professional message that is connected to client goals in a given case or legal matter. Letter writing is an important legal skill that helps define everything a lawyer does. Every case will contain many different kinds of letters, and all of these letters will be interconnected to the primary purpose of the representation and advocacy on behalf of the client. Certain letters will also be critical to the case or to a particular aspect of the case. Accordingly, law students and attorneys need to devote more time, attention, and effort to the letters they write. Letter writing is viewed as an important legal skill in the Law Clinic. Students will spend a considerable amount of time drafting and redrafting legal letters.

In the course of practice, the typical practitioner will write many different kinds of letters. While all of these letters share certain common conventions as to style and format, each letter should be viewed as a specific legal document with its own particularized requirements. At the same time, all letters should be tailored to the larger goals in the client's case and should fit into the overall case handling strategy. No letter should be viewed as unimportant or incidental to the case handling and resolution strategy. The key point is that all letters are important and all letters within a case are interconnected to everything else in the case.

List of Common Legal Letters

A listing of the general types of letters that a typical practitioner will write is as follows:

| | |
|--------------------------------------|--|
| Marketing Letters. | Letters containing legal notices or claims. |
| Case acceptance letters. | Legal instruction letters. |
| Case non-acceptance letters. | Letters to opposing counsel. |
| Referral letters. | Letters to un-represented parties. |
| Demand Letters. | Letters to the court or administrative tribunal. |
| Representation letters. | Confirming letters. |
| Official notice letters. | Cover or transmittal letters. |
| Opinion letters. | Notice of withdrawal of representation letters. |
| Case progress letters to the client. | Case closing letters. |
| Billing letters and statements. | Specialized letters. |
| Negotiation letters. | |
| Settlement letters. | |

Basic Criteria for Legal Letters

Each of these letters has its own particular role and each is somewhat different. The student should try to differentiate each general type of letter listed and try to identify the special substantive requirements involved in each type of letter. Within a case file, all of the different letters should have a common theme and professional style that is conducive to advancing the client's case.

At a minimum, a law student or attorney in preparing a good legal letter, should:

- Use proper grammar and spelling.
- Give the letter a professional appearance.
- Use an appropriate level of formality.
- Use simple words rather than complicated words.
- Explain terms of art.
- Use short paragraphs.
- Communicate key thoughts clearly and directly.
- Include an appropriate touch of professionalism and diplomacy.
- Select words carefully.
- Write short letters, rather than long letters.
- Organize longer letters in a way that enhances understanding.
- Clearly state the purpose of the letter.
- Address short-term and long-term professional objectives.
- Connect the letter to other letters or activities in the case.
- State timelines or deadlines clearly.
- Set timelines and deadlines in a reasonable manner and anticipate response times.
- Provide legal and factual support for conclusions or opinions.
- Clearly identify the primary reader or "audience."
- Anticipate and address all secondary readers or "audiences."

Consider and address ultimate, inevitable, accidental, and probable readers.
Use an appropriate “tone” for the immediate purpose, and for the long- term case handling strategy.
Promote or advance the ultimate or inevitable method of case resolution.
Not send an angry or hostile letter.
Not write anything that will increase or promote hostility or ill will.
Recognize that a letter can be firm, even forceful and still be professional and diplomatic.
Anticipate the probable or likely emotional and practical responses to the letter being sent.
Connect the letter to other letters, pleadings, and future procedures in the case.
Recognize that every letter is important.
Avoid form letters.

The Sandwich as a Model for Legal Letters

Everyone likes sandwiches. A simple sandwich is a nice edible ingredient surrounded by two slices of bread. The better the bread, and the better the main ingredients, the better the sandwich. A really good sandwich has really good bread and more than one good ingredient. A truly great sandwich has excellent bread, an excellent main ingredient, very good dressings, and complementary ingredients. The main ingredients can be sweet, or sour, or sweet and sour. How ingredients are mixed together can also be very important. The sandwich can serve as a useful model for the good legal letter. With practice, each successive sandwich and letter can and should become progressively better. Like the sandwich, a good legal letter should always contain a good, professionally prepared and arranged series of central ingredients always surrounded by two slices of bread.

The top slice of bread should include:

1. A correct salutation,
2. An appropriate, context correct, diplomatic, never hostile or angry, professional, introductory sentence or two,
3. A short direct statement of the letters purpose or purposes, and
4. If necessary, a statement that places the letter in short-term or long-term context.

The top layer of bread or introductory paragraph of the letter is critical. It sets the tone, style, and context for everything that follows. If it is bitter, hostile, or angry, one can almost guarantee the emotional and practical response that will accompany the reading of the following paragraphs. Except in very rare circumstances, the professional letter should always start with a courteous, diplomatic, maybe even friendly, introduction. If a bitter or unwelcome message must be delivered, it should be moved to the center or “meat” part of the sandwich. A complex or long letter might even have a sort of list or index of items to be discussed in the first paragraph or two to help the reader organize his or her reading and reception. Unless the top layer of the letter

requires any additional positive garnish, one can then move quickly to the “meat” or main ingredients of the letter.

As in a true sandwich, the “meat” or heart of the letter, is the important part. This is the whole purpose of the letter. The central message should be clear, concise, well organized, and legally or factually justified. The central message must be unambiguous. State exactly what you mean to convey, without being brusque or hostile. While one may want to temper how something is said, the emphasis should be on making sure the reader clearly understands the message and hopefully agrees with the message. There should be a consistent tone in all parts of the letter including the opening paragraphs and the central message.

A common failure in legal letters is that the message, request or demand in the letter is clear, but the “why” or reasoning is left ambiguous. Many legal letters fail to factually or legally justify a given conclusion or position. If your message depends on facts, then the facts need to be stated or proven. As long as facts can remain “disputed” or “unclear,” the reader can stay outside the reach of your logic or conclusion. If the stated facts depend on an outside source or document, furnish the source or document as an attachment or exhibit to the letter. If your position or conclusion depends on law or rules, furnish the law or rules in the letter, preferably by direct quote or attached copy rather than by citation only. The justification for each conclusion or assertion should be self-contained within the letter. An attorney reader may understand or know the legal citation, but an important secondary reader may benefit by reading the legal authority directly. Finally, if the mission of the letter is to be persuasive, it should be written much as an appellate brief is written. The persuasive points should be organized and contained within the body of the letter.

If more than one matter is to be discussed, organization becomes very important. Generally, items within a letter should be organized in a chronological, logical or in a simple to complex order. Similarly, if it is clear that certain items will be favorably received and others less favorably received by the reader, then the more favorable ones might be discussed first. In general, it is best to start from agreement and then move towards areas of disagreement. This will order the nature of the response and narrow the areas of disagreement.

If there are “hot-button” types of items that will clearly provoke a strong emotional response these should clearly be discussed last or as separate items in a separate letter. If an item is truly “hot-button,” then perhaps the item should be discussed in several letters, with several of the early letters being warm-up or educational letters. One last comment on including difficult or “hot-button” items is that the student should remember that angry or hostile letters produce predictable angry or hostile responses. Once a party is angry or hostile, it is more likely that that party will become obstinate or remain hostile as a matter of principle. This is one of the reasons one never sends an angry or hostile letter. A truly professional lawyer does not provoke anger or hostility. One can be firm and clear and still be courteous and diplomatic. Chest pounding by an attorney within a letter for the benefit of a client is a common form of un-professional conduct by attorneys. Clinic students routinely see it in response letters from opposing counsel. A courteous professional letter, which is sent when an angry letter is expected, can sometimes produce surprising results. Lastly, any timelines or deadlines need to be stated clearly and unambiguously. The student should carefully organize the central text of every letter.

The last part of the sandwich is the bottom slice of bread. Like the top slice of bread, this slice needs to always be as courteous, diplomatic, and as positive as possible. The closing in the letter should invite and facilitate a positive response. If it is clear that the response will involve some disagreement, then the letter should propose or suggest more correspondence or some means of resolving the anticipated differences or disagreements. If response time is important, this should be stated within the letter, including why a prompt response is required. The closing of the letter should also remind the recipient of future events or activities and should set the stage for the next legal or logical step in the proceedings. The closing of the letter should advance the overall tone or purpose of the letter and facilitate resolution or completion of the case in a professional manner.

Hopefully, every letter written will be like a well-made sandwich, if not tasty, at least palatable and well received. Which is the better sandwich, pastrami with mustard, plain corned beef, or avocado bean sprouts and tomatoes? The real answer lies with the person who consumes the sandwich or receives the letter. Students should also consider the fact that copies of most legal letters in a case are routinely sent to the client on both sides of the case. This standard practice presents certain challenges and opportunities for the writer.

Multiple Audiences and Legal Letters

A major consideration in writing legal letters is the question of who will read the letter being written. The question of audience involves not only the addressee, but also a natural and inevitable audience, a possible ultimate audience, and sometimes a surprise audience. Most lawyers write letters as if the addressee will be the only person who will ever read the letter. The assumption seems to be that some large net of confidentiality surrounds legal affairs, and that only persons directly involved will read a particular piece of correspondence. The reality is that many people beyond the addressee read the typical piece of legal correspondence.

In most legal situations almost every letter must be read by layers of people beyond the addressee, and in some situations even the most privately intended letter will be read by a surprise audience. This reality should influence how attorneys write letters. Every letter should be written with the assumption and understanding that many persons, maybe even un-expected or un-authorized persons, will read the letter at some time. If a matter is truly sensitive, one should either take very careful precautions to insure confidentiality or very often not send the letter at all. Students should be aware that many a future case or motion will be based on a poorly drafted letter.

The Natural and Inevitable Audience

Tracking a series of hypothetical and common legal letters will illustrate the point. A common letter most attorney's send is the demand letter. It is typically written to a lay-person, provides an introduction, states the representational capacity, refers to the legal incident, states a few facts, reaches a general legal conclusion and then demands some sort of legal relief, typically money. The demand letter is typically brief, states that the addressee is liable (e.g.

“negligent”), and asks for payment of some sum (e.g. \$50,000) by a certain date (e.g. 10 days) and then threatens legal action if no response is received.

Once the demand letter is received, the issue of audience starts to play out. The typical layperson is probably surprised and upset to receive a demand letter, especially since they wish to debate the underlying facts and legal conclusions and furthermore, do not generally have \$50,000. This is where the path of the letter becomes interesting. The typical layperson receiving a demand letter will probably show the letter to wife, family, and friends, while expressing predictable outrage. Each of these persons beyond the addressee will then read the letter, express some level of empathy, reach some sort of independent conclusion, and then possibly give some type of advice to the addressee on how to proceed. But since the addressee does not usually have the \$50,000, and humans do not like to easily part with their money, the most likely first, legally important reader of the demand letter will likely be a fellow attorney. This is not to say that the other casual readers are not forming possible important impressions about the professionalism of the writer. Some of these casual readers might even turn out to be future witnesses.

The important point for the writer of the demand letter is that the first legally important reader of the letter will be the soon to be “opposing counsel.” The angry addressee will likely go see an attorney and hand the letter over for evaluation and advice. He or she will be a much more sophisticated reader. He or she may even know the author from previous cases. The new attorney reader will see through all of the nice sounding, “chest pounding” rhetoric the first lawyer put in the letter (mostly to please the client), the weak, un-substantiated or debatable facts, and the quick and un-justified legal conclusions in the letter. The attorney reader may even want to “quibble” with the accuracy or reasonableness of the amount demanded. The fact that an attorney, known or un-known, will probably review a demand letter is very predictable. The reality is that the initial addressee, all the early informal readers, and the first attorney will all read the demand letter.

First impressions on the merits of the case, the writer’s client, and the competency and professionalism of the writer are very important moments in a developing case. Who knows, if the letter is well written, the facts are substantiated or justified, the law is stated correctly, and persuasively, the amount demanded is indeed reasonable, and the right amount of persuasion, logic, and professionalism are mixed in the demand letter, and even if the new “opposing counsel” is disposed to be “difficult,” one could have that once in a life-time experience where the \$50,000 check is “in the mail”. Return mail that is.

No matter how speculative this last scenario may be, it is very clear what type of impression and response will result if the demand letter contains spelling errors, grammatical errors, incorrect facts and faulty legal reasoning. The student should remember that every letter is a professional calling card and that multiple audiences read legal letters.

Using the same demand letter as an example, a consideration of the inevitable audience requires the attorney to recognize that in most financial liability situations an insurer may be involved as an early reader of this simple demand letter. This adds a new level of sophistication and experience to the audience of inevitable readers and such raises new issues for the writer such as policy coverage and policy limits. The more money one demands or the more novel the

client's claim is the more levels there are for review of the letter. This in turn results in the creation of more initial and possibly lasting impressions.

In an insurance situation, it is almost certain that the insurer and its various claims agents will have the final decision on whether a case is settled or tried. This insures that every letter, pleading and document written on behalf of an injured client will be closely read by various insurance company executives as a matter of course. While insurance agents in Albuquerque may be somewhat forgiving of poorly drafted letters and pleadings, the agents in Chicago will probably have a more national and critical perspective. What all of this teaches, in addition to writing correctly and accurately, is that an attorney must write for several audiences in the same demand letter. While the initial addressee may be the intended audience of the letter, the really important audience for the letter may be the new "opposing counsel" or unknown, but very experienced and critical insurance executives in Chicago. The student must also recognize that if the case is litigated, all future correspondence and pleadings must be written with this multiple audience consideration in mind.

The Potential Impact of Automatically Sent Copies

The standard practice of attorneys routinely sending carbon copies of virtually all legal correspondence to their client not only compounds the multiple audience situation, it also creates new audience opportunities for the legal writer. As each new letter is sent it is "shared" again and again, as discussed above, with the same ripple effect. This allows the writing attorney to address indirectly, and often very directly, the important audience he or she cannot write directly for ethical reasons. This secondary audience may even be entirely unknown, but it may also be amenable to different or more sophisticated forms of persuasion and logic than the primary or screening audience. Usually in multi-audience situations, each successive reader has some voice or authority in the matter. The writer of a legal letter should be aware of this and use it to advance his or her client's case and cause. Some more sophisticated or controlling clients will even require their own counsel to send them copies of all correspondence and pleadings. This natural or required mailing of copies then allows the writing attorney to craft a letter that appeals to multiple audiences in slightly different and even incremental ways. The assumption should be that every legal letter is read by successive numbers of readers and the letter should be crafted accordingly.

The Problem of Surprise or Future Audiences

A related matter is the question of future or maybe even surprise audiences. Many an attorney has written a hasty or poorly drafted letter only to be surprised later on when a judge, jury, or outside party is called upon to discern its meaning or purpose. A good example of this is what one may call the official "notice" letter. Every attorney has to write letters that notify someone of a claim, makes an important factual or legal assertion, starts a time period running, announces representation, or otherwise makes a legally relevant point. Many times the attorney writing this type of letter never even thinks that a judge or jury will ever see the letter or that it may become important to the outcome of the case. Surprise, three years later for some legal reason the letter becomes relevant to some legal or procedural issue in the case, and there is that

poorly written, poorly thought out letter in front of the judge or the jury. Maybe the judge or jury will be forgiving or maybe aided by opposing counsel they will read the ambiguity your way, and maybe that poor professional impression the letter gives will not be a big factor.

Every legal letter should be written with the possibility in mind that a future judge or jury may be called upon to read the letter. Attorneys who work on truly important cases and matters should also be aware that future historians or legal scholars might also not be understand or be forgiving. Every letter should be written and sent with the understanding and assumption that many persons beyond the addressee will read and review the contents of the letter. A good lawyer should never be surprised or have to apologize or explain away what he or she has previously written. This applies with double force in the cyber space world of e-mail.

One last example of the importance of letters is that within the Law Clinic, certain professors have learned that when a student submits a poorly drafted or poorly planned letter for review, a good teaching device is to mail an unedited copy to a new audience of parents, spouses, and prospective future employers. Hopefully, all students will recognize that letter writing is an important legal skill and all letters will be professionally written and this last audience will never be addressed. Students should think before they write and should craft every letter.

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XV. Practicing Family Law in the Second Judicial District of New Mexico

This section provides some basic instructions for practicing Domestic Relations in the Second Judicial District of New Mexico. It does not provide detailed substantive instruction in family law, nor does it address the many important psychological or emotional issues that arise in family law cases, especially those cases involving domestic violence. Rather, this section is designed as a guide to the relevant provisions of the domestic relations laws, and to provide some basic instructions for starting and pursuing domestic relations cases in our local district court, the Second Judicial District. This section explains the papers that must be filed by a married couple seeking dissolution of their marriage, or persons seeking resolution of parentage and child support issues. It also provides an outline of how a typical domestic relations case proceeds. At the end of the section is a chart outlining the basic flow of a domestic relations case, and some sample legal forms that may be used as a starting place for the development of appropriate pleadings and motions in domestic relations cases.

Cases Involving Domestic Violence

Domestic violence is involved in many family law cases. These cases require special attention for the safety of the client, and sensitivity to issues surrounding domestic violence. Where a client reports that domestic violence has recently occurred, or that he or she is in fear of domestic violence, the client can seek a Protective Order under the Family Violence Protection Act, §§ 40-13-1 NMSA, et seq. The Second Judicial District has a special Domestic Violence office on the second floor of the Courthouse, which is designed to assist *pro se* parties in filing and serving Petitions for Orders of Protection. The clerks in the Domestic Violence Branch will provide all of the necessary forms. Samples of the forms are included in the Forms Section of this Manual, and you may want to review them with the client, however, it is best to use the forms provided at the Courthouse.

If the client seeks a Protective Order, a Petition for a Temporary Order of Protection from Domestic Abuse must be filed in the Domestic Violence office. The client must be able to show in the verified Petition provided by the clerks in the Domestic Violence office that domestic abuse has occurred. The client must be sure to **bring picture identification** so that the Petition can be notarized by the domestic violence clerks. There are usually no filing fees, and any fees can be waived by the court upon motion.

The Family Violence Protection Act defines domestic abuse rather broadly, and includes any incident resulting in severe emotional distress, threats causing imminent harm, stalking, harassment and other injuries, which are specifically set forth in the statute. See § 40-13-2 C NMSA. The Domestic Violence Commissioners generally require that the incident of domestic abuse occurred within thirty days prior to the Petition. Special Domestic Violence Commissioners review the initial applications for Temporary Orders of Protection. They also preside over the hearings where requests for extensions of the Orders are presented.

Upon the filing of the Verified Petition setting forth the allegations of domestic abuse, the Domestic Violence Commissioner will issue a Temporary Order of Protection and Order to Appear. The Temporary Order will set a date within approximately 10 days for a hearing to

decide whether the Order should be extended. Following the issuance of the Order, the domestic violence clerks will prepare a folder with the signed Order, which must be filed in the Domestic Relations Clerks office, where copies are made. Then, one copy must be taken to the Sheriff's Office at 400 Roma NW, to be served on the Respondent. There are no fees required to have the sheriff serve the Order once it is issued. § 40-13-3.1 NMSA. At the hearing that is held approximately ten days from the issuance of the Temporary Order of Protection, commonly referred to as "the ten day hearing," the Petitioner must present evidence demonstrating that an act of domestic abuse has occurred. While the hearings are somewhat formal and, technically, the Rules of Evidence apply at those hearings, the Domestic Violence Commissioners will review police reports without the police officers present. The Domestic Violence Commissioners also look at the criminal histories of both parties at the time of the hearing.

If, at the ten day hearing, the Domestic Violence Commissioner finds that an act of domestic abuse has occurred, an Order of Protection will be issued ordering the respondent to refrain from abusing and to stay away from the petitioner or any other household member. The Court may also grant sole possession of a residence, award temporary custody of children and other necessary relief. § 40-13-5 NMSA. The Protective Order can last for up to six months, and can be extended for up to an additional six months, upon a showing of good cause. § 40-13-6 NMSA. Some Commissioners have extended the stay away portion of the Protective Orders for up to three years.

In cases involving domestic violence, it is important to consult frequently with the faculty supervisor, and inform the client of the resources available in the community, including the shelters, counseling services and advice regarding public benefits. Some of the resources are listed in the "Referrals" section of this Manual.

Actions for Dissolution of Marriage or Separation

Starting an Action for Dissolution of Marriage or Separation

This section will first list the papers that must be filed to initiate an action for divorce, separation, or custody of children. It will then discuss some of the essential elements of the Petition, where the forms need to be filed, and some common issues regarding service of process.

The following forms must be filed to initiate a domestic relations action for divorce, separation, or custody of children. Samples of some of these forms are included at the end of this section. The approved Court Forms (marked with an asterisk) are Forms that are included in the New Mexico Rules of Civil Procedure and can be found on the New Mexico Supreme Court website at <http://www.supremecourt.nm.org/>

1. Petition for Divorce, Separation, or Custody
2. Domestic Relations Information Sheet (Civil Form 4A-101)
3. Domestic Relations Cover Sheet (Civil Form 4A-101(required by Rule but yet not by clerks))
4. Summons (Civil Form 4-206)
5. Temporary Domestic Order (Form 4A-112)
6. Filing fee (currently \$137 call clerk's office to verify); or

- a. Motion to Proceed Without Costs (LR2-Form A)
 - b. Affidavit of Indigency (LR2-Form B).
 - c. Attorney's Affidavit (LR2-Form C) (Note that clerks require this form to be notarized, even though it does not appear to be required by the Form)
 - d. Proposed Order (LR2- Form D)(note that the presiding Judge of the Second Judicial District requires a specific form that includes option of requiring \$30 fee for Court Clinic)
 - e. Rule 99 Certificate (commonly referred to as a "SCRA")
7. In cases of Domestic Violence, you should consider filing a Motion to Seal the Address of the client in order to protect the client.

The Petition

While actions for separation, divorce, and child custody can be very different in terms of the relief sought, they must all contain some of the same elements. This section will go over the basic elements of a Petition for Dissolution of Marriage involving children. An action for separation, or for child custody should follow the same basic form omitting the sections that are not relevant. So, if the parties are not married, the appropriate Petition would be a Petition for Child Custody. Along with the basic allegations regarding the names of the parties to the suit, the Petition should include allegations regarding the following issues:

Jurisdiction. The Petition must allege Court has jurisdiction. In actions for separation or dissolution of marriage, the allegation will be that one of the parties has resided in the state for at least six months prior to the filing of the Petition § 40-4-5 NMSA. Child custody jurisdiction is controlled by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). For initial jurisdiction, see NMSA. § 40-10A-201.

Venue. The Petition usually alleges that venue is proper because one of the parties or the children reside in the County where the action is filed.

Grounds for Dissolution of Marriage. The grounds for the dissolution of marriage are set forth in § 40-4-1 NMSA, and include the allegation that the parties are "incompatible." While some clients may want to include other grounds, such as adultery or cruel and inhuman treatment, it is the very rare case in which it is advisable to include such an allegation, because these allegations are inflammatory and make it more difficult to resolve other issues. Even in the very rare case where the client insists on including the allegation (usually for religious reasons) it is advisable to also include the no fault ground of incompatibility so that there does not have to be a trial on the issues of adultery or cruelty should the parties be unable to reach an agreement.

Legal Custody of Children. There is a strong presumption in New Mexico that joint custody is in the best interests of children. § 40-4-9.1 NMSA. The presumption can be overcome by the factors set forth in § 40-4-9.1 NMSA. One of the factors that may overcome the presumption of Joint Custody is a judicial adjudication of domestic abuse. The facts supporting the contention that the presumption of joint custody should be defeated must be alleged in any Petition for sole custody. The facts must be pretty dramatic to make it worth filing for sole custody if sole custody will be contested by the other parent. Requests for sole custody should be carefully reviewed

before filing. Petitions filed by grand parents seeking custody must allege that the parents are unfit.

Timesharing and Visitation. A timesharing or visitation schedule must also be developed in order to resolve the custody issues. These issues are generally resolved in a Parenting Plan that may be incorporated by reference into the Petition. It is a good idea to develop a Parenting Plan as soon as possible in a case, but, commonly, Parenting Plans are developed after the Petition is filed, and are attached to the Final Decree. The Court Clinic Guidelines, available in the clinic, should be reviewed in developing an age appropriate Parenting Plan.

Child Support. In most cases, the Petition will allege that child support should be awarded in accordance with the Child Support Guidelines set forth in § 40-4-11.1 NMSA. If the Petitioner is seeking deviation from the Guidelines, the Petition must set forth good cause for the departure.

Division of Property, Debts and Taxes. All property must be divided at the time the Final Decree of Divorce is entered. Therefore, all property and assets must be addressed in the Petition. The Petition should list all separate and community property and debts, including any interests in retirement accounts or other funds. Taxes, the issue of who will get to claim the child as a dependent, and any outstanding tax refunds should also be addressed. The proposed distribution of property and debts should be as specific as possible at the time of filing to increase the chances of settlement and to simplify the award of relief in the event that the Respondent defaults. The distribution of property may also be resolved by a Marital Settlement Agreement, which can be incorporated by reference into the Petition. A Marital Settlement Agreement must be notarized by both parties, and included in the Final Decree of Dissolution of Marriage.

Request for Restoration of Former Name. If the Petitioner has changed her name and seeks restoration of her maiden name in the proceedings, she should request this relief in the Petition.

Filing the Petition

Petitions for Dissolution of Marriage, and the other necessary documents must be filed in the Domestic Relations Branch of the Second Judicial District Court at 500 Lomas. It is important to take enough copies so you have a copy for the clinic records, a copy for your client, and a copy to be served on the opposing party. The Summons and Temporary Domestic Order should be presented the Clerk at the time of the filing, but will be technically “issued” by the Clerk.

In cases where it is necessary to file a Motion to Proceed without Costs, the Court does not actually permit the filing until there has been a ruling on the Motion. It is best to show the documents to a Clerk in the Domestic Relations Division. The Motion to Proceed without Costs and the Petition must then be left in the In Box for the Presiding Judge of the Domestic Relations Division, which is currently Judge Deborah Davis Walker. The In Boxes for the Domestic Relations judges are located in the reception area for Domestic Relations Court on the second floor of the District Courthouse. Be sure to keep a copy of the documents that you leave in the judges’ inbox. It is not uncommon for documents to be misplaced.

Service of the Petition and Summons

In domestic relations, it is particularly important to carefully consider the time and manner of service of process. The emotional impact of service of legal papers should not be underestimated. In cases involving domestic violence, it is vital to make sure that, to the extent possible, your client is in a safe place when the papers are served. In cases involving children, where possible, it is best not to serve a party during his or her period of responsibility for the children. It is also important to consider the impact of service on any settlement discussions. In some cases, the opposing party may agree to the requested relief, and service can be waived. However, it is also important to get papers served as soon as possible so that the matter can proceed during the short clinical semester.

The legal requirements for service in a domestic relations case are the same as in any civil case in New Mexico. The service of process must be in compliance with Rule 4 of the New Mexico Rules of Civil Procedure. Other than the standard Summons form listed above, there are several different forms for service of process which can be found in Civil Forms, Form 4-207, Form 4-208 or by an "Acceptance of Service" form, available in the brief bank.

Some important jurisdictional issues arise where it is not possible to secure personal service. While the state of New Mexico has jurisdiction over the marriage of anyone who has lived in New Mexico for six months, the courts have more limited jurisdiction over assets or child custody, where there has not been personal service.

Interim Relief

Parenting Plans and Referrals to the Court Clinic

Parenting Plans address the details of sharing children in cases involving custody of children. If parties are not able to agree on a Parenting Plan, 30 days after the service of the Petition, or "promptly upon learning of any dispute over any child related issue" (other than Child Support) the parties must present a proposed order to the assigned judge referring the matter to the Court Clinic. (LR2-504 NMRA, LR2- Form T). Because of these rules, and because it is usually best to resolve parenting matters without court intervention, it is advisable to work with the client to draft a proposed Parenting Plan as soon as possible in the case. The preparation of a detailed proposed Parenting Plan can avoid disputes over theoretical disagreements and help parents to focus on the logistics of sharing their children. There is a court approved form for Pro Se Parties set forth in Domestic Relations Forms 4A-331 which can be a good starting point for a Parenting Plan, but does not provide many details about transfers of children, timing and other practical matters. The more detail that is included in the Parenting Plan, the more certainty it provides for the parents and the children. A sample parenting plan is also attached at the end of this section (p.243).

If the parties cannot agree upon a Parenting Plan, the matter will be referred to Court Clinic or for settlement facilitation as discussed in the Section on Court Clinic Process for Domestic Relations Cases involving Child Visitation and Custody. Even where a party seeks interim relief from the Court regarding parenting issues, the matter is likely to be referred to Court Clinic for mediation.

If the parties cannot reach an agreement in Court Clinic, on either short term or long term parenting issues, then the matter is likely to be set for an Advisory Consultation. The Advisory Consultation will become the Order of the Court if no objection is filed within eleven days. If an objection is filed, the person filing the objection is well advised to get a second opinion, and it can be an uphill battle to overcome a negative court clinic recommendation. Thus, if the parties are unable to agree, either a court clinician, or a judge, will make decisions about the intimate details in the parties' lives, including where and when they pick up their children. It is therefore important to work diligently to encourage the client to develop a reasonable Parenting Plan, and to negotiate in good faith throughout the process.

In cases involving domestic violence, the Court Clinic has protocols to protect the parties and the children. It is critical to provide the client with a copy of the domestic violence protocols. While attorneys are not permitted to participate with the client in the Court Clinic meetings, it may be advisable to go to the first scheduled meeting to make sure that the domestic violence protocols will be used.

Keep in mind that the Court Clinic relies on Time Sharing Guidelines based on a concept of age appropriate contacts. While there are experts who dispute the scientific validity of the guidelines, they are an objective framework that may be constructive in the negotiation process.

Brochures describing the Court Clinic Guidelines and the protocols for Domestic Violence cases are available in the Law School Clinic.

Financial Relief

Once a Petition is filed, either party can file a Motion for Interim Relief. Issues regarding interim financial relief are likely to be heard by the Child Support Hearing Officers. Clinic clients typically have few assets, so most interim issues revolve around temporary division of income and expenses. Absent "exceptional circumstances" community income and expenses will be divided equally between the parties during the pendency of the case, under Rule 1-122 of the Rules of Civil Procedure. It is important to fill out the "Interim Monthly Income and Expenses Statement" (Domestic Relations Form 4A-121 NMRA) as completely as possible before filing the Motion, because the amount of interim "relief" may not be as high as the client's income before all of the expenses are included. The Statement must be completed and provided to the opposing party or attorney, five days before the hearing under Rule 1-122 of the Rules of Civil Procedure, NMRA.). The Court will, generally send out a notice of the hearing on the interim issues in a form substantially similar to the form set forth at Domestic Relations Forms 4A-121NMRA). It is very common in the Second Judicial District for judges to require the parties to "meet and confer" one hour prior to the hearing.

It is very important to counsel the client that the amount of interim financial relief awarded by a judge may be very different from the amount awarded in the Final Decree. The amount of interim relief is determined according to a very different formula from the child support guidelines.

Sometimes it can be very difficult to get accurate or reliable information from the other party about income, assets, and debts. Even though parties are required to provide the information five days before the hearing, and the parties are supposed to “meet and confer,” pro se parties often fail to provide the information in a timely manner. While it may be possible to delay the filing of a Motion for Interim Relief until discovery methods produce necessary information, it is also common to have to proceed to the hearing without full and accurate information. Under those circumstances you may request that the Judge or Hearing Officer reset the hearing and direct the opposing party to provide accurate and reliable information.

Discovery

Formal discovery may be necessary to get information about the income, assets, and debts of the parties. Discovery may also be necessary to get detailed information about parenting issues. Methods of discovery are beyond the scope of this section, but if the opposing party is not forthcoming with information, it may be necessary to serve the party with interrogatories. Another relatively inexpensive form of securing information is to Notice a Videotape deposition and issue a Subpoena Duces Tecum. These issues should be discussed with your supervisor.

Requesting a Trial and the Necessary Exchange of Information

Most cases settle without a hearing or trial. Domestic relations cases are no exception. As discussed in the section on ADR it is almost always in the interest of the parties and the children to settle. However, there may be cases in which the parties cannot agree, and it is in the client’s interest to request a hearing on the Petition. The Request for a trial setting is usually made by filing a Request for Hearing for a Trial on the Merits. The Court may set a Pretrial Scheduling Order. However, in the absence of a Order, if the parties have not already done so, five days before the trial, the parties must exchange Child Support Worksheets (discussed below), and Community Separate Property and Liabilities Schedules in accordance with Rule 1-123 on Forms 4A 131, and 4A 132. In cases where a trial is likely, it may be advisable to file a Motion Requesting a Pretrial or Settlement Conference to help narrow or clarify the issues to be tried.

As discussed above, when there are unresolved parenting and custody issues, the Advisory Recommendations of the Court Clinician will have a great deal of weight in the case at trial. Therefore, if the recommendations are not favorable to the client, then it will be vital to have expert testimony in support of your claim that the recommendations are not in the best interest of the child. Experts who work with the client at the community sites, such as Peanut Butter and Jelly Family Services, and FOCUS, can be a good source for qualified experts where clients have very limited resources and cannot afford the hundreds or thousands of dollars it costs to secure an expert evaluation and opinion.

Even if the parties cannot reach agreement on all issues, it is advisable to reach agreement on as many issues as possible. A Trial Memorandum outlining the theory of the case, the relevant facts and law should be prepared. A proposed resolution of the remaining issues should also be prepared. So, for example, if the parties are not able to reach agreement on which parent will get to reside with the children, it would be a good idea to prepare a proposed Parenting Plans that would suit the client’s need in the case of a ruling in the client’s favor, as

well as a Parenting Plan that would suit the client's needs in the event the court rules that against his or her request.

Generally, the prevailing party will be directed to prepare a proposed Final Decree, approved as to form by opposing party, for the Judge's signature within 10 days after the hearing pursuant to LR2-129.

The Final Decree

Any time a marriage is dissolved, a Final Decree of Dissolution of Marriage must be entered by the court. While each judge has his or her own preferences regarding the form of the Final Decree, the general practice is to prepare each of the following documents separately.

Final Decree of Dissolution of Marriage

The Final Decree of dissolution of marriage must address every issue raised by the Petition, and all issues must be resolved prior to the entry of the Decree. There are very rare cases in which a Court might consider granting a divorce prior to the dissolution of the marriage, but that is very rare, as judges prefer to use the parties desire to dissolve their marriage as an incentive to resolve the remaining issues. In child custody cases where the parents are not married, an Order Awarding Custody and Timesharing is likely to be issued, and neither the Marital Settlement Agreement nor a QDRO would be necessary, but otherwise, the final documents are similar. Generally, a Final Decree will incorporate the following documents by reference. For an example, see Forms 4A-341 and 342 of the New Mexico Rules of Civil Procedure.

Marital Settlement Agreement

The Marital Settlement Agreement (MSA) must address all property and debts of the parties, both community property and separate property. It should list all assets and debts fully, and provide significant identifying details regarding each asset and liability, to avoid any future confusion, and to protect the clients from future allegations that certain property was or was not disclosed by the other party. Taxes, issues of who will claim any child as a dependent, and apportionment of any outstanding tax refunds should be addressed in the Marital Settlement Agreement. The Rules of Civil Procedure provide basic forms that can be used as starting places for drafting appropriate Marital Settlement Agreements. (See Form 4A-311 and 4A-312). The Agreement must have a caption, and both parties' signatures must be notarized.

Parenting Plan

As discussed above, the Parenting Plan should be as clear and detailed as possible. It must be signed by both parties, and incorporated by reference into the final decree.

Child Support

Child support will almost always be awarded in accordance with the Child Support Guidelines which are calculated using the child support worksheets set forth at § 40-4-11.1 NMRA. There are two basic worksheets for determining the amount of child support that a party is required to pay. Worksheet A should be used when one party has primary physical custody of the child and the other parent has visitation. Worksheet B should be used where parties share physical custody of the child or children more equally. The Courts provide a child support calculator on their website at <http://www.nmcourts.com/>, which can be used to get an approximate idea of what the child support will be. The website calculator, however, rounds numbers up or down, rather than using actual figures and should not be relied upon for the final draft of the Child Support Worksheets. The worksheets must be signed by the parties and submitted to the court.

Even though the guidelines are set forth in a formula, there is some room for advocacy in creating the Worksheets. It is possible to request that income be imputed to the opposing side if they are unemployed or underemployed. It is also important to evaluate the calculations of the other party to make sure that they are using accurate information, and are not, for example, failing to include overtime payments in calculating the income, or similarly are picking strategic time periods for averaging the income.

The Final Decree must include a provision that the parties will annually exchange financial information upon the written request of either party pursuant to §40-4-11.4 NMSA. The exchange can also be automatic. The provision regarding annual exchange of financial information is mandatory.

The Final Decree must include a provision for automatic wage withholding unless both parties request a waiver for good cause shown. Please note that the party seeking wage withholding must apply to the state Child Support Enforcement Division (CSED) for a case number.

Qualified Domestic Relations Orders (QDROs)

While cases involving retirement benefits are rare in the clinic, it is important to know that Qualified Domestic Relations Orders (QDRO) must be prepared where parties seek division of a marital retirement account. The valuation of retirement plans is a difficult issue, requiring the hiring of an actuarial expert. In addition, each retirement company seems to have its own preferred form of Order. Therefore, if a case involves a retirement account, an expert must be consulted, and the Plan Administrator for the retirement account must be contacted for a copy of the company's preferred form of QDRO.

Uncontested Proceedings

Default

In cases where a Respondent has been personally served with a Summons and Petition and fails to answer within 30 days of service, the Petitioner may request, by Motion or Application, the Entry of a Default Judgment. Along with compliance with the other local rules for filing of motions set forth in the Section on Motions, a Motion for Entry of Default must be filed along with an Affidavit of Non-Military Service signed by the client or other person with knowledge, and Certificate as to the State of the Record, which should be prepared in advance for signature by a domestic relations clerk. The Certificate of the State of the Record should be issued at the time of the Court hearing, or at the time of the request for the entry of the default.

Agreement of the Parties

If the parties are able to reach agreement on all disputed issues, it is possible to file an uncontested Divorce. The papers listed in the section on Starting an Action For Dissolution of Marriage, and the papers listed in the Section on the Final Decree should be prepared. If the Respondent will sign an "Acceptance of Service and Waiver of Notice" all of the papers can be filed at the same time, and a copy of the proposed Final Decree, with attachments, can be placed in the Judge's in box located in the reception area of the courts on the second floor of district courthouse. Note that the forms must be signed by both parties (the Marital Settlement Agreement and Acceptance of Service and Waiver of Notice must be notarized.) There is no longer a 30 day waiting requirement.

| Flow Of A Domestic Relations Case | | | |
|---|---|-----------------------------|-------------------------------------|
| INITIAL FILING | INTERIM ACTIVITY | | FINAL DECREE |
| Petition for Divorce, Separation, or Custody | | | |
| Dissolution of Marriage → → → → | → → → → → → → | D → → | Final Decree |
| Custody of Children and Parenting Issues → → → | Agreement or Court Clinic Referral Order (30 days) LR2 Form T | I → → | Parenting Plan |
| Child Support → → → → → → → → → | Motion for Interim Relief (Hearing Officer or Judge) | S C | Child Support Worksheets |
| Division of Property and Debts And Spousal Support → → → → → → → | Motion for Interim Relief (Hearing Officer or Judge) | O V → → | Marital Settlement Agreement (QDRO) |
| Domestic Relations Information Sheet (Civil Form 4A-101) Domestic Relations Cover Sheet (Civil Form 4A-101) | | E R | |
| Summons (Civil Form 4-206) → → → → → → → → → | Copy Served, Original, with Return, filed with judge | Y | |
| Temporary Domestic Order (Form 4A-112) | | | |
| Filing Fee (currently \$137. Call clerk's office to verify); or | | | |
| Motion to Proceed Without Costs (LR2-Form A) Affidavit of Indigency (LR2-Form B) Attorney's Affidavit (LR2-Form C) Proposed Order (LR2-Form D) Rule 99 Certificate (commonly referred to as a "SCRA") | | | |
| Motion to Seal the Address of the client (if needed) | | | |

Common Legal Forms

A.

- (1) Petition for Order of Protection from Domestic Abuse (Form4-961)
- (2) Temporary Order of Protection and Order to Appear (Form 963)
- (3) Order of Protection (Form 4-965)

B. Dissolution of Marriage and Custody/Parenting Forms

- (1) Petition for Dissolution of Marriage and Custody of Children
- (2) Domestic Relations Information Sheet (Civil Form 4A-101)
- (3) Domestic Relations Cover Sheet (Civil Form 4A-101)
- (4) Summons (Civil Form 4-206)
- (5) Temporary Domestic Order (Form 4A-112*)
- (6)(a) Motion for Free Process (LR2-Form A)
- (6)(b) Affidavit of Indigency
- (6)(c) Attorney Affidavit of In Support of Indigency (modified)
- (6)(d) Order for Free Process (modified)
- (6)(e) Rule 99 Certificate (modified)

C. Interim Forms

- (1) Interim Monthly Income and Expenses Form4A122
- (2) Interim Order Allocating Income and Expenses 4A 123
- (3) Community Property and Liabilities Schedule 4 A-131
- (4) Separate Property Schedule 4A- 132

D. Final Decree

- (1) Simple Final Decree 4A 341
- (2) Final Decree 4A-342 (With Children)
- (3) Sample Final Decree of Dissolution of Marriage
- (4) Sample Marital Settlement Agreement
- (5) Sample Parenting Plan
- (6) Child Support Worksheet A

Domestic Violence Forms

Form 4-961, Petition for Order of Protection from Domestic Abuse

Form 4-961. Petition for order of protection from domestic abuse.

[Standard simplified petition form,
Family Violence Protection Act,
Sections 40-13-1 to 40-13-8 NMSA 1978.]

_____ JUDICIAL DISTRICT COURT
COUNTY OF _____
STATE OF NEW MEXICO

Petitioner

v. No. _____

_____ Respondent

PETITION FOR ORDER OF PROTECTION

FROM DOMESTIC ABUSE/

1. COURT ASSISTANCE REQUEST

We will need an interpreter in _____ to translate at hearings for me the respondent.
 We will need _____ (describe other request for special help).

2. INFORMATION ABOUT THE RESPONDENT (the person I am filing against)

A. The respondent is:

- my husband or my wife
- my ex-husband or my ex-wife
- the parent of my child(ren)
- a family member _____ (describe the family relationship)
- a person with whom I have had a continuing personal relationship _____ (describe the relationship)

B. The respondent has the following weapons: _____

3. CHILD(REN)2

A. List minor child(ren) of either party.

**Name Date of Relationship of Child(ren)
Birth To You To Respondent**

B. List address and with whom the child(ren) are currently living. (List each child separately if child(ren) do not reside with same person.)

C. List each address where child(ren) have lived during the last 3 years. (List each child separately if child(ren) did not reside with same person.)

D. Does anyone else have physical custody of the child(ren) or claim to have custody or visitation rights? yes no.

If yes, complete the following for the child(ren):

Child's name Person claiming rights

4. OTHER CASES

The following divorce, separation, order of protection, child support, paternity, abuse or neglect cases have been previously filed by me, the respondent or the state:

Type of Case Year Filed Case Number Where Filed

(if known) (if known) (city and state)

5. DOMESTIC ABUSE

A. The respondent committed the following act(s) of domestic abuse against me or a member of my household: *(describe in detail what happened to you or to a member of your household and when and where.)*

Physical abuse: _____

Threats which caused fear that you or any household member would be injured: _____

Other abuse: _____

B. Others present during the abuse _____

C. Did drugs or alcohol play a role in the domestic abuse? yes no.

D. Were weapons used during the abuse? yes no.

If yes, what weapons? _____

E. Has there been prior domestic abuse? yes no.

6. REQUESTS TO THE COURT

I REQUEST THAT THE COURT ORDER *(check all that you want)*

A. that the respondent not contact me, not abuse me and that the respondent stay away from my residence, place of employment and school.

B. (1) that the respondent shall immediately leave my our residence.

OR

(2) that the respondent provide me with temporary suitable alternative housing.

C. that the respondent shall not sell, remove, pawn, hide, destroy or damage any property owned by me or the two of us jointly.

D. that law enforcement officers assist me in retrieving my clothing and personal belongings from the residence at _____.

E. that I be given temporary custody of the child(ren) listed in this petition.

F. that until the court hearing:

respondent shall have the following contact with the child(ren): _____

respondent shall have no contact with the child(ren).

G. that the respondent shall pay:

support for the child(ren)

support for me.

H. that the respondent shall pay me for the damage and medical bills resulting from the abuse.

I. other relief that is necessary to resolve this domestic abuse problem *(list or describe what relief is necessary):*

7. INFORMATION ABOUT THE PETITIONER (ME)

(If you do not want the respondent to know your address and phone number, do not include it on this form. Tell the court clerk that you need to complete two other forms (Forms 4-961A and 4-961B) for your name and address and request that the clerk place your address under seal.)

A. **I DO NOT WANT RESPONDENT TO KNOW MY ADDRESS NOW OR AFTER THE HEARING FOR THE FINAL ORDER OF PROTECTION. I HAVE COMPLETED FORM 4-961B AND GIVEN IT TO THE COURT CLERK.**

OR

B. My physical address is: _____ in the County Indian Country of _____, State of New Mexico.

My mailing address is:

_____ *(street address)*

_____ *(city and zip)*

My telephone numbers are:

Home Work Message

8. NOTICE TO RESPONDENT

A. I have not told respondent that I am filing a petition to ask the court for an order of protection because I believe irreparable harm would result if I told respondent before coming to court. *(Describe what might happen to you or what you are afraid might happen if the respondent knew you were asking for a court order of protection.)*

B. I have told respondent that I am filing this petition.

9. LOCATION OF RESPONDENT

Respondent may be found at:

_____ *(address)*

_____ *(city)*

_____ *(state and zip code)*

_____ (if in Indian Country, please name tribe or pueblo).

Respondent's:

_____ (social security number)

_____ (date of birth)

_____ (home telephone number)

_____ (work address)

_____ (work telephone number).

B. Is respondent in jail? [] yes [] no

VERIFICATION

STATE OF NEW MEXICO)

COUNTY OF _____)

TRIBE OR PUEBLO _____)

The petitioner was sworn and states: I have read this petition for order of protection from domestic abuse and it is true to the best of my knowledge and belief. I understand that I can be punished both civilly and criminally if any information in this petition is false.

Date Signature of Petitioner

Signed and sworn before me on this _____ day of _____, _____.

Notary public

My commission expires: _____.

USE NOTES

1. Petitioner should complete all information known by the petitioner.
2. This part must be completed if there are children. Section 40-10-10 NMSA 1978 [see now 40-10A-209 NMSA 1978] of the Child Custody Jurisdiction Act requires the first pleading of every custody action to give information under oath as to the child's present address, the places where the child has lived within the last 3 years and the names and present addresses of the persons with whom the child has lived during that period. If a child lives with you now, but you do not want respondent to know your address, do not put your current address here, but do fill out Forms 4-961A and 4-961B.
3. Use Notes 1 and 2 are to be printed on pre-printed forms published for use by pro se petitioners. This note and Use Note 4 should not be printed on the form. This form has been approved by the Supreme Court of New Mexico for use in the courts of this state and distribution pursuant to Section 40-13-3 NMSA 1978. Pre-printed pro se forms should include a lined blank page at the end of the form for use by the petitioner if the pre-printed form does not include adequate space for a complete answer to a question.
4. Section 40-13-3.1 NMSA 1978 provides that a victim in a domestic abuse case shall not be required to pay for the issuance or service of a protection order. This has been construed to mean that a petitioner or counter-petitioner in a domestic abuse case is not required to pay a docket or other filing fees or fee for service of process.

[Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001.]

Form 963, Temporary Order of Protection and Order to Appear

Temporary Order of Protection and Order to Appear (Form 963)

[Standard simplified temporary order prohibiting domestic abuse,

Family Violence Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978.]

JUDICIAL DISTRICT COURT

COUNTY OF

STATE OF NEW MEXICO

Petitioner

v. No. Respondent

TEMPORARY ORDER OF PROTECTION AND ORDER TO APPEAR

The court has reviewed the sworn petition alleging domestic abuse. The court having considered the petition, FINDS that the court has jurisdiction, that there is probable cause to believe that an act of domestic abuse has occurred and that petitioner or a household member of petitioner will suffer immediate and irreparable injury, loss or damage unless the court enters this order. The court ORDERS:

- [] 1. Respondent shall not write to, talk to, visit or contact the petitioner in any way except through petitioner's lawyer, if petitioner has a lawyer.
[] 2. Respondent shall not abuse the petitioner or the petitioner's household members in any way. "Abuse" means any incident by respondent against petitioner or petitioner's household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat causing imminent fear of bodily injury; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by a residence or work place; (8) telephone harassment; (9) stalking; (10) harassment; (11) harm or threatened harm to children in any manner set forth above.
[] 3. Respondent shall not ask or cause other persons to abuse the petitioner or the petitioner's household members.
[] 4. Respondent shall not go within yards of the petitioner's home or school or work place. Respondent shall not go within yards of the petitioner at all times except . If at a public place, such as a store, respondent shall not go within yards of petitioner.
[] 5. shall have temporary physical custody of the following child(ren):

- [] 6. With respect to the child(ren) named in the preceding paragraph, [] respondent [] petitioner shall have:
[] A. No contact with the child(ren) until further order of this court and shall stay yards away from the child(ren)'s school.
[] B. Contact with the child(ren), subject to:

[] 7. The court may decide temporary child and interim support at the hearing listed below. Both parties shall bring to the hearing proof of income in the form of the two latest pay stubs or the federal tax returns from the previous year, proof of work related day-care costs and proof of medical insurance costs for the child(ren).

[] 8. [] A. Respondent is ordered to immediately leave the residence at and to not return until further court order.

[] B. Law enforcement officers are hereby ordered to evict respondent from the residence at

[] C. Respondent is ordered to surrender all keys to the residence to law enforcement officers.

[] 9. Law enforcement officers or shall accompany [] respondent [] petitioner to remove essential tools (as specified in No. 12), clothing, and personal belongings from the residence at

[] 10. Neither party shall transfer, hide, add debt to, sell or otherwise dispose of the other's property or the joint property of the parties except in the usual course of business or for the necessities of life. The parties shall account to the court for all such changes to property made after the order is served or communicated to the party. Neither party shall disconnect the utilities of the other party's residence.

[] 11. This order supersedes inconsistent prior order in Cause No. and any other prior domestic relations order and domestic violence restraining orders between these two parties.

[] 12. Other:

13. While this order is in effect, petitioner shall refrain from any act that would cause the respondent to violate this order.

HEARING

IT IS FURTHER ORDERED that the parties shall appear in the _____ Judicial District Court, Room _____, at _____, before _____, at _____ (a.m.) (p.m.) on _____ (date) for hearing on whether an extended order of protection against domestic abuse will be issued. Either party may bring witnesses or evidence and may be represented by counsel at this hearing. Respondent may file a Response to the Petition for Order of Protection from Domestic Abuse on or before the hearing. If the respondent fails to attend this hearing, an extended order may be entered by default against respondent and a bench warrant may be issued for respondent's arrest. If petitioner willfully fails to appear at this hearing, the petition may be dismissed. This order remains in force until _____.

DO NOT BRING ANY CHILDREN TO THE HEARING WITHOUT PRIOR PERMISSION OF THE COURT.

ENFORCEMENT OF ORDER

If the respondent violates any part of this order, the respondent may be charged with a crime, arrested, held in contempt of court, fined or jailed.

SERVICE AND NOTICE TO LAW ENFORCEMENT AGENCIES

Upon the signing of this order by a district court judge, a law enforcement officer shall serve on the respondent a copy of this order and a copy of the petition.

A LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.

[] I have reviewed the petition for order of protection and made recommendations to the district judge regarding its disposition.

(Signed) Court telephone number

(Title)

SO ORDERED:

District Judge Date and time approved

USE NOTE

The Temporary Order of Protection and Order to Appear requires a proof of return of service. The Committee has been informed that each local law enforcement agency has its own return of service form which will be used for this purpose.

Personal service of the Temporary Order of Protection and Order to Appear will assure that the Temporary Order is fully enforceable. It is possible that actual notice to the respondent of the content of the Temporary Order will also suffice to bind the respondent to comply with the order. *Territory of New Mexico v. Clancy*, 7 N.M. 580, 583 (1894).

[Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001.]

Form 4-965. Order of protection, mutual, non-mutual.

Form 4-965. Order of protection, mutual, non-mutual.

[Standard simplified order of protection, Family Violence
Protection Act, Sections 40-13-1 to 40-13-8 NMSA 1978.]

_____ JUDICIAL DISTRICT COURT

COUNTY OF _____

STATE OF NEW MEXICO

Petitioner

v. No. _____

Respondent

ORDER OF PROTECTION /
 MUTUAL NON-MUTUAL

This order is an order of protection under 18 U.S.C. Section 922, 18 U.S.C. Section 2265 and Section 40-13-6(D) NMSA 1978. This order shall be accorded full faith and credit by the courts of every state and Indian Tribe and shall be enforced as if it were the order of such other State or Tribe.

THIS MATTER came before the court on the _____ day of _____, _____ through a hearing on the petitioner's respondent's request for an order prohibiting domestic abuse.

The court, having determined that it has legal jurisdiction over the parties and the subject matter, **FINDS, CONCLUDES AND ORDERS:**
(check only applicable paragraphs)

1. NOTICE AND APPEARANCES

- Petitioner was present.
- Petitioner was represented by counsel.
- Respondent was present.
- Respondent was represented by counsel.
- Respondent was properly served with a copy of the petition, temporary order of protection prohibiting domestic abuse and order to appear.
- Respondent was properly served with a copy of the petition and order to appear.
- Respondent received actual notice of the hearing and had an opportunity to participate in the hearing.³
- Petitioner was properly served with a copy of the counter-petition and Order to Appear.⁴
- Petitioner was properly served with a copy of the temporary order and Order to Appear.
- Petitioner received actual notice of the hearing and had an opportunity to participate in the hearing.³

2. CONSEQUENCES OF ENTRY OF ORDER OF PROTECTION

Violation of this order by the respondent petitioner can have serious consequences, including:

- A. If you violate the terms of this order, you may be charged with a misdemeanor, which is punishable by imprisonment of up to 364 days and a fine of up to \$1,000. You may be found in contempt of court.
- B. If you are the spouse of the other party, an individual who lives with or has lived with the other party, or if you and the other party have had a child together, federal law prohibits you from possessing or transporting firearms or ammunition while this order is in effect. If you have a firearm or ammunition, you should immediately dispose of the firearm or ammunition. Violation of this law is a federal crime punishable by imprisonment for up to 10 years and a fine of up to \$250,000.
- C. If you are not a citizen of the United States, entry of this order may have a negative effect on your application for residency or citizenship.

3. FINDING OF DOMESTIC ABUSE

An act of domestic abuse was committed by respondent petitioner that necessitates an order of protection.

4. DOMESTIC ABUSE PROHIBITED

Respondent Petitioner shall not abuse the other party or members of the other party's household. "Abuse" means any incident by one party against the other party or another household member resulting in (1) physical harm; (2) severe emotional distress; (3) bodily injury or assault; (4) a threat by petitioner or respondent causing imminent fear of bodily injury to the other party or any household member; (5) criminal trespass; (6) criminal damage to property; (7) repeatedly driving by petitioner's or respondent's or a household member's residence or work place; (8) telephone harassment; (9) stalking; (10) harassment; or (11) harm or threatened harm to children in any manner set forth above.
 Respondent Petitioner shall not ask or cause other persons to abuse the other party or any other household members.

5. CONTACT PROHIBITIONS

Respondent Petitioner shall stay _____ yards away from the other party, the other party's home and any workplace at all times, unless at a public place, where the respondent petitioner shall remain _____ yards away from the other party except as specifically permitted by this order.

Respondent Petitioner shall not telephone, talk to, visit or contact the other party in any way except as follows:

- The parties may contact each other by telephone regarding medical emergencies of minor children;

Other _____

The parties may attend joint counseling sessions at the counselor's discretion.
(Unless the court has sealed petitioner's or respondent's address, include address of residence and employment for the appropriate party or parties.)

Respondent's addresses

(home address)

(work address)

(city)

(if applicable, tribe or pueblo)

(state and zip code)

Petitioner's addresses

(home address)

(work address)

(city)

(if applicable, tribe or pueblo)

(state and zip code)

6. COUNSELING

Respondent shall attend counseling at _____, contacting that office within five (5) days. The respondent shall participate in, attend and complete counseling as recommended by the named agency.

Petitioner shall attend counseling at _____, contacting that office within five (5) days. The petitioner shall participate in, attend and complete counseling as recommended by the named agency.

Respondent shall report to _____, for a drug [and] alcohol screen by _____, _____ (date) with the results returned to this court.

Petitioner shall report to _____, for a drug [and] alcohol screen by _____, _____ (date) with the results returned to this court.

Other counseling requirements: _____

7. CUSTODY

The court's orders regarding the minor child(ren) are addressed in the Custody, Support and Division of Property Attachment of this Order of Protection.

8. PROVISIONS RELATING TO SUPPORT

The court's orders regarding support issues for the parties are found in the Custody, Support and Division of Property Attachment of this Order of Protection.

9. PROPERTY, DEBTS AND PAYMENTS OF MONEY

The court's orders regarding property, debts and payment of money are found in the Custody, Support and Division of Property Attachment of this Order of Protection.

10. PARTIES SHALL NOT CAUSE VIOLATION

While this order is in effect, the parties shall refrain from any act that would cause the other party to violate this order.⁶

11. ADDITIONAL ORDERS

Review hearing. The parties are ordered to appear for a review hearing on the _____ day of _____, _____, at _____ (a.m.) (p.m.). Any party ordered to attend counseling shall bring proof of counseling to the review hearing.

IT IS FURTHER ORDERED⁷: _____

12. EFFECTIVE DATE OF ORDER; EXTENSION; MODIFICATION

This order is effective upon filing with the clerk of the court.

This order [with the exception of the orders in the Custody, Support and Division of Property Attachment⁵] shall continue until _____ (date), or until modified or rescinded by the court.

13. NOTICE TO LAW ENFORCEMENT AGENCIES

ANY LAW ENFORCEMENT OFFICER SHALL USE ANY LAWFUL MEANS TO ENFORCE THIS ORDER.

Respondent Petitioner is ordered to surrender all keys to the residence to law enforcement officers.

Law enforcement officers or _____ shall be present during any property exchange.

This order supersedes prior orders in _____ County, State of _____, Cause No. _____ to the extent that there are contradictory provisions.

14. NOTICE TO PARTIES

This order does not serve as a divorce and does not permanently resolve child custody or support issues.

15. RECOMMENDATIONS

I have:

reviewed the petition for order of protection;

reviewed the counter-petition for order of protection;

conducted hearings on the merits of the petition;

after notice and hearing as indicated in this order I prepared this order as my recommendation to the district court judge regarding disposition of requests for order of protection.

Signed

Title

Court's telephone number: _____

SO ORDERED:

District Judge Date

A copy of this order was hand delivered faxed mailed to respondent respondent's counsel on _____ (date)⁸.

A copy of this order was hand delivered faxed mailed to petitioner petitioner's counsel on _____ (date).

Signed

Title

USE NOTES

1. These use notes shall not be included in any Order of Protection issued by the court.
 2. Mutual orders of protection are binding on the petitioner as well as the respondent and are entitled to full faith and credit when certain procedural requirements are met. Because the mutual order of protection will only issue when a petition and counter-petition (or reversed-caption petition) are filed and the court finds that both petitioner and respondent committed acts of abuse, a mutual order will be entitled to full faith and credit pursuant to 18 U.S.C. Section 2265(c) and Section 40-13-6D NMSA 1978.
 3. A mutual order may be entered only after a counter-petition has been filed and a hearing conducted of which petitioner received actual notice and at which petitioner had an opportunity to participate if 18 U.S.C. Section 922 is to apply to this order.
 4. This order may be entered only after a hearing at which respondent received actual notice and at which respondent had an opportunity to participate if 18 U.S.C. Section 922 is to apply to this order.
 5. See Form 4-967 for the Custody, Support and Division of Property Order attachment.
 6. A violation of this provision may result in a finding of contempt of court, punishable by fine, imprisonment or both.
 7. If appropriate, an order providing for restitution may be included in this paragraph.
 8. Respondent or petitioner should be served at the time this order is issued, before leaving the courthouse. If a default order is issued, service upon the non-attending party shall be made by mail or by personal service. *See* Section 40-13-6(A) NMSA 1978.
- [Approved, effective November 1, 1999 until July 1, 2001; approved, as amended, effective May 1, 2001.]

Sample Petition for Dissolution of Marriage

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DR ____ - ____

Victor Diaz,

Respondent,

**PETITION FOR DISSOLUTION OF MARRIAGE AND
JOINT CUSTODY OF CHILDREN**

Petitioner states the following in support of this Petition.

I. JURISDICTION AND VENUE

1. Petitioner and Respondent are domiciled in New Mexico, and have resided in Bernalillo County, New Mexico, for at least six months prior to the filing of this Petition.

II. THE MARRIAGE

2. Petitioner and Respondent were married on January 27, 1992 in Albuquerque, New Mexico and have been husband and wife since that time.
3. Due to differences in temperament and outlook, Petitioner and Respondent are incompatible.

There is no reasonable expectation of reconciliation.

III. PROPERTY

4. Petitioner and Respondent have accumulated the following community property:
 - a. a red 1984 Toyota Corolla Station Wagon, Vehicle Identification Number (VIN) 126F94769DF 573:

- b. a green 1981 Chevy Conversion Van, Vehicle Identification Number 77735XS90351,
- c. A joint checking account at New Mexico Federal Credit Union, account number, 0098987, with a current balance of approximately \$497.00,
- d. A savings account at the New Mexico Federal Educators Credit Union with \$133.00,
- e. A brown corduroy couch,
- f. General Electric Washer and Dryer,
- g. Oak bedroom set,
- h. Red Tool box,
- i. A 22 inch Zenith color television set,
- j. General Electric Washer and Dryer,
- k. Electrolux Vacuum cleaner,
- l. Set of bunk-beds and children's sheets, and
- m. Half of the Family Photographs.

5. Petitioner's share of the community property should include:

- a. the red 1984 Toyota Corolla Station Wagon, Vehicle Identification Number (VIN) 126F94769DF 573, to the Petitioner,
- b. A joint checking account at New Mexico Federal Credit Union, account number 0098987, with a current balance of approximately \$497.00,
- c. A brown corduroy couch,
- d. Electrolux Vacuum cleaner,
- e. Set of bunk-beds and children's sheets,
- f. General Electric Washer and Dryer, and
- g. Half of the Family Photographs.

6. Respondent's share of the community property should include:
 - a. the green 1981 Chevy Conversion Van, Vehicle Identification Number 77735XS90351,
 - b. the savings account at the New Mexico Federal Educators Credit Union with \$133.00,
 - c. A 22 inch Zenith color television set,
 - d. Red Tool box,
 - e. Oak bedroom set, and
 - f. Half of the Family Photographs

7. Any other community property of the marriage is limited to minor household items and should become the property of the party currently in possession of the item.

8. Petitioner and Respondent have been separated for approximately two years and have already assumed responsibility for all of their respective separate property. The separate property consists of personal effects and minor household items.

9. All separately owned property is in the possession of each party and should be confirmed in the party having possession.

IV. DEBTS

10. Petitioner and Respondent have accumulated community debts during their marriage that should be equitably allocated and divided between them.

11. The community debts known to the Petitioner are:
 - a. \$1200.00 student loan taken out in the name of Petitioner,
 - b. \$500.00 Bank of America Visa credit card debt on account number 579299, and
 - c. a \$250 hospital bill, payable in installments of \$5.00 per month to University Hospital.

12. Petitioner should assume responsibility for the \$1,200 student loan taken out in her name.

13. Respondent should assume responsibility for the:

- a. \$500.00 Bank of America Visa credit card debt on account number 5792992 ,and
- b. \$250 hospital bill, payable in installments of \$5.00 per month to University Hospital.

14. Petitioner is not aware of any other community or separate debts. Any debts that are not listed should be paid by the party incurring the debt.

V. TAXES

- 15. The parties have filed their tax returns for the 2001 tax year, and received their tax refund which has already been equally divided by the parties.
- 16. The parties shall file separate tax returns for the year of 2002.

VI. CHILD CUSTODY

- 17. There are three minor children of the marriage, Angelique Diaz, Brianna Diaz, and Milagro Diaz who are six, four and two years old respectively.
- 18. Petitioner has had primary physical custody of the children since Mr. Diaz left them in 2001.
- 19. The children live together as a family and have had an opportunity to forge sibling relationships that are in their best interests.
- 20. Petitioner and Respondent currently have an informal visitation arrangement that they would like to make more formal in order to minimize the possibility of disrupting their children’s lives in the future.
- 21. During the past three years all three minor children have lived with:

| <u>Who</u> | <u>Where</u> | <u>Dates</u> |
|-----------------------------------|--|----------------|
| Ms. Diaz. (petitioner, mother) | 2408 Las Lomas SW Albuquerque, NM 87105 | 1996 - present |

22. There is no other litigation known to the Petitioner concerning custody or visitation with the minor children of the parties in New Mexico or in any other state in which the Petitioner has participated as a party as a witness or in any other capacity.

23. Petitioner has no information of any proceeding that is pending in a court in New Mexico or in any other state involving visitation or custody with the parties' minor children.
24. Petitioner does not know of any other persons other than the parties who have physical custody of the minor children or who claim to have custody or visitation rights to the minor children.
25. Since the children and the Petitioner have a significant connection with New Mexico, the court has jurisdiction over the custody issues and should exercise its jurisdiction because it is in the best interests of the children to have a formal custody arrangement in place.
26. The parties should be awarded joint legal custody with primary physical custody in Petitioner with time-sharing consistent with the best interests of the children.

VII. CHILD SUPPORT

27. Respondent should be ordered to pay child support in accordance with the New Mexico Child Support Guidelines.

VIII. SPOUSAL SUPPORT

28. Each party is able to support him or herself adequately and no alimony or spousal support should be awarded to either party.

IX. ATTORNEY'S FEES AND COSTS

29. Petitioner does not need an award of attorney's fees and costs to adequately prepare her present case.

IX. NAME RESTORATION

30. Petitioner requests that the Court restore her name to Diane Dominguez.

WHEREFORE, Petitioner asks the Court to:

- A. Dissolve the marriage between Petitioner and Respondent and grant a Decree of Dissolution of Marriage on the grounds of incompatibility;
- B. Order the distribution of property and debts as requested in this Petition;
- C. Award Petitioner reasonable child supporting accordance with the New Mexico Child Support Guidelines;
- D. Exercise its jurisdiction to decide the custody issues and award joint custody of the children to the parties, with timesharing in the best interests of the children;
- E. Order that Petitioner's name be restored to Diane Dominguez; and
- F. Award such additional and further relief, as the Court may deem equitable and appropriate.

Respectfully submitted,

April Land, Supervising Attorney
CLINICAL LAW PROGRAM
1117 Stanford N.E.
Albuquerque, NM 87131-1413
(505) 277-5265

Danielle Tsosie
Law Practice Student

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF BERNALILLO

I, Diane Diaz, being first duly sworn upon oath depose and state:
That I have read the foregoing Petition for Dissolution of Marriage and the Statements
contained therein are true and correct to the best of my knowledge and belief.

Diane Diaz

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this _____
Day of April 2002, by Diane Diaz.

Notary Public, State of New Mexico

My Commission Expires: _____

Domestic Relations Information Sheet (Civil Form 4A-101)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,
Petitioner,

v.

NO. DV ___ - ___

Victor Diaz,
Respondent,

DOMESTIC RELATIONS INFORMATION SHEET

Case number: DV Assigned judge: Angela J. Jewell

The following information is required by New Mexico law and federal law for child support enforcement. The information also is needed to identify and monitor the case.

1. Information regarding petitioner and respondent. *(Do not use an attorney's mailing address. Use a separate sheet if necessary.)*

Petitioner

Name: Diaz, Diane

Last name, first, middle)

Other names *(e.g. maiden name):*

Martinez

Address: 1001 Unser Blvd. NW

City: Albuquerque

State: New Mexico

Zip code: 87114

Date of birth: November 29, 1968

Social Security number: 525-99-3203

Respondent

Name: Diaz, Victor

(Last name, first, middle)

Other names *(e.g. maiden name):*

N/A

Address: 406 Beaver Rd. SW

City: Albuquerque

State: New Mexico

Zip code: 87105

Date of birth: July 31, 1954

Social Security number: 585-66-2302

2. Parties' minor children. *(Provide the date of birth and social security number for each minor child, if any. Use a separate sheet if necessary.)*

Name: Amanda Diaz

Last name, first, middle)

Date of birth: August 17, 1993

Social Security number: 585-99-1011

Name: Johathan Diaz

(Last name, first, middle)

Date of birth: May 23, 1997

Social Security number: 648-12-5566

Has any court made an order for child support? Yes No

Has any court changed the amount of child support you requested? Yes No

If you answered "Yes" to either question, what state and what court issued the order?

New Mexico _____ State Second Judicial District _____ Court.

Domestic Relations Cover Sheet (Civil Form 4A-101)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,
Petitioner,

v.

NO. DV 2001-0408

Victor Diaz,
Respondent,

DOMESTIC RELATIONS COVER SHEET

THIS SECTION FOR OFFICIAL USE ONLY²

Case number: _____ Assigned judge: _____ Free process: Y N

Information for court clerk's use.

A. Parties' names and petitioner's attorney information.

Petitioner's information

Petitioner's name: Diane Diaz
Attorney's name: Richard Begay, Student Attorney, April Land, Supervising Attorney
Attorney address: 1117 Stanford NE
City: Albuquerque
State: New Mexico
Zip code: 87131
Telephone: (505) 277-5265
Respondent's name: Victor Diaz

B. Case tracking (*select codes from page 3*)³

Primary case type. (*Insert three letter code*) DDC.
Primary claim for relief (*cause of action*) (*Insert three letter code*) DDC.
Other claims for relief (*cause of action*) (*insert three letter codes*)⁴: DPV.

C. Type of pleading (*mark only one*)

FIRST PLEADING for this party (*petition*)
 RE-OPENED (*Post judgment decree, motions, petitions for enforcement or modification*)

Information for judge's use. (*mark all that apply*)

Has mediation or settlement facilitation been attempted? _____ Yes No.
Are there any pending or closed cases, including any domestic violence or children's court cases, involving the same parties or children? Yes _____ No.

END OF COVER SHEET. GO TO INFORMATION SHEET.5

NOTE TO CLERK: PLACE THE COVER SHEET IN THE COURT FILE.

Summons (Civil Form 4-206)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,
Petitioner,
v.
Victor Diaz,
Respondent,

NO. DV 2001-0408

**SUMMONS
THE STATE OF NEW MEXICO**

TO:
ADDRESS:

GREETINGS:

You are hereby directed to serve a pleading or motion in response to the petition within thirty (30) days after service of this summons, and file the same, all as provided by law.

You are notified that, unless you serve and file a responsive pleading or motion, the petitioner will apply to the court for the relief demanded in the petition.

Vincent Martinez
Practicing Law Student

Michael Norwood
Supervising Attorney
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, New Mexico 87131
(505) 277-5265

WITNESS the Honorable _____, district judge of the second judicial district court of the State of New Mexico, and the seal of the district court of Bernalillo County, this _____ day of _____, 19____.

_____,
CLERK OF THE DISTRICT COURT
By: _____
Deputy

RETURN
STATE OF NEW MEXICO)
)ss.
COUNTY OF BERNALLIO)

I, being duly sworn, on oath, say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that I served the within Summons in said County on the _____ day of _____, 19____, by delivering a copy thereof, with copy of Petition attached, in the following manner:

(check one box and fill in appropriate blanks)

[to Respondent _____. (used when Respondent receives copy of Summons or refuses to receive Summons).

[to _____, a person over fifteen (15) years of age and residing at the usual place of abode of Respondent _____, who at the time of such service was absent therefrom.]

[by posting a copy of the Summons and Petition in the most public part of the premises of Respondent _____. (used if no person found at dwelling house or usual place of abode)

[to _____, an agent authorized to receive service of process for Respondent _____.

[to _____, (parent) (guardian) of Respondent _____ (used when Respondent is a minor or an incompetent person)

[to _____ (name of person), _____, (title of person authorized to receive service) (used when Respondent is corporation or association subject to a suit under a common name, a land grant board of trustees, the State of New Mexico or any political subdivision)

Fees:

Signature of Person Making Service

Title (if any)

*Subscribed and sworn to before me this
____ day of _____, 19____.

Judge, Notary or Other Officer
Authorized to Administer Oaths

Official Title

My Commission Expires:

Temporary Domestic Order (Form 4A-112)

[1-121]

STATE OF NEW MEXICO

_____ COUNTY
_____ JUDICIAL DISTRICT

Petitioner,

v. No. _____

Respondent.

TEMPORARY DOMESTIC ORDER/

This order is issued pursuant to Rule 1-121 NMRA. This is not an order of protection under federal or state law. It is otherwise fully enforceable. It applies to both parties. This order will continue in effect until modified. The procedure for modification of this order is described below.

THE COURT ORDERS THE PARTIES AS FOLLOWS:

- (1) **Do not** injure or physically or mentally abuse, molest, intimidate, threaten or harass the other party or any child of either party.
- (2) **Do not** interfere with the relationship of your spouse with any child of either party. If you are living apart, you shall each continue to have frequent contact and communication with any minor child of both parties, personally and by telephone. A party shall notify the other party of any change of address or telephone number within twenty-four (24) hours of the change.
- (3) **Do not** change a child's school, religion, child care, doctor, dentist, physical or mental treatment or recreational activities in which the child has been participating.
- (4) **Do not** remove, cause or permit the removal of any minor child of both parties from the State of New Mexico without court order or written consent of the other party.
- (5) **Do not** make the other party leave the family home, whether it be community or separate property, without court order. You should attempt to resolve the question of who leaves the home in a fair manner. If you cannot agree, you must ask the court to decide.
 - (a) Whoever moves from the family home may return to pick up personal belongings at a reasonable time as you may agree. Personal belongings do not include furniture unless you agree or the court permits. If an order prohibiting domestic violence has been entered, you must arrange to have a law enforcement officer present to monitor the removal of personal belongings. The party moving out of the residence is not prejudiced by reason of the move in any way with respect to custody of any minor child, with respect to a claim of any interest in the family residence or the personal property in or on the premises.
 - (b) Whoever leaves the family residence shall notify the other party, within twenty-four (24) hours of an address where the vacating party can receive mail.
 - (c) At a reasonable time, you are entitled to examine the contents of the marital residence and to have access to all properties owned by either of you, for inspection, valuation or appraisal. If you ask, the other party must provide access to the home within fifteen (15) days after the date of the request.
- (6) **Do not** incur unreasonable or unnecessary debts. Any debt that does not contribute to the benefit of both spouses or the minor children of the parties which is incurred after you have separated, may be the separate debt of the party who incurs the debt.
- (7) **Do not** sell, remove, transfer, dispose of, hide, encumber or damage any property, real or personal, community

or separate, except in the usual course of business or for the necessities of life. Keep an accounting of any transactions to show to the court.

(8) **Do not** drop or cancel any insurance policy, including automobile or other vehicle insurance, household insurance, medical or dental insurance or life insurance.

(9) **Do not** terminate or change the beneficiaries of any existing life insurance policy.

(10) **Do not** close any financial institution account² or cancel any credit cards nor remove the other party from any credit card account during pendency of this case, unless the parties otherwise agree in writing.

MODIFICATION BY COURT³

This order may be modified by the court upon request of either party. To request the court to modify this order, a motion must be filed with the clerk of the court. The motion must include reference to each paragraph number the party is requesting to be modified or terminated. The party making the request must provide the other party with a copy of the motion requesting the change. If the other party agrees with the request, an order approving the request, which has been initialed by both parties as “approved”, shall be filed with the motion.

WAIVER BY PARTIES

The parties may modify a specific provision of this order by entering into a written agreement and filing it with the court. The parties may also waive a provision of this order on a specific occasion if both parties sign an agreement to waive the provision. A waiver must include the paragraph number of each paragraph waived by the parties.

OTHER ORDERS

If an order of protection from a domestic violence case has been served on either party or if there is any other order in effect governing the relationship of the parties, and there is a conflict between this order and the other order, the other order controls unless the court specifically orders otherwise.

VIOLATIONS

Violation of this court order may result in the imposition of a fine or imprisonment. This order is binding on the petitioner at the time the petition is filed. This order is effective on the respondent two (2) days after it is served on the respondent. The parties are cautioned that actions taken by either party that are contrary to the terms of this order are subject to redress by the court, including costs and attorney fees.

Date District Judge

USE NOTES

1. A scheduling order may be issued at the time a domestic relations case is docketed and served with the petition, however, the scheduling order must be issued as a separate order.

2. *See* Section 58-1-7 NMSA 1978 for notice to any bank of an adverse claim to a bank account.

3. Within two (2) days after service of this order, a party may file a motion requesting a hearing to dissolve this order. If the court finds the motion was frivolous or was not filed in good faith it may assess the party filing the motion with costs and attorney fees.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Motion for Free Process (LR2-Form A)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DV ____ - ____

Victor Diaz,

Respondent,

MOTION FOR FREE PROCESS

Petitioner, Diane Diaz, moves this Court for an order allowing free process in this case. As grounds for this motion, Petitioner states that because of indigency, she cannot afford to pay the court fees and costs in this case. Petitioner has attached the affidavits required by Second Judicial District Local Rules, Rule LR2-115.

April Land, Supervising Attorney
University of New Mexico
CLINICAL LAW PROGRAM
1117 Stanford NE
Albuquerque, NM 87131-1413

Daniele Tsosie
Law Practice Student

Affidavit of Indigency

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,
Petitioner,

v.

NO. DV 2001-0408

Victor Diaz,
Respondent,

AFFIDAVIT OF INDIGENCY

I state, under penalty of perjury, that to the best of my knowledge and belief the following statements and information are true and correct. I wish to file a Petition for Dissolution of Marriage with Child Custody and Child Support in this case, and I cannot afford to pay any court fees or costs.

EMPLOYMENT INCOME

I am not employed.

I am employed as a _____, at
_____, and earn
_____ per hour/week/month.

I am paid every _____ weeks. My next payday is _____.

My gross pay is \$ _____.

The following amounts are deducted from my gross pay:

| | |
|--------------------|----------|
| Federal income tax | \$ _____ |
| Social security | \$ _____ |
| State income tax | \$ _____ |
| Union dues | \$ _____ |
| Insurance payments | \$ _____ |
| Retirement | \$ _____ |
| Other | \$ _____ |

My take-home pay is \$ _____

OTHER INCOME

In addition to wages and salary, I receive the following income:

| | |
|-----------------|----------|
| Social security | \$ _____ |
| Welfare | \$ _____ |
| Unemployment | \$ _____ |
| Food stamps | \$ _____ |

AFDC \$ _____
 Child support \$ _____
 Alimony \$ _____
 Investments \$ _____
 Other \$ _____
 Total other income \$ _____

BANK ACCOUNTS AND CASH ON HAND

I have a checking account at _____, and the present balance is \$ _____.
 I have a savings account at _____, and the present balance is \$ _____.
 I have \$ _____ cash on hand.

REAL PROPERTY AND OTHER TANGIBLE ASSETS

I own houses, buildings, land or other real property at _____, with a present value of \$ _____.
 I own stocks, bonds, certificates of deposit, etc., valued at \$ _____.

MONTHLY EXPENSES

My monthly expenses are as follows:
 House payment/rent \$ _____
 Utilities \$ _____
 Telephone \$ _____
 Groceries (after food stamps) \$ _____
 Car payments \$ _____
 Gasoline \$ _____
 Insurance \$ _____
 Child Care \$ _____
 Other \$ _____

HOUSEHOLD

I live at _____, and I am the head of the household.

Other than myself, members of the household are:

| Name | Age | Employment | I support |
|-------|-------|------------|-----------|
| _____ | _____ | _____ | [] |
| _____ | _____ | _____ | [] |
| _____ | _____ | _____ | [] |
| _____ | _____ | _____ | [] |
| _____ | _____ | _____ | [] |
| _____ | _____ | _____ | [] |

 Danielle Tsosie,
 Law Practice Student

 April Land
 Supervising Attorney
 CLINICAL LAW PROGRAM
 1117 Stanford NE
 Albuquerque, NM 87131-1413

VERIFICATION

STATE OF NEW MEXICO)

)ss.

COUNTY OF BERNALILLO)

I, Diane Diaz, have read this Petition for Dissolution of Marriage including Child Custody and Child Support and certify that I am the above named Petitioner and that I have read and understand this Petition for Dissolution of Marriage and it is true and accurate to the best of my knowledge and belief, this _____ day of March, 2002.

Diane Diaz

SUBSCRIBED, SIGNED AND SWORN TO before me on this _____ day of _____, 2002.

Notary Public

My commission expires on _____.

Attorney's Affidavit Supporting Indigency
(modified LR2 Form C) (attorney notarization added)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DR ____ - ____

Victor Diaz,

Respondent,

ATTORNEY'S AFFIDAVIT SUPPORTING INDIGENCY

I hereby certify that to the best of my knowledge and belief the statements and information contained in Diane Diaz's affidavit of indigency are true and correct. I further certify that I have not received any attorney fee from Diane Diaz, and that if any attorney fee is paid to me, court fees and costs shall be paid to the clerk from such fee.

Danielle Tsosie
Law Practice Student

April Land, Supervising Attorney
University of New Mexico
CLINICAL LAW PROGRAM
1117 Stanford NE, Albuquerque,
NM 87131-1413
(505) 277-5265

SUBSCRIBED, SIGNED AND SWORN TO by me on this _____ day of _____, 2002.

Notary Public

My commission expires on _____.

I hereby certify that a copy of this Motion was mailed first-class postage prepaid to opposing counsel at 400 Lead, NW Albuquerque, New Mexico 87108. this _____ day of _____, 2002.

Order for Free Process (modified LR2-Form D) (\$30 court mediation fee added)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DV _____ - _____

Victor Diaz,

Respondent,

ORDER FOR FREE PROCESS

THIS MATTER having come before the court on Petitioner's Motion for Free Process and proof of indigency by affidavit.

The Court ORDERS:

- the original fee is waived
- a post decree filing fee is waved
- a portion of the filing fee is waived. The movant is to pay the thirty dollar (\$30) court mediation fee
- the movant is granted free service of process in Bernalillo County, New Mexico.
- the movant is denied free process.

Honorable

Submitted by:

Danielle Tsosie
Law Practice Student

April Land
Supervising Attorney
University of New Mexico
CLINICAL LAW ROGRAM
1117 Stanford NE
Albuquerque, NM 87131-1413
(505) 277-5256

Rule 1-099 Certificate (modified LR2 Form J) (“proceeding without costs” added)

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diana Diaz,

Petitioner,

v.

NO. 2002-0138

Victor Diaz,

Respondent.

RULE 1-099 NMRA, CERTIFICATE

The UNM Clinical Law Program, Danielle Tsosie, Practicing Law Student, and April Land, Supervising Attorney, attorneys for the Petitioner, hereby certify, pursuant to Rule 1-099 NMRA, and Second Judicial District Local Rules, Rule LR2-132, that no Rule 1-099 NMRA fee is required because:

this case is pending.

the attached pleading, motion, or other paper is filed within sixty (60) days after the last disposition; the last action taken in this case was _____; a judgment or decree was filed _____.

the attached pleading, motion, or other paper is requesting action which may be performed by the clerk pursuant to these rules --or-- seeking to correct a mistake in the judgment, decree, or record filed on, , 20___, -or- a motion accompanied by signed stipulated order disposing of the issue(s) raised by the motion.

the attached pleading, motion, or other paper is seeking only enforcement of a child support order filed on, 20___.

proceeding without costs.

Danielle Tsosie
Student Attorney for Petitioner

April Land
Supervising Attorney
UNM CLINICAL LAW
PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, NM 87131-1431
(505) 277-5265

I certify that a copy of this certificate was mailed to Attorney for Respondent this _____ day of _____, 2002

April Land
Supervising Attorney

Interim Forms

Interim Monthly Income And Expense

4A-122

[1-122]

STATE OF NEW MEXICO

COUNTY OF _____
_____ JUDICIAL DISTRICT

_____,

Petitioner,

v.No. _____

_____,

Respondent.

INTERIM MONTHLY INCOME AND EXPENSES STATEMENT

(fixed percentage for child expenses)

STATE OF NEW MEXICO)

) ss.

COUNTY OF _____)

I, _____ (*petitioner*) (*respondent*) state under penalty of perjury that the following is true and correct at this time:

| | Husband | Wife | Combined |
|----------------------------------|----------------|-------------|-----------------|
| 1. Gross monthly income | \$ _____ | \$ _____ | \$ _____ |
| a. Gross monthly wages | \$ _____ | \$ _____ | \$ _____ |
| b. Rental income | \$ _____ | \$ _____ | \$ _____ |
| c. Self-employment income | \$ _____ | \$ _____ | \$ _____ |
| d. Dividends and interest | \$ _____ | \$ _____ | \$ _____ |
| e. Other income | \$ _____ | \$ _____ | \$ _____ |
| 2. Total gross monthly income | \$ _____ | \$ _____ | \$ _____ |
| 3. Payroll deductions | | | |
| a. Federal withholding | \$ _____ | \$ _____ | \$ _____ |
| b. State withholding | \$ _____ | \$ _____ | \$ _____ |
| c. Estimated tax payments | \$ _____ | \$ _____ | \$ _____ |
| d. FICA | \$ _____ | \$ _____ | \$ _____ |
| e. Medicare | \$ _____ | \$ _____ | \$ _____ |
| f. Health insurance | \$ _____ | \$ _____ | \$ _____ |
| g. Life and disability insurance | \$ _____ | \$ _____ | \$ _____ |
| h. Union dues | \$ _____ | \$ _____ | \$ _____ |

| | | | |
|---|----------|----------|----------|
| i. Mandatory retirement | \$ _____ | \$ _____ | \$ _____ |
| j. Other _____ | \$ _____ | \$ _____ | \$ _____ |
| 4. Total payroll deductions | \$ _____ | \$ _____ | \$ _____ |
| (Add items in #3) | \$ _____ | \$ _____ | \$ _____ |
| 5. Net monthly income | \$ _____ | \$ _____ | \$ _____ |
| (Subtract Line 4 from Line 2) | | | |
| 6. Monthly fixed expenses: | | | |
| a. Residence | \$ _____ | \$ _____ | \$ _____ |
| b. Utilities | \$ _____ | \$ _____ | \$ _____ |
| c. Car payments | \$ _____ | \$ _____ | \$ _____ |
| d. Insurance premiums | \$ _____ | \$ _____ | \$ _____ |
| (1) Car or other vehicle | \$ _____ | \$ _____ | \$ _____ |
| (2) Life | \$ _____ | \$ _____ | \$ _____ |
| (3) Health | \$ _____ | \$ _____ | \$ _____ |
| (4) Homeowners or renters | \$ _____ | \$ _____ | \$ _____ |
| (5) Other | \$ _____ | \$ _____ | \$ _____ |
| e. Day care | \$ _____ | \$ _____ | \$ _____ |
| f. Credit card payments | \$ _____ | \$ _____ | \$ _____ |
| g. Loan payments | \$ _____ | \$ _____ | \$ _____ |
| h. Child support payments | \$ _____ | \$ _____ | \$ _____ |
| i. Medical | \$ _____ | \$ _____ | \$ _____ |
| j. Other _____ | \$ _____ | \$ _____ | \$ _____ |
| 7. Total monthly fixed expenses | \$ _____ | \$ _____ | \$ _____ |
| (Add items in #6 and #7) | \$ _____ | \$ _____ | \$ _____ |
| 8. Net spendable income | \$ _____ | \$ _____ | \$ _____ |
| (Line 5 minus Line 7) | \$ _____ | \$ _____ | \$ _____ |
| 9. 1/2 of combined net spendable income (1/2 of Line 8 Column 3) | \$ _____ | \$ _____ | |
| 10. Amount transferred and received | \$ _____ | \$ _____ | |
| 11. Child support adjustment (see table, Use Note 15) | \$ _____ | \$ _____ | |
| 12. Total to be transferred | \$ _____ | \$ _____ | |

Signature

Subscribed to and sworn to before me this _____ day of _____, _____, by

Notary Public

USE NOTES

1. This form is to be used with an Interim Order Allocating Income and Expenses, Domestic Relations Form 4A-123 NMRA. Unless, upon motion of a party, the court orders the division of separate income and expenses, only community income and expenses should be included on this form. In minimal or negative income cases, the court will have discretion to fashion an appropriate order.

2. "Gross monthly income" is income from all sources except child support received from a prior court order. For self-employed individuals, gross monthly income means gross receipts less reasonable and ordinary business expenses. For varying income and expenses, use the average of the last three (3) months' income and expenses.

Gross monthly income is to be computed by using one of the following: hourly wage x average hours worked per week x 52 divided by 12; weekly wage x 52 divided by 12; every two weeks wage x 26 divided by 12; twice monthly x 2. For varying wages, use the average of the last three months' income.

3. "Deductions" are payroll deductions for taxes, social security, health insurance, union dues, retirement and other employer-related deductions. Payroll deductions are to be computed on a monthly basis as described in Use Note 2.

4. "Monthly fixed expenses" include periodic expenses even though paid quarterly, semiannually or yearly. Fixed expenses are to be computed on a monthly basis by using one of the following: annual income or expenses divided by 12. For varying expenses, use the average of the last three months' receipts or expenses.

5. Residence fixed expense is mortgage or rent actually paid. If a party receives free rent, e.g., by living with parents, that party's rent is imputed as zero. If residence expense is a mortgage payment for the residence of a party, unless already separately stated, include insurance and taxes.

6. Include monthly average payments for gas, electricity, water, sewer, refuse and basic telephone bill, if not paid as part of rent. Use average for last 12 months if known.

7. Do not include medical, dental, liability, life or other insurance that is deducted by payroll deduction.

8. Do not include homeowners insurance premiums if the premium is included as part of the residence expense, Line 6(a).

9. Day care fixed expense is work-related day care and does not include baby-sitting or occasional day care.

10. "Credit card payments" is listed as a fixed expense and includes only the minimum monthly payment as of the date of the filing of the petition.

11. Any regular monthly payment ordered by a prior order of child support or alimony, which is actually paid, is a fixed expense.

12. Line 8. "Net spendable income" and "combined net spendable income" are determined by subtracting Line 7, "total monthly fixed expenses", from Line 5, "net monthly income".

Negative combined net spendable income. If the "combined net spendable income" (Line 8, Column 3) is a negative number, and there are no children, adjust the allocations of income or expenses between the parties, or transfer an amount from one party to another so that the amount of net spendable income for the "Husband" and "wife" on Line 9 is equal. Do not complete Lines 10, 11 and 12. If Line 8, Column 3 has a negative or minimal

“combined net spendable income”, and there are children, the court will need to fashion an appropriate form to divide interim income and expenses of the parties.

13. Line 9. Equalizing spendable income. If “net spendable income” on Line 8, Column 3, is a positive number, divide “combined net spendable income” by two and enter the result in each column of Line 9.

14. Line 10. Amount transferred and received. The party with the larger net spendable income will transfer an equalizing amount to the party with the smaller net spendable income. To determine the amount of the transfer or receipt, subtract Line 9 (one-half of combined net spendable income) from Line 8, “net spendable income” and enter the amount on Line 10. This is the amount to be transferred by the party with the larger net spendable income to the party with the lower net spendable income.

For example, if the husband has a net spendable income of \$1,000.00 per month and the wife has a net spendable income of \$500.00 per month, divide the total, \$1,500.00, by two. Since the husband has the larger net spendable income, enter the result, \$750.00, on Line 9, under Column 1. To determine the amount the husband transfers, subtract Line 9 of Column 1 from Line 8 of Column 1 (\$1,000.00 minus \$750.00 = \$250.00) and this amount (\$250.00) will be transferred each month by the husband to the wife.

15. Line 11. Children. If Line 8, Column 3, is a positive number, an adjustment for child support is made by multiplying the amount on Line 8, Column 3 (combined “net spendable income”) by the applicable percentage in the table below and enter the amount in the party column of the party with primary custody of the child or children. Do not count children who are covered by a prior child support order.

| | |
|----------------|-----|
| One child | 10% |
| Two children | 15% |
| Three children | 19% |
| Four children | 22% |
| Five children | 25% |
| Six children | 28% |

If more than six children, add three percent (3%) for each additional child.

For example, if the combined “net spendable income” of husband and wife (Column 3, Line 8, is \$1,500.00) and there is one child multiply, Column 3, Line 8, (\$1,500.00 by ten percent (10%)) and enter the result, (\$150.00), on Line 11 in the husband and wife columns.

16. Line 12. Total amount transferred. Line 11 is used to adjust the amount to be transferred by a party or received by a party on Line 10 by the parties. Using the example in Use Notes 14 and 15. if there is one child and the combined net spendable income of the parties is \$1,500.00, an adjustment of ten percent (10%) of \$1,500.00 (\$150.00) is made for child support. If the wife has primary custody, she will receive another \$150.00. If the husband has primary custody, subtract \$150.00 from the amount the wife is to receive on Line 10. Using the example in Use Notes 14 and 15, if the wife has primary custody, the husband will transfer \$400.00 to the wife. If the husband has primary custody, the husband will transfer \$100.00 to the wife.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Interim Order

4A-123

[1-122]STATE OF NEW MEXICO

COUNTY OF _____

JUDICIAL DISTRICT

Petitioner,

v.

No. _____

Respondent.

INTERIM ORDER ALLOCATING INCOME AND EXPENSES

This matter having come on for a hearing by the court and the court being sufficiently advised
FINDS, CONCLUDES AND ORDERS:

1. NOTICE AND APPEARANCES

(check only applicable paragraphs)

Petitioner was present.

Petitioner was represented by counsel.

Respondent was present.

Respondent was represented by counsel.

Respondent was properly served with a copy of the notice of hearing on the motion for temporary order dividing income and expenses.

2. The parties have agreed to the income and expenses of the parties except:

3. The parties shall receive the income and pay the expenses as listed on the Interim Monthly Income and Expense Statement.

4. Each party shall presumptively be responsible for any debts the party incurs during the pendency of this case.

5. Any assets obtained by either party after the entry of this order from that party's share of net spendable income are presumptively the separate property of the obtaining party.

6. Each party shall use the party's share of the income to pay the party's respective expenses for food, clothing, telephone, utilities, gasoline, car maintenance, entertainment, meals out, haircuts, attorney fees, ordinary medical and dental expenses and other personal expenses.

7. _____ (name of party) shall pay to _____ (name of party) _____ dollars (\$_____)2 per month by check or money order, delivered or postmarked on or before the _____ of each month during the pendency of this case.

8. The medical and dental expenses of the child or children not covered by insurance shall be paid one-half by each party.

9. Notwithstanding entry of this order, all claims and defenses are preserved.

10. This order shall remain in effect during the pendency of this case except as modified by court order.

11. Disobedience of this order can constitute contempt of court and subject the violator to fine, imprisonment and other sanction, plus payment of attorney fees and costs to the other party.

District judge

Recommended by:

Hearing officer

Attorney for petitioner

Attorney for respondent

CERTIFICATE OF MAILING

I _____, certify that I caused a copy of this report and recommendations to be served on the following persons by (delivery) (mail) on this _____ day of _____, _____:

(1) _____
(Name of party)

(2) _____
(Name of party)

Attorney

USE NOTE

1. This form is used with Domestic Relations Form 4A-122 NMRA.
2. For the amount to be transferred or paid, see Line 12 of Domestic Relations Form 4A-122 NMRA.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Community Property Schedule

4A-131

[1-123]

STATE OF NEW MEXICO

COUNTY OF _____

_____ JUDICIAL DISTRICT

_____,
Petitioner,

v.

No. _____

_____,
Respondent.

[PETITIONER] [AND] [RESPONDENT]'S COMMUNITY PROPERTY AND LIABILITIES SCHEDULE

Neither party is required to submit a proposed distribution. Any stipulation regarding value or distribution should be indicated by an asterisk.

ASSETS Value

| | <u>Husband</u> | <u>Wife</u> | <u>Combined</u> |
|------------------------------------|----------------|-------------|-----------------|
| 1. Cash | \$ _____ | \$ _____ | \$ _____ |
| 2. Financial institution accounts: | | | |
| a. _____ Account # _____ | \$ _____ | \$ _____ | \$ _____ |
| b. _____ Account # _____ | \$ _____ | \$ _____ | \$ _____ |
| c. _____ Account # _____ | \$ _____ | \$ _____ | \$ _____ |
| d. _____ Account # _____ | \$ _____ | \$ _____ | \$ _____ |
| 3. Stocks, bonds and mutual funds: | | | |
| a. _____ Sh. _____ | \$ _____ | \$ _____ | \$ _____ |
| b. _____ Sh. _____ | \$ _____ | \$ _____ | \$ _____ |
| c. _____ Sh. _____ | \$ _____ | \$ _____ | \$ _____ |
| 4. Insurance policies: | | | |
| a. Company _____ | | | |
| [Face amount \$ _____] | | | |
| Cash value \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| Loan balance \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| b. Company _____ | | | |
| [Face amount \$ _____] | | | |
| Cash value \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| Loan balance \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| 5. Real estate: | | | |
| a. _____ \$ _____ | | | |
| Mortgage (\$/mo) \$ _____ | | | |

| | | | |
|----------------------------------|----------|----------|----------|
| REC (\$/mo) \$ _____ | | | |
| Cost of sale | | | |
| (\$/%) \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| b. _____ \$ _____ | | | |
| Mortgage (\$/mo) \$ _____ | | | |
| REC (\$/mo) \$ _____ | | | |
| Cost of sale (\$/%) \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| 6. Vehicles: | | | |
| a. _____ \$ _____ | | | |
| Lien (\$/mo) \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| b. _____ \$ _____ | | | |
| Lien (\$/mo) \$ _____ | \$ _____ | \$ _____ | \$ _____ |
| 7. Business assets | \$ _____ | \$ _____ | \$ _____ |
| 8. Household furniture and goods | \$ _____ | \$ _____ | \$ _____ |
| 9. Tax refunds | \$ _____ | \$ _____ | \$ _____ |
| 10. IRA/Keogh/Annuity | \$ _____ | \$ _____ | \$ _____ |
| 11. Retirement | \$ _____ | \$ _____ | \$ _____ |
| 12. Retirement | \$ _____ | \$ _____ | \$ _____ |
| 13. Other total assets | \$ _____ | \$ _____ | \$ _____ |
| Total assets | \$ _____ | \$ _____ | \$ _____ |

| | | | |
|------------------------------|----------|----------|----------|
| LIABILITIES (Mo/Pmt) Value: | Husband: | Wife: | |
| 1. _____ \$(_____) | \$ _____ | \$ _____ | \$ _____ |
| 2. _____ \$(_____) | \$ _____ | \$ _____ | \$ _____ |
| 3. _____ \$(_____) | \$ _____ | \$ _____ | \$ _____ |
| 4. _____ \$(_____) | \$ _____ | \$ _____ | \$ _____ |
| 5. Tax Liability \$(_____) | \$ _____ | \$ _____ | \$ _____ |
| Total liabilities: \$(_____) | \$ _____ | \$ _____ | \$ _____ |

| | | | |
|-------------------------|----------|----------|----------|
| ESTIMATED NET ASSETS: | \$ _____ | \$ _____ | \$ _____ |
| Equalization of Assets: | \$ _____ | \$ _____ | \$ _____ |
| EQUAL ASSETS: | \$ _____ | \$ _____ | \$ _____ |

I have read the foregoing and the amounts are true and correct. I understand that if I make a material misstatement of fact, I may be prosecuted and punished for perjury.

Signature

Name (print)

Address (print)

City, state and zip code (print)

Telephone number

NOTARY PUBLIC

Signed and sworn to before me this _____ day of _____, _____.

My commission expires: _____.

USE NOTE

1. Include all checking, savings and money market accounts and certificates of deposit.
[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Separate Property Schedule

4A-132

STATE OF NEW MEXICO

COUNTY OF _____
 _____ JUDICIAL DISTRICT

_____,
 Petitioner,

v.

No. _____

_____,
 Respondent.

[PETITIONER] [AND] [RESPONDENT]'S SEPARATE PROPERTY AND LIABILITIES SCHEDULE

ASSETS:

| | Husband | Wife |
|--|----------|----------|
| 1. Checking & Savings Accounts: | | |
| a. _____ Bk, Ck. # _____ | \$ _____ | \$ _____ |
| b. _____ Bk, Sav. # _____ | \$ _____ | \$ _____ |
| c. _____ CD # _____ | \$ _____ | \$ _____ |
| d. _____ Cr Un # _____ | \$ _____ | \$ _____ |
| 2. Bonds/Stocks: | | |
| a. _____ Sh. _____ | \$ _____ | \$ _____ |
| b. _____ Sh. _____ | \$ _____ | \$ _____ |
| 3. Financial institution accounts: <i>I</i> | | |
| a. _____ Account # _____ | \$ _____ | \$ _____ |
| b. _____ Account # _____ | \$ _____ | \$ _____ |
| c. _____ Account # _____ | \$ _____ | \$ _____ |
| d. _____ Account # _____ | \$ _____ | \$ _____ |
| 4. Stocks, bonds and mutual funds: | | |
| a. _____ Sh. _____ | \$ _____ | \$ _____ |
| b. _____ Sh. _____ | \$ _____ | \$ _____ |
| c. _____ Sh. _____ | \$ _____ | \$ _____ |
| 5. Insurance policies: | | |
| a. Company _____ | | |
| Policy No. _____ | | |
| Face amount \$ _____ | | |
| Cash value \$ _____ | | |
| Loan balance \$ _____ | \$ _____ | \$ _____ |
| b. Company _____ | | |
| Policy No. _____ | | |
| Face amount \$ _____ | | |

| | | | |
|----------------------------------|-------|----------|----------|
| Cash value \$ | _____ | | |
| Loan balance \$ | _____ | \$ _____ | \$ _____ |
| 6. Real estate: | | | |
| a. _____ | | | |
| Present value \$ | _____ | | |
| Mortgage (\$/mo) \$ | _____ | | |
| REC (\$/mo) \$ | _____ | \$ _____ | \$ _____ |
| b. _____ | | | |
| Present value \$ | _____ | | |
| Mortgage (\$/mo) \$ | _____ | | |
| REC (\$/mo) \$ | _____ | \$ _____ | \$ _____ |
| 7. Vehicles: | | | |
| a. _____ | | \$ _____ | \$ _____ |
| Lien (\$/mo) | | \$ _____ | \$ _____ |
| b. _____ | | \$ _____ | \$ _____ |
| Lien (\$/mo) | | \$ _____ | \$ _____ |
| 8. Business assets | | \$ _____ | \$ _____ |
| 9. Household furniture and goods | | \$ _____ | \$ _____ |
| 10. Tax refunds | | \$ _____ | \$ _____ |
| 11. IRA/Keogh/Annuity | | \$ _____ | \$ _____ |
| 12. Retirement | | \$ _____ | \$ _____ |
| 13. Retirement | | \$ _____ | \$ _____ |
| 14. Other total assets | | \$ _____ | \$ _____ |
| Total Separate Assets: | | \$ _____ | \$ _____ |
| LIABILITIES: | | | |
| a. _____ | | \$ _____ | \$ _____ |
| b. _____ | | \$ _____ | \$ _____ |
| c. _____ | | \$ _____ | \$ _____ |
| d. _____ | | \$ _____ | \$ _____ |
| Total Separate Liabilities: | | \$ _____ | \$ _____ |
| NET SEPARATE PROPERTY: | | \$ _____ | \$ _____ |

I have read the foregoing and the amounts are true and correct. I understand that if I make a material misstatement of fact, I may be prosecuted and punished for perjury.

Signature

Name (*print*)

Address (*print*)

City, state and zip code (*print*)

Telephone number

NOTARY PUBLIC

Signed and sworn to before me this _____ day of _____, _____.

My commission expires: _____

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

Simple Final Decree 4A-341

4A-341

STATE OF NEW MEXICO

_____ COUNTY
_____ JUDICIAL DISTRICT

Petitioner,

v. No. _____

Respondent.

FINAL DECREE OF DISSOLUTION OF MARRIAGE

(No Children)

This matter was brought before the court by _____ (husband's name) and _____ (wife's name). They have asked the court to end their marriage and enter a Final Decree of Dissolution of Marriage. In addition, the parties have filed a Verified Marital Settlement Agreement ("agreement") that settles the claims related to their marital relationship. This court has considered the parties' agreement set forth here, and finds the parties' requests to be reasonable.

THIS COURT FINDS AND CONCLUDES:

- 1. The court has jurisdiction over the parties and the subject matter of this action. The parties are entitled to a decree of dissolution of marriage on grounds of incompatibility.
2. The parties have sworn, under oath, that the agreement is complete, true and correct.
3. The parties have sworn, under oath, that the agreement divides all known property and debt of the parties, settles their rights and obligations and is fair.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

- 1. The marriage of husband and wife is dissolved on the grounds of incompatibility.
2. (Wife to choose A or B)
[] A. Wife will keep her present name.
[] B. Wife's name is changed from _____ to _____. (Wife must use a name previously used by her and not a new name.)
3. The parties are ordered to comply with the terms of the Verified Marital Settlement Agreement, the terms of which are incorporated here by reference.
4. This case is now closed.

District judge

When I sign here, I am telling the judge that I have read this document and agree with everything in it. I state, upon oath, that this document, and the statements in it, are true and correct as far as I know and believe.

Husband's signature

Wife's signature

Address: _____ Address: _____

Telephone: _____ Telephone: _____

[Approved, effective November 15, 2001 until November 15, 2002.]

Cross reference

See Rule 4A-209 for an explanation of this form.

Final Decree With Children 4A-342

STATE OF NEW MEXICO

_____ COUNTY

_____ JUDICIAL DISTRICT

_____,

Petitioner,

v.No. _____

_____,

Respondent.

FINAL DECREE OF DISSOLUTION OF MARRIAGE

(with children)

This matter was brought before the court by _____ (*husband's name*) and _____ (*wife's name*). They have asked the court to end their marriage and enter a Final Decree of Dissolution of Marriage. In addition, the parties have filed a Verified Marital Settlement Agreement (“agreement”) that settles the claims related to their marital relationship. They have also entered into a Parenting Plan and Child Support Agreement (“parenting plan”) that sets out the custody and child support of their [child] [children]. This Court has considered the parties' agreements, and finds the parties' requests to be reasonable. This court has considered the parties' agreement set forth here, and finds the parties' requests to be reasonable.

THIS COURT FINDS AND CONCLUDES:

1. The court has jurisdiction over the parties, the [child] [children] and the subject matter of this action. The parties are entitled to a Final Decree of Dissolution of Marriage on grounds of incompatibility.
2. The parties have sworn, under oath, that the agreement and the parenting plan are complete, true and correct.
3. The parties have sworn, under oath, that the agreement divides all known property and debt of the parties, settles their rights and obligations and is fair.
4. The filed parenting plan determines custody and child support of the parties' minor [child] [children]. The parties have sworn, under oath, that the parenting plan is in the best interest of the children.
5. (*Judge to complete.*)
 The child support guidelines are appropriate in this case.
or

The child support guidelines are unjust or inappropriate in this case because they result in substantial hardship. It is appropriate to deviate from the child support guidelines in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

- 1. The marriage of husband and wife is dissolved on the grounds of incompatibility.
- 2. (*Wife to choose A or B*)

A. Wife will keep her present name.

B. Wife's name is changed from _____ to _____.

(*Wife must use a name previously used by her and not a new name.*)

- 3. (*Judge to complete as appropriate.*)

Husband Wife is ordered to pay child support in the amount of _____ to the other parent.

- 4. (*Judge to complete as appropriate.*)

The parties have joint custody of the [child] [children].

or

Father Mother is the sole custodian of the [child] [children].

- 5. The parties are ordered to comply with the terms of the Verified Marital Settlement Agreement and the Parenting Plan and Child Support Agreement, the terms of which are incorporated here by reference.

- 6. This case is now closed. However, the court will have continuing jurisdiction over issues relating to the [child] [children] of the marriage until the [child reaches] [children reach] the age of majority as provided by law.

District judge

When I sign here, I am telling the judge that I have read this document and agree with everything in it. I state, upon oath, that this document, and the statements in it, are true and correct as far as I know and believe.

Husband's signature

Address: _____

Telephone: _____

Wife's signature

Address: _____

Telephone: _____

[Approved, effective November 15, 2001 until November 15, 2002.]

Cross reference

See Rule 4A-209 for an explanation of this form.

Sample Final Decree Of Dissolution Of Marriage

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DR 2002- 1138

Victor Diaz,

Respondent,

FINAL DECREE OF DISSOLUTION OF MARRIAGE

This matter comes before this Court upon Petitioner's request for a Final Decree of Dissolution of Marriage. Petitioner appeared in person and by counsel, Danielle Tsosie, practicing law student of the University of New Mexico Law School Clinical Programs, and April Land, supervising attorney. Respondent appeared in person, and by counsel, Juan Hernandez. The Court has reviewed the pleadings, and considered the documentary evidence and is otherwise fully advised, makes the following Findings of Fact and Conclusions of Law.

I. JURISDICTION AND VENUE

1. Petitioner and Respondent are domiciled in New Mexico, and have resided in Bernalillo County, New Mexico, for at least six months prior to the filing of this Petition.

II. THE MARRIAGE

2. Petitioner and Respondent were married on January 27, 1992 in Albuquerque, New Mexico and have been husband and wife since that time.

3. Due to differences in temperament and outlook, Petitioner and Respondent are incompatible. There is no reasonable expectation of reconciliation.

III. PROPERTY AND DEBTS

4. Petitioner and Respondent have entered into a Marital Settlement Agreement that is reasonable and settles the rights and obligations of the parties regarding their property. The Marital Settlement Agreement dated August 1, 2002, is attached to this Decree and is, incorporated in this Decree by reference.

5. The Marital Settlement Agreement is reasonable and settles the rights and obligations of the parties.

IV. CHILD CUSTODY

6. There are three minor children of the marriage, Angelique Diaz, born December 15, 1995, Brianna Diaz born June 23, 1998, and Milagro Diaz born March 12, 2000.

7. The parties have agreed upon a Parenting Plan in which the parents share joint custody of the children and time-sharing. The Parenting Plan dated July 27, 2002, is approved and incorporated in this Decree by reference.

V. CHILD SUPPORT

8. Respondent should be ordered to pay child support in accordance with the New Mexico Child Support Guidelines as set forth in the attached Child Support Worksheets.

9. The parties shall annually exchange financial information in accordance with §40-4-11.4 NMSA.

VI. SPOUSAL SUPPORT

10. Each party is able to support him or herself adequately and no alimony or spousal support should be awarded to either party.

VII. ATTORNEY'S FEES AND COSTS

11. Petitioner does not need an award of attorney's fees and costs to adequately prepare and present her case. Respondent shall pay his own attorney fees and costs.

VIII. NAME RESTORATION

12. Petitioner’s request for restoration of her former name should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

- 1. The marriage between Petitioner and Respondent is dissolved on the grounds of incompatibility.
- 2. The property of the parties is distributed according to the terms of the Verified Marital Settlement Agreement, and the parties are ordered to comply with the terms of that Agreement.
- 3. The parties are awarded joint custody of the children of the marriage, and are ordered to comply with the custody and timesharing provisions of the Parenting Plan.
- 4. Respondent shall pay Petitioner child support as provided in the Verified Marital Settlement Agreement.
- 5. Petitioner’s name is restored to Diane Dominguez.

District Judge

Approved:

Diane Diaz, Petitioner

Victor Diaz. Respondent

Danielle Tsosie
Practicing Law Student for Petitioner
UNM Clinical Law Program
1117 Stanford Drive N.E.
Albuquerque, New Mexico 87131
(505) 277-5265

Juan Hernandez
Attorney for Respondent
1348 San Mateo
Albuquerque, New Mexico 87112
(505) 265-4563

April Land
Supervising Attorney

Sample Marital Settlement Agreement

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

Diane Diaz,

Petitioner,

v.

NO. DR 2002- 1138

Victor Diaz,

Respondent,

VERIFIED MARITAL SETTLEMENT AGREEMENT

The parties, Petitioner, Diane Diaz and Respondent, Victor Diaz, have reached the following agreement regarding the distribution of their property and debts. This Agreement is a complete and fair settlement of all rights and obligations arising out of their marriage. Petitioner and Respondent also stipulate that all representations in this Agreement are true and accurate statements and ask that the Court enter a Final Decree of Dissolution of Marriage adopting all of the terms of this Agreement as a final judgment.

Each party has consulted with an independent attorney who was freely selected before signing this Agreement. Each party signs this Agreement with full knowledge of its contents, with advice about its meaning and legal significance, and without coercion, duress or undue influence of any kind.

PROPERTY

A. Separate Property. Petitioner and Respondent have been separated for approximately two years and have already equitably divided all of their respective separate property. The separate property consists of personal effects and minor household items.

B. Community Property. The community property of the parties is hereby described and divided in the following manner.

1. Petitioner's share of the community property that is distributed to her as sole and separate property includes:

- a. the red 1984 Toyota Corolla Station Wagon, Vehicle Identification Number (VIN) 126F94769DF 573, to the Petitioner.
- b. A joint checking account at New Mexico Federal Credit Union, account number 0098987, with a current balance of approximately \$497.00.
- c. A brown corduroy couch
- d. Electrolux Vacuum cleaner
- e. Set of bunk-beds and children's sheets
- f. General Electric Washer and Dryer
- g. Half of the Family Photographs

2. Respondent's share of the community property that is distributed to him as his sole and separate property includes:

- a. the green 1981 Chevy Conversion Van, Vehicle Identification Number 77735XS90351.
- b. the savings account at the New Mexico Federal Educators Credit Union with \$133.00.
- c. the 22 inch Zenith color television set
- d. Red Tool box
- e. Oak bedroom set
- f. Half of the Family Photographs

3. Any other community property of the marriage is limited to minor household items and shall become the sole and separate property of the party who has possession of the property.

DEBTS

A. Debt Allocation. The community and joint debts are hereby allocated between the parties as follows:

1. Petitioner shall pay as her sole and separate debt:
 - a. the \$1,200 student loan taken out in her name.
2. Respondent shall pay as his/her sole and separate debts:
 - a. the \$500.00 Bank of America Visa credit card debt on account number 5792992;
and,
 - b. the \$250 hospital bill, payable in installments of \$5.00 per month to University Hospital.

B. Other. Any debt not listed will be the sole responsibility of the party who created it.

C. Indemnification. Each party indemnifies the other party for all expenses, costs and attorney's fees incurred when a creditor attempts to collect or does collect a debt from one party that was assumed by the other party under this Agreement.

D. Credit. Each party will cooperate in turning in all credit cards and do all other necessary acts to cancel or change any credit account established on community or joint credit. Any charges made after the effective date of this Agreement on any account shall be the separate debt of the party who made the charges.

TAXES

A. Tax Returns. The parties will file separate state and federal tax returns for the 2002 tax year or as otherwise required by law. Each acknowledges that from January 1 of 2002 up to the effective date of this Agreement, each will declare one-half of the community income of the other party on his or her respective return. Each party will also declare one-half of the other party's community withholding and estimated prepaid tax for that period, and one-half of the deductions created by paying community or joint obligations with community monies. Each party will keep his or her own tax refund from such return.

The parties will exchange information regarding earnings, income, withholding, prepaid tax, and deductions on or before March 1 of the year in which the return will be prepared. The parties will cooperate in providing other information necessary to prepare such returns.

In the event that Petitioner has to pay any additional tax, interest or penalties as a result of having to declare one-half of Respondent's income, withholding and/or prepaid estimated tax, then Respondent will promptly pay Petitioner for all such additional tax, interest or penalties before Petitioner's return is filed or by way of reimbursement.

B. Indemnification and Prior Joint Returns. Each party will indemnify the other for all costs, expenses and attorneys' fees incurred when any tax authority attempts to collect or does collect a tax obligation from one party that was assumed by the other party under this Agreement. In the event any prior joint return is audited or contested, and any additional tax, interest or penalties are found due, the parties will each pay only one-half of such additional tax, interest or penalties. The indemnification stated above shall also be applicable to the tax liability on prior returns.

C. Exemption. Petitioner will claim the income tax exemptions under §151 of the Internal Revenue Code or its successor section and under any state law tax counterpart for the children for each taxable calendar year.

SPOUSAL SUPPORT

Each party waives any claim to alimony or spousal support.

GENERAL TERMS AND CONDITIONS

A. Good Faith Disclosure. Each party has made representations or provided information in good faith to the other party concerning all of the property and debts known by that party. Each party has relied on the representations made to him or her by the other.

B. Documents. The parties shall execute whatever documents are necessary to effect the division of and clear title to the property set forth above. Should any party fail or refuse to do so, this Agreement shall constitute an actual grant or assignment and conveyance of the property rights set forth above or may be used to obtain a court order to effect the division and to clear title.

C. Legal Expenses. Each party will bear her or his own legal expenses and costs incurred in this action up to the entry of the Final Decree of Dissolution.

D. Default. In the event either party defaults on his or her obligations under this Agreement, the defaulting party shall be liable to the other party for all reasonable expenses incurred by the other party, including attorneys' fees, in pursuing enforcement of the obligations created by this Agreement.

E. Effective Date. This Agreement shall be fully effective and binding upon the parties and their personal representatives and assigns as of August 31, 2002. Any property acquired by either party after the effective date shall be the sole and separate property of the party acquiring the same.

Sample Parenting Plan

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

Diane Diaz,

Petitioner,

CASE NO. DM-2002-1138

v.

Victor Diaz

Respondent.

PARENTING PLAN

The parties have agreed to the following parenting plan to resolve custody and time-sharing issues regarding their three children. The three minor children of the parties and the marriage are Angelique Diaz, born December 15, 1995, Brianna Diaz born June 23, 1998, and Milagro Diaz born March 12, 2000.

1. LEGAL CUSTODY

Both parents are fit and proper persons to raise their children and it is in the best interests of the children that the parents share joint legal custody.

Joint legal custody means that the parents will consult with each other on major decisions involving their children before implementing those decisions; neither parent will make a decisions or take an action which results in a major change in their children's lives until the matter has been discussed with the other parent and the parents agree. No changes will be made until a new agreement or resolution has been made.

Major decisions will include, but are not limited to: elective medical and dental treatment; school; day care; place of residence; religious denomination and religious activities; and, recreational activities. Ordinary childcare decisions will be made by the parent during his or her period of responsibility.

2. STATUS QUO FOR: Angelique Diaz

Residence: With Mother
2408 Las Lomas SW
Albuquerque, NM 87105
Religion: Catholic
Doctor: Dr. Seelinger
Dentist: Bright Teeth Dental Clinic
Therapist: None

School: Monte Vista Elementary
Child Care: Maternal grandparents or Sweetheart Day Care
Recreational: None

3. STATUS QUO FOR: Brianna Diaz

Residence: With Mother
2408 Las Lomas SW
Albuquerque, NM 87105
Religion: Catholic
Doctor: Dr. Seelinger
Dentist: Bright Teeth Dental Clinic
Therapist: None
School: Monte Vista Elementary
Child Care: Maternal Grandparents or Sweetheart Day Care
Recreational: None

4. STATUS QUO FOR: Milagro Diaz

Residence: With Mother
2408 Las Lomas SW
Albuquerque, NM 87105
Religion: Catholic
Doctor: Pediatric Associates
Dentist: Bright Teeth Dental Clinic
Therapist: None
School: None
Child Care: Maternal Grandparents or Sweetheart Day Care
Recreational: None

5. TIMESHARING:

Mother and Father have been flexible about time-sharing, and will continue to be flexible about time-sharing. However, when the parties are unable to reach an informal agreement about the periods of timesharing responsibility, the fixed schedule will be as follows:

Weekdays: During the week, the children will stay with their Mother. Father and all paternal relatives agree not to take the children out of school for unannounced weekday visits. If Father wishes to, and Mother agrees, Father may have children during the week if he picks them up after school hours and drops them all off, with homework completed, at Mother's home by 7:00 p.m. Father must make weekday timesharing arrangements at least three days in advance.

Weekends: Father will have the children the second weekend of every month, beginning at 3:30 p.m. on Friday and ending at 11:30 a.m. on Sunday. If this is not possible, the children will stay with Mother. Father may have more than one weekend a month with the children if he gives Mother at least three day's notice.

Vacations/Summer: Each parent will have uninterrupted time with the children for two weeks each summer, provided that the parent gives the other at least ten (10) days notice.

Christmas Holidays: The children will spend the Christmas school holiday with both parents as they agree to from time to time. However, on Christmas Day, Mother will have children beginning at noon until 8 p.m. Christmas night. The children will stay with their Father on Christmas Eve. Otherwise, Father has timesharing on the second weekend of this month.

Thanksgiving Holidays: On Thanksgiving Day, Father will have children either in the morning after 9:00 a.m. up to 1:00 p.m. or in the afternoon from 1:00 p.m. to 5:00 p.m. The children will stay with their Mother both the night before and the night of Thanksgiving.

Spring Break from School: Father will have the children only the portion of the break that falls on the second weekend of the month. Otherwise, the children will stay with their mother.

Other Holidays/Events: The children will stay with Mother on Mother's Day and on Mother's Birthday and with Father on Father's Day and on Father's Birthday.

Children's Birthdays: The children will stay with their Mother on their birthdays. Father will have the children on the day before or the day after the child's birthday, as agreed by both parents.

6. PARENTING PROVISIONS

a) Periods of Responsibility:

During a parent's period of responsibility, that parent is responsible for transporting the children to day care and to school; that parent is responsible for caring for the children if they become ill during that parent's period of responsibility. Father is responsible for transporting the children to and from the Mother's home for his periods of responsibility.

b) Parental Involvement:

The parents further agree to be actively involved in the decisions and responsibilities regarding the children and to communicate and be flexible about their children's needs especially as those needs change due to the children's growth and development.

c) Supportive of Relationships:

The parents agree to be supportive of the children's relationship with the other parent. Each will give permission to the children to enjoy the relationship with the other parent and neither will interfere with or hinder the parent-child relationship with the other parent. The parents agree that neither will align the children with him or her against the other parent or the other parent's family.

d) Change of Address and Telephone Numbers:

The parents will promptly notify each other of any changes in residential addresses and residential, work and mobile telephone numbers.

e) Telephone and Mail;

The parents agree that the children have a right to place phone calls to and receive phone calls from the absent parent, and to send and receive letters and packages, without interference from the other parent.

f) Emergencies:

The parents agree that in case of a medical emergency the parent with that period of responsibility will contact the other parent concerning the treatment of the children as soon as possible. If the absent parent cannot be reached, the available parent will make any decisions for emergency medical treatment in the child's best interest.

g) Exceptions and Temporary Changes to the Timesharing Schedule:

Either party may ask the other for exceptions to this timesharing schedule from time to time, but both understand that the other parent has the right to say "No." Neither parent will argue about or criticize the decision.

h) Notice of Cancellation and Scheduling:

Both parties agree that notice and predictability of periods of timesharing are important for the welfare of the children and the well-being of the parents. The parties agree that notice of cancellation of weekend and weekday visitation shall be a minimum of 8 hour's notice to the other party. Cancellation of summer holiday timesharing shall require 5 days notice. Cancellation of timesharing will not be construed as a waiver of future timesharing; however, the party who misses his or her period of timesharing is not entitled to make-up time unless the parties agree.

i) When a Parent Cannot Care for the Children During His or Her Period of Responsibility: If a parent cannot care for the children during his or her scheduled period of responsibility, he or she will notify the other parent who may care for the children during that period of responsibility.

j) Removal from New Mexico:

Neither parent will remove, cause to be removed, or permit removal of the children from the State of New Mexico without the written consent of the other parent or resolution of the dispute by the methods agreed to in this Parenting Plan.

7. DISPUTE RESOLUTION

a) General Concerns (day to day matter and temporary changes in the timesharing schedule):

1. Oral discussion: The parents will discuss general concerns, day to day matters regarding their children, and temporary changes to the timesharing schedule. The parents will make good faith efforts to reach agreement on the matters discussed. If they cannot reach an agreement, either party may request mediation and they both agree to participate in mediation.

b) Changes in Status Quo and Permanent Changes to Timesharing Schedule:

Attorney for Petitioner

Attorney for Respondent

Date: _____

Bibliography

Herman, Michelle, Domestic Relations Handbook For New Mexico (Unm Law Clinic 1991)

David H. Kelsey & William N. Henderson, New Mexico Divorce Manual: A Systems Approach To Family Law In New Mexico (Institute Of Public Law 1978).

Thomas C. Montoya, New Mexico Domestic Relations Law And Forms (Lexis Law Publishing 1997).

Shapiro, Barbara L., Family Law In New Mexico (Abogada Press, 1998).

State Bar Of New Mexico, New Mexico Domestic Relations Manual (1985).

XVI. Custody Options for Non Parent Caregivers

Many children in New Mexico are living with caregivers other than their parents. This chapter discusses the legal mechanisms by which a person, other than a parent, can secure some legal decision-making authority over a child that is already in his or her care. This chapter does not address cases involving formal allegations of abuse and neglect by the Children Youth and Families Division of the state as provided by the Children's Code. See NMSA §32-4-1, et seq.

The chapter begins with a brief overview of the legal context in which decision-making powers over children are transferred between private parties. It then briefly explains several of the options that are available in the state of New Mexico for caretakers seeking legal decision-making authority over children in their care. It also outlines the procedures necessary to establish each of the options.

The options are set forth beginning with the mechanisms that transfer the least parental authority, and ending with the mechanism which transfers the most parental authority. A chart comparing the different legal mechanisms, and some sample forms are included.

Legal Framework

Legal Custody is Decision Making Power

In order to evaluate the best option for a client seeking to transfer decision-making authority over a child to another person, it is important to understand that physical custody is different from legal custody. Physical custody involves attending to the daily needs of a child. Legal custody is the right to make decisions about important aspects of a child's life. Legal custody is, generally, the right to make decisions about a child's education, religion, medical care, residence, and recreation. These are the decision-making rights that are transferred through the legal mechanisms discussed in this chapter.

Parents have a Constitutionally Protected Fundamental Right to Parent

Parents have a fundamental liberty interest in the care custody and management of their children. See, *Santosky v Kramer* 455 U.S. 745 (1982). This fundamental interest is the starting point for any transfer of legal decision-making power. The protection of parents' constitutional rights is the basis for many of the statutory requirements in this area, and for the limitations on the rights of caretakers to make decisions for children in their care. Nonetheless, New Mexico law does provide for several mechanisms through which legal decision-making authority can be transferred to caretakers.

Legal Mechanisms For The Transfer Of Authority

Caregiver's Authorization Affidavit

A person over 18 with whom a child resides, and who provides the child with care maintenance and supervision, may secure authority to enroll the child in school and for school related medical care by executing a "Caregivers Authorization Affidavit" pursuant to § 40-10B-15. NMSA. If the caregiver is a qualified relative, within the definition set forth in § 40-10B-3. E, then the caregiver's affidavit may also be used to authorize medical care, dental care and mental health care for the child. All the caregiver must do is fill out and sign a copy of the statutory form in front of a Notary Public.

The form does not impact the parents' rights, other than to allow a caregiver to change a previous decision made by a parent about school or medical care. The parents still retain their rights to make those decisions for the child. Because of the minimal impact on the parental rights, the caregiver must indicate only that the parent has been advised of the intent to authorized medical treatment and has not objected, or that the caregiver is unable to contact the person.

The Caregivers Authorization Affidavit is effective for up to one year. And, if the child stops residing with the caregiver, the caregiver must notify any school, health care provider or other person to whom the affidavit has been given. The statute also provides health care providers with protection from liability for any good faith reliance on the affidavit to authorize medical care.

Power of Attorney

A parent can transfer any legal decision-making power the parent has to another person for six months by executing a Power of Attorney. NMSA § 45-5-105. The only parental powers that cannot be delegated by a Power of Attorney are the authority to consent to marriage or adoption. The statutory form set forth at NMSA § 45-5-601 is designed primarily for the delegation of property interests, but can be modified to include the care and custody, property and maintenance of children. The Power of Attorney form can specify the powers that the parent seeks to delegate.

A Power of Attorney can, by its own terms, continue to be effective even if the parent who issued the Power of Attorney becomes incapacitated during its six-month duration. A Power of Attorney is a good mechanism for a parent to use to transfer parental authority to a specific person for a fixed period of time, not to exceed six months.

The Power of Attorney can be revoked by the parent at any time by simply destroying the document, and giving notice to anyone who had previously been given a copy of the document.

Guardianship

A more secure and comprehensive manner of transferring legal decision-making power is through the creation of a permanent guardianship. Permanent guardianship is, generally, the transfer of all parental rights to person designated by the parent. The transfer is generally viewed as a permanent suspension of parental rights, but does not terminate parental rights, leaving open the possibility that the parents will resume a parenting role in the future.

This section outlines the basic forms of guardianship in New Mexico, briefly pointing out the options available under the Probate Code and focusing, primarily, on the Kinship Guardianship Act that was passed by the New Mexico Legislature in 2001.

Parental Appointment of a Guardian of a Minor

A parent may appoint a permanent guardian for a minor in a writing signed by the parent and attested by at least two witnesses, pursuant to NMSA § 45-5-202. This provision is under the probate code and appears to contemplate guardianship upon death of a parent. However, written parental appointments have been used by living parents to delegate their parental authority. A problem with the parental appointment from the guardian's perspective, is that the parent could also revoke the guardianship and deprive the guardian of decision-making authority. A child, 14 years or older, can object to the parental appointment of a particular guardian pursuant to § 45-5-203.

Court Appointment under the Probate Code

Most guardianship actions will now be filed pursuant to the Kinship Guardianship Act enacted in 2001, as discussed below. However, prior to the enactment of the Guardianship Act, all private guardianship actions were filed under the Probate Code, which still includes some important provisions relating to guardianships. The Probate Code provides that a child 14 years or older can nominate his or her own guardian pursuant to § 45-6-206. The notice requirements and procedures for Court Appointment of a guardian set forth in § 45-1-401 of the Probate Code are still the relevant notice requirements under the Kinship Guardianship Act.

The Probate Code includes the statute regarding the Powers and Duties of a guardian of minor. Those powers and duties include the powers and responsibilities of a parent, but also limit the liability of the guardian to third persons. See § 45-5-209.

The Probate Code also provides for court appointment of a guardian of a minor, "if all parental rights of custody have been terminated or suspended by circumstances or prior court order." NMSA § 45-5-204.A. However, where a parent contests the guardianship, this provision of the Probate Code does not give the court authority to grant a guardianship. Therefore, prior to the passage of the Kinship Guardianship Act, discussed below, contested guardianships had to be considered under the Children's Code. See NMSA § 32A-4-32. *In the Matter of the Guardianship Petition of Lupe C*, 112 N.M. 116 (1991), and *In Re Guardianship of Sabrina Mae D*, 114 N.M. 133 (1992). This created logistical problems because the Children, Youth and Families Department had to file a petition alleging abuse and neglect pursuant to §32A-4-15, but the Department did not have the resources to do so where children were not in danger. The

Kinship Guardianship Act was, therefore, enacted to create a meaningful cause of action for non-parents seeking permanent guardianship of children in their care.

Under the Kinship Guardianship Act

The Kinship Guardianship Act provides a legal mechanism for transferring legal decision-making power over a child to a caregiver by the establishment of a permanent guardianship. A permanent guardianship does not terminate the parental rights of the biological parents, but the guardian has the legal rights and duties of a parent except for the right to consent to adoption of the child, and any other rights specified in the order appointing the guardian. Unless the guardianship order specifies otherwise, the guardian may make all decisions regarding visitation with the parents and the child.

This section describes requirements and process for Kinship Guardianships in New Mexico under NMSA § 40-10B-1 et seq., and provides some practice tips, as well as a warning about the financial consequences of filing for guardianship to caregivers who are currently receiving Temporary Assistance to Needy Families (TANF). The substantive requirements for the establishment of the statute are discussed primarily in the section detailing the Petition for Guardianship.

Initiating an Action for Kinship Guardianship

To initiate a Kinship Guardianship Action, the following papers must be prepared and filed.

1. Petition for Kinship Guardianship (with Parental Designation/Consent, where applicable)
2. Request for Hearing
3. Notice of Hearing
4. Summons
5. Motion to Proceed without Costs (or \$122 (as of July 2002))

In the Second Judicial District, actions pursuant to the Kinship Guardianship Act will, almost always, be filed in the Civil Division on the first floor of the Courthouse at 500 Lomas Blvd.

In the exceptional case where you intend to file in the Family Division, if for example, you believe that Court Clinic will be helpful to your client, or if you would like a Temporary Domestic Order to be issued upon filing, you will also need:

6. A filing fee of \$137 instead of \$122
7. A Temporary Domestic Order
8. Domestic Relations Information Sheet (Civil Form 4211)
9. Domestic Relations Cover Sheet (required by Rule but yet not by clerks)

The Petition for Kinship Guardianship

A Petition for Kinship Guardianship must be verified by the Petitioner, meaning the client must sign it in front of a Notary Public. The Petition must include the following allegations, as set forth in § 40-10B-5.

Jurisdiction and Venue

The district court where the child resides has jurisdiction over proceedings under the Kinship Guardianship Act pursuant to § 40-10B-4.

Kinship Caregiver

The Petition must also allege that the Petitioner is a kinship caregiver, a caregiver nominated by a child over 14, or a caregiver designated by formal writing by a parent. § 40-10B-B.

A caregiver is an adult with whom the child resides, and who provides care, maintenance, and support for the child consistent with the duties and responsibilities of a parent. § 40-10B-3. Kinship is defined as a relationship between a child and a relative, godparent, member of the child's tribe or clan or an adult with whom the child has a significant bond. § 40-10B-3.

In the absence of parental consent, or the prior termination of a parent's rights, the child must have lived with the petitioner, without the parent, for a period of ninety days or more immediately preceding the date the Petition is filed. § 40-10B-8B(3).

Grounds and Standards of Proof for Permanent Guardianship in Contested Cases

The Petitioner must allege that he or she can prove by clear and convincing evidence that a parent having legal custody of the child consents, or is currently unwilling or unable to provide adequate care, maintenance and supervision for the child, or there are extraordinary circumstances.

The Petitioner must also prove at the final hearing on the Petition that guardianship is in the best interest of the child. Therefore, the allegation of best interests should be included in the Petition.

If, the Indian Child Welfare Act applies, as discussed below, the proof must be by clear and convincing evidence.

Applicability of the Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act of 1978 (ICWA) is a federal law that protects Native American families and children against the unwarranted break up and removal of children from their tribes. ICWA requires notice to tribes, higher standards of proof, and a series of placement preferences in cases where Indian children are being removed from their parents. The Kinship Guardianship Act refers to ICWA in setting forth the applicable burden of proof, and notice

requirements stating that notification and the higher burden of proof are required only as set out in ICWA.

ICWA applies in cases, among others, involving foster care placement of children. The definition of “foster care placement” includes removal and placement “in any home of a *guardian* where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” 25 U.S.C. § 1903 (1) (i)[emphasis added]. Therefore, even where the child has been living with the Petitioner for ninety days prior to the filing of the Petition, the Kinship Guardianship proceedings formalize the legal separation of the child from the parent and tribe. In addition, the effect of the guardianship is to create a legal barrier to the return of the child to an Indian parent, a case that appears to be covered by ICWA.

Moreover, the tribal notification provisions of the New Mexico Children’s Code require notice to the tribe of an Indian child, even where the child is placed voluntarily. NM § 32A-1-14. This provides protections for children and the tribe beyond the scope of ICWA, and therefore, appears to indicate that a broad definition should apply throughout New Mexico state law. This stronger protection is allowed under ICWA. 25 U.S.C 1921.

Some practitioners have argued that ICWA does not apply to Kinship Guardianship actions because ICWA only applies to “actions removing an Indian child from its parent or Indian custodian.” 25 USC §1903. They claim that it is not possible to remove a child from a parent or custodian in Kinship Guardianship proceedings because Kinship Guardianship Act requires that the child have lived with the Petitioner for 90 days prior to the filing of the Petition. Therefore, ICWA would never apply to Kinship guardianship proceedings. Moreover, they argue, protections only apply where children are going to be adopted or placed in foster care through the abuse and neglect proceedings instigated by the state. Because Kinship Guardianship proceedings generally do not involve foster care or adoption, and are private actions, some practitioners conclude that ICWA would not apply.

Even though there is debate on this issue, given the strong policy of protecting New Mexico’s tribes, it is best to notify the tribe at the beginning of the proceedings to avoid long-term challenges to any Kinship Guardianship involving an Indian child.

Other Information required by § 40-10-B-6

The Petition must also include:

- the date and place of birth of the child or the reason why that information is not known
- the legal residence or place of residence of the child
- the marital status of the child
- the name and address of the petitioner
- the kinship, if any between the petitioner and the child
- the names and addresses of the parents of the child
- the names and addresses of persons having legal custody of the child
- the existence of any matters pending involving custody of the child
- a statement that the petitioner agrees to accept the duties and responsibilities of guardianship

- the existence of any pending proceedings under the Children's Code and, if so, consent of the Children, Youth and Families Department
- whether the child is subject to provisions of the Indian Child Welfare Act and, if so, the tribal affiliation of the child, and specific information regarding contact with the tribe

Requirements for Written Consent

A parent who consents to the appointment of a permanent guardian under the Kinship Guardianship Act must sign a formal written "designation" stating that the signing parent understands the purpose and effect of the guardianship, and that the parent understands that he or she has a right to be served with the petition and notices of the hearings in the case, and that he or she may appear in court to contest the action. §40-10B-5.

Notice and Service

The Kinship Guardianship Act states that at the time of the filing of the Petition, the Petitioner shall obtain a Notice of Hearing setting the matter within 30 to 90 days. §40-10B-6 A. This is why you must take a Request for Hearing and Notice of Hearing form to the Courthouse at the time of the filing of the Petition.

Once the Notice is issued, the Petition and Notice must be served upon CYFD, if a matter is pending under the Children's Code, the child if he or she is over 14, the parents of the child, and, if ICWA applies, to the tribe.

The Kinship Guardianship Act provides that service must be made according to the provisions of §45-1-401 that requires that the Notice of Hearing be served by mailing a copy, by certified, registered or ordinary first class mail, to the business or residence of the person, at least fourteen days prior to the hearing, by service in accordance with the Rules of Civil Procedure, or by publication, if the address or identity cannot be ascertained with reasonable diligence.

Notification by mail is probably sufficient for service on CYFD, and the child.

Emergencies and Temporary Guardianships

It is possible to move the Court for the appointment of a Temporary Guardian pursuant to NMSA §40-10B-7. The statute provides that the temporary guardian shall serve for up to 180 days or until the hearing on the merits, whichever ever occurs first. The motion may be filed anytime after the petition is filed, and a hearing must be held within 20 days.

In an emergency, where a guardian for the child is needed immediately, a motion may be *ex parte*. The Motion may be *ex parte* for good cause shown. NMSA §40-10B-7 C. The Order must be served upon all parties entitled to notice in the action. And, if a party objects to the Order, a hearing must be held on the objections within 10 days of the filing of objections. NMSA §40-10B-7 C.

Another method for securing a form of immediate relief is to file the Petition for Guardianship in the Family Division and request the issuance of a Summons, which automatically triggers the issuance of a Temporary Domestic Order by the Clerk. The Temporary Domestic Order should preserve the status quo on an emergency basis. The Temporary

Guardianship is a clearer and more direct way to get relief, but the TDO is an option to consider in some cases, for example, where an immediate hearing is not possible.

The Conduct of the Hearing

At the hearing on the permanent Kinship Guardianship the Petitioner must meet the elements of proof set forth in § 40-10B-8. Essentially, the petitioner must prove, by clear and convincing evidence that the, required notices have been given, that a parent consents or is unwilling an unable to care for the child and that the Kinship Guardianship serves the best interest of the child. If the Indian Child Welfare Act applies, then the burden of proof shall be beyond a reasonable doubt.

The Court may award child support to the caregiver. Visitation may also be ordered.

Standard of Proof for Revocation

The policy of the state, according to the Kinship Guardianship Act, is that the interests of children are best served by when they are with their parents. Therefore, a parent seeking revocation of a guardianship must provide a proposed transition plan for the child, and demonstrate, by a preponderance of the evidence, a change in circumstances and that revocation is in the best interest of the child §40-10B-12. If the parent meets this burden, the motion for revocation shall be granted. Thus, the burden of proof for setting aside a guardianship is lower than the burden of proof to create a guardianship.

Impact on Income of Caretakers of Children on Welfare/TANF

It is important to consider the financial impact of a guardianship for caretakers of children who are receiving welfare in the form of cash assistance. The most common form of cash assistance for children who are not disabled is Temporary Assistance to Needy Families (TANF). In determining whether a child is eligible for TANF, the Human Services Department looks at the income of the child's "assistance group." The definition of the "assistance group" was changed after the Kinship Guardianship Act became law. The child's "assistance group" now includes the "legal guardian of the dependent child" § 8.102.400 NMAC. Therefore, caretakers who depend on the TANF income to support the child must be advised that they are likely to lose their cash assistance if they become a legal guardian of the child.

Legal Custody

Persons other than parents, usually grandparents, can Petition for Legal Custody of a child. Because of the parents' constitutional fundamental liberty interest in parenting their children, the legal framework in custody cases gives a strong preference for the rights of the parents. Therefore, the grandparents must show that the parent is unfit. See *Shorty v. Scott* 87 NM 490. The process for the Petitioning for custody is explained in the Section on Practicing Law in the Second Judicial District.

Adoption

Adoption terminates the rights of parents and gives those rights to the adoptive parents. Private parties may Petition for Adoption of children in their care, as set forth in NMSA § 32A-5-2 et seq. There are different requirements or adoption depending on whether the Petitioner is a relative of the child, a step- parent or a private agency. The processes for applying for adoption are beyond the scope of this Manual.

CUSTODY CONTINUUM

(FOR NON-PARENTS)
IN NEW MEXICO

| | KINSHIP CAREGIVERS AFFIDAVIT 40-10B-17 (FORM) | POWER OF ATTORNEY 45-5-104 (authority) 45-5-501 (durable) 45-5-601 (FORM) | CUSTODY (If Domestic Violence, 40-13-1 et seq for 6-month emergency custody) | GUARDIANSHIP 45-5-202 parental appointment 45-5-204 court appointed) 40-10B Kinship Guardianship | ADOPTION 32A-5-1 et seq |
|------------------|---|---|---|--|--|
| TERM | Up to 1 year | Only up to 6 months Can be very specific as to time, such as, only for a week, or can be broad | Indefinite Modification upon “substantial and material change in circumstances”. | Indefinite. Guardianships are valid until revocation of guardianship. | Permanent |
| PARENTAL RIGHTS | No effect on parental rights | No effect on parental rights. Parents retain all rights | Court or agreement determines allocation of parental rights | Suspends all parental rights | Terminates all parental rights |
| PARENTAL CONSENT | Only notice to parents required, where ability to contact. | At least one parent must consent. | Non-parent must prove that parent is unfit. Shorty v. Scott 87 MN 490 (Where domestic violence “household member” must show immediate harm or fear of harm to child) | Parents may consent or are unavailable, deceased or incapacitated. If contested, the child must be with the potential guardian, and guardian must prove parent is unwilling or unable to care for child. | Consent must be after Counseling, or implied by Abandonment or relinquishment 32A-5-18 |
| POWERS & DUTIES | If “caregiver” authority to enroll in school and school related medical care If “qualified relative,” also authorize medical and dental care | Only those powers specifically stated in the Power of Attorney. Can be specific, such as, only for educational decisions, or can be broad, such as, for all parental decisions | Decision-making and daily needs | All those of a parent (except for consenting to adoption.) See duties outlined in 45-5-209 NMSA 1978 | All those of a parent |
| FINALIZED | Must sign in front of Notary | Signed by a parent or legal guardian and witnessed by a Notary Public Do not have to go to court. | Must Petition Court and prove unfitness of parent. | Parent may appoint by signing in front of two witnesses under Probate Code, or Petition the court, and a judge must sign Order Appointing Guardian. | Must petition the court and a judge must sign a Final Order of Adoption |
| LIABILITIES | | No parental liabilities are assumed with a Power of Attorney. | | Guardians are not liable for the child’s expenses or to third persons for the acts of the child. | All parental liabilities |

Sample Forms

- Caregiver’s Affidavit**
- Power of Attorney**
- Petition for Kinship Guardianship**
- Emergency Motion for Appointment of Temporary Guardian**
- Temporary Kinship Guardianship Order**
- Order Appointing Permanent Kinship Guardian**

Caregiver’s Affidavit

CAREGIVER’S AUTHORIZATION AFFIDAVIT

Use of this affidavit is authorized by the Kinship Guardianship Act.

Instructions:

- A. Completion of Items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorizes school-related medical care.
- B. Completion of Items 5-8 is additionally required to authorize any other medical care.

Print clearly:

The minor named below lives in my home and I am 18 years of age or older.

1. Name of Minor:

2. Minor’s birth date:

My name (adult giving authorization):

My home address:

3. () I am a grandparent, aunt, uncle or other qualified relative of the minor (see back of this form for a definition of “qualified relative”).

4. () Check one or both (for example, if one parent was advised and the other cannot be located):

() I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

() I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

5. My date of birth:

6. My NM driver's license or other identification card number: _____

WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment or both.

I declare that under the penalty of perjury under laws of the state of New Mexico that the foregoing is true and correct.

Signed:

The foregoing affidavit was subscribed, sworn to and acknowledged before me this _____ day of _____, 20____, by _____.

My commission expires: _____

Notary Public

NOTICES:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody and control of the minor, and does not mean that the caregiver has legal custody of the minor.
2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. "Qualified relative", for purposes of Item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, godparent, member of the child's tribe or clan, an adult with whom the child has a significant bond or any person denoted by the prefix "grand" or "great", or the spouse or former spouse of any of the persons specified in this definition.
2. If the minor stops living with you, you are required to notify any school, health care provider, mental health care provider, health insurer or other person to whom you have given this affidavit.
3. If you do not have the information requested in Item 8, provide another form of identification such as your social security number or Medicaid number.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical, dental or mental health care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Sample Petition for Kinship Guardianship

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

NO.

**IN THE MATTER OF THE GUARDIANSHIP
OF THOMAS CRUZ, MINOR.**

PETITION FOR KINSHIP GUARDIANSHIP OF GRANDSON

Petitioners, Anita and Ricardo Cruz, through counsel, UNM School of Law Clinical Law Program, Richard Begay, student attorney, April Land, supervising attorney, Petition this Court for guardianship of their grandson Thomas Cruz. Petitioners make the following allegations in support of this Petition.

1. Petitioners are the paternal grandparents of Thomas Cruz.
2. This Court has jurisdiction to appoint Petitioners as guardians pursuant to the Kinship Guardianship Act § 40-10B-1 NMSA 2001, *et seq.*, and its inherent equitable power.
3. Venue is proper in this case because both Petitioners and Thomas Cruz reside in Bernalillo County.
4. Thomas Cruz was born on April 17, 1997, in Albuquerque, New Mexico.
5. Thomas has resided with Mr. and Mrs. Cruz, for most of his life, including the year prior to the filing of this Petition.
6. Mr. and Mrs. Cruz tend to his daily needs in a manner consistent with the duties and responsibilities of a parent.
7. Mr. and Mrs. Cruz have legal guardianship of Jordan's older brother, Ernie Cruz.
8. Thomas has been living with Mr. and Mrs. Cruz for approximately one year at 1271 Patricio Place NW, Albuquerque, NM 87107.
9. Estella Rodriguez is Jordan's mother.

10. To the best of our knowledge and belief Estella Rodriguez lives at 84502 Grambling, Salina, CA 91111.
11. Estella Rodriguez, is currently unable to provide adequate care, maintenance or supervision for Thomas.
12. Mark Chavez, Thomas' father, currently resides at the home of Petitioners, his parents, Anita and Ricardo Cruz, at 1271 Patricio Place NW, Albuquerque, NM 87107.
13. Mike Cruz consents to this guardianship.
14. Mike Cruz and Estella Rodriguez were never married.
15. Mike Cruz, in an effort to ensure that Thomas Cruz have a stable and enduring home, wishes that Petitioners be appointed the legal guardians of Thomas.
16. Petitioners wish to be appointed guardians of Thomas Cruz.
17. Petitioners understand that as guardians, they will have all of the legal rights and duties of a parent except the right to consent to adoption of Thomas Cruz and except for any parental rights and duties that the Court orders that the parents retain.
18. No matter involving the custody of the child is currently pending.
19. No matter pursuant to the provisions of Chapter 32A, Article 4 NMSA 1978 is currently pending.
20. Thomas Cruz is not subject to the provisions of the federal Indian Child Welfare Act of 1978.

WHEREFORE, Petitioners respectfully request that this Court:

1. Grant Petitioners Permanent Guardianship of Thomas Cruz; and
2. Award such other relief as deemed appropriate or necessary by the Court.

Respectfully Submitted by

Richard Begay
Student Attorney for Anita Cruz
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E. Room 3228
Albuquerque, NM 87131
(505) 277-5265

April Land
Supervising Attorney

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF BERNALILLO

I, Anita Cruz, being first duly sworn upon oath, state that I have read the foregoing Petition for Appointment of Guardian of a minor and the statements contained therein are true and correct to the best of my knowledge and belief.

Anita Cruz

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this _____ day of _____ 200__ by Anita Cruz.

Notary Public, State of New Mexico

My Commission Expires: _____

STATE OF NEW MEXICO
COUNTY OF BERNALILLO

I, Ricardo Cruz, being first duly sworn upon oath, state that I have read the foregoing Petition for Appointment of Guardian of a minor and the statements contained therein are true and correct to the best of my knowledge and belief.

Ricardo Cruz

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this _____ day of _____ 200__, by Ricardo Cruz.

Notary Public, State of New Mexico
My Commission Expires: _____

Emergency Motion for Appointment of Temporary Guardian

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

NO.

**IN THE MATTER OF THE GUARDIANSHIP
OF THOMAS CRUZ, MINOR.**

EMERGENCY MOTION FOR TEMPORARY KINSHIP GUARDIANSHIP

Petitioners, Anita and Ricardo Cruz, through counsel, UNM School of Law Clinical Law Program, Richard Begay, practicing law student, April Land, supervising attorney, respectfully request that this Court appoint Petitioners as temporary guardians of their four year-old grandson, Thomas Cruz. Petitioners make the following allegations in support of this Emergency Motion.

1. This court has authority to appoint a temporary guardian pursuant to the Kinship Guardianship Act § 40-10B-2 to § 40-10B-7 NMSA 2001.
2. Petitioners are the paternal grandparents of two bothers, Thomas Cruz, age four and his older brother Ernie Cruz.
3. Mr. and Mrs. Cruz have been the primary caregivers for both children for much of their lives, including the year preceding this filing.
4. Mr. and Mrs. Cruz have a legal guardianship of the older child Ernie Cruz.
5. The mother, Estella Rodriguez, has had sporadic visitation with Ernie, supervised by Peanut Butter and Jelly for the last year.
6. Recently, Estella Rodriguez, requested an unsupervised visit with the older child, Ernie.
7. Mrs. Cruz informed Estella that she would be able to visit with Ernie at Peanut Butter and Jelly with a counselor present.

8. Estella threatened to remove the younger child, Thomas, from the home on Saturday, February 9, 2002 if she is not allowed an unsupervised visit with the elder son, Ernie.
9. Mr. and Mrs. Cruz are fearful that Estella will take Thomas to California because that was her last known residence.
10. The children's father, Mike Cruz, wants Jordan to live with Petitioners and has authorized the Petitioners to care for him.
11. Furthermore, Thomas wants to remain in the home with his grandparents, Mr. and Mrs. Cruz.
12. There is good cause to enter this Order *Ex Parte* because the mother is threatening to take the child, Thomas, and may possibly take him out of the state.

WHEREFORE, Petitioners respectfully request that this Court:

- a. Grant Petitioners Temporary Guardianship of Thomas Cruz; and
- b. Award such other relief as deemed appropriate.

Respectfully Submitted By:

Richard Begay
Student Attorney for Anita and Ricardo Cruz
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, NM 87131-1431
(505) 277-5265

April Land
Supervising Attorney

VERIFICATION

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

I, Anita Cruz, being first duly sworn upon oath, state that I have read the foregoing Emergency Motion for Temporary Guardianship of a minor and the Statements contained therein are true and correct to the best of my knowledge and belief.

Anita Cruz

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this _____

Day of February 2002, by Anita Cruz

Notary Public, State of New Mexico

My Commission Expires: _____

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

I, Ricardo Cruz, being first duly sworn upon oath, state that I have read the foregoing Emergency Motion for Temporary Guardianship of a minor and the Statements contained therein are true and correct to the best of my knowledge and belief.

Ricardo Cruz

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this _____

Day of February 2002, by Ricardo Richard Begay

Notary Public, State of New Mexico

My Commission Expires: _____

Temporary Kinship Guardianship Order

**STATE OF NEW MEXICO
IN THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY**

NO.

**IN THE MATTER OF THE GUARDIANSHIP
THOMAS CRUZ.**

TEMPORARY KINSHIP GUARDIANSHIP ORDER

The Court, upon the Petitioner's verified Emergency Motion for Kinship Guardianship grants the Motion. The Court makes the following Findings of Fact and Conclusions of Law.

1. This court has authority to appoint a temporary guardian pursuant to the Kinship Guardianship Act § 40-10B-2 to § 40-10B-7 NMSA 2001.
2. Petitioners are the paternal grandparents, and primary caretakers of two brothers, Thomas Cruz, age four and his older brother Ernie Cruz.
3. Thomas Cruz has lived with the Petitioners for most of his life, including the year preceding the filing of this Motion.
4. Estella Rodriguez has recently contacted the Petitioners and threatened to remove Thomas, from the home on Saturday, February 9, 2002 if she is not allowed an unsupervised visit with her older son, Ernie Cruz.
5. Mr. and Mrs. Cruz are fearful that Estella will take Thomas to California, her last known residence.
6. It is not in Thomas' best interest to be removed from the home of the Petitioners.
7. The children's father, Mike Cruz, consents to the appointment of the Petitioners as guardians for Thomas.
8. Mike Cruz wants Thomas to live with Petitioners and has authorized the Petitioners to care for him.

9. Thomas wants to remain in the home with his grandparents, Mr. and Mrs. Cruz.
10. There is good cause to enter this Order Ex Parte because the mother is threatening to take the child, Thomas, and may possibly take him out of the state.

WHEREFORE, this Court hereby:

1. Appoints the Petitioners, Ricardo and Anita Cruz, as Temporary Guardians of Thomas Cruz.

This Guardianship will be valid for 180 days, or until further Order of this Court. If an objection to this Order is filed, the court shall schedule a hearing to be held within 10 days.

IT IS SO ORDERED.

HONORABLE DISTRICT COURT JUDGE

SUBMITTED BY:

Richard Begay
Student Attorney for Anita and Ricardo Cruz
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, NM 87131-1431
(505) 277-5265

April Land
Supervising Attorney

Order Appointing Permanent Kinship Guardian

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

**IN THE MATTER OF GUARDIANSHIP
PROCEEDINGS
FOR THOMAS CRUZ, a Minor. NO. DM 2002-0560**

ORDER APPOINTING KINSHIP GUARDIANSHIP OF THOMAS CRUZ

THIS MATTER having come before the Court on the Petition for Appointment of Guardian of a Minor, and the Court being fully advised on the premises **FINDS:**

1. Venue is proper in Bernalillo County.
2. Estella Rodriguez is the biological mother of minor child, Thomas Cruz.
3. Mike Cruz is the biological father of the minor child, Thomas Cruz.
4. Petitioner Anita Cruz is the paternal grandmother of the minor child, Thomas Cruz.
5. Petitioner Ricardo Cruz is the paternal grandfather of the minor child, Thomas Cruz.
6. Biological father, Mike Cruz, consents to the appointment of Petitioners as kinship guardians of his minor child, Thomas Cruz.
7. Estella Rodriguez was served with the Petition for Kinship Guardianship and a Summons February 15, 2002 at 84502 Grambling, Salina, CA 91111, and she has not filed a responsive pleading or entry of appearance.
8. Petitioners provide the minor child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent.
9. Petitioners are qualified to serve as Guardians.
10. The minor child, Thomas Cruz, has not had any previously appointed guardians.
11. Appointment of Petitioners as Guardians is in the best interest of the minor.

IT IS THEREFORE ORDERED that pursuant to the Kinship Guardianship Act:

Anita and Ricardo Cruz are appointed as Kinship Guardians of the minor child, Thomas Cruz.

Anita and Ricardo Cruz are hereby vested with all the rights and responsibilities of the parents of

Thomas Cruz, except the right to consent to the adoption of the minor child, Thomas Cruz.

Visitation with the minor is to be determined and carried out at the discretion of Anita and

Ricardo Cruz.

DISTRICT JUDGE

Submitted By:

Richard Begay
Student Attorney for Anita and Ricardo Cruz
UNM CLINICAL LAW PROGRAMS
1117 Stanford, N.E., Room 3228
Albuquerque, NM 87131-1431
(505) 277-5265

April Land
Supervising Attorney

Students are cautioned that the above court form and pleading samples are provided as general guides. All pleadings or forms drafted or submitted on behalf of a client should be carefully edited and tailored to meet the legal needs of the individual client. If any questions arise regarding forms or pleadings, students should consult their faculty supervisor.

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