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I. INTRODUCTION

Whenever a judicial system employs a three-tiered judicial structure with trial courts, an intermediate appellate court or courts, and a high court, the issue arises of what precedential value shall be accorded to decisions of the intermediate court or courts. New Mexico has had a three-tiered structure since 1965.

Precedent, or stare decisis, can operate in two different directions: horizontally, meaning that a panel of the court of appeals is bound by a prior decision of the court of appeals, even though rendered by a different panel of judges; and vertically, meaning that trial courts are bound by a decision of the court of appeals.[1] Of course, modern stare decisis does not mean that a point of law once decided is settled for all time.[2] It does mean that an apt decision will be followed, distinguished, or overruled by the deciding court, as well as followed by lower courts in the same judicial system. If the deciding court neither follows nor overrules its own "on point" decision, it creates a conflict within the jurisdiction. Conflicts, if allowed to persist, forfeit the benefits of certainty, stability, and predictability of the law which the doctrine of stare decisis is intended to foster.

The number of states with intermediate appellate courts has increased greatly within the past fifteen years.[3] The general trend in jurisdictions with large intermediate appellate courts may go from recognition of horizontal stare decisis to ignoring it. That is, for a time after the intermediate court is established, it will speak in terms of high deference to its own prior decisions. As time goes on, however, the court departs

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1. *See generally* Mattis & Yalowitz, *Stare Decisis Among [Sic] the Appellate Court of Illinois*, 28 DE PAUL L. REV. 571 (1979) (applying these concepts of horizontal and vertical stare decisis to the intermediate appellate court in Illinois).

2. Stare decisis, if correctly understood, is not static and does not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arises. *See* Bielski v. Schulze, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1962) (citing Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

3. By 1891 there were only seven intermediate state appellate courts. R. STERN, APPELLATE PRACTICE 6 & n.10 (2d ed. 1989). Now all but eleven states have them. *Id.* at 7. Fifteen states created intermediate appellate courts within the past fifteen years. *Id.* at 6 & n.12.

from the principle and willy-nilly creates conflicts, proclaiming that it is not "bound" by a decision of a prior panel, branch, or division of the court, yet failing to overrule that prior decision.[4] In some jurisdictions, horizontal stare decisis is eschewed. Nevertheless, all trial courts are said to be bound by intermediate appellate court decisions; vertical stare decisis is required.[5] This kind of jurisprudence may be satisfying to an individual panel of appellate judges who believe that they have ruled correctly in the case they decided,[6] yet are unwilling to offend coordinate judges by overruling their decision. Trial courts, lawyers and other planners of transactions, however, find themselves in an untenable position where they are "bound" by conflicting decisions of an intermediate appellate court. Litigants, to the extent that they understand the situation at all, may believe that equal protection of the law is mocked.

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4. The Florida, Illinois, and Michigan experiences are examples.

Florida: *Compare* Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980) ("[D]ecisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.") *with* McDonald's Corp. v. Department of Transp., 535 So. 2d 323, 325-26 (Fla. App. 1988) ("[T]his court is not bound by the decision of a sister district court.").

Illinois: *Compare* Hughes v. Mendendorp, 294 Ill. App. 424, 427-28, 13 N.E.2d 1015, 1017 (1938) ("[A]n opinion of the Appellate Court is binding authority . . . upon said court.") *with* Garcia v. Hynes & Howes Real Estate, Inc., 29 Ill. App. 3d 479, 481, 331 N.E.2d 634, 636 (1975) ("The opinions of any Appellate Court . . . are . . . not [binding] on the other branches of the Appellate Court.").

Michigan: *Compare* Hackett v. Kress, 1 Mich. App. 6, 11, 133 N.W.2d 221, 223 (1965) ("[A] decision of any division of this Court is controlling state-wide until a contrary decision is reached by another division on the identical question or until such decision is reversed by the Supreme Court.") *with* City of Detroit v. Recorder's Court Traffic & Ordinance Judge, 104 Mich. App. 214, 228, 304 N.W.2d 829, 835 (1981) ("[D]ecisions of this Court are not precedent setting in the sense that subsequent panels of this Court are bound to follow earlier opinions . . . .").

The Supreme Court of Michigan has promulgated Administrative Order 1990-6, entitled "Resolution of Conflicts in Court of Appeals Decisions," effective November 1, 1990. It provides that a panel of the court of appeals must follow the rule of law established by a prior published decision of the court of appeals issued on or after November 1, 1990. For a discussion of the rule see Mattis, *Stare Decisis Within Michigan's Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan Trial Courts*, 37 WAYNE L. REV. 265, 305-11 (1991).

5. *See, e.g.*, Mattis & Yalowitz, *supra* note 1, at 592; Mattis, *supra* note 4, at 272, 274. *Compare* McGlothlen v. Department of Motor Vehicles, 71 Cal. App. 3d 1005, 1017, 140 Cal. Rptr. 168, 176 (1977) ("[O]ne division or district [of the court of appeals] may decline to follow a prior decision of a different district or division.") *with* Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 324 (1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state . . . .") (*quoted in* Hale v. Superior Court, 15 Cal. 3d 221, 229 n.3, 539 P.2d 817, 822 n.3, 124 Cal. Rptr. 57, 62 n.3 (1975)) *and* Brewer v. Crown Life Ins. Co., 609 F. Supp. 1258, 1266 (E.D. Cal. 1985) ("Where decisions of equal authority are in conflict, 'the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.'").

6. *See* Schaefer, *Foreword: Stare Decisis and the "Law of the Circuit,"* 28 DE PAUL L. REV. 565, 566 (1979), wherein Justice Schaefer recognizes that judges feel responsible for the moral rightness of each of their decisions ("[t]hat responsibility is probably felt most deeply by our most conscientious judges"), but emphasizes that that feeling does not relieve judges from an obligation to avoid creating conflicts.

To its credit the New Mexico Court of Appeals has not succumbed to the temptation of rejecting horizontal stare decisis. It generally acts and speaks with deference to its own prior decisions, regardless of the personnel of the bench who happen to be sitting. Further, it seems to be taken for granted that lower courts in New Mexico are bound by decisions of the court of appeals. With remarkably few exceptions, the trial courts and the court of appeals honor the principles of stare decisis, deferring to prior decisions of the court of appeals, with the result that there is comparatively little conflict or inconsistency in the jurisprudence of New Mexico.[7]

This article first sets forth the structural and procedural position of the court of appeals within the state. It then examines judicial decisions involving the precedential value of court of appeals decisions. By attending to the issue while there are few conflicts among court of appeals decisions, New Mexico may avoid the problems plaguing other jurisdictions where conflicts abound.

II. JUDICIAL STRUCTURE

By a 1965 constitutional amendment, New Mexico added a court of appeals to the list of institutions in which the judicial power of the state is vested.[8] The court of appeals, as established by the constitution and the legislature, is unitary; it is not divided into districts, divisions, or branches. It consists of ten judges.[9] The headquarters of the court and the clerk's office are located at the seat of government, Santa Fe, although the court may convene at any location in New Mexico.[10] Three judges

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7. To be sure, in any living, growing judicial system the legal and philosophical concepts and moods of judges will change. Over time, uncertainty, vagueness, and conflicting opinions may result. *See* Trujillo v. Baldonado, 95 N.M. 321, 326, 621 P.2d 1133, 1138 (Ct. App. 1980) (Sutin, J., specially concurring).

8. N.M. CONST. art. VI, § 1:

> The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts; probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.

9. The 1965 constitutional amendment provided that the court of appeals shall consist of not less than three judges. N.M. CONST. art. VI, § 28 (1965, amended 1988). By an amendment to article VI, section 28, adopted in 1988, the court of appeals consists of not less than seven judges. Article VI, section 28 of the constitution, before and after the 1988 amendment, further provides that when necessary, the chief justice of the supreme court may designate any justice of the supreme court, or any district judge of the state, to act as a judge of the court of appeals. *Id.*

By statute the court of appeals now comprises ten judges. N.M. STAT. ANN. § 34-5-1 (Supp. 1991).

10. N.M. STAT. ANN. § 34-5-7 (Repl. Pamp. 1990). For example, in the 1985-86 fiscal year the court of appeals held eight days of oral arguments involving eleven cases in Santa Fe, Albuquerque, and Roswell. ADMINISTRATIVE OFFICE OF THE COURTS, 74TH FISCAL YEAR ANN. REP. OF THE NEW MEXICO JUD. BRANCH OF GOV'T 17 (1986). In the 1986-87 fiscal year the court held eight days of oral arguments involving thirteen cases in Santa Fe, Albuquerque, and Roswell. ADMINISTRATIVE OFFICE OF THE COURTS, 75TH FISCAL YEAR ANN. REP. OF THE NEW MEXICO JUD. BRANCH OF GOV'T 31 (1987).

constitute a quorum, and, by statute not more than three judges sit in any matter on appeal.[11]

The jurisdiction of the court of appeals is broad. The supreme court specifically reserves to itself direct appeals from the district courts in cases involving a penalty of death or life imprisonment and those "in which one or more counts of the complaint alleges a breach of contract or otherwise sounds in contract."[12] Most other appeals are taken to the court of appeals.[13]

Conflict resolution is specifically provided for in that the supreme court has jurisdiction to review by writ of certiorari to the court of appeals any matter in which the decision of the court of appeals conflicts with a decision of the supreme court or with another decision of the court of appeals.[14]

III. HORIZONTAL STARE DECISIS

Although this author found no specific language to the effect that a panel of the court of appeals must either follow or overrule a prior court of appeals decision on a particular point of law, the more important finding was that the court behaves consistently with that precept. In a recent memorandum opinion, *State v. Bothne*,[15] the court of appeals followed an indistinguishable prior court of appeals decision, chosing not to revisit it. In a specially concurring opinion Judge Pickard agreed that the prior case should be followed, even though she had "serious reservations" about the validity of the precedent. She said:

> I concur in the above case only because the issue was recently decided by a panel of this court and I believe that, notwithstanding my concerns about whether the issue was correctly decided in that case, it is more important for this court to follow its own recent precedents than to allow justice to be a gamble in which the rights of the parties are governed by the draw of a particular panel of judges.[16]

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11. N.M. CONST. art. VI, § 28; N.M. STAT. ANN. § 34-5-11 (Repl. Pamp. 1981); *see* discussion *infra* note 18. The court of appeals does sit in panels. ADMINISTRATIVE OFFICE OF THE COURTS, 75TH FISCAL YEAR ANN. REP. OF THE NEW MEXICO JUD. BRANCH OF GOV'T, p. i (1987).

12. N.M. R. APP. P. 12-102. The supreme court also reserves to itself appeals from the Public Service Commission, removals from the State Corporation Commission, appeals from the granting of writs of habeas corpus, and appeals in any other matter in which jurisdiction has been specifically reserved to the supreme court by the constitution or by supreme court order or rule. *Id.*

13. *Id.*; see also N.M. STAT. ANN. § 34-5-8 (Repl. Pamp. 1990) for a legislative statement of the jurisdiction of the court of appeals. The appellate jurisdiction of the supreme court is residual, however, extending to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals. State v. Weddle, 77 N.M. 420, 424, 423 P.2d 611, 614 (1967).

14. N.M. STAT. ANN. § 34-5-14(B)(1) to -14(B)(2) (Repl. Pamp. 1990).

15. No. 13,425 (N.M. Ct. App. Dec. 4, 1991), *cert. denied*, 113 N.M. 32, 882 P.2d 671 (1991).

16. *Id.*, slip op. at 1 (Pickard, J., specially concurring). Judge Hartz, concurring in the memorandum opinion, responded to Judge Pickard as follows:

> A decision of one panel to blindly follow a precedent from another panel does not eliminate the "gamble in which the rights of the parties are governed by the draw of a particular panel of judges." The parties in the second appeal are simply

That no case was found wherein the supreme court was asked to resolve a conflict between decisions of the court of appeals is strong support for the conclusion that the court of appeals does indeed apply horizontal stare decisis. The awareness of the court of the necessity for certainty in the law is demonstrated in *State v. Tijerina*.[17] There were separate opinions from each of the three judges on the court of appeals panel: one calling for an affirmance of the criminal conviction, the second calling for reversal and remand for a new trial, and the third calling for reversal and remand for discharge of the defendant. In a per curiam decision the cause was certified to the supreme court as of substantial public interest that should be determined by the supreme court. The court of appeals was concerned that the three proposed opinions, if filed as opinions of the court of appeals, "would create uncertainty in the law in that although there is a majority for reversal there is no guidance for the future procedure of the case."[18]

The court of appeals does not hesitate to overrule its own prior decisions when they are deemed erroneous.[19] This is in accord with the concept of horizontal stare decisis that a court will refrain from creating conflicting law within a given jurisdiction.

Only two circumstances have been identified wherein the court of appeals neither follows nor overrules its own prior decisions. Close ex-

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bound by the results of the gamble in the first appeal.

Id., slip op. at 1 (Hartz, J., concurring).

The argument, however, proves too much. By the nature of stare decisis itself parties in later cases are bound by the fortuitous gamble of which case got decided first, how good were the lawyers in the first case, how astute were the judges in the first case, etc.

17. 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd*, 86 N.M. 31, 519 P.2d 127 (1973), *cert. denied*, 417 U.S. 956 (1974).

18. *Id.* at 432, 504 P.2d at 642. The court of appeals believed that it had no power to call in additional judges because N.M. STAT. ANN. § 34-5-11 (Repl. Pamp. 1990) (formerly § 16-7-11 (Repl. Pamp. 1970)) provides that "not more than three judges shall sit in any matter on appeal." The supreme court, however, protective of its superior rule-making power, noted that *because* it had not seen fit to modify the operation of the statute by rule, it had no disagreement with the reasoning of the court of appeals on that matter. State v. Tijerina, 86 N.M. 31, 32, 516 P.2d 127, 128 (1973).

19. *See e.g.*, Varos v. Union Oil Co., 101 N.M. 713, 688 P.2d 31 (Ct. App. 1984), *overruling* Purcella v. Navajo Freight Lines, 95 N.M. 306, 621 P.2d 523 (Ct. App. 1980); Candelaria v. Hise Constr., 98 N.M. 763, 652 P.2d 1214 (Ct. App. 1981), *overruled in part*, Garcia v. Schneider, Inc., 105 N.M. 234, 731 P.2d 377 (Ct. App. 1986), *overruling* Newhoff v. Good Housekeeping, Inc., 94 N.M. 621, 614 P.2d 33 (Ct. App.), *cert. denied*, 94 N.M. 674, 615 P.2d 991 (1980); State v. Virgil, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974), *cert. denied*, 420 U.S. 955 (1975), *overruling* State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), *overruling* State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), on issue of inventory searches.

Indeed, the court of appeals does not hesitate to "overrule" decisions of the United States Court of Appeals for the Tenth Circuit on interpretation of New Mexico statutory law. *See* State v. Ruud, 90 N.M. 647, 649-50, 567 P.2d 496, 498-99 (Ct. App. 1977); *cf.* DeVargas v. State *ex rel.* New Mexico Dep't of Corrections, 97 N.M. 447, 451, 640 P.2d 1327, 1331 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982) (rejecting the reasoning of and refusing to follow a federal district court on the choice of the appropriate state statute of limitations for section 1983 civil rights actions). The choice of the applicable state statute of limitations was later held to be a question of federal law. Wilson v. Garcia, 471 U.S. 261 (1985). The New Mexico Court of Appeals thereafter followed the characterization rule of the United States Supreme Court. Walker v. Maruffi, 105 N.M. 763, 768, 737 P.2d 544, 549 (Ct. App.), *cert. denied*, 105 N.M. 707, 736 P.2d 985 (1987).

amination will reveal that in neither circumstance is the court deviating from the principles of stare decisis. One situation occurred where review of the prior decision was pending in the supreme court when the court of appeals decided the second case contrary to the prior. This situation could be viewed as creating a principled exception to the rule of horizontal stare decisis. The other circumstance is where the prior opinion is not considered precedent at all, in that it is a "one-judge" opinion. No departure from stare decisis is involved, stare decisis simply does not apply. In this latter circumstance, where the court does not follow the prior one-judge opinion, the court sometimes plainly labels the portion not followed as erroneous. This course of action should prevent any future reliance on the opinion just as effectively as an overruling of prior precedent would.

A. Prior Decision Pending Before Supreme Court

In the first situation, *State v. Scott*,[20] a criminal defendant argued before the court of appeals that one of the uniform jury instructions approved by the supreme court was erroneous. He cited a two-month old court of appeals decision, *State v. Castrillo*, wherein two judges had ruled favorably on such a contention.[21] That decision was pending before the supreme court on a writ of certiorari recently issued. The *Scott* court "declined to review the merits" of the jury instruction because it was "bound by the Supreme Court order approving the challenged instructions."[22] In so doing, the court of appeals was declining to follow a decision of the court of appeals, but was doing so in the service of vertical stare decisis. Normally, such action would be accompanied by overruling the prior court of appeals decision. Because *Castrillo* was pending before the supreme court, an overruling by the court of appeals might have been considered precipitant.[23] This consideration could justify

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20. 90 N.M. 256, 561 P.2d 1349 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977), *overruled on other grounds*, State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

21. *Scott*, 90 N.M. at 257, 561 P.2d at 1350.

22. *Id.*

23. The case that was argued as precedent in *Scott*, State v. Castrillo, No. 2499, was decided by the court of appeals on December 21, 1976. The opinion was not reported. *See* N.M. STAT. ANN. § 34-5-13 (Repl. Pamp. 1990) (providing for selection by the court of appeals of the opinions that shall be published). Writ of certiorari was issued on February 1, 1977. *Scott* was decided on March 1, 1977. *Scott*, 90 N.M. at 256, 561 P.2d at 1349. The supreme court decided State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), *overruled*, State v. Wardlow, 95 N.M. 585, 624 P.2d 527 (1981), on July 8, 1977.

On the issue of the effect of a grant of certiorari by the supreme court one might compare the experience of the State of Michigan. Michigan Court Rule 7.215(C)(2) provides: "The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." Before that rule was enacted, the Supreme Court of Michigan had said that an application for leave to appeal to it from a decision of the court of appeals effectively stays the court of appeals decision as a final adjudication and denies it precedential force until the supreme court denies leave to appeal. People v. Phillips, 416 Mich. 63, 74-75, 330 N.W.2d 366, 371 (1982). Under the *Phillips* rule, a federal court applying state law might refuse to follow a court of appeals decision for which an application for leave to appeal had been filed. *See* Spurgeon v. Ford Motor Co., 502 F. Supp. 729, 731 (W.D. Mich. 1980).

an exception to the stare decisis requirement that a court either follow or overrule its own prior decision.

On the other hand, a conflict can be left standing in this situation if the supreme court does not rule on the issue despite its having granted certiorari. Consider what did happen after the *Scott* decision. About four months later, the supreme court reversed *Castrillo* on a double jeopardy issue.[24] The power of the court of appeals to entertain an argument on the validity of uniform jury instructions approved by the supreme court was not addressed in the supreme court's *Castrillo* opinion.

Because the court of appeals *Castrillo* decision was unpublished, the chances for confusion resulting from two conflicting decisions, the earlier of which was not overruled or reversed on the point at issue, were minimal. The court of appeals' *Castrillo* decision was publicized, however, through the discussion in *Scott*. Whenever there are two published decisions with opposite results in this jurisdiction, the bench and bar would likely assume that the earlier decision was impliedly overruled by the later. Such an assumption would not be likely in jurisdictions that do not have a tradition of conflict avoidance by their intermediate appellate court or courts.[25]

On the merits, the *Scott* court was eminently correct under New Mexico law in declining review of a uniform jury instruction approved by the supreme court. Already on the books at the time of the *Scott* decision was *Alexander v. Delgado*,[26] wherein the supreme court had reminded the court of appeals of the impropriety of its purporting to overrule a number of supreme court cases and to abolish an approved jury instruction. Two years after *Scott* the supreme court held that the court of appeals correctly refused to review an objection to a uniform jury instruction, "since it is bound to follow the Supreme Court's order requiring the use of uniform jury instructions and has no authority to alter, modify or abolish any such instruction."[27] Likewise, the court of appeals has consistently maintained that it has no such power.[28]

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24. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977).

25. *See supra* notes 4-5 and accompanying text..

26. 84 N.M. 717, 507 P.2d 778 (1973).

27. Collins v. Michelbach, 92 N.M. 366, 367, 588 P.2d 1041, 1042 (1979) (citing *Scott*, 90 N.M. 256, 561 P.2d 1349); *accord* State v. Chavez, 101 N.M. 136, 139, 679 P.2d 804, 807 (1984) (citing *Scott*, 90 N.M. 256, 561 P.2d 1349).

28. *See, e.g.*, State v. Sparks, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985); Jones v. Minnesota Mining & Mfg. Co., 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983); State v. Doe, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983); State v. Lopez, 94 N.M. 349, 350, 610 P.2d 753, 754 (Ct. App.), *aff'd*, 94 N.M. 341, 610 P.2d 745 (1980); State v. Sheets, 94 N.M. 356, 610 P.2d 760 (Ct. App.), *cert. denied*, 94 N.M. 675, 615 P.2d 992 (1980); State v. Rhea, 93 N.M. 478, 480, 601 P.2d 448, 450 (Ct. App. 1979); State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), *overruled on other grounds*, State v. Reynolds, 98 N.M. 527, 529, 650 P.2d 811, 813 (1982).

An excellent tactic for dealing with a jury instruction that the court of appeals believes is erroneous but has no power to review is illustrated in State v. Lopez, 94 N.M. 349, 610 P.2d 753 (Ct. App.), *aff'd*, 94 N.M. 341, 610 P.2d 745 (1980). The court said: "Merely because the Supreme Court approved an instruction submitted by a committee appointed for the purpose, does not make it sacrosanct. It becomes infallible only after the Supreme Court opinionates on the validity of the instruction." *Id.* at 351, 610 P.2d at 755. The court then "found" that the jury instruction was

It is clear that the court of appeals decision in *State v. Castrillo* was deviate. The point of interest in this discussion is why *Scott*, which was inconsistent but correct, did not expressly overrule *Castrillo*. The answer submitted is that *Castrillo* was pending before the supreme court at the time the court of appeals decided *Scott*. If this decision not to follow or overrule is viewed as an exception to the rule of horizontal stare decisis, it has a rational basis.[29]

B. Prior Decision with One-Judge Opinion

The other circumstance in which the court of appeals will decide contrary to a prior opinion without overruling it is where the prior decision is devoid of precedential value on the point in issue.[30] This can occur where two of the three members of the prior panel concurred "in result only," or where one concurs and one dissents. Thus is created a one-judge opinion.

Supreme court language and authority provide the background for the one-judge opinion doctrine of the court of appeals. In the five-justice[31] supreme court, three justices must concur in an opinion in order for the high court to create precedent. In *Crocker v. Johnston*,[32] the supreme court was called upon to apply a certain view of contributory negligence espoused in a supreme court case decided two years earlier.[33] There were two dissents and one special concurrence in the earlier opinion. The holding of the case was gleaned from the portion of the opinion and the specially concurring opinion that were in agreement. The view that

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erroneous, but affirmed a conviction based on that instruction because "we have no authority to declare it so." *Id.* at 350, 610 P.2d at 754. On certiorari the supreme court held that the jury instruction was not erroneous. Lopez v. State, 94 N.M. 341, 610 P.2d 745 (1980).

29. As previously noted, *see supra* text accompanying note 15, the court in *State v. Bothne* choose to follow and not to revisit a prior case, State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App.), *cert. denied*, 113 N.M. 23, 821 P.2d 1060 (1991). At least one of the judges on the *Bothne* panel had serious reservations about the correctness of *Alvarez*, but the supreme court apparently still had the opportunity to determine whether it would grant certiorari in Alvarez. Unfortunately, the supreme court denied certiorari in *Alvarez* on the same day that *Bothne* was decided. In any case, that the prior decision was pending before the supreme court was an appropriate reason for the court of appeals not to overrule it.

30. Chief Justice Marshall gave guidelines for reading opinions for precedential value in Boyle v. Zacharie, 31 U.S. (6 Pet.) 348 (1832). Counsel had asked the Court for advice as to the holding of Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), whose five opinions cover 116 pages. The Chief Justice responded that three of the seven justices concurred in the opinion of Mr. Justice Johnson on the general question of the constitutionality of state insolvency laws. Four of the seven Justices therefore had agreed on Johnson's opinion. "Whatever principles are established in that opinion, are to be considered no longer open for controversy, but the settled law of the court." *Boyle*, 31 U.S. (6 Pet.) at 348.

31. N.M. CONST. art. VI, section 4 (1978, amended 1988), provided that the supreme court shall consist of three justices, but section 10 gives the legislature the power to increase the number to five. N.M. STAT. ANN. section 34-2-1 (Repl. Pamp. 1990) provides for five justices of the supreme court. The 1988 amendment to article six, section four, provides that the supreme court shall consist of at least five justices.

32. 43 N.M. 469, 95 P.2d 214 (1939).

33. Pettes v. Jones, 41 N.M. 167, 66 P.2d 967 (1937).

was not concurred in by the special concurrence "had not the sanction of a majority of the court."[34]

In the supreme court case of *Primus v. Clark*[35] (*Primus-2*), the issue was whether a prior supreme court decision, *Primus-1*,[36] was the law of the case on later appeal to the supreme court. *Primus-1* was heard by five supreme court justices: one concurred in the opinion, three concurred in the result. The supreme court in *Primus-2* observed that the opinion in *Primus-1* did not have the concurrence of a majority of the justices, even though the three remaining justices did concur in the result. "Hence, it is scarcely accurate to choose given passages from that opinion and characterize them as reflecting the views of the court."[37]

Since 1960 the supreme court has used panels of three justices to dispose of cases "other than those of serious public nature, or those involving serious constitutional questions."[38] In announcing the commencement of this practice, Justice Carmody stated that the opinion of such a three-judge court, "as written," must be concurred in by the two other justices on the panel "in order for it to go down; if one of the judges who is to participate disagrees or wishes to dissent, then the other two members of the Court are called in and it becomes a five-man case."[39] Without the concurrence of three of the five supreme court justices, a published opinion would have no precedential effect on the supreme court itself[40] or on the court of appeals.[41]

It was for the court of appeals to adopt a similar rule that stare decisis is not applicable to its decisions where fewer than two judges concur in an opinion. This it did in three cases in 1980. In *Casias v. Zia Co.*,[42] which presented a law of the case rather than a stare decisis problem, two of the three judges on the first court of appeals panel had concurred

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34. *Crocker*, 43 N.M. at 485, 95 P.2d at 224.

35. 58 N.M. 588, 273 P.2d 963 (1954).

36. Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944).

37. *Primus-2*, 58 N.M. at 595, 273 P.2d at 967. The *Primus-2* court did, however, give law-of-the-case treatment to the mandate of *Primus-1*, because the justices there were unanimous in remanding the cause for the trial court to determine a vital issue. The effect of the plaintiff's abandonment of that issue was the matter before the court in *Primus-2*.

38. Address by Justice Carmody before the New Mexico State Bar Association, published in Carmody, *The Supreme Court of New Mexico-Observations of a Justice*, 1 N.M. STATE BAR J. 3, 6 (1961) (quoted in Comment, *Courts—Number of Justices Concurring in Opinion—Some Dangers of New Mexico's "Three-Judge Court,"* 5 NAT. RESOURCES J. 403, 403 (1965)).

39. *Id.* (emphasis omitted).

40. *See* Comment, *supra* note 38, at 405-07. The author of the comment, John N. Urtes, states that the following quotation accurately describes the New Mexico situation:

> [T]he doctrine of stare decisis does not apply to a case which was heard by only three of the five judges of a court where, of these three, one judge delivered an opinion in which one of the other judges concurred but the third judge concurred in result only.

Id. at 404 n.7 (quoting 14 AM. JUR. *Courts* § 81 (1938)).

41. Hamel v. Winkworth, 102 N.M. 133, 692 P.2d 58 (Ct. App. 1984). The *Hamel* court said that "the fundamental law issue upon which plaintiffs rely from [Gerrard v. Harvey & Newmann Drilling Co., 59 N.M. 262, 282 P.2d 1105 (1955)] was a one-judge holding. As such, it is not the holding of our supreme court." *Hamel*, 102 N.M. at 134, 692 P.2d at 59.

42. 93 N.M. 78, 596 P.2d 521 (Ct. App.), *cert. denied*, 93 N.M. 8, 595 P.2d 1203 (1979).

"in result," writing separate opinions.[43] After remand, on a second appeal, the court refused to accord law of the case status to the previous opinion. The second *Casias* court[44] relied on a statute that provides: "Decisions of the court [of appeals] shall be in writing with the grounds stated, and the result shall be concurred in by at least two judges."[45] The opinion in the first *Casias* case, concerning escalating benefits under the workers' compensation act, "not being concurred in by another judge, her view concerning escalating benefits was not a *decision* of the Court of Appeals."[46]

Silva v. City of Albuquerque,[47] another 1980 case, shifted the labeling and perhaps the rationale somewhat, but likewise made it plain that the court of appeals is not bound by a one-judge opinion in a prior court of appeals case. When it was asked to apply a recent case involving directed verdict procedure,[48] the *Silva* court said:

> *Strickland*, an opinion with which one judge of this court concurred in the result and another judge dissented, constitutes a "judgment" according to Art. VI, § 28 of the New Mexico Constitution,[49] and a "decision" under [N.M. STAT. ANN. § 34-5-11 (1978).[50]] But it is not an opinion expressing the views of a majority of this court as now constituted; and, because one of the participating judges concurred only in the result reached, we may reasonably conclude that the rationale of the opinion does not even express the view of a majority of the panel which considered that case.[51]

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43. *Id.* at 83-84, 596 P.2d at 526-27.

44. Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980).

45. N.M. STAT. ANN. § 34-5-11 (Repl. Pamp. 1990).

46. *Casias*, 94 N.M. at 725, 616 P.2d at 438 (emphasis added).

47. 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980).

48. Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 612 P.2d 689 (Ct. App. 1980), *cert. denied*, 463 U.S. 1209 (1983), held that a directed verdict in favor of the defendant on the grounds that the plaintiff's decedent was guilty of contributory negligence as a matter of law was erroneous under the circumstances of that case. *Strickland* was decided by the court of appeals on January 17, 1980. According to *Silva*, 94 N.M. at 333, 610 P.2d at 220, certiorari was granted by the New Mexico Supreme Court on February 26, 1980, to review *Strickland*. Thus, apparently an alternative reason was available for the *Silva* court's refusal to follow the *Strickland* decision without overruling it. *Strickland* was pending before the supreme court when the court of appeals decided *Silva* on April 1, 1980, thus calling for the exception discussed *infra* in text accompanying notes 20-29.

49. "Three judges of the court of appeals shall constitute a quorum for the transaction of business, and a majority of those participating must concur in any *judgment* of the court." N.M. CONST. art. VI, § 28 (emphasis added).

50. "Decisions of the court [of appeals] shall be in writing with the grounds stated, and the result shall be concurred in by at least two judges." See *supra* notes 44-45 and accompanying text.

51. *Silva*, 94 N.M. at 333, 610 P.2d at 220. The court went on to distinguish *Strickland*, holding that: "Regardless of its precedential value, however, the *Strickland* rule cannot be applied to summary judgment procedures." *Id.*

Short shrift was given to *Strickland* in a later court of appeals decision. In Sewell v. Wilson, 101 N.M. 486, 684 P.2d 1151 (Ct. App. 1984), the court responded to plaintiff's reliance on *Strickland*: "Two judges agreed in that result, one judge dissented. Thus the result went only to reversal and not the discussion. *See* [N.M. STAT. ANN.] § 34-5-11 (Repl. Pamp. 1981); *Casias v. Zia Co.*, 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980). The discussion in *Strickland* serves no precedential value and is not considered." *Sewell*, 101 N.M. at 492, 684 P.2d at 1157.

Despite *Silva*'s effort to correct the terminology, other opinions have continued to state that a one-judge court case does not constitute a *decision* of the court of appeals.[52]

The final 1980 case illustrates how conflict and confusion can be avoided while rejecting a one-judge opinion as precedent. In *Trujillo v. Baldonado*,[53] the plaintiff relied on a quotation from a prior court of appeals case[54] in arguing that the sudden emergency jury instruction should not have been given by the trial court. The court ruled that the trial court was correct for two reasons: (1) language in the prior opinion was not joined in by other members of the panel, and the view of the opinion writer "was not an opinion of this Court;"[55] and (2) the language in issue "is not to be followed because it is an incorrect statement of the law."[56] Labelling non-precedent as "wrong," "incorrect," or "erroneous" puts it to rest as thoroughly as overruling precedent.

In the later half of the 1980s the court of appeals in several cases continued to recognize that a one-judge opinion of a court of appeals decision is not binding precedent. In some cases the court rejected the rationale or rule espoused in the one-judge opinion.[57] In some cases, where the court believed that the one-judge opinion correctly stated the law, it adopted it,[58] thereby creating precedent. Some cases where two

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52. Southern Union Exploration Co. v. Wynn Exploration Co., 95 N.M. 594, 598, 624 P.2d 536, 540 (Ct. App. 1981), *cert. denied*, 455 U.S. 920 (1982); Gonzales v. Stanke-Brown & Assocs., 98 N.M. 379, 385, 648 P.2d 1192, 1198 (Ct. App. 1982).

53. 95 N.M. 321, 621 P.2d 1133 (Ct. App. 1980).

54. Williams v. Cobb, 90 N.M. 638, 567 P.2d 487 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

55. *Trujillo*, 95 N.M. at 323, 621 P.2d at 1135.

56. *Id.*

57. Jaynes v. Wal-Mart Store No. 824, 107 N.M. 648, 763 P.2d 82 (Ct. App. 1988). A workers' compensation claimant relied on Chavez v. Lectrosonics, Inc., 93 N.M 495, 601 P.2d 728 (Ct. App. 1979), wherein one judge concurred "in result" with no written opinion and another judge concurred specially with a written opinion. After quoting from the opinion the *Jaynes* court pointed out that the "opinion was not an opinion of this court . . . . Nevertheless, claimant urges the court to adopt [the opinion-writer's] reasoning. We are not inclined to do so." *Jaynes*, 107 N.M. at 649, 763 P.2d at 83 (citations omitted). After analyzing the rationale, the court "rejected" it. *Id.* at 650, 763 P.2d at 84.

Requarth v. Brophy, 111 N.M. 51, 801 P.2d 121 (Ct. App. 1990), pointed out that plaintiff's reliance on the broad language of an opinion, Harmon v. Atlantic Richfield Co., 95 N.M. 501, 623 P.2d 1015 (Ct. App.), *cert. denied*, 95 N.M. 593, 624 P.2d 535 (1981), "not concurred in by a majority of the court," was "misplaced." *Requarth*, 111 N.M. at 55, 801 P.2d at 125.

58. In Chadwick v. Public Service Co., 105 N.M. 272, 731 P.2d 968 (Ct. App. 1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987), the question was whether an allergic rash, caused by airborne substances at employer's generating station, was an occupational disease, where the plaintiff-employee was wholly able to do the same work elsewhere. Marable v. Singer Business Machines, 92 N.M. 261, 586 P.2d 1090 (Ct. App. 1978), had defined occupational disease, under the New Mexico Occupational Disease Disablement Law, N.M. STAT. ANN. § 52-3-33 (Repl. Pamp. 1991), as one that results from the occupation, not the workplace. Two judges on the *Marable* panel concurred "in result only" but wrote no opinion. *Marable* was urged as precedent in *Chadwick*. The *Chadwick* court said: "The discussion and rationale underlying the opinion in *Marable* do not constitute binding precedent within the meaning of the state constitution, *see* N.M. CONST. art. VI, § 28 because two judges concurred only in the result." *Chadwick*, 105 N.M. at 274, 731 P.2d at 970. (section 28 of the judiciary article of the state constitution provided then, and after the 1988 amendment still provides, that: "Three judges of the court of appeals shall constitute a quorum for the transaction of business, and a majority of those participating must concur in any judgment

judges concurred in result only without written opinions have been cited as authority in later court of appeals and supreme court decisions with no mention of *Casias* or the one-judge opinion rule.[59] Some court of appeals cases have so cited a prior opinion having one concurrence in result and one dissent.[60] Where opinions with no full concurrence have

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of the court."). Nevertheless, the *Chadwick* court concluded that the *Marable* "opinion contains . . . a definition that we should adopt." *Chadwick*, 105 N.M. at 274, 731 P.2d 970. Consistently with *Marable*, the court held that the condition, resulting from the location of the workplace rather than the occupation itself, was not an occupational disease.

In Salter v. Jameson, 105 N.M. 711, 736 P.2d 989 (Ct. App.), *cert. denied*, 105 N.M. 720, 737 P.2d 79 (1987), the court quoted from Las Luminarias of New Mexico Council of the Blind v. Isergard, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978). The *Salter* court noted that one member of the panel in *Las Luminarias* concurred in the result only and a second specially concurred. Once again, *Casias* was cited. The *Salter* court believed, however, that the principles announced by the judge who wrote the *Las Luminarias* opinion correctly stated the law and "we adopt them here." *Salter*, 105 N.M. at 713, 736 P.2d at 991.

In State v. Barraza, 110 N.M. 45, 791 P.2d 799 (Ct. App.), *cert. denied*, 109 N.M. 704, 789 P.2d 1271 (1990), the court cited State v. Marquez, 87 N.M. 57, 529 P.2d 283 (Ct. App.), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974), concerning the plain error rule. In a footnote the court said: "Although *Marquez* might be considered a one-judge opinion of no precedential value, *see* Casias v. Zia Co., 94 N.M. 723, 616 P.2d 436 (Ct. App. 1980), the dissenting and specially concurring opinions do not appear to dispute the lead opinion's definition of 'plain error.' In any event, we agree with that definition." *Barraza*, 110 N.M. at 49 n.2, 791 P.2d at 803 n.2.

59. Harmon v. Atlantic Richfield Co., 95 N.M. 501, 623 P.2d 1015 (Ct. App.), *cert. denied*, 95 N.M. 593, 624 P.2d 535 (1981), had two concurrences "in result" without further opinions. The court of appeals cited *Harmon* as authority in Burgi v. Acid Engineering, Inc., 104 N.M. 557, 559, 724 P.2d 765, 767 (Ct. App.), *cert. denied*, 104 N.M. 460, 722 P.2d 1182 (1986); Begay v. Livingston, 99 N.M. 359, 362, 658 P.2d 434, 437 (Ct. App. 1981), *cert. denied*, 98 N.M. 712, 652 P.2d 734 (1982); and Jelso v. World Balloon Corp., 97 N.M. 164, 168, 637 P.2d 846, 850 (Ct. App. 1981). *But cf.* Requarth v. Brophy, 111 N.M. 51, 55, 801 P.2d 121, 125 (Ct. App. 1990), stating that reliance on broad language in *Harmon*, "not concurred in by a majority of the court," was "misplaced."

Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979), was a decision in which two judges concurred "in result only." It was cited as authority by the supreme court in Marchiondo v. Brown, 98 N.M. 394, 400, 649 P.2d 462, 468 (1982), and by the court of appeals in Zuniga v. Sears, Roebuck & Co., 100 N.M. 414, 417, 671 P.2d 662, 665 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 283, 291, 648 P.2d 321, 330 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (1982); and Kurtz v. Independent Publishing Co., 97 N.M. 243, 247, 638 P.2d 1088, 1092 (Ct. App. 1981) (Donnelly, J., specially concurring).

State v. James, 91 N.M. 690, 579 P.2d 1257 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978), likewise had two concurrences "in result" without further opinions. Its "holding" was limited in State v. Cervantes, 92 N.M. 643, 648, 593 P.2d 478, 483 (Ct. App.), *cert. denied*, 92 N.M. 621, 593 P.2d 62 (1979). *James* was cited as authority by the supreme court in State v. Snedeker, 99 N.M. 286, 290, 294, 657 P.2d 613, 617, 621 (1982) (cited in opinion and also in dissent), and in State v. Turkel, 93 N.M. 248, 251, 599 P.2d 1045, 1048 (1979), and by the court of appeals in State v. Wyrostek, 108 N.M. 140, 142, 767 P.2d 379, 381 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989); State v. Burdex, 100 N.M. 197, 200, 668 P.2d 313, 316 (Ct. App.), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983); State v. Donaldson, 100 N.M. 111, 115, 666 P.2d 1258, 1262 (Ct. App.), *cert. denied*, 100 N.M. 53, 665 P.2d 809 (1983); State v. Ramirez, 95 N.M. 202, 204, 619 P.2d 1246, 1248 (Ct. App. 1980); and State v. Jones, 96 N.M. 18, 20, 627 P.2d 413, 415 (Ct. App. 1980), *rev'd*, 96 N.M. 14, 627 P.2d 409 (1981).

60. In State Farm Mutual Automobile Insurance Co. v. Duran, 93 N.M. 489, 601 P.2d 722 (Ct. App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979), there was one concurrence in result, with no concurring opinion written, and one dissent. It has been cited as precedent in *In re* Doe, 100 N.M. 92, 95, 666 P.2d 771, 774 (1983); Benham v. All Seasons Child Care, Inc., 101 N.M. 636, 639, 686 P.2d 978, 981 (Ct. App.), *cert. denied*, 101 N.M. 686, 687 P.2d 743 (1984); Trembath v. Riggs, 100 N.M. 615, 620, 673 P.2d 1348, 1353 (Ct. App. 1983), *cert. denied*, 101 N.M. 11, 677 P.2d 624 (1984), *overruled by*, Dupper v. Liberty Mut. Ins. Co., 105 N.M. 503, 734 P.2d 743 (1987); Bryant v. Gilmer, 97 N.M. 358, 360, 639 P.2d 1212, 1214 (Ct. App. 1982); *In re* Estate of Padilla, 97 N.M. 508, 511, 641 P.2d 539, 542 (Ct. App. 1982).

been cited as authority without further comment, they may be being used as persuasive authority, much as secondary or out-of-state authority is. This would surely be the case when the supreme court cites any court of appeals decision as authority.[61]

The recognition that a one-judge opinion is not binding precedent implies the converse. If two court of appeals judges agree on an opinion, the decision creates precedent binding the court of appeals.[62] This acceptance of horizontal stare decisis is regularly exemplified by court of appeals decisions.

Within the folds of the one-judge opinion doctrine, however, lies a facile device for avoiding the creation of precedent if such a device were ever to be sought. If two judges on a panel agree with the result reached by the opinion writer but wish to avoid its having value as precedent, or even as the law of the case, they might accomplish this avoidance merely by adding "in result" to their concurrence. Judges who do not concur in a published opinion should carefully consider whether they have an obligation to write at least a short special concurrence specifying wherein they disagree and why. Not to do so postpones the time for settling the law, without the benefit of the thinking of those judges who disagree with the rationale of the opinion.

Moreover, when a second panel rejects a prior opinion because it lacked a concurrence, it is proper that the rejecting opinion label and explain the erroneous nature of the prior opinion. This course is preferable to a flat rejection under the one-judge opinion doctrine, which merely says "we do not accept the prior opinion because it is not binding precedent."

Stare decisis does not apply where the one-judge opinion doctrine operates. Furthermore, an exception to stare decisis exists where a prior decision of the court of appeals is pending before the supreme court. Other than in these two circumstances, the court of appeals either follows its own on-point prior decisions or overrules them, keeping the jurisdiction relatively conflict-free. The New Mexico Court of Appeals seems solidly, if not expressly,[63] committed to precepts of horizontal stare decisis.

IV. VERTICAL STARE DECISIS

As to vertical stare decisis, it seems to go without saying that lower courts are bound by decisions of the court of appeals absent supreme

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61. *In re* Doe, 100 N.M. 92, 95, 666 P.2d 771, 774 (1983); Marchiondo v. Brown, 98 N.M. 394, 400, 649 P.2d 462, 468 (1982); State v. Snedeker, 99 N.M. 286, 290, 294, 657 P.2d 613, 617, 621 (1982) (cited in opinion and also in dissent); and State v. Turkal, 93 N.M. 248, 251, 599 P.2d 1045, 1048 (1979), are examples of supreme court cases citing one-judge court of appeals opinions as authority.

62. It may seem ironic that the opinion of two judges of the ten-judge, or formerly seven-judge, court of appeals can bind that court, whereas the opinion of three justices of the five-justice supreme court is required to bind that court. The explanation lies in the difference in the constitutional language pertaining to the two courts. The court of appeals has a quorum of three, "and a majority *of those participating* must concur in any judgment of the court." N.M. CONST. art. VI, § 28 (emphasis added). The supreme court has a quorum of three, but "a majority *of the justices* . . . must concur in any judgment of the court." N.M. CONST. art. VI, § 5 (emphasis added).

63. There is an express commitment in an opinion of at least one of the judges of the court of appeals. *See supra* notes 15-16 and accompanying text.

court authority to the contrary. It has been emphatically held that the court of appeals is bound by decisions of the supreme court.[64] The New Mexico Supreme Court, in that context, has used language equally applicable to court of appeals decisions in relation to lower tribunals in the state.

> [I]t is not considered good form for a lower court to reverse a superior one. Such actions are unsettling in the law which we ought to strive to make certain, and result in a disorderly judicial process. . . . "The general rule is that a court lower in rank than the court which made the decision invoked as a precedent cannot deviate therefrom and decide contrary to that precedent, irrespective of whether it considers the rule laid down therein as correct or incorrect."[65]

V. CONCLUSION

As the State of New Mexico continues to grow, it is possible that the unified court of appeals will grow in the number of judges and in the complexity of the system. More than ten judges may be elected or appointed. The constitution now provides that there shall be "not less than seven judges."[66] During the time the constitution provided for "not less than three judges," a statute provided for five judges.[67] The number was increased in 1978 to seven judges,[68] and, effective in 1991, to ten judges.[69] Likewise, by statute under the 1988 constitutional amendment, the legislature could provide for more than ten judges. Moreover, the chief justice of the supreme court can designate other judges to sit on the court of appeals.[70]

Complexity in the system could result if the court of appeals became geographically separated, with panels or branches regularly sitting in different headquarters. A simple statutory change could accomplish this.[71] Even now, the offices of the judges of the court of appeals are no longer all in Santa Fe. During 1989 and 1990 half of the judges established offices in different cities, one in Las Cruces, four in Albuquerque. Five

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64. Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973); State v. Manzanares, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983), *cert. denied*, 471 U.S. 1057 (1985); *accord* State v. Scott, 90 N.M. 256, 257, 561 P.2d 1349, 1350 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977), *overruled on other grounds*, State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

65. *Alexander*, 84 N.M. at 718, 507 P.2d at 779 (quoting 20 AM. JUR. 2D *Courts* § 201 (1965)).

66. N.M. CONST. art. VI, § 28.

67. N.M. STAT. ANN. § 34-5-1 (1978).; *cf.* N.M. CONST. art. VI, § 28 (repealed 1978).

68. N.M. STAT. ANN. § 34-5-1 (Repl. Pamp. 1990).

69. *Id.* § 34-5-1 (Supp. 1991).

70. N.M. CONST. art. VI, § 28. In the 1987-88 fiscal year nine district court judges were, at the request of the court of appeals, designated by the supreme court to act as judges of the court of appeals in eleven cases. ADMINISTRATIVE OFFICE OF THE COURTS, 75TH FISCAL YEAR ANN. REP. OF THE NEW MEXICO JUD. BRANCH OF GOV'T 33 (1987).

71. N.M. STAT. ANN. § 34-5-7 (Repl. Pamp. 1990) now provides that the headquarters of the court of appeals and the clerk's office shall be located at the seat of government, and that the court may convene at any location in the state.

remain in Santa Fe.[72] Satellite offices have several advantages. A certain amount of day-to-day collegiality, however, is sacrificed.

As these or similar changes do occur, it will become more difficult for the court of appeals to resist creating conflicting decisions,[73] as other jurisdictions have done. Continued devotion to the doctrine of stare decisis will be required to ward off such conflicts.

72. Murphy, *The New Mexico Court of Appeals Experiments with Satellite Offices*, XVIV NEW MEXICO TRIAL LAW. 153 (1991).

73. "[T]his court is now made up of ten judges and the possibilities for inconsistent decisions or decision by luck of the draw are now greatly expanded. Even when the court was smaller, there were occasions when different panels of judges arrived at different legal conclusions, resulting in instability in the law." State v. Bothne, No. 13,425, slip op. at 2 (N.M. Ct. App. Dec. 4, 1991) (Pickard, J., specially concurring) (citations omitted).