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ACQUISITION



**THE  
JUDICIAL COUNCIL  
OF  
NEW MEXICO**

**NINTH  
ANNUAL REPORT**

**DECEMBER 31, 1977**

46394



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JUDICIAL COUNCIL  
OF  
NEW MEXICO**

**NINTH  
ANNUAL REPORT**

**DECEMBER 31, 1977**

NEW MEXICO  
JUDICIAL  
COUNCIL

NEW MEXICO LAW CENTER  
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ALBUQUERQUE, NM 87106



BOYD F. SCOTT

Chairman

BEN C. HERNANDEZ

Vice Chairman

DAVID R. GARDNER

Executive Secretary  
(505) 842 3102

December 31, 1977

The Honorable Jerry Apodaca, Governor  
State of New Mexico

The Honorable Members of the  
New Mexico State Legislature

The Honorable Justices of the  
New Mexico Supreme Court

Dear Governor, Members of the Legislature, and Justices of  
the Supreme Court:

I am submitting herewith the 1977 annual report of the New Mexico Judicial Council pursuant to Section 16-10-5, New Mexico Statutes Annotated, 1953 Compilation, which directs the Judicial Council to "submit a report of its proceedings and recommendations to the legislature, the governor and the Supreme Court each year."

Respectfully submitted,

Boyd F. Scott, Chairman  
New Mexico Judicial Council

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MEMBERSHIP

Dr. James Beall, Ruidoso - Paul F. Becht, State Senator, Albuquerque - Mack Easter, Supreme Court Justice, Santa Fe - Thomas P. Fry, State Representative, Silver City - Ben C. Hernandez, Court of Appeals Judge, Albuquerque - Edmund H. Kase, III, District Judge, Socorro - James A. Maloney, District Judge, Albuquerque - Russell D. Mann, lawyer, Roswell - Marshall Martin, lawyer, Albuquerque - Theodore Montoya, State Senator, Placitas - Ludio Rinaldi, Magistrate, Gallup - Rena Rosenquist, Taos - Carlos Salas, Mesilla Park - Boyd F. Scott, State Representative, Farmington - Harry Slowers, District Judge, Albuquerque - Tony Anaya, Attorney General ex officio, Santa Fe - Larry Coughenour, Director of Administrative Office of the Courts, ex officio, Santa Fe - Frederick M. Hart, Dean of UNM Law School, ex officio, Albuquerque

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JUDICIAL COUNCIL MEMBERSHIP

December 31, 1977

Chairman: Boyd F. Scott

Vice-Chairman: Ben C. Hernandez

\* \* \*

Dr. James Beall, Ruidoso

Paul F. Becht, Senator, Albuquerque

Mack Easley, Justice, New Mexico Supreme Court, Santa Fe

Ben C. Hernandez, Judge, New Mexico Court of Appeals, Santa Fe

Edmund H. Kase, III, District Judge, Socorro

James A. Maloney, District Judge, Albuquerque

Russell D. Mann, Attorney, Roswell

Marshall G. Martin, Attorney, Albuquerque

Theodore Montoya, Senator, Placitas

Walter R. Parr, Representative, Las Cruces

Lidio Rainaldi, Magistrate, Gallup

Carlos Salas, Mesilla Park

Boyd F. Scott, Representative, Farmington

Harry E. Stowers, Jr., District Judge, Albuquerque

Vacancy - to be appointed by the Governor

Toney Anaya, Attorney General, Santa Fe, ex-officio member

Larry Coughenour, Director, Administrative Office of the Courts,  
Santa Fe, ex-officio member

Frederick M. Hart, Dean, University of New Mexico School of Law,  
Albuquerque, ex-officio member

\* \* \*

The following members were replaced by appointments of members listed above during the year: The Honorable Samuel Z. Montoya, Justice, New Mexico Supreme Court, Santa Fe, Thomas P. Foy, Representative, Silver City, and Rena Rosequist, Taos.

## THE NEW MEXICO JUDICIAL COUNCIL

### MEMBERSHIP

Created by the legislature in 1969, the Judicial Council is a statutory body of eighteen members. The membership consists of one Supreme Court justice, one court of appeals judge, one magistrate, three district judges, two state senators, two state representatives, two lawyers, three non-lawyers, the attorney general, the dean of the law school at the University of New Mexico and the director of the Administrative Office of the Courts.

### DUTIES

The functions of the Judicial Council are:

- a. to continuously study the administration and operation of all courts in the state;
- b. to investigate criticisms and suggestions pertaining to the administration of justice;
- c. to keep advised concerning decisions of the courts and the legislature affecting the organization and operation of the courts; and
- d. To recommend desirable changes to the legislature and the Supreme Court.

The Council adopted the following statement of Justice Cardozo as best summarizing its functions: "to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged - to act as mediator and research assistant as a means of adapting law to justice." (U. S. Supreme Court Justice Benjamin Cardozo, then New York Chief Justice, 1921.)

### MEETINGS

During 1977 the Council held ten meetings including three public meetings - one in Albuquerque, one in Ruidoso and one in Farmington. All meetings are open to the public, but at least one meeting during the year is held after special efforts are made to invite the public, requesting testimony on any matter involving the courts in New Mexico. Two of the regular meetings were held in Santa Fe, and the rest were in Albuquerque.

#### COOPERATION AND ASSISTANCE

The Judicial Council has received valuable cooperation from several sources during the year which has greatly aided the Council in performing its duties. The Administrative Office of the Courts; the justices, judges, clerks, and other personnel of the Supreme Court, Court of Appeals and district courts, as well as officials of other state agencies and members of the general public, have been very responsive to requests for information and opinions. The Judicial Council is grateful for that help and the willing attitude with which it was given.

## PROJECTS AND STUDIES

### CITIZEN PARTICIPATION

In addition to the Judicial Council's statutory responsibility to receive citizen input through at least one meeting per year called for that purpose, the Council has encouraged citizen participation in efforts to improve the judicial system through a special program begun with the aid of federal funds prior to 1974. That program resulted in a state-wide Citizens' Conference on New Mexico Courts held in October of 1974. Citizens attending that conference formed a non-profit corporation called New Mexicans for Improvement of the Judicial System, Inc. With the aid of federal funding the Judicial Council supported the educational efforts of that group. In March of 1977 the federal grant and the Judicial Council's direct sponsorship terminated. The citizens group has continued to flourish since that time and the President's Annual Report, specifying the activities of the group, is reprinted below. It should be noted that in addition to the accomplishments listed, the President of the group was awarded the State Bar Association's Outstanding Citizen Award on October 15, 1977.

#### Report of the President

The third year of our existence as a citizen's group concerned with the judicial system has been one of continued accomplishments, building on the programs begun in the past, and taking steps in new directions.

A new publication was started a year ago to keep members informed of activities. "News Brief" began as a monthly newsletter and now appears every other month.

On November 12, 1976, the President testified before the Interim Legislative Criminal Justice Study Committee. The testimony was an explanation of the organization's proposal for strengthening the Judicial Standards Commission. The testimony apparently was well received by members of the committee since legislation was passed placing the issue on the ballot in the 1978 general election.

On November 13, a mini-conference was held in Santa Fe. This was a continuation of the program for holding mini-conferences around the state to inform the public of improvements being sought in the magistrate, municipal and probate courts.

On January 8 a similar mini-conference was held in Clovis. Again, the conference was very successful.



During the early part of 1977, the President was invited by the Chief Justice of the Florida Supreme Court to serve on the American Bar Association subcommittee on Standards for Judicial Discipline.

In February, 1977, the organization was notified by the Internal Revenue Service that its petition for tax exempt status had been granted.

At the invitation of the American Judicature Society and the Institute for Court Management, the President, on January 30, through February 2, attended a national conference on Improving Citizen Input in Denver.

On February 12, 1977, the last of the series of mini-conferences on the lower court study was held in Roswell. Again, local interest was stimulated.

In February the results of the judicial poll were finally released to the public by the State Bar Association. Effort was made by NMIJS to encourage a repetition of the poll, but due to the lack of support from the State Bar Association, plans never materialized.

On March 31, the federal grant which provided funds for the organization expired. Since that time the organization has been operating without outside financial support.

Throughout the legislative session our organization was informed on bills that affected our goals through reports from Kenneth McDaniel at board meetings, and through summaries published in the News Brief. Following the legislative session a final analysis appeared in the News Brief. Several times during the session members and officers of the organization went to Santa Fe to testify in committee hearings. The most notable result was that the organization-sponsored legislation to strengthen the Judicial Standards Commission was passed and a constitutional amendment will appear on the ballot at the next general election.

At the March 5 board meeting, the organization adopted the name of Court Update while still being incorporated under the name of New Mexicans for Improvement of the Judicial System, Inc. The new name provides a more effective way to identify the organization.

In connection with the adoption of the new name, a new brochure was printed explaining the organization and goals of Court Update.

The adoption of the name of Court Update coincides with a new emphasis on working with the courts to achieve our common purposes. A new theme for the mini-conference emphasized informing the public as to how the courts function. Called "Know Your Courts" conference, the first was held on April 23 in Albuquerque. Citizens who attended were pleased with the opportunity to ask court personnel about their functions as the tour moved from one duty station to another.

In support of merit selection of federal judges, New Mexico U.S. Senators were urged by Court Update to establish a nominating commission to nominate district judges in the New Mexico District of the Federal Courts. With additional input from the State Bar Association and Common Cause the Senators have now released guidelines for setting up such a commission.

Recognition and publicity for Court Update has continued. The American Judicature Society periodical, "Joint Enterprise", reported on Court Update activities. On July 12, Doris Wakeland and Judy Glover appeared on the KGGM-TV program Forum 13 to explain about Court Update and its programs. On August 5 Doris Wakeland and Ruth Farley were part of the panel selected by the New Mexico Judicial Council to discuss plea bargaining. On August 9, Doris Wakeland was featured on "Focus" by Ed Pennybacker on KOAT-TV. In late August, Governor Apodaca reappointed Doris Wakeland to the Judicial Standards Commission.

Under the chairmanship of Pauline LaDu, a major effort went into the September 1977 membership drive to reach people in every county through court tours. As part of the drive Governor Jerry Apodaca issued a proclamation declaring September 12 through 16 as "Know Your Court Week".

Doris Wakeland

## JURY SELECTION

### A. Initiation of Study

During 1976 there was some expression by members of the Council of a need to study the composition of juries and the rights of jurors. It was noted that the majority of the jurors were either housewives, retired persons or government employees who found less opportunity to be excused from jury duty than other citizens. It was felt this composition was not representative of the general population. Following the 1977 legislature there was a concern voiced to the Council about the passage of the three-month jury term - a reduction from the previous six-month jury term. This came primarily from judges who felt it would be a hardship on their courts, administratively, to go through the jury selection process four times a year rather than twice a year. As a result of these concerns a committee was established by the Judicial Council to study jury selection.

### B. Inquiry of Judges

One of the first steps taken in the jury selection study was to send a questionnaire to the presiding judge of each district. The questionnaire asked whether jurors were selected in the district from poll books or with use of a computer under the Optional Registration Act, whether the judge felt the voter registration list was a representative source of jurors in his community, and what excuses or exemptions from jury duty are routinely allowed by the judge. The questionnaire also asked for criticisms or suggestions for improving the jury selection process.

Six of the districts, covering 12 counties, use a computer in the jury selection process and an additional district is thinking about using a computer. The judges reported they were satisfied with representativeness of the voter registration list, though one judge felt it was not representative of the population in his community. All districts listed illness as a reason for excusing a person from jury duty and some added physical disabilities, such as poor hearing. Four of the judges said they excused business and professional people and three excused those who are too busy. One excused prospective jurors for scheduled vacations, one for age, one for long travel distances. One listed extreme hardship as a basis for excusal. Another added that mothers with small babies are excused. Generally excuses seem to be fairly liberally given by the district judges. In some cases they are given on the stipulation that a person who is not able to attend one trial will be willing to attend at another time when it is more convenient.

Six of the presiding judges offered no suggestions or criticisms, three had comments in favor of the longer jury terms, either six months or one year, two suggested supplementary source lists, one offered the suggestion of having three panels at a time and rotating them so that there would be less hardship on the jurors, and one suggested that lawyers should be impressed with the need to be considerate of the jurors' time and not waste it.

#### C. Selection of Jurors in New Mexico

The New Mexico statutes, Sections 19-1-1 through 19-1-16, govern jury service and selection. Any person who is a qualified elector may be called to jury duty unless that person is incapable due to physical or mental illness or infirmity. The Constitution of New Mexico excludes the mentally ill and convicted felons from being qualified electors. A district judge has the discretion to excuse any person from jury service upon presentation of satisfactory evidence. The basic source for juror selection is from poll books; however, under the Optional Registration Act, where voter registration lists are maintained on computer, the computer may serve as the master jury wheel and the names may be randomly selected using a computer program. The district judge chooses the number of potential jurors to be selected, but the number must equal at least five per cent of the number of voters' names in the poll books of the last general election and may not be less than 150. If the district judge feels commissioners would be helpful in eliminating ineligible persons from those names drawn, he may appoint up to five jury commissioners. Where a poll book is used as a source of jurors, lot slips, each with the name of a potential juror, are prepared, folded, and placed in the master jury wheel by the district court clerk in the presence of the jury commission or the sheriff and one other person. When jurors are to be selected, the master jury wheel is taken to open court where it is opened and names are drawn in the presence of the county sheriff and one other person or in the presence of the jury commission. Names of jurors so drawn are listed in the jury book. The clerk issues a summons for each juror along with a form on which the jurors may make affidavits to facts supporting any claim of exemption. The district judge presides over the qualifying and empaneling of the jury panels. He determines the number of jurors to be summoned and qualified to provide panels of jurors, the size of trial jury panels, and the length of time jurors are retained for service. No person may be required to remain a member of the petit jury panel for more than three months in any year under the current law.

In districts using a computerized voter registration list

as the jury source, the computer picks every nth\* name to produce a list of potential jurors. Jury commissioners then go through those names and eliminate those persons known not to be eligible. Of course if the voter registration list is not up to date (i.e. has not been purged in four years), there arrives a time when there may be a relatively high number of names on the list of persons who have moved away or died. At this point mailing out summonses may tend to be expensive due to the fact that a large number of them may be returned indicating the person has left the jurisdiction.

A problem with the use of poll books might be that only names of those who actually voted at the last general election are listed and those names are hand written. If the name is illegible, or the address is incomplete it may take more work on the part of the court clerk to determine who has been selected and where they reside. An additional expense encountered under the present system is that jury summonses are to be mailed out by registered or certified mail. This may be an unnecessary expense since regular mail would reach jurors just as well.

In the Second Judicial District, computerization is used to the extent that the computer not only makes the random selection of names but addresses the packets that are to be mailed out. Less personnel time is involved. In the Second Judicial District, the term of jury service is shorter, being six weeks rather than three months. The number of jurors needed is also higher. Currently computer selection is used in the Second, Third, Fifth, Sixth, Ninth and Twelfth Judicial Districts and is being contemplated in the Eleventh Judicial District.

The Judicial Council discussed the possibility of a state-wide system under which a district judge could request of a central office a list for a particular county. This apparently is being done in Colorado where a centralized automated program has been developed by the judicial department to handle jury selection in 14 counties. It was planned that all counties over 15,000 population would be added to the automated program in 1972. The program for selecting juries included mailing the questionnaire and summons. In New Mexico, every two years, just prior to an election, each county sends a voter registration list to the Secretary of State. These lists are alphabetized by precinct and are as current as any lists maintained by the county. The question as yet unresolved is whether placing these lists in computers

\*n being the number which, divided into the total number of names, gives the number of names needed for the jury panel.

and using them for jury selection would be less expensive or function better than the system currently used.

#### D. Source Lists

In New Mexico the source list of jurors to be exclusively used is the poll books, or in counties using the Optional Registration Act, the voter registration list.

Some other states have gone to alternate source lists to provide a larger number of names from which to draw jurors, finding that not everyone who is eligible is registered to vote. Alaska, for instance, has used a list of Alaskans who have purchased fish and game licenses and the list of Alaskans who filed income tax returns, in addition to the voter registration list. Alaska is planning to add the names of those who are licensed to drive. That state, through its computer processing, has been able to eliminate all but a very small number of duplications. The use of additional source lists is also being considered for federal court juries.

In Denver, after supplementing the voter list with the persons holding drivers licenses, and also using the city directory, the number of persons who could be selected as jurors nearly doubled, after eliminating the duplications.

The jury selection study committee of the Judicial Council recommended that a centralized bank of potential juror names be established using the list of registered voters sent to the Secretary of State by each county every two years and a list of licensed drivers from the Motor Vehicle Department. It was felt that a program could be established in the Administrative Office of the Courts under which a district judge could request a list of potential jurors in the county where the case was to be tried. It was suggested that a five year lead time should be allowed in order to consolidate lists from the Motor Vehicle Department and the Secretary of State.

The purpose for expanding the source of potential jurors has most often been stated to be to provide a more representative cross section of the community on juries. There are arguments for and against using additional sources. One for it is that it would provide a fair representation of the community. Another is that it would broaden the base of juries so there would be less hardship on a smaller number in the community. Another reason looks forward to the one-day one-jury type of system which will be discussed later under which a larger number of people would necessarily be involved in jury duty. It would also bring more people in contact with the courts where hopefully they would have a positive experience that would improve the image of the courts. The main

argument against going outside the voter registration lists is that by using the voter registration list you have a screening process built in whereby only those citizens who have enough civic consciousness to register to vote are sitting on trials. This would eliminate people who really are not interested in the governmental processes and the preservation of our freedoms. Other arguments are that the voter registration lists are sufficiently representative of the community, and there is a sufficient number of registered voters to provide enough jurors for the needs of the courts.

#### E. Jury Terms

The 1977 legislature amended the law to provide that a person would not be required to serve more than three months on a petit jury in any year. Prior to the change, the law provided six month jury terms. In both the prior and current laws a difference was made for the Second Judicial District where the jury term is not to exceed six weeks.

The apparent theory behind the change in the law was to reduce the hardship on jurors. Of course it would be burdensome for a person over the six month jury term to be called repeatedly to serve on juries and thereby be required to neglect family or occupational duties at a personal expense to himself. It would also be a hardship on an employer to have a person absent frequently over a six month period of time. A response by those who favor the six month or longer jury term is that judges are fairly liberal in granting excuses so that a person who has served on a jury or who has pressing family or occupational responsibilities may be excused from jury duty. Also, many counties have jury trials only infrequently and over a six month period there may be only three or four jury trials lasting one or two days each. It is also feared that doubling the time and cost involved will be very expensive and burdensome. A questionnaire was sent to the district and deputy court clerks to determine the cost of the three-month jury term as opposed to the six-month jury term. The responses show that the cost and time involved has doubled and that in some counties it makes no sense to impanel a jury every three months when there are only two or three jury trials during the entire year. In 1976 there were five counties with no criminal jury trials during the year, and nine other counties that had less than five criminal jury trials.

Other jurisdictions have experimented with decreasing the jury term. Notable experiments are the one-day one-trial jury system in Wayne County, Michigan, and Harris County, Texas. Under this system a juror is required to serve for

one trial, or, if he is not impaneled on a jury for a trial but has been available for service, for one day. Following that one trial or one day, he may not be called again for a year. The proponents of this system have found that it involves many more citizens in the judicial process and hopefully gives them a better understanding and appreciation of the judicial system. It lessens the burden on individual jurors and it avoids a type of professionalism which sometimes develops when a juror comes to feel like he knows from experience how a case should be tried and what questions should be asked. Jury service on several cases where particular lawyers appear frequently leads to a sense of alliance with or against particular lawyers which may also cause an imbalance in the decision of cases.

Obviously a one-day one-trial system can only work where good organization exists to call jurors, qualify them, orient them and notify them as to dates of trials and cancellations. Ideally, a computer is needed in this system and it can be expensive. However, the Wayne County program actually had a savings in money with the installation of the computer program due to the fact that it lead to a better use of jury time and less per diem and mileage for jurors. The Second Judicial District is currently planning ways to implement a one-day one-trial system and the Eleventh Judicial District is thinking of a modification such as five days or two or three trials.

In another attempt to save jury time and per diem and mileage expenses, the district courts were appropriated money to establish code-a-phone systems whereby jurors call in the day or evening before a trial and receive a recorded message telling them whether or not the trial has been postponed or cancelled. The system has not yet been fully implemented in all districts.

#### F. Juror Rights

The Uniform Jury Selection and Service Act proposes a law which makes it illegal for employers to threaten or coerce employees who are summoned for jury duty. Several states have implemented such a law, but their experience with it has been too short to provide much guidance as to its effectiveness. There apparently have been no reported cases as to the use of the law, but there was a case in Oregon prior to the passage of the law in which the court established that an employee who was wrongfully discharged because of being called to jury duty was entitled to reinstatement and damages. Arizona has found that some employers will discharge a juror who insists on serving, but the employers will deny that service on the jury was the reason for the discharge. The First



Judicial District in New Mexico has found a number of instances where people called to jury duty have reported they would be fired if they missed work. Employers have apparently confirmed this. Employees have actually been terminated for that reason. Currently, there is no law in New Mexico to prevent this from happening. The Judicial Council in discussing this matter felt a simply worded law would be sufficient. That law should make it a petty misdemeanor for an employer, individually or through his agent, to deprive an employee of his employment or threaten or otherwise coerce him with respect thereto because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

#### REFEREES

Following completion of its study of the use of para-judges in 1976, the Council continued its interest in ways to conserve judicial manpower by using referees. Consequently, at the Council meeting in Ruidoso in April, the study consultant, Lars Bjork, and former district judge D. A. MacPherson, Jr., were invited to discuss the subject further. While it was noted that there are limitations such as lack of finality of decisions and expense to private litigants inherent in the use of referees, it was determined that referees can be used to free a judge from time consuming, detailed fact gathering in complicated cases and thus avoid the build-up of case backlogs. The Council has continued to examine the use of referees.

## MISCELLANY

### PLEA BARGAINING

Noting that some of the realities of criminal prosecutions were being obscured by emotional pronouncements regarding plea bargaining and that plea bargaining had been used as a pivotal issue in recent election campaigns for the office of district attorney, the Judicial Council conducted a forum on plea bargaining at its August meeting. A panel moderated by Court of Appeals Judge B. C. Hernandez and composed of Joseph Caldwell, president of the District Attorneys Association, Harris Hartz, director of the Governor's Organized Crime Prevention Commission, E. H. Williams and James Brandenburg, former district attorneys, District Judges Stanley Frost and Randolph Reese, Law Professor Jack Love, defense attorneys Charles Driscoll and Leon Taylor, Police Chief Bob Stover, and Ruth Farley and Doris Wakeland, officers of Court Update, was invited to discuss the subject.

The points made by the different panelists were:

1. The term plea bargaining is distasteful in implying that it is a bargain for the defendant.
2. Plea bargaining produces a just solution in difficult situations not adequately provided for by statutes.
3. Plea bargaining is not justified by the savings in costs even though costs are saved.
4. The finality and certainty of convictions do justify plea bargaining.
5. The widespread belief that criminals are set free as a result of plea bargaining is mistaken - in fact, most often the criminal goes to prison.
6. Plea bargaining of criminal cases leaves more time for trying civil and juvenile matters that would otherwise be delayed or require more judges to handle.
7. The granting of witness immunity to obtain testimony necessary for other convictions is a form of plea bargaining especially vital to combatting organized crime.
8. The police feel plea bargaining provides no benefits to them.

9. Plea bargaining in some form is used even by prosecutors who say they do not plea bargain.
10. In New Mexico the practice of plea bargaining is governed by Supreme Court rule.
11. Plea bargaining in criminal cases is similar to settlement of civil cases.
12. A survey has shown that judges are more lenient towards those that plead guilty than towards those that are convicted upon trial.
13. Plea bargaining is more palatable when the arresting officer and victim are consulted.
14. Plea bargaining best serves its purpose when both the state and the defendant are represented by competent lawyers.
15. Plea bargaining is not going to cease.
16. The public needs to be better informed about plea bargaining.

While there was no consensus of opinion on plea bargaining, it was generally felt the practice will continue, but could be improved.

#### CRITICISM OF JUDGES

During 1977 some news media criticism of judges revived Council discussions of the possible role the Judicial Council might play in educating the public on the manner in which courts function. It was felt the criticism of judges during the pendency of cases from which the criticism arose could be detrimental to the public image of the courts because the judges in the cases often cannot respond without prejudicing the cases, and no one else seemed inclined to respond. The Council examined its statutory authority as well as the mechanism for making effective, credible responses.

The Council found that the subject was under discussion by the Supreme Court and State Bar Association, and, after observing that a mechanism for response was implemented by the State Bar Association and Supreme Court, proceeded no further in the matter.

## JUDICARE

At the Council-sponsored panel discussion on plea bargaining in August, there was a question raised as to the relative abilities of public defenders and district attorneys. It was suggested that both offices were subject to high turnover and were generally staffed by young, inexperienced attorneys. It was proposed that the Council examine the judicare system, under which indigent defendants could choose their own attorneys for their defense and the fee would be paid from public funds.

Although some information was compiled on judicare, more is being sought and further discussion and action by the Council is pending.

## COURT DECISIONS

The dates given below indicate the issue of the State Bar of New Mexico Bulletin and Advance Opinions:

January 13, 1977 - The Court of Appeals held that where a jury announces, in a multiple offense charge, that it is unable to agree, and the trial court does not make inquiry of the jury's deliberations on each offense, manifest necessity for declaring a mistrial does not exist and jeopardy attaches as to each offense charged against the defendant. In the same case the Court of Appeals held that under the merger doctrine, where the crime of assault merges with the homicide, a valid felony murder information charge cannot be stated with assault alone as its foundation.

January 20, 1977 - The Court of Appeals held that if the statute punishes for "use" of the firearm in committing a felony the punishment is to be applied for each felony committed by using a firearm.

January 27, 1977 - The Supreme Court held that a person subject to an in personam order to pay a dischargeable debt is not subject to the trial court's contempt power, for to hold otherwise would circumvent the policy behind allowing bankruptcies.

February 3, 1977 - The Court of Appeals in discussing evidentiary rules on the use of memoranda to stimulate or refresh memory held that Territory vs. Harwood does not apply to present recollection revived and held there was no error in allowing a witness to revive his memory by referring to the transcription made without a showing that the transcription was correct when made.

February 24, 1977 - The Supreme Court held that where there had been a determination that a person is an habitual offender the trial court has no discretion to suspend sentence but must impose the sentence called for for habitual offenders.

March 10, 1977 - The Court of Appeals held that the hazard of a greater sentence upon trial de novo did not deprive a defendant of due process and is not fundamentally unfair.

April 28, 1977 - The Supreme Court held that the State Corporation Commission, when it had found that the rates of a utility were not fair and reasonable and when it became obvious that it would be a considerable length of time before permanent rates could be fixed, had a constitutional duty of fix interim rates that would minimize the confiscation of the utility's property.

May 19, 1977 - The Supreme Court overruled a Court of Appeals decision which established a cause of action in an injured third party against tavern keepers who sell intoxicating liquors to inebriated customers. The Supreme Court left that area to the legislature to deal with but did not foreclose judicial action in the event the legislature chooses not to act.

May 19, 1977 - The Court of Appeals held that in medical malpractice cases the statute of limitations begins to run from the time of the injury and not from the time of the malpractice. The court held that the limitation period begins to run from the time the injury manifests itself in a physically objective manner and is ascertainable.

June 30, 1977 - The Supreme Court held that in probate cases a constructive notice in a general publication of a hearing on the final account and report is not sufficient to meet minimum requirements of due process with respect to known creditors, tort claimants and other interested persons.

June 30, 1977 - The Court of Appeals held that where there is evidence supporting both a contributory negligence instruction and a sudden emergency instruction a plaintiff is not required to object to the first in order to be entitled to the latter.

June 30, 1977 - The Court of Appeals held that a private person having several separate businesses in New Mexico is covered by the Workmen's Compensation Act if the separate businesses cumulatively employ four or more employees at the time of injury or death of the workman.

July 7, 1977 - The Supreme Court held that the presence of an unauthorized person before a grand jury requires dismissal of the indictment handed down by the grand jury without the necessity of showing prejudice.

July 21, 1977 - The Supreme Court held that where there is a conflict between the statute on the children's code and the rule of the Supreme Court in determining the time limits for beginning hearings, the Supreme Court rule prevails.

July 28, 1977 - The Supreme Court overruled a previous ruling and held that when a jury announces its inability to reach a verdict in cases involving included offenses the trial court will be required to submit the verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses. The jury may then be polled with regard to any verdict thus returned.

August 4, 1977 - The Court of Appeals held on the basis of statutory language that false imprisonment is a lesser offense necessarily included in kidnapping by holding to service.

September 15, 1977 - The Supreme Court modified previous decisions by adopting the standard of knowledge, care and skill rule in medical malpractice cases and dropping the strict locality rule.

September 29, 1977 - The Supreme Court decided that in the disqualification of judges the word "disqualified" includes withdrawal or recusal by a judge on his motion with or without stated reasons.

October 6, 1977 - The Supreme Court interpreted Section 71-5-1 to clarify which records in a personnel file are exempt from disclosure under that section of the law.

October 27, 1977 - The Court of Appeals held that a magistrate loses any continuing control over a case upon expiration of the time for filing an appeal to the district court or upon filing of such an appeal.

November 3, 1977 - The Supreme Court held that the doctrine of merger does not apply to extinguish the lesser estate when the lessee acquires the greater estate when to so apply the doctrine would prejudice the rights of an innocent third party.

November 3, 1977 - The Supreme Court listed the conditions necessary to justify a non-consensual warrantless administrative inspection of business premises.

November 3, 1977 - The Court of Appeals held that a proprietor of a business has the right to expel or restrain a person who by virtue of abusive conduct refuses to leave or persists in this abusive conduct after being cautioned, though that person was initially on the premises by express or implied invitation, so long as the expulsion or restraint is by reasonable force.

November 10, 1977 - The Supreme Court adopted the rule that the act of a joint tenant or tenant by entirety in withdrawing all money from the account does not destroy the joint estate or the estate by the entirety.

November 10, 1977 - The Court of Appeals held that a defendant has the due process right of not being indicted on the basis of false evidence known to and uncorrected by the prosecutor if the false evidence is material to the indictment.

November 17, 1977 - The Supreme Court held that in an insurance case there must be a reasonable causal connection between a felony and the resultant injury where the insurance clause denies coverage for loss sustained while the insured is committing a felony.

December 1, 1977 - In a case overturning a determination by the Property Tax Department that property valuation for tax purposes in excess of ten percent was correct, the Court of Appeals noted that the property owners were put to great expense to secure their statutory rights. The Court found it had no authority to order the state agency to reimburse the costs and attorney fees of the property owner, and commended to the legislature the issue of allowing recovery of costs and fees in such appeals.

December 15, 1977 - The Supreme Court held that when a party submitting written interrogatories offers in evidence part of the answers thereto, the interrogatee has a right to introduce or to have introduced all of the interrogatories which are relevant to, or which tend to explain or correct, the answers submitted.

December 29, 1977 - The Supreme Court declared unconstitutional a law which would have allowed litigants in the Second Judicial District to disqualify three judges while litigants in other judicial districts could disqualify only one judge.

December 29, 1977 - In a condemnation case that had twice been tried to a jury with compensation awarded to the defendant



each time, the Supreme Court concluded that the award of compensation to bear interest shall not include any accrued interest monies; and ordered that only simple interest at the statutory rate should be paid on the unpaid balance of the final award.

December 29, 1977 - The Supreme Court adopted the rule that abandonment of a mining claim by one co-owner does not effect an abandonment of the entire claim but merely passes the interest of the abandoning co-owner to the other co-owners if they continue to do the necessary work to preserve the claim.

#### LEGISLATION

One of the duties of the Judicial Council is to keep advised concerning legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts. Of course, any legislation can have some effect on the operation and jurisdiction of the courts if the courts are called upon to enforce that legislation. There were some bills enacted by the 1977 session of the legislature which have had a great impact upon the case load of the courts. One of these is the Mental Health and Developmental Disabilities Code which requires the district court to provide hearings within stated time periods for the commitment, release or recommitment of persons alleged to be mentally ill. Another law has eliminated the mail-in penalty assessment for non-residents charged with traffic violations. This has resulted in a great increase in the number of cases the magistrate courts in heavily travelled areas are required to hear.

The jurisdiction of the courts has been expanded through a number of laws that have added civil and criminal penalties, the right to attorneys fees or the right to appeal administrative decisions to the courts. This may very well encourage more litigation. Examples of these laws are in the areas of radiation control, hazardous wastes, Indian jewelry, shop lifting, contraband in prisons, remote financial services, unfair trade practices, imitation honey, raw milk, waste of game, commission hearings, food service sanitation, insurance, destruction of motor vehicles, motor carrier regulations, natural gas prices, podiatry, cable television, school board member recall, irrigation, and the Rio Chama.

The operation and procedures of the courts have been affected by other acts including the Right to Die Act, Children's Code, method of selecting the Chief Justice, additional judgeships, reduction of the jury term from six months to three

months, disqualification of judges, indigent free process on appeals and in magistrate courts, adoption, divorces, child custody, redemption of real estate, garnishment, probate, arrest records, the sentencing act, victim restitution, commitment of alcoholics, manufacture and repair of automobiles, renewal of drivers licenses, and organization of water and sanitation districts.

There were some changes which may lead to some decrease in the case loads of the courts such as where laws have been repealed or penalties have been modified or eliminated. The proposed constitutional amendment to allow the Chief Justice to appoint judges pro tempore, if adopted, should alleviate some case load pressures.

#### JUDICIAL COMPENSATION

The National Center for State Courts' October 1977 report on judicial salaries shows that New Mexico ranks 35th among the states in the amount paid to supreme court justices, and 30th in the amount paid to general trial (district) court judges.

The same report ranks New Mexico 48th in per capita income and 37th in population.

Pay for New Mexico's Supreme Court justices is \$5,106 below the national average, and pay for the district court judges is \$1,831 below the national average. The Court of Appeals is \$6,831 below the average salary of the twenty-seven states that have a comparable court.

The legislature in 1977 again increased the salaries of the judges of the district court, Court of Appeals and Supreme Court, but inflation has continued to nullify the raises. Table 1 on the next page shows the effect of inflation on judicial salaries in New Mexico since 1967.

TABLE 1

NEW MEXICO JUDICIAL SALARIES AS RELATED TO CONSUMER PRICE INDEX

1967 = \$1.00 Purchasing Power of the Dollar

as of:	1967 Price Index	<u>Supreme Court</u>		<u>Court of Appeals</u>		<u>District Judges</u>	
		<u>Annual</u> <u>Salary</u>	<u>Purchasing</u> <u>Power</u>	<u>Annual</u> <u>Salary</u>	<u>Purchasing</u> <u>Power</u>	<u>Annual</u> <u>Salary</u>	<u>Purchasing</u> <u>Power</u>
12/31/67	100	\$20,000	\$20,000	\$18,500	\$18,500	\$17,500	\$17,500
12/31/68	104.2	21,000	20,154	19,500	18,714	18,500	17,754
12/31/69	109.8	21,000	19,126	19,500	17,760	18,500	16,849
12/31/70	116.3	22,500	19,347	21,000	18,057	20,000	17,197
12/31/71	121.3	22,500	18,549	21,000	17,312	20,000	16,488
12/31/72	125.3	29,500	23,543	28,000	22,346	27,000	21,548
12/31/73	133.1	29,500	22,164	28,000	21,037	27,000	20,285
10/31/74	153.2	29,500	19,256	28,000	18,277	27,000	17,624
10/31/75	164.6	32,000	19,441	30,500	18,530	29,500	17,922
10/31/76	173.3	33,500	19,331	32,000	18,465	31,000	17,888
10/31/77	184.5	36,348	19,754	34,720	18,870	33,635	18,280

## RECOMMENDATIONS

### JUROR RIGHTS

As discussed on pages 7 through 13 of this report, the Judicial Council has considered several aspects of jury selection and service. Finding that there is a real need to protect the employment of persons called to serve on juries, the Council recommends that legislation be enacted to make it illegal for an employer or his agent to threaten, coerce, or discharge an employee because the employee attends court for prospective jury duty, serves on a jury, or receives a summons for jury duty.

### JURY TERMS

Based on the burdens placed on the court staffs and budgets by the reduction of jury terms from six months to three months, and on the finding that in many counties jury trials are infrequent, judges are liberal in granting excuses, and efforts are being made administratively to reduce the time a juror must spend in jury duty, the Judicial Council recommends that legislation be enacted to return to the six month jury term in judicial districts other than the Second Judicial District.

### TRANSCRIPT FEES FOR COURT REPORTERS

The Judicial Council found that transcript fees vary from district to district although the amount of the fee is set by statute. It also found that the statutory fee was inadequate. The Council recommends that the statute regarding court reporters (Section 16-3-7 NMSA, 1953 comp. as amended) be amended to delete the language setting the maximum charge per page of typewritten transcript. The fee could then be set by Supreme Court rule. The Council recommends that the Supreme Court, after determining the amount of the fee to be charged, should seek an appropriation from the legislature to cover the cost of transcripts in indigent appeals.

### ADDITIONAL JUDGESHIPS

After reviewing the caseloads, travel distances, and growth patterns in the Second, Fifth, and Eighth Judicial Districts, the Judicial Council recommends that the legislature authorize additional judgeships to bring the total to fifteen in the Second District, seven in the Fifth, and two in the Eighth.



**END**