

Opinion No. 89-12

February 28, 1989

OPINION OF: HAL STRATTON, Attorney General

BY: Carol A. Baca, Assistant Attorney General

TO: The Honorable Charles R. Barnhart, Metropolitan Court Judge, P.O. Box 133,
Albuquerque, NM 87103

QUESTIONS

In light of the conflict between Section 31-3-2(E) NMSA 1978 and SCRA 7-406, may a metropolitan court judge refund a forfeited bond to a bondsman who is able to apprehend a defendant and bring her back to court?

CONCLUSIONS

The bond may be refunded pursuant to Section 31-3-2(E).

ANALYSIS

Section 31-3-2(E) NMSA 1978, as amended June 19, 1987, provides:

When a judgment has been rendered against the defendant or surety for the whole or part of the penalty of a forfeited recognizance, the court rendering such judgment shall remit the amount thereof when, after such rendition, the accused has been arrested and surrendered to the proper court to be tried on such charge or to answer the judgment of the court, provided that the apprehension of the accused in some way was aided by the surety's efforts or by information supplied by the surety.

Rule 7-406(D) of the Rules of Criminal Procedure for the Metropolitan Courts, which became effective on October 1, 1987, states:

The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by the surety into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

SCRA 7-406(D) conflicts with Section 31-3-2(D) when, after entry of default on the bond, a defendant is apprehended and surrendered to court with the aid of the surety and when there is no showing of good cause for the initial failure to appear. In that situation, Section 31-3-2(E) requires a refund of the forfeited bond, while SCRA 7-406(D) prohibits the return of the bond.

N.M. Const. art. III, § 1 and art. V, § 3 vest the New Mexico Supreme Court with exclusive power to regulate pleading, practice and procedure affecting the judicial branch of state government. *Otero v. Zouhar*, 102 N.M. 482, 697 P.2d 482 (1985); *State ex rel. Gesswein v. Galvan*, 100 N.M. 769, 676 P.2d 1334 (1984); *Maestas v. Allen*, 97 N.M. 230, 638 P.2d 1075 (1982); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976); *State ex rel. Anaya v. McBride*, 88 N.M. 244, 539 P.2d 1006 (1975). See also Section 38-1-1 NMSA 1978. Thus, in matters of procedure, when a state statute conflicts with a rule promulgated by the supreme court, the statute is not binding. *Otero*, 102 N.M. at 486, 697 P.2d at 486; *Maestas*, 97 N.M. at 231, 638 P.2d at 1076; *Ammerman*, 89 N.M. at 311, 551 P.2d at 1358; *McBride*, 88 N.M. at 246, 539 P.2d at 1008. Conversely, if the conflict involves a question of substantive law, the statute will prevail.

Generally, substantive law creates, defines or regulates rights, while procedural law outlines the means for enforcing those rights and obtaining redress. *Gesswein*, 100 N.M. at 770, 676 P.2d at 1335. See also *Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc.*, 74 N.M. 458, 465, 394 P.2d 978, 983 (1964). Although the New Mexico Supreme Court has acknowledged that the distinction between substantive and procedural matters can be difficult to discern, it has declined to formulate a more specific definition. *Gesswein*, 100 N.M. at 772, 676 P.2d at 1337. See also *Browde & Occhialino, Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M L. Rev. 407 (1985). Rather, each case must be determined upon its own circumstances. *Gesswein*, 100 N.M. at 770, 676 P.2d at 1337.

In our opinion, the conflict at issue concerns substantive rather than procedural law. In Section 31-3-2(E), the legislature granted bonding companies the right to recover forfeited bond money if the company successfully assisted in recapturing the missing defendant. SCRA 7-406(D) goes beyond specifying a procedure for securing that right, and purports to substitute its own grounds for bond recovery for the grounds specified in the statute. This change affects the substantive law in the same sense that altering the elements of a cause of action or of a crime changes the substantive law. Therefore, to the extent that SCRA 7-406(D) conflicts with Section 31-3-2(E) on this question, the statute controls.

ATTORNEY GENERAL

HAL STRATTON Attorney General