Inside This Issue:

NM Supreme Court  6
NM Board of Legal Specialization
Legal Specialists Announced

Thirteenth Judicial District Court  7
Nominees

State Bar News  7
2004 Section Elections
Nominating Committees Announced

UNM Law Library Hours  10
Fall Semester 2004

Legal Education Calendar

Writs of Certiorari


2004-NMCA-094: State v. Roger Montaño


Special Inserts:

NEW MEXICO HISPANIC BAR NEWSLETTER
RES PUBLICA

CLE AT • A • GLANCE
Bar Bulletin Now Available Electronically

Request
If you would like to receive the Bar Bulletin as a PDF via e-mail, contact State Bar Systems Manager Chris Baum at cbaum@nmbar.org or link to Chris’s e-mail on our homepage at www.nmbar.org and subscribe to this new and convenient service.

Receive
Members who opt-in will receive both paper and electronic copies of the Bar Bulletin for one month. After the one-month period, you will receive only the electronic copy via e-mail, unless you tell us to cancel the electronic subscription.

System Recommendations
The State Bar recommends that you have cable or satellite connections so the publication will download in a matter of seconds. If you are using a dial-up connection, downloading should take between one and five minutes.

Deadline to Opt-In
Members requesting the electronic format must subscribe by Wednesday at 5 p.m., one week prior to the starting publication date.

www.nmbar.org
VIDEO REPLAY TUESDAYS ARE COMING!

This Fall, CLE will be introducing a new concept called Video Replay Tuesday to be held every Tuesday of the month from October 19 through December 28, 2004. Video Replay Tuesday will provide a wide variety of videotaped programs from 2004 seminars that may still be viewed by attendees for live CLE credits here at the State Bar Center. Lunch will also be provided for those in attendance at these programs.

For more information and detailed information on programs, see Bar Bulletin August 5 (Vol 43 No. 33).
The Changing Role of Paralegals: What Every Attorney Needs To Know
Friday, September 10, 9:00 a.m. – Noon • State Bar Center • 2.3 General and 1.0 Ethics CLE Credits
Presenter: Robert Kidd, Esq.
This seminar presented by Robert Kidd, Esq. will focus on recent changes to the rules governing paralegal services, the debate over the need for increased community access to the legal system, and the role of the paralegal in facilitating this access. The seminar is designed for attorneys, paralegals and the clients that they serve.

Legal Matters, Life Concerns: Planning for the Inevitable
Tuesday, September 14, 8:30 a.m. – Noon • State Bar Center • 3.8 General CLE Credits
Co-sponsor: Senior Lawyers Division of the State Bar of New Mexico
Presenter: John Edward, The Edward Group and Stephen J. Rhoades, Esq
According to the American Bar Association, more than 32% of lawyers in a given six month period advise their clients on financial services. Given that a major cause of business failure involves the disability of an owner or key employee, qualified sick pay plans are written agreements about which attorneys who advise their clients need to be informed. Of equal significance for those who advise clients in areas of real estate, insurance and probate are transfer on death deeds (TODDs).

Health Law Symposium: New Law and Issues Affecting Providers and Their Counsel
Friday, September 17, 8:15 a.m. – 4:45 p.m. • State Bar Center • 4.8 General, 1.2 Ethics and 2.1 Professionalism CLE Credits
Co-sponsor: Health Law Section of the State Bar of New Mexico
This seminar topics will include legal issues affecting the relationship between physicians and hospitals, the new Medicare prescription drug benefit from both the provider and consumer perspective, and a discussion of recent claims against health care providers that go beyond medical negligence theories.

FOUR EASY WAYS TO REGISTER
Phone: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.  (Please have credit card information ready)
Fax: (505) 797-6071, Open 24 hours
Internet: www.nmbar.org, click CLE, then Calendar of Events
Mail: CLE of the SBNM, PO Box 92860, Albuquerque, NM 87199

SEMANTIC REGISTRATION FORM
LIVE PROGRAMS
State Bar Center

TELESEMINARS
State Death Tax Credit Phase-Out: Impact on Estate Planning, State Inheritance Taxes and Gifts
inq Tuesday, September 1, • 11 a.m. MT • 1.2 General CLE Credits $67

FOUR EASY WAYS TO REGISTER
Phone: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.  (Please have credit card information ready)
Fax: (505) 797-6071, Open 24 hours
Internet: www.nmbar.org, click CLE, then Calendar of Events
Mail: CLE of the SBNM, PO Box 92860, Albuquerque, NM 87199
# Table of Contents

<table>
<thead>
<tr>
<th>Notices</th>
<th>6-10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Education Calendar</td>
<td>11-12</td>
</tr>
<tr>
<td>Writs of Certiorari</td>
<td>13-14</td>
</tr>
<tr>
<td>Opinions</td>
<td>15-45</td>
</tr>
<tr>
<td>Advertising</td>
<td>46-52</td>
</tr>
</tbody>
</table>

## Professionalism Tips

**WITH RESPECT TO PARTIES, LAWYERS, JURORS AND WITNESSES:**

*I WILL GIVE ALL CASES DELIBERATE, IMPARTIAL AND STUDIED ANALYSIS AND CONSIDERATION.*

## Meetings

### August

- **31**
  - Quality of Life Committee, noon, State Bar Center

### September

- **1**
  - Employment and Labor Law Section Board of Directors, noon, State Bar Center

- **8**
  - Membership Services Committee, 1:30 p.m., State Bar Center

- **21**
  - Lawyer Referral for the Elderly Workshop, 10 a.m., Cibola Senior Center, Grants

**State Bar Workshops**

### September

- **1**
  - Lawyer Referral for the Elderly Workshop, 10:30 a.m., Union County Senior Center, Clayton

- **2**
  - Lawyer Referral for the Elderly Workshop, 10:30 a.m., Raton Senior Center, Raton

- **8**
  - Immigration Workshop (in Spanish), 6 – 8 p.m., State Bar Center, Albuquerque

- **11**
  - Ethics Advisory Committee, 10 a.m., Dines & Gross, P.C.

- **21**
  - Lawyer Referral for the Elderly Workshop, 10 a.m., Cibola Senior Center, Grants

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-0227, or visit the SBNM Web site, www.nmbar.org.*
NOTICES

COURT NEWS

NM Supreme Court
New Mexico Board of Legal Specialization
Legal Specialists Announced

The New Mexico Supreme Court
Board of Legal Specialization is pleased
To announce the following attorneys as
Certified Specialists:

- Family Law
  Catherine Oliver

- Natural Resources – Water Law
  Arnold J. Olsen

New Specialty Areas

The Board of Legal Specialization is
pleased to announce the approval of
two new areas of law eligible for special-
ization certification by the Supreme
Court of New Mexico.

- Federal Indian Law
- Local Government Law

The board is grateful for the efforts of
Federal Indian Law Specialty Committee
Chair Catherine Baker Stetson and Local
Government Law Specialty Committee
Chair Randall Van Vleck in the creation
of these new specialty areas. Access
the State Bar Web site, www.nmbar.org
for a copy of the new specialty areas’
standards and applications.

To receive information on any of the
certified specialty areas, call the Legal
Specialization Administrative Office,
(505) 797-6015.

First Judicial District Court

Almost Free CLE Credit

The First Judicial District Court
invites any attorney who practices in
the district to earn 6.9 general hours of
almost free CLE credit by attending a
video presentation and panel discussion
of the seminar Mastering Settlement
Facilitation that was sponsored by the
Court’s ADR Program in February. The
seminar was presented by Mark Bennett
of Decision Resources, Inc., Professor
Scott Hughes of the UNM School of Law
and David Levin, the director Second
Judicial District Court Alternatives
Program. The program will be offered
again by video, with a panel discussion,
from 8:30 a.m. to 5 p.m., Sept. 15 at the
Eldorado Hotel in Santa Fe. The panel
will include Judge Carol Vigil, and local
attorneys Kim Udall and Mary Jo Sny-
der. The only charge to attendees will
be the MCLE filing fee of $1 per credit
hour. In return, the Court requests that
all attendees register to participate in
the Court’s ADR program by acting as
a volunteer settlement referee in one
or two cases per year. To register or for
more information call Celia Ludi, ADR
program director, 827-5072, no later
than Sept. 1.

Destruction of Exhibits
Criminal, Civil, Children’s Court, Domestic, Incom-
petency/Mental Health and Probate Cases, 1976 to 1987

Pursuant to the Supreme Court Ret-
tention and Disposition Schedule, the
First Judicial District Court will destroy
exhibits filed with the court, in criminal,
civil, children’s court, domestic, incom-
petency/mental health and probate
cases for years 1976 to 1987. Counsel
for parties are advised that exhibits can
be retrieved through Oct. 19. Attorneys
who may have cases with exhibits may
verify exhibit information with the Spec-
ial Services Division, 476-0196, from 8
a.m. to 4 p.m., Monday through Friday.
Plaintiff exhibits will be released to
counsel of record for the plaintiff(s) and
defendant exhibits will be released to
counsel of record for the defendant(s)
by Order of the Court. All exhibits will
be released in their entirety. Exhibits
not claimed by the allotted time will
be considered abandoned and will be
destroyed by Order of the Court.

Second Judicial District Court
Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Child-
ren’s Court will hold its monthly judges’
and managers’ meeting at noon, Sept. 7
in the jury room, John E. Brown Juvenile
Justice Center, 5100 Second St. NW,
Albuquerque. Children’s Court judges
and managers of court-related agencies
will meet to discuss ongoing concerns
and projects. For a copy of the meeting
agenda, call (505) 841-7644.

Destruction of Exhibits
Domestic Cases, 1980-1988

Pursuant to the Supreme Court
Ordered Judicial Retention and Dispo-
sition Schedules, the Second Judicial
District Court will destroy exhibits
filed with the court in domestic cases
for years 1980 to 1988 including, but
not limited to, cases that have been
consolidated. Cases on appeal are ex-
cluded. Counsel for parties are advised
that exhibits may be retrieved Aug. 27 to
Oct. 26. Attorneys who may have cases
with exhibits should verify information
with the Special Services Division,
841-7596/6711, from 8 a.m. to noon and
from 1 to 5 p.m. Monday through Friday.
Plaintiff exhibits will be released to
counsel of record for the plaintiff(s) and
defendant exhibits will be released to
counsel of record for the defendant(s)
by Order of the Court. All exhibits will
be released in their entirety. Exhibits
not claimed by the allotted time will
be considered abandoned and will be
destroyed by Order of the Court.

Destruction of Exhibits
Civil Cases, 1987-1991

Pursuant to the Supreme Court
Ordered Judicial Retention and Dispo-
sition Schedules, the Second Judicial
District Court will destroy exhibits
filed with the court in civil cases for years
1987 to 1991 including, but not limited
to, cases that have been consolidated.
Cases on appeal are excluded. Counsel
for parties are advised that exhibits may
be retrieved July 29 to Sept. 27. Atto-
neys who may have cases with exhibits
should verify information with the Spec-
ial Services Division, 841-7596/6711,
from 8 a.m. to noon and from 1 to 5
p.m. Monday through Friday. Plaintiff
exhibits will be released to counsel of record for the plaintiff(s) and
defendant exhibits will be released to

counsel of record for the defendant(s)
by Order of the Court. All exhibits will
be released in their entirety. Exhibits
not claimed by the allotted time will
be considered abandoned and will be
destroyed by Order of the Court.

Family Court Open Meetings

Second Judicial District Family
Court judges will hold open meetings
to discuss ongoing concerns and projects
at noon on the first business Monday of
each month in the Conference Center
Sixth Judicial District Court

Destruction of Exhibits, Domestic Cases, 1985-2000

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Sixth Judicial District Court, Luna County, will destroy exhibits filed with the court in years 1985-2000 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through Sept. 30. Attorneys who may have cases with exhibits may verify exhibit information with the Court Administrator, (505) 538-3250, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Thirteenth Judicial District Court

Nominees

The Thirteenth Judicial District Court Nominating Commission convened Aug. 19 in Bernalillo and completed its evaluation of the 14 applicants for the vacancy on the court as a result of the resignation of Judge Kenneth G. Brown, effective July 31. The commission recommends the following four applicants to Gov. Bill Richardson:

- John F. Davis
- George P. Eichwald
- Patrick C. McNertney
- Phillip G. Sapien

U.S. District Court for the District of New Mexico

Amendments to Local Civil Rules

Amendments to the Local Civil Rules of the United States District Court for the District of New Mexico are being considered. The amendments are to D.N.M.LR-Civ. 7.7, Length of Motion and Brief, and to Local Forms 1 and 2 regarding the release of health information. The amendments are posted on the Court’s web site at www.nmcourt.fed.us. Members of the bar may submit comments to Richard L. Puglisi, chairperson, Local Civil Rules Committee, 333 Lomas NW, Suite 730, Albuquerque, NM 87102, no later than Sept. 2.

State Bar News

2004 Section Elections

In accordance with the Section By-laws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election so that any section member may indicate to the committee his or her interest in serving on the Board of Directors. The nominating committee appointment deadline is Aug. 31. See the Aug. 5 Bar Bulletin (Vol. 43, No. 31) for a complete list of positions to be elected.

Nominating committee membership for the Appellate Practice, Business Law, Indian Law, and Real Property, Probate and Trust sections have been published in past issues. Nominating committee information for the Bankruptcy Law, Elder Law, Employment and Labor Law, Health Law and Solo and Small Firm Practitioners Sections follow:

Bankruptcy Law Section

Positions to be filled:

- Position 1 2003 - 2005 term
- Position 2 2005 - 2007 term
- Position 3 2005 - 2007 term
- Position 4 2005 - 2007 term

Nominating Committee:

- Daniel Behles, Chair
- PO Box 415
- Albuquerque, NM 87103-0415
- Tel: 242-3535
- Fax: 242-2836

- Nancy Cusack
- Hinkle Hensley Shanor & Martin LLP
- PO Box 2068
- Santa Fe, NM 87504-2068
- Tel: 982-4554
- Fax: 982-8623

- Robert Jacobvitz
- Jacobvitz Thuma & Walker PC
- 500 Marquette NW #650
- Albuquerque, NM 87102-5309
- Tel: 766-9272
- Fax: 766-9287

James Jacobsen
- NM Attorney General
- 111 Lomas NW #300
- Albuquerque, NM 87102-2368
- Tel: 222-9085
- Fax: 222-9086

Kelley Skenen
- Office of the Chapter 13 Trustee
- 1925 Silver SW #350
- Albuquerque, NM 87102-3111
- Tel: 243-1335
- Fax: 247-2709

Elder Law Section

Positions to be filled:

- Position 1 2005 – 2007 term
- Position 2 2005 – 2007 term
- Position 3 2005 – 2007 term

Nominating Committee:

- Kevin Hammar, Chair
- Aldridge Grammer Jeffrey & Hammar PA
- 1212 Pennsylvania NE
- Albuquerque, NM 87110-7410
- Tel: 266-8787
- Fax: 255-4029

George Graham, Jr.
- PO Box 1020
- Artesia, NM 88211-1020
- Tel: 746-9881
- Fax: 746-6455

Rae Ann Shanley
- Canepa & Vidal PA
- PO Box 8980
- Santa Fe, NM 87504-8980
- Tel: 982-9229
- Fax: 982-8141

Ann Sims
- PO Box 187
- Los Lunas, NM 87031-0187
- Tel: 865-1449
- Fax: 865-6809

Elaine Wright
- 1234 NM Hwy 24
- Weed, NM 88354-9714
- Tel: 687-3073
- Fax: 687-2039

Employment and Labor Law Section

Positions to be filled:

- Position 1 2004 – 2005 “Employee” term
- Position 2 2005 – 2006 “Employee” term
- Position 3 2005 – 2006 “Employer” term
Nominating Committee:
Eric Miller, Chair
152 Valley Dr.
Santa Fe, NM 87501-1164
Tel: 955-1017
Fax: 995-5827
Amy Archibeque
Klecan & Childress
6000 Uptown NE #305
Albuquerque, NM 87110-4148
Tel: 883-8555
Fax: 883-9374
Cindy Lovato-Farmer
Los Alamos National Laboratory
PO Box 1663 MS A187
Los Alamos, NM 87545-0001
Tel: 667-3750
Fax: 665-4424
Carlos Quinones
Narvaez Law Firm PA
PO Box 2769
Los Alamos, NM 87545-0001
Tel: 248-0500
Fax: 247-1344
Lorna Wiggins
Wiggins Williams & Wiggins PC
Albuquerque, NM 87103-1308
Tel: 764-8400
Fax: 764-8555

Positions to be filled:
Position 1 2005 - 2007 term
Position 2 2005 - 2007 term
Position 3 2005 - 2007 term

Nominating Committee:
Carolyn Banks, Chair
Reeves Chavez Albers Anderson & Montes PA
PO Box 2769
Las Cruces, NM 88004-2769
Tel: 524-9617
Fax: 524-1954
Charles Gurd
1208 San Pedro NE PMB#186
Albuquerque, NM 87110-6726
Tel: 856-1468
Barbara Quissell
Blue Cross and Blue Shield of NM
PO Box 27630
Albuquerque, NM 87125-7630
Tel: 816-4224
Fax: 816-5586
Rod Schumacher
Atwood Malone Turner & Sabin PA
PO Box 700
Roswell, NM 88202-0700

Solo and Small Firm Practitioners Section
Positions to be filled:
Position 1 2003 - 2005 term
Position 2 2004 - 2006 term
Position 3 2004 - 2006 term
Position 4 2004 - 2006 term
Position 5 2005 - 2007 term
Position 6 2005 - 2007 term
Position 7 2005 - 2007 term

Note that the terms of these positions have been modified from what was originally published in the Aug. 5 issue of the Bar Bulletin.

Health Law Section
Positions to be filled:
Position 1 2005 - 2007 term
Position 2 2005 - 2007 term
Position 3 2005 - 2007 term

Nominating Committee:
Caralyn Banks, Chair
Reeves Chavez Albers Anderson & Montes PA
PO Box 2769
Las Cruces, NM 88004-2769
Tel: 524-9617
Fax: 524-1954
Charles Gurd
1208 San Pedro NE PMB#186
Albuquerque, NM 87110-6726
Tel: 856-1468
Barbara Quissell
Blue Cross and Blue Shield of NM
PO Box 27630
Albuquerque, NM 87125-7630
Tel: 816-4224
Fax: 816-5586

Solo and Small Firm Practitioners Section
Positions to be filled:
Position 4 2004 - 2006 term
Position 5 2004 - 2006 term
Position 6 2004 - 2006 term
Position 7 2005 - 2007 term
Position 8 2005 - 2007 term

Note that the terms of these positions have been modified from what was originally published in the Aug. 5 issue of the Bar Bulletin.

Bankruptcy Law Section Picnic
The State Bar's Bankruptcy Law Section Board of Directors is planning a picnic for section members and court staff at 2 p.m., Sept. 19, at George Moore's house. Members are asked to R.S.V.P. for address and directions by Sept. 13 to Arin Berkson, (505) 242-1218, or aberson@swcp.com.

Children's Law Section Poster and Writing Contest
The Children's Law Section is again sponsoring a poster and writing contest in Albuquerque to celebrate children's artistic talent and to promote anti-violence awareness. The children will be asked to create a work that answers the question, “A Self-Portrait-Who do I want to be?” The contestants will be children who are currently either detained, involved in the Youth Reporting Center, participants in Drug Court, or are in anti-domestic violence programs.

The children's work will be displayed at the Juvenile Justice Center in Bernalillo County at a target date between mid-October and early November where donors will be recognized.

County funds are not available to cover the cost of supplies for children who are in detention and the Children's Law Section is seeking donations for the costs of art supplies, prizes and setup. Monetary donations may be made to the Children's Law Section of the State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 before Sept. 15. To learn more about the event, contact Linda Yen, (505) 841-5164.
Commercial Litigation Section
Annual Meeting
The State Bar’s Commercial Litigation Section will hold its annual meeting at 3 p.m., Oct. 21 at the State Bar Center. R.S.V.P. to Tony Horvat (505) 797-6033, 800-876-6227, ext. 6033, or via e-mail, thorvat@nmbar.org by Oct. 18.

Employment and Labor Law Section
Board Meetings Open to Section Members
The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Sept. 1. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-1017.

Las Cruces Office
The State Bar of New Mexico’s satellite office in the Third Judicial District Courthouse, (201 W. Picacho, Las Cruces, NM 88005) is open two days per month, on a Thursday and Friday. The satellite office will be open to all State Bar members and will offer general bar services and public service programs and information. Programming also will be available from the State Bar Center for Legal Education on most days at the Thomas Branigan Memorial Library, 200 E. Picacho. Members will receive a CLE schedule via mail and e-mail. The office schedule is as follows:

Las Cruces Office Schedule

<table>
<thead>
<tr>
<th>Month</th>
<th>Day</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>September</td>
<td>9</td>
<td>1 - 5 p.m.</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>9 a.m.-3 p.m.</td>
</tr>
<tr>
<td>October</td>
<td>14</td>
<td>1 - 5 p.m.</td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>9 a.m.-3 p.m.</td>
</tr>
<tr>
<td>November</td>
<td>11</td>
<td>Closed for Veterans’ Day</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>9 a.m.-3 p.m.</td>
</tr>
<tr>
<td>December</td>
<td>9</td>
<td>1 - 5 p.m.</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>9 a.m.-3 p.m.</td>
</tr>
</tbody>
</table>

Lawyers Assistance Committee
Monthly Meeting
The next Lawyers Assistance Committee meeting will be held at 5:30 p.m., Sept. 13 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group usually meets regularly on the first Monday of the month, but the meeting has been moved back one week due to Labor Day.

For more information, contact Bill Stratvert, (505) 242-6845.

Membership Survey Results
Available at www.nmbar.org
Recently, the State Bar of New Mexico commissioned a survey to assess member satisfaction. The study covered a wide variety of issues to measure members’ interest in the programs and services provided by the State Bar. The survey also assesses member support for key issues such as mandatory versus voluntary membership, support for the Bar convention, CLE courses, Internet usage and visitation to the Bar Web site, communications and satisfaction with the Bar staff.

This study was administered by mail. Surveys were sent to all 5,605 State Bar members with a cover letter explaining the purpose of the survey and asking members for their participation. Respondents were asked to return the surveys directly to Research & Polling in a business reply envelope. A total of 1,569 completed surveys were returned, which represents a 28% response rate. The Board of Bar Commissioners is grateful to the many members who took the time to complete the survey.

The survey results are available online at www.nmbar.org. They are presented in two reports: top line results which provide raw data on the survey questions and an executive summary which summarizes the results from each question in the survey and reports on any variances in attitude or perception, where significant, among demographic subgroups. The subgroups examined in this report include: years practicing law, length of Bar membership, age, gender, ethnicity, region, areas of practice, practice setting and judicial district.

Future issues of the Bar Bulletin will highlight specific results of the survey. Significant findings will also be presented as an insert in an upcoming Bulletin. Members with questions or comments may contact Joe Conte, executive director at jconte@nmbar.org or (505) 797-6099.

Paralegal Division Brownbag CLEs for Attorneys and Paralegals
The Paralegal Division of the State Bar is offering lunchtime brownbag CLEs at the State Bar Center the second Wednesday of every month. The next brownbag is on Sept. 8 and is titled “Conflict Theory - How to Deal with Difficult Attorneys and Clients.” The cost is $16 for attorneys and $15 for paralegals, legal assistants and office staff. Each meeting has been approved for 1.0 G CLE credits. Registration begins at the door at 11:30 a.m. each month, and the presentation will follow from noon to 1 p.m. For more information contact Debi Shoemaker-Scott at Rothstein Donatelli, (505) 243-1443

Public Law Section Board Meeting
The next Public Law Section board meeting will be held at noon, Sept. 9 at the New Mexico Municipal League in Santa Fe. Contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000, for more information.

Other Bars
Albuquerque Association of Legal Professionals
September Meeting
Albuquerque Association of Legal Professionals, the local chapter of the Association for Legal Professionals, will hold its monthly general meeting at 6 p.m., Sept. 21 at Shoney’s Restaurant at Menaul and Louisiana. All members are encouraged to attend and visitors are welcome. Thomas C. Montoya of Atkinson & Kelsey, P.A., will be the guest speaker at Boss Appreciation. He will talk about “The More Humorous Aspects of Being a Boss,” and the association will present its Boss of the Year award. NALS/AALP membership is open to anyone employed in any profession.

OTHER BARS
Albuquerque Association of Legal Professionals
September Meeting
Albuquerque Association of Legal Professionals, the local chapter of the Association for Legal Professionals, will hold its monthly general meeting at 6 p.m., Sept. 21 at Shoney’s Restaurant at Menaul and Louisiana. All members are encouraged to attend and visitors are welcome. Thomas C. Montoya of Atkinson & Kelsey, P.A., will be the guest speaker at Boss Appreciation. He will talk about “The More Humorous Aspects of Being a Boss,” and the association will present its Boss of the Year award. NALS/AALP membership is open to anyone employed in any profession.

BAR BULLETIN - AUGUST 26, 2004 - VOLUME 43, NO. 34
capacity in a law office or court office, or with any law-related employer, such as court reporters. No reservations are required for the meeting. If you need further information on NALS/AALP or the meeting location call Nancy Laird, (505) 837-9200 or (505) 249-3751.

NM Black Lawyers Association
Monthly Meeting
The New Mexico Black Lawyers Association will hold its monthly general meeting at 5:30 p.m., Sept. 3 at McGrath’s Restaurant at Tijeras Avenue NW, in downtown Albuquerque. All members are encouraged to attend and visitors are welcome. If you need further information on NMBLA or the meeting location, call Randilynn Lord, (505) 222-9000.

NM Women’s Bar Association
Mid-State Chapter Monthly Networking Breakfast
The Mid-State Chapter of the New Mexico Women’s Bar Association will hold a networking breakfast meeting from 7:30 to 9 a.m., Sept. 8 at Le Peep Restaurant, 2125 Louisiana Blvd. NE, Albuquerque. Visitors are welcome. Advance reservations are required. Breakfast prices range from $6 to $11 and payment is to be made to the restaurant. Anyone interested in attending the meeting should contact via e-mail Virginia R. Dugan, vrd@atkinsonkelsey.com, or Rendie Baker-Moore, martren@eb-b.com.

OTHER NEWS
NM Workers’ Compensation Administration Practice Tip – Mandatory Production
Note that a response and mandatory production items are due at least five days prior to the mediation conference. See 11 NMAC 4.4 Rule 10. Both parties have duties to produce documentation under this rule. Compliance with this rule is important in order to allow time to:

• Fully evaluate the strengths and weaknesses of your case;
• Permit the mediator to prepare for the mediation conference; and
• Determine a reasonable settlement value in your case.
Your cooperation with these rules is expected. Violations will be documented in Recommended Resolutions, effective Oct. 1.

UNM Law Library Hours
Fall Semester 2004
Aug. 23 to Dec. 17, 2004
Building and Circulation:
Monday - Thursday: 8 a.m. to 11 p.m.
Friday: 8 a.m. to 5 p.m.
Saturday: 9 a.m. to 5 p.m.
Sunday: noon to 11 p.m.
Reference:
Monday - Thursday: 9 a.m. to 9 p.m.
Friday: 9 a.m. to 5 p.m.
Saturday: 1 to 5 p.m.
Sunday: noon to 4 p.m.
Exceptions:
Labor Day Holiday:
Sept. 5: noon to 9 p.m.
Sept. 6: CLOSED
Thanksgiving Day Holiday:
Nov. 24: 8 a.m. to 5 p.m.
Nov. 25: CLOSED
Nov. 26: CLOSED

Address Corrections
The following addresses are corrections to either the 2004-2005 Bench and Bar Directory or the Clerk’s Certificates address changes published in the Aug. 12 issue of the Bar Bulletin.

John M. Burnet
320 Gold Ave S.W. Suite 1218
Albuquerque, NM 87102
Phone (505) 842-8335
Fax (505) 842-8338
Toll Free (877) 842-8335

Roger E. Michener
Michener Law Firm LLC
PO Box 400
Placitas, NM 87043-0400
(505) 771-1728
(505) 771-1020
Michener@redthistle.com

James A. Noel
Judicial Standards Commission
111 Lomas Blvd. NW, Ste. 220
Albuquerque, NM 87102
PO Box 27248
Albuquerque, NM 87125-7248
(505) 222-9353

Keith R. Romero
Attorney at Law
1025 1/2 Lomas Blvd. NW
Albuquerque, NM 87102-1952
(505) 243-3763
(505) 247-1377 fax
keithromero@qwest.net

The Hon. Violet C. Otero
PO Box 3202
Los Lunas, NM 87031-3202
(505) 865-0108
(505) 865-0107 fax
lludvco@nmcourts.com

The Hon. Rebecca Sitterly
500 Marquette NW #280
Albuquerque, NM 87102-5340
(505) 243-7388
(505) 843-9492 fax
behka@aol.com

Serapio Jaramillo
PO Box 3823
Albuquerque, NM 87190-3823
(505) 980-2640
(505) 842-8560
### AUGUST

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
<td>Workplace Harassment-Provide Your Clients with the Essentials for Eliminating Claims</td>
<td>Teleconference ТRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>31</td>
<td>Reporting Misconduct-Who, When and Where</td>
<td>Teleconference ТRT, Inc. 2.4 Е (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
</table>

### SEPTEMBER

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>NM Special Education Law</td>
<td>Albuquerque National Business Institute 6.7 G, 0.5 Е (800) 930-6182 <a href="http://www.nbi-nems.com">www.nbi-nems.com</a></td>
</tr>
<tr>
<td>7</td>
<td>When Counsel's Duties Conflict</td>
<td>Teleconference ТRT, Inc. 2.4 P (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>10</td>
<td>The Changing Role of Paralegals: What Every Attorney Needs to Know</td>
<td>State Bar Center - Albuquerque Center for Legal Education of SBNM 2.3 G, 1.0 Е (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
<tr>
<td>2</td>
<td>When Lawyers Cross the Line</td>
<td>Teleconference ТRT, Inc. 2.4 Е (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>8</td>
<td>2004 Professionalism: A Historical Perspective</td>
<td>VR - State Bar Center Albuquerque Center for Legal Education of SBNM 2.0 P (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
<tr>
<td>9</td>
<td>Expert Opinions - Adjudication or Legislation?</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>10</td>
<td>How to Make a Private Company Acquisition</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>13</td>
<td>Effective Time Management for Lawyers</td>
<td>Teleconference TRT, Inc. 2.4 Е (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>14</td>
<td>Legal Matters, Life Concerns: Planning for the Inevitable</td>
<td>State Bar Center - Albuquerque Senior Lawyers Division and Center for Legal Education of SBNM 3.8 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
<tr>
<td>7</td>
<td>ADR in the Practice of Law</td>
<td>Albuquerque Petroleum Club Albuquerque Bar Association and the NM Defense Lawyers Association 2.0 G (505) 243-2615</td>
</tr>
<tr>
<td>9</td>
<td>Fundamentals of Workers’ Compensation</td>
<td>Albuquerque Sterling Educational Serv. 8.0 G (715) 855-0495</td>
</tr>
<tr>
<td>9</td>
<td>Public Contracts and Procurement Regulations</td>
<td>Albuquerque Lorman Educational Services 6.6 G, 0.6 Е <a href="http://www.lorman.com">www.lorman.com</a></td>
</tr>
<tr>
<td>14</td>
<td>Should My Client Litigate or Mediate</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>14</td>
<td>Social Security Law</td>
<td>21</td>
</tr>
<tr>
<td>----</td>
<td>---------------------</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>Roswell</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Paralegal Division of NM</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1.0 G</td>
<td></td>
</tr>
<tr>
<td></td>
<td><a href="mailto:pd@nmbar.org">pd@nmbar.org</a></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>16</th>
<th>Estate Planning: Mastering the Basics</th>
<th>22</th>
<th>2004 Professionalism: An Historical Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Albuquerque</td>
<td></td>
<td>VR - State Bar Center</td>
</tr>
<tr>
<td></td>
<td>Sterling Educational Serv.</td>
<td></td>
<td>Albuquerque Center for Legal Education of SBNM</td>
</tr>
<tr>
<td></td>
<td>6.6 G, 1.2 E</td>
<td></td>
<td>2.0 P</td>
</tr>
<tr>
<td></td>
<td>(715) 855-0495</td>
<td></td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>16</th>
<th>Shareholder Activism - The Legal Context</th>
<th>22</th>
<th>Essential Issues of Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Albuquerque</td>
<td></td>
<td>Teleconference</td>
</tr>
<tr>
<td></td>
<td>Sterling Educational Serv.</td>
<td></td>
<td>TRT, Inc.</td>
</tr>
<tr>
<td></td>
<td>2.4 G</td>
<td></td>
<td>(800) 672-6253</td>
</tr>
<tr>
<td></td>
<td>(800) 672-6253</td>
<td></td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>17</th>
<th>Health Law Symposium: New Laws and Issues Affecting Providers and Their Counsel</th>
<th>22</th>
<th>Legal Writing and Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State Bar Center, Albuquerque Health Law Section and Center for Legal Education of SBNM</td>
<td></td>
<td>State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
</tr>
<tr>
<td></td>
<td>4.8 G, 1.2 E, 2.1 P</td>
<td></td>
<td>8.3 G</td>
</tr>
<tr>
<td></td>
<td>(505) 797-6020</td>
<td></td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>17</th>
<th>Workplace Harassment - Provide Your Clients with the Essentials for Eliminating Claims</th>
<th>23</th>
<th>Advanced Gross Receipts and Compensating Taxation in New Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Teleconference</td>
<td></td>
<td>Albuquerque</td>
</tr>
<tr>
<td></td>
<td>TRT, Inc.</td>
<td></td>
<td>Lorman Education Services</td>
</tr>
<tr>
<td></td>
<td>2.4 G</td>
<td></td>
<td>8.0 G</td>
</tr>
<tr>
<td></td>
<td>(800) 672-6253</td>
<td></td>
<td><a href="http://www.lorman.com">www.lorman.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>20</th>
<th>Advanced Oil and Gas Land Institute</th>
<th>23</th>
<th>ALN - Advanced Estate Planning Practice Update-Fall 2004</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Santa Fe Association Of Professional Landmen</td>
<td></td>
<td>State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
</tr>
<tr>
<td></td>
<td>7.2 G</td>
<td></td>
<td>3.6 G</td>
</tr>
<tr>
<td></td>
<td>(817) 847-7700</td>
<td></td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>20</th>
<th>Is the Attorney-Client Privilege on the Ropes?</th>
<th>23</th>
<th>Estate Planning</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Teleconference</td>
<td></td>
<td>Roswell</td>
</tr>
<tr>
<td></td>
<td>TRT, Inc.</td>
<td></td>
<td>Paralegal Division of NM</td>
</tr>
<tr>
<td></td>
<td>2.4 G</td>
<td></td>
<td>1.0 G</td>
</tr>
<tr>
<td></td>
<td>(800) 672-6253</td>
<td></td>
<td><a href="mailto:pd@nmbar.org">pd@nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>23</th>
<th>Experts: A Primer on Scientific Evidence Under Federal Standards</th>
<th>23</th>
<th>Legal Writing and Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Teleconference</td>
<td></td>
<td>State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
</tr>
<tr>
<td></td>
<td>TRT, Inc.</td>
<td></td>
<td>8.3 G</td>
</tr>
<tr>
<td></td>
<td>(800) 672-6253</td>
<td></td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>23</th>
<th>Real Estate Purchases &amp; Sale Transactions</th>
<th>24</th>
<th>Annual Probate Institute</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Albuquerque</td>
<td></td>
<td>State Bar Center, Albuquerque Real Property, Probate and Trust Law Section and Center for Legal Education of SBNM</td>
</tr>
<tr>
<td></td>
<td>Sterling Educational Serv.</td>
<td></td>
<td>8.0 G</td>
</tr>
<tr>
<td></td>
<td>(715) 855-0495</td>
<td></td>
<td>(505) 797-6020</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
<td></td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>27</th>
<th>Parental Alienation Syndrome-The Lawyer’s Role</th>
<th>28</th>
<th>Just WHO is the Client?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Teleconference</td>
<td></td>
<td>Teleconference</td>
</tr>
<tr>
<td></td>
<td>TRT, Inc.</td>
<td></td>
<td>TRT, Inc.</td>
</tr>
<tr>
<td></td>
<td>2.4 E</td>
<td></td>
<td>2.4 E</td>
</tr>
<tr>
<td></td>
<td>(800) 672-6253</td>
<td></td>
<td>(800) 672-6253</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
<td></td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
</table>

**G = General  E = Ethics  P = Professionalism  VR = Video Replay**

Programs have various sponsors; contact appropriate sponsor for more information.
**WRITS OF CERTIORARI**

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**EFFECTIVE AUGUST 24, 2004**

### Petitions for Writ of Certiorari Filed and Pending:

<table>
<thead>
<tr>
<th>Case No.</th>
<th>Party</th>
<th>Citation</th>
<th>Date Petition Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 28,500</td>
<td>Manning v. New Mexico Energy &amp; Minerals</td>
<td>(COA 23,396)</td>
<td>1/20/04</td>
</tr>
<tr>
<td>NO. 28,596</td>
<td>State v. Jackson</td>
<td>(COA 22,043)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,598</td>
<td>State v. Brown</td>
<td>(COA 23,505)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,628</td>
<td>Herrington v. State Engineer</td>
<td>(COA 23,871)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,660</td>
<td>State v. Johnson</td>
<td>(COA 23,463)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,630</td>
<td>Archuleta v. Santa Fe Police Department</td>
<td>(COA 24,445)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,631</td>
<td>State v. Garcia</td>
<td>(COA 23,353)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,640</td>
<td>State v. Waterhouse</td>
<td>(COA 24,392)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,634</td>
<td>State v. Dang</td>
<td>(COA 22,982)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,661</td>
<td>Calderon v. State</td>
<td>(COA 21,501)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,645</td>
<td>State v. Gonzales</td>
<td>(COA 22,580/22,612)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,648</td>
<td>Fernandez v. Espanola School</td>
<td>(COA 23,032)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,731</td>
<td>Valdez v. LeMaster</td>
<td>(COA 24,232)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,759</td>
<td>State v. Carr</td>
<td>(COA 23,707)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,774</td>
<td>State v. Perea</td>
<td>(COA 23,557)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,816</td>
<td>Romero v. City of Santa Fe</td>
<td>(COA 24,775)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,821</td>
<td>State v. Maese</td>
<td>(COA 23,793)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,812</td>
<td>Battishill v. Farmers Insurance</td>
<td>(COA 24,196)</td>
<td>9/16/04</td>
</tr>
</tbody>
</table>

### Certiorari Granted but Not Submitted:

(Submission = date of oral argument or briefs-only submission)  
ALL CASES HELD IN ABYANCE PENDING DISPOSITION IN **NO. 28,477, STATE V. SMITH**

<table>
<thead>
<tr>
<th>Case No.</th>
<th>Party</th>
<th>Citation</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 28,586</td>
<td>State v. Yazzie</td>
<td>(COA 24,519)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,597</td>
<td>State v. Kee</td>
<td>(COA 24,561)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,610</td>
<td>State v. Roy</td>
<td>(COA 24,403)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,611</td>
<td>State v. Frank</td>
<td>(COA 24,402)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,612</td>
<td>State v. Natani</td>
<td>(COA 24,558)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,613</td>
<td>State v. Williamson</td>
<td>(COA 24,411)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,614</td>
<td>State v. Yazzie</td>
<td>(COA 24,388)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,615</td>
<td>State v. Nakai</td>
<td>(COA 24,654)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,616</td>
<td>State v. Attson</td>
<td>(COA 24,505)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,617</td>
<td>State v. Dickie</td>
<td>(COA 24,475)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,618</td>
<td>State v. Etsitty</td>
<td>(COA 24,414)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,619</td>
<td>State v. Jim</td>
<td>(COA 24,404)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,620</td>
<td>State v. Luther</td>
<td>(COA 24,516)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,621</td>
<td>State v. Henderson</td>
<td>(COA 24,506)</td>
<td>9/16/04</td>
</tr>
<tr>
<td>NO. 28,736</td>
<td>State v. Hunter</td>
<td>(COA 24,816)</td>
<td>7/6/04</td>
</tr>
<tr>
<td>NO. 28,744</td>
<td>State v. Yazzie</td>
<td>(COA 24,815)</td>
<td>7/12/04</td>
</tr>
</tbody>
</table>
WRIT OF CERTIORARI
AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE AUGUST 24, 2004

CERTIORARI GRANTED BUT NOT SUBMITTED:
(Submission = date of oral argument or briefs-only submission)
ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN
NO. 28,670, STATE V. SHAY

Date Writ Issued
NO. 28,674 State v. Avilucea (COA 23,964) 6/10/04
NO. 28,705 State v. Monger (COA 23,944/23,993) 6/22/04
NO. 28,704 State v. Lopez (COA 23,531) 6/22/04
NO. 28,703 State v. Armenta (COA 24,311) 6/22/04
NO. 28,653 State v. Moreno (COA 23,893) 7/19/04
NO. 28,652 State v. Abeyta (COA 23,804) 7/19/04
NO. 28,751 State v. Perez (COA 24,474) 7/19/04
NO. 28,750 State v. Horcasitas (COA 24,274) 7/19/04
NO. 28,748 State v. Tave (COA 24,114) 7/19/04
NO. 28,746 State v. Hensley (COA 23,966) 7/19/04
NO. 28,745 State v. Torres (COA 24,683) 7/19/04
NO. 28,805 State v. Garcia (COA 24,369) 8/10/04
NO. 28,778 State v. Washington (COA 24,004) 8/10/04

CERTIORARI GRANTED BUT NOT SUBMITTED:
(Submission = date of oral argument or briefs-only submission)
ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN
NO. 28,663, STATE V. DEAN

Date Writ Issued
NO. 28,665 State v. Self (COA 23,588) 7/19/04
NO. 28,664 State v. Lopez (COA 23,531) 7/19/04

CERTIORARI GRANTED AND SUBMITTED:
(Submission = date of oral argument or briefs-only submission)

Submission Date
NO. 27,950 Breen v. Carlsbad Schools (COA 22,858/22,859) 9/30/03
NO. 28,038 Paule v. Santa Fe County Commissioners (COA 22,988) 10/27/03
NO. 27,945 State v. Munoz (COA 23,094) 11/18/03
NO. 27,817 Tomlinson v. George (COA 22,017) 12/15/03
NO. 28,068 State v. Gallegos (COA 22,888) 2/3/04
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 8/10/04
NO. 28,225 Huntley v. Cibola General Hospital (COA 23,916) 2/29/04
NO. 28,272 Lester v. City of Hobbs (COA 22,250) 3/16/04
NO. 28,241 State v. Duran (COA 22,611) 3/31/04
NO. 28,317 Turner v. Bassett (COA 22,877) 4/12/04
NO. 28,237 State v. McDonald (COA 22,689) 4/13/04
NO. 28,261 State v. Dedman (COA 23,476) 4/13/04
NO. 28,286 State v. Graham (COA 22,913) 5/17/04
NO. 28,270 State v. Paredes (COA 24,082) 6/23/04
NO. 28,355 State v. Villa (COA 23,229) 6/30/04
NO. 28,374 Smith v. Bernalillo County Commissioners (COA 22,766) 8/9/04
NO. 28,380 Angel Fire v. Wheeler (COA 24,295) 8/9/04
NO. 28,477 State v. Smith (COA 24,253/24,254/24,258) 8/10/04

PETITIONS FOR WRIT OF CERTIORARI DENIED:
Date of Order denying
NO. 28,829 Salez v. Sneeker (12-501) 8/11/04
NO. 28,825 State v. Jones (COA 24,665) 8/17/04
NO. 28,822 State v. Powells (COA 23,834) 8/17/04
NO. 28,827 State v. Lujan (COA 24,818) 8/17/04
NO. 28,769 State v. Reuben (COA 23,598) 8/18/04
NO. 28,843 Dickinson v. Romero (12-501) 8/18/04
NO. 28,846 Hall v. Ulibarri (12-501) 8/18/04
NO. 28,771 State v. Hensley (COA 23,966) 8/20/05
NO. 28,786 Las Cruces v. United Steel (COA 24,893) 8/20/04
NO. 28,808 Carrillo v. Duggan (COA 24,205) 8/20/04

WRIT OF CERTIORARI QUASHED:
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 8/17/04
OPINION

PAMELA B. MINZNER, JUSTICE

{1} Petitioners are defendants in several pending criminal cases who are seeking to have their polygraph examination results admitted into evidence under Rule 11-707(C) NMRA 2004, which states that “the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness,” provided certain conditions are met. In each case the State has opposed the admission of such polygraph evidence on the ground that it fails to satisfy the standard for the admissibility of expert testimony set forth in Rule 11-702 NMRA 2004. On February 10, 2004, Petitioners filed a Petition for Writ of Superintending Control asking this Court to order the district courts to comply with Rule 11-707, rather than conducting a separate Rule 11-702 hearing in each case.

{2} On April 14, 2003, we granted Petitioners’ request for a writ pursuant to Rule 12-504 NMRA 2004 and Article VI, Section 3 of the New Mexico Constitution. In our order, we remanded the cases to the Honorable Richard J. Knowles of the Second Judicial District “for the limited purpose of conducting an evidentiary hearing as to the scientific reliability of polygraph evidence under State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993), State v. Anderson, 118 N.M. 284, 881 P.2d 29 (1994), and State v. Torres, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20.” The district court held a seven-day evidentiary hearing in order to determine whether polygraph evidence should be admissible.

{3} On August 25, 2003, the district court filed its Findings of Fact and Conclusions of Law. In addition to its legal conclusions, the district court’s order contained a thorough description of the polygraph examination and a comprehensive review of how other jurisdictions have treated polygraph evidence. The district court’s Findings of Fact and Conclusions of Law are attached as an appendix. First, the district court concluded polygraph results are not sufficiently reliable to satisfy Rule 11-702. Second, the district court concluded that “the limited probative value of polygraph test results is substantially outweighed by the danger of confusion of the issues, undue delay,
and waste of time” rendering such results inadmissible under Rule 11-403 NMRA 2004. Third, the district court cited authority for the proposition that polygraph testimony is inadmissible under Rule 11-608(B) NMRA 2004, which generally provides that “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility . . . may not be proved by extrinsic evidence.”

{4} We now must consider whether to repeal our Rule 11-707 and hold that polygraph results are per se excluded. For the reasons that follow in this opinion, we do not repeal Rule 11-707. Instead, we hold that polygraph examination results are sufficiently reliable to be admitted under Rule 11-702, provided the expert is qualified and the examination was conducted in accordance with Rule 11-707. Therefore, we exercise our power of superintending control to order the district courts in the pending cases to comply with Rule 11-707 in determining whether to admit polygraph examination results. The proponents of such polygraph evidence are not required to independently establish the reliability of the examiner’s testimony in a Daubert/Alberico hearing.

{5} We do not address the admissibility of the polygraph results in the pending cases under Rule 11-403 because it would be inappropriate for this Court to categorically exclude any type of evidence under that rule. See Ohlson v. Kent Nowlin Const. Co., 99 N.M. 539, 542, 660 P.2d 1021, 1024 (Ct. App. 1983) (“There is, and can be, no fixed rule delineating relevant and irrelevant evidence. The problem must be decided on a case-by-case basis.”). Furthermore, Rule 11-707(C) specifically provides that the admissibility of polygraph results is subject to “the discretion of the trial judge.” We believe that the district court in its discretion may properly exclude polygraph results when the probative value of such results “is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” Rule 11-403. However, it would be an abuse of discretion for the district court to apply Rule 11-403 to exclude polygraph results that were conducted in accordance with Rule 11-707 if the district court’s reasons for excluding the evidence are grounded in a general disbelief in the reliability of polygraph results or a general hostility toward polygraph evidence.

{6} We also decline to address the applicability of Rule 11-608(B) because the issue was not raised in the Petition for a Writ of Superintending Control and was not extensively briefed by the parties. However, we note that Rule 11-608(B) deals with character evidence. Rule 11-707(C) states that “the opinion of a polygraph examiner may . . . be admitted as evidence as to the truthfulness of any person called as a witness.” (Emphasis added.) If, as Rule 11-707(C) seems to allow, polygraph results are offered as character evidence, then Rule 11-707 may very well act as an exception to Rule 11-608(B). Furthermore, polygraph results are not necessarily character evidence; the evidence may be offered as evidence of the examinee’s lack of consciousness of guilt, which would be admissible under Rule 11-404(B) NMRA 2004. See State v. Martinez, 1999-NMSC-018, ¶ 29, 127 N.M. 207, 979 P.2d 718 (“[C]onsciousness of guilt, like intent or motive, constitutes a permissible use of other acts or wrongs under Rule 11-404(B).”). At any rate, we need not decide the issue in this opinion.

I. THE POLYGRAPH EXAMINATION

{7} The National Academy of Sciences (“NAS”), a private, non-profit society of distinguished scientists and engineers that advises the federal government on scientific and technical matters, recently conducted a review of the validity of polygraph testing. The published report of the NAS provides a detailed description of the various polygraph testing techniques, sets forth the basic scientific theories underlying the polygraph examination, and objectively reviews the scientific literature on the reliability of polygraph examinations. See National Research Council of the National Academies, The Polygraph and Lie Detection (2003), available at http://www.nap.edu/openbook/0309084369/html [hereinafter “NAS Report”]. The NAS Report contributed greatly to our understanding of the underlying science of the polygraph examination and was immensely helpful to our resolution of the issues in this case. In this section, we rely heavily on the NAS Report in describing the modern polygraph examination.

{8} The polygraph instrument records “physiological responses that are believed to be stronger during acts of deception than at other times.” Id. at 13. These physiological responses include cardiovascular activity, electrodermal activity (electrical conductance at the skin surface), and respiratory activity. See id. at 286-89 (describing in detail the physiological processes measured by the polygraph). In general, a polygraph examination consists of “a series of yes/no questions to which the examinee responds while connected to sensors that transmit data on these physiological phenomena by wire to the instrument, which uses analog or digital technology to record the data.” Id. at 13. “[T]he record of physiological responses during the polygraph test is known as the polygraph chart.” Id.

The polygraph examination is based on the theory that “a deceptive response to a question causes a reaction—such as fear of detection or psychological arousal—that changes respiration rate, heart rate, blood pressure, or skin conductance relative to what they were before the question was asked.” Id. {9} Three different polygraph questioning techniques have been developed. First, in the “relevant/irrelevant” technique, the examinee is asked two different types of questions—“the relevant questions are typically very specific and concern an event under investigation”; whereas, “[t]he irrelevant questions may be completely unrelated to the event and may offer little temptation to deceive.” Id. at 14. A deceptive person is expected to have a stronger physiological response to the relevant questions than to the irrelevant questions. Id. Second, in the “control question technique” or “comparison question technique,” instead of coupling the relevant questions with irrelevant questions, the irrelevant questions are replaced with control questions “intended to generate physiological reactions even in nondeceptive examinees.” Id. An example of a control question might be, “Have you ever lied to a friend?” Truthful examinees are expected to experience stronger physiological responses to the control questions; whereas, deceptive examinees are expected to experience stronger physiological responses to the relevant questions. See id. at 14-15. Third, in the “guilty knowledge polygraph test,” the examinee is asked a number of “questions about details of an event under investigation that are known only to investigators and those with direct knowledge of the event.” Id. at 15. Examinees are expected to experience the greatest physiological responses to those questions that accurately describe the event. Id.

{10} In this opinion, we address only polygraph examinations conducted using the control question technique because it appears that in each pending case below that technique was used. The control question technique is the most widely
used questioning technique for evidentiary polygraph examinations. The relevant/irrelevant technique cannot be used because those examinations are not numerically scored. See Rule 11-707(C)(2) (providing that the opinion of a polygraph examiner can only be admitted if “the polygraph examination was quantitatively scored”).

The guilty knowledge test is generally used in investigations and was not used in any of the cases pending below.

II. STANDARD OF REVIEW

{11} As a preliminary matter, we must determine the level of deference which we will afford the district court’s findings of fact and conclusions of law. In general, “[t]he rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion.” *Alberico*, 116 N.M. at 169, 861 P.2d at 205. However, the procedural posture in which this case arose demands a heightened standard of review. Rather than issuing a ruling regarding the admissibility of expert testimony during the course of an individual trial, Judge Knowles was ordered by this Court to conduct a special evidentiary hearing. He properly viewed his role as that of a “special master.” Rule 1-053 NMRA 2004 allows for the appointment of a special master by any court in which an action is pending. As a special master, Judge Knowles had the power to require the production of certain evidence, rule upon the admissibility of evidence, and allow for the examination of witnesses. See Rule 1-053(C). We ordered Judge Knowles to file findings of fact and conclusions of law in this Court.

{12} Under Rule 1-053, the standard of review for findings of fact differs from those for conclusions of law. *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 16, 122 N.M. 103, 920 P.2d 1057. “[T]he court shall accept the master’s findings of fact unless [they are] clearly erroneous.” Rule 1-053(E)(2). A master’s conclusions of law are reviewed de novo. *Lozano*, 1996-NMCA-074, ¶ 18; see also Rule 1-053(E)(2) (“The court after hearing may adopt the [master’s] report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.”).

Therefore, it is clear that in reviewing Judge Knowles’ conclusions of law, “we exercise our own independent judgment without assigning special weight to [his] decision.” *Martinez v. Friede*, 2004-NMSC-006, ¶ 10, 135 N.M. 171, 86 P.3d 596.

{13} It is less clear the standard of review that we should apply to Judge Knowles’ findings of fact. While Rule 1-053(E)(2) appears to require us to adopt an extremely deferential standard of review, Petitioners argue that the findings of fact should also be reviewed de novo because the findings are legislative facts, not adjudicative facts. “Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take.” *Trujillo v. City of Albuquerque*, 110 N.M. 621, 635, 798 P.2d 571, 585 (1990) (Montgomery, J., concurring in part, dissenting in part) (quoting Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955)). Unlike adjudicative facts, legislative facts do not concern individual parties, such as who did what, when, where, and how. *Id.* Since Judge Knowles’ findings of fact were formulated to help this Court develop its policy regarding the admissibility of polygraph examination results, we conclude his findings are legislative in nature. As such, we will also review Judge Knowles’ findings of fact de novo.

III. RULE 11-702

{14} The State forcefully argues that our Rule 11-702, which governs the admissibility of polygraph examination results, should be repealed in light of our analysis for the admissibility of expert testimony set forth in *Alberico* and its progeny. Neither this Court nor the Court of Appeals have applied the *Daubert/Alberico* analysis for the admissibility of expert testimony to polygraph results. We could hold Rule 11-702 acts as an exception to Rule 11-702, thus obviating the need for such expert testimony to satisfy Rule 11-702. Cf. *Banks v. IMC Kalium Carlsbad Potash Co.*, 2003-NMSC-026, 134 N.M. 421, 77 P.3d 1014 (holding that the *Daubert/Alberico* analysis does not apply to the testimony of a health care provider regarding causation in administrative proceeding under the Workers’ Compensation Act). However, we refuse to do so without conducting a *Daubert/Alberico* analysis first:

Since a polygraph examiner renders an opinion about a subject that involves a scientific device that is purported to measure and record a number of involuntary body responses to the stress produced by knowing deception, [Rule 11-702] clearly has some bearing on the admissibility of polygraph evidence.

Leo M. Romero, *The Admissibility of Scientific Evidence under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. Rev. 187, 197 (1976); *cf. Torres*, 1999-NMSC-010, ¶ 31 (holding that the horizontal gaze nystagmus field test for sobriety is scientific evidence that must satisfy Rule 11-702 because the test “is based on principles of medicine and science not readily understandable to the jury”) (quoting *State v. Meadore*, 674 So.2d 826, 834 (Fla. Dist. Ct. App. 1996)).

{15} The purpose of Rule 11-702 is “to assist the trier of fact to understand the evidence and to determine the issues of fact.” *Madrid v. Univ. of California*, 105 N.M. 715, 718, 737 P.2d 74, 77 (1987).

Scientific evidence can only assist the trier of fact if it is “grounded in valid, objective science” and is “reliable enough to prove what it purports to prove.” *Alberico*, 116 N.M. at 168, 861 P.2d at 204. If we held that polygraph evidence did not have to satisfy Rule 11-702, we would in effect be conceding that polygraph evidence is either not grounded in science or is not sufficiently reliable to assist the trier of fact. Such a holding would be inappropriate and unnecessary. Therefore, we take this opportunity to subject polygraph evidence to a proper *Daubert/Alberico* analysis in order to inform our determination on the continued vitality of Rule 11-702.

A. The *Daubert/Alberico* Analysis

{16} In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993), the United States Supreme Court rejected the rigid “general acceptance” test for the admissibility of expert testimony first articulated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The Court held that application of a rigid “general acceptance” test “would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to “opinion” testimony.’” *Daubert*, 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). This liberal approach to the admission of evidence is consistent with the intent of the drafters of the Federal Rules of Evidence. As one notable commentator has recognized:

*Universality of education and the almost instantaneous dispersal of information through modern technology have created a citizenry with a remarkable and historically unique breadth of knowledge, percep-
tion, and sophistication. These mature men and women should be treated with the respect they
deserve. Excluding information on the ground that jurors are
too ignorant or emotional to evaluate it properly may
have been inappropriate in England at
a time when a rigid class society created a yawning gap between royal judges and commoner
jurors, but it is inconsistent with the realities of our modern American informed society and
the responsibilities of independent thought in a working democracy.

1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence xix (2d
ed. 2003); see also State v. Mann, 2002-
NMSC-001, ¶ 27, 131 N.M. 459, 39 P.3d
124 ("Jurors are generally knowledgeable
in many areas, and they are entitled to use
their common or acquired sense in arriving
at a verdict . . .") (quoted authority omitted).

Given the capabilities of jurors and the
liberal thrust of the rules of evidence, we
believe any doubt regarding the admissibil-
ity of scientific evidence should be resolved
in favor of admission, rather than exclusion.

See Brown v. Gen. Ins. Co. of Am., 70 N.M.

{17} Rule 11-702 governs the admissibility
of scientific evidence:

If scientific, technical or other
specialized knowledge will
assist the trier of fact to un-
derstand the evidence or to
determine a fact in issue, a
witness qualified as an expert
by knowledge, skill, experi-
ence, training or education may
testify thereto in the form of an
opinion or otherwise.

In Alberico, 116 N.M. at 166, 861 P.2d at
202, we discerned three prerequisites in
Rule 11-702 for the admission of expert
opinion testimony. First, the expert must be
qualified. Id. Second, the testimony must 
"assist the trier of fact." Id. Third, the expert
may only testify as to "scientific, technical
or other specialized knowledge." Id.
The first two prerequisites are not at issue in this
opinion. In each individual case, the district
court must determine whether the proffered
expert is qualified under Rule 11-707 to
give expert testimony on polygraph results.
Additionally, there can be little doubt that
polygraph evidence indicating that a defen-
dant or witness is telling the truth or lying
about a specific incident at issue would be
helpful to the jury. Cf. Anderson, 118 N.M.
at 296-97, 881 P.2d at 41-42 (concluding
that DNA evidence linking the defendant
to the crime scene was helpful to the jury).
Thus, the focus of this opinion is on the
reliability of the control question polygraph
examination.

{18} "[U]nder the Rules the trial judge
must ensure that any and all scientific
testimony or evidence admitted is not
only relevant, but reliable." Id. at 291, 881
P.2d at 36 (quoting Daubert, 509 U.S. at
589); accord Torres, 1999-NMSC-010, ¶
26 ("[E]videntiary reliability is the hall-
mark for the admissibility of scientific
knowledge."). Thus, "the trial court must
determine whether the scientific technique
is based upon well-recognized scientific
principle and whether it is capable of sup-
porting opinions based upon reasonable
probability rather than conjecture." Al-
berico, 116 N.M. at 167, 861 P.2d at 203.
In making this determination, we consider:
(1) whether a theory or technique can
be (and has been) tested; (2) whether the
theory or technique has been subjected to
peer review and publication; (3) the known
potential rate of error in using a particular
scientific technique and the existence and
maintenance of standards controlling the
technique's operation; and (4) whether
the theory or technique has been generally
accepted in the particular scientific field.

Anderson, 118 N.M. at 291, 881 P.2d at
36 (quotations marks and quoted authority
omitted). We apply these factors to the
case.

B. Application of the Alberico
Factors

i. Testability

{19} We first address whether the poly-
graph examination can be tested, and if
so, whether it has been tested. Id.; see
also Daubert, 509 U.S. at 593. "Scientific
methodology today is based on generating
hypotheses and testing them to see if they
can be falsified; indeed, this methodology is
what distinguishes science from other
fields of human inquiry." Daubert, 509 U.S.
at 593 (quoting authority omitted). Applying
this factor to polygraph examinations, the
district court concluded:

Polygraph test results and the
conclusions derived from them
are not based upon an over-
arching theory. To the extent
it is merely argued that there
is a hypothesis that the test
reliably detects deception, that

hypothesis has not been sub-
jected to field research. The
existing laboratory research,
given the problems described
[in the Findings of Fact], is
woefully inadequate to support
admissibility in court in real life
contexts.

In reviewing the district court's conclusion,
we must determine whether a testable hy-
pothesis has been generated for the control
question polygraph, and if so, whether that
hypothesis has in fact been tested.

{20} The hypothesis of the polygraph
examination was discussed thoroughly in
the NAS Report, which notes that a well-
supported theory can provide confidence
the polygraph can be accurate when used
in novel situations and with different
examinees. NAS Report, supra, at 66.
Also, a theory is essential to providing
confidence the polygraph will work well
 despite efforts by examinees to "beat the
polygraph" through the use of various
countermeasures. Id. Finally, "[a] solid
theoretical and scientific base is also valu-
able for improving [the polygraph] test
because it can identify the most serious
threats to the test's validity and the kinds
of experiments that need to be conducted
to assess such threats." Id. at 69.

{21} The NAS Report notes that
"[a]ccording to contemporary theories of
polygraph questioning, individuals who are
being deceptive or truthful in responding
to relevant questions show different pat-
terns of physiological response when their
reactions to relevant and comparison ques-
tions are compared." Id. at 70. The specific
test of the control question technique is
that an innocent person will show a greater
physiological response to the control ques-
tions; but, a guilty person will react more
strongly to the relevant questions. Id. The
NAS Report states that in order to have a
well-supported theory, "it is . . . necessary
to identify the relevant psychological states
and to understand how those states are
linked to characteristics of the test ques-
tions intended to create the states and to
the physiological responses the states are
said to produce." Id. at 71-72. The current
polygraph research, though, has focused almost
exclusively on the applicability of the
polygraph at the expense of developing the
underlying science. Id. at 92. Specifically,
"[t]here has been no systematic effort to
identify the best potential physiological in-
dicators on theoretical grounds or to update
theory on the basis of emerging knowledge
in psychology or physiology." Id.
Petitioners agree there is no scientifically testable hypothesis explaining all the psychophysiological variables occurring in the control question polygraph. However, Petitioners argue such an overarching theory is not necessary for polygraph results to be deemed admissible under Rule 11-702. We agree. The State’s primary witness admitted at the evidentiary hearing held below that people experience “emotional turmoil” when they are telling a lie, and these emotions can be detected by the polygraph machine. Also, despite its criticism of the current research on the polygraph, the NAS Report nonetheless concludes that “[b]asic scientific knowledge of psychophysiology offers support for expecting polygraph testing to have some diagnostic value, at least among naive examinees.” Id. at 101. The NAS Report further concludes that “[a]lthough the basic science indicates that polygraph testing has inherent limits regarding its potential accuracy, it is possible for a test with such limits to attain sufficient accuracy to be useful in practical situations.” Id. at 102.

As we noted in Anderson, “refutability” is the key criterion when analyzing the scientific theory or hypothesis underlying expert testimony. 118 N.M. at 297, 881 P.2d at 42. Under the facts of that case, in which we examined the admissibility of certain DNA evidence under Rule 11-702, we stated:

Defendants vociferously dispute the accuracy of the match results and the adequacy of the testing done, and in refutation have presented evidence about deficiencies in both the results and the testing of the results. Thus, it appears that by attempting to refute the FBI’s theory and methods with evidence about deficiencies in both the results and the testing of the results, the defendants have conceded that the theory and methods can be tested.

Id. (quoting United States v. Bonds, 12 F.3d 540, 559 (6th Cir. 1993)). The State’s primary witness on the reliability of polygraphs testified there are numerous studies on polygraphs and their accuracy. By claiming that a number of those studies establish that polygraph examinations do not work, the State has implicitly conceded that the hypothesis underlying the control question polygraph can be tested. The State’s concession is supported by the NAS Report, which states “it is possible to do better field research than we have found in the literature and, over time, to use admittedly imperfect research designs, both experimental and observational, to advance knowledge and build methodological understanding, leading to better research design in the future.” NAS Report, supra, at 116.

Based on the foregoing, we conclude that the control question polygraph examination can be tested. We believe the district court’s apparent finding to the contrary is erroneous. As was stated in United States v. Galbreath, 908 F. Supp. 877, 891 (D.N.M. 1995), “[u]like an endeavor such as astrology, the scientific validity of which can never be empirically verified, it is possible to test [the control question polygraph technique].” We now turn to the published academic literature on the polygraph examination.

Peer review and publication

The second factor we consider is whether the control question polygraph has been subjected to peer review and publication. Anderson, 118 N.M. at 291, 881 P.2d at 36. Peer review and publication is important because “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” Daubert, 509 U.S. at 593. Regarding this factor, the district court concluded that the control question polygraph “has been subjected to limited peer review publication,” but that “the relevant publications do not enhance confidence in the test results, particularly considering the effectiveness of countermeasures.”

The committee that prepared the NAS Report gathered and evaluated as many polygraph validation studies as possible. The committee located 217 research reports of 194 separate studies. NAS Report, supra, at 107. Of those studies, 102 were deemed of sufficient quality to be included in the committee’s review of the polygraph. Id. Each of these studies met the following minimum criteria developed by the committee:

1. documentation of examination procedures sufficient to allow a basic replication;
2. independently determined truth;
3. inclusion of both guilty and innocent individuals as determined by truth criteria;
4. sufficient information for quantitative estimation of accuracy;
5. polygraph scoring conducted blind to information about truth; and,
6. in experimental studies, appropriate assignment to experimental groups germane to estimating accuracy (mainly, guilt and innocence).

Id. While the NAS Report concluded that the polygraph studies that met the criteria for consideration “do not generally reach the high levels of research quality desired in science,” it nonetheless observed that “a sizable number of polygraph studies have . . . appeared in good-quality, peer-reviewed journals.” Id. at 108. The NAS Report speculated that so many polygraph studies have appeared in high-quality journals because of “the practical importance of the topic and the willingness of journals to publish laboratory studies that are high in internal validity but relatively low in salience to real-world application.” Id.

Furthermore, both Petitioners and the State submitted as exhibits a number of articles on the validity of the control question polygraph, some of which were published in peer-reviewed journals. While the State argues these articles are insufficient and cannot be relied upon to establish the validity of the control question polygraph, that is not our focus at this point in the Alberico/ Daubert inquiry. We are only looking at whether the scientific technique has been subjected to peer review and publication, not the validity of the scientific research or the scientific community’s response to the research. While there has certainly been a heated debate in the scientific community on the validity and accuracy of the control question polygraph, that debate “is a question of weight and not of admissibility.” Anderson, 118 N.M. at 298, 881 P.2d at 43. The fact that an ongoing debate exists is all that is required for this factor to be deemed satisfied. Notwithstanding the NAS Report’s criticisms of the polygraph validation studies conducted, we conclude that the NAS Report sufficiently establishes that the polygraph has been subjected to peer review and publication. We now turn to the validity of the scientific research on the control question polygraph.

III. Rate of error

The third factor of the Daubert/Alberico analysis requires us to examine the known or potential rate of error of the control question polygraph. Anderson, 118 N.M. at 291, 881 P.2d at 36. With regard
to the rate of error of the control question polygraph, the district court concluded that “[t]he potential rate of error is vague and unreliable” and because the base rate is unknown “the reliability of test results as reflected in an actual percentage misrepresents the confidence level in the test.”

[29] As noted in the preceding section of this opinion, a number of polygraph validation studies have been conducted and subsequently published. A review of those studies revealed that the median accuracy index of the polygraph in laboratory studies is 0.86 with an interquartile range of 0.81 to 0.91. NAS Report, supra, at 122. The controlled question test specifically had a median accuracy index of 0.85, with an interquartile range from 0.83 to 0.90. Id. at 125. The field studies reviewed had a median accuracy index of 0.89, with a range from 0.711 to 0.999. Id. The interquartile range of accuracy indexes for all the studies, laboratory and field, was 0.81 to 0.91. Id. at 126. Based on the foregoing, the NAS Report concluded “the empirical data clearly indicate that for several populations of naïve examinees not trained in countermeasures, polygraph tests for event-specific investigation detect deception at rates well above those expected from random guessing.” Id. at 149. The State argues the high accuracy rates derived from the studies are invalid for a number of reasons.

[30] Specifically, the NAS Report was concerned that the high accuracy rates for polygraph examinations in the studies may not correspond with what can be expected when the polygraph is used in real-life situations. The hypothesis underlying the control question polygraph technique is that physiological responses increase the more concerned the subjects are about being deceptive, which, if true, means “polygraph accuracy in laboratory models [might] be on average somewhat below true accuracy in field practice, where the stakes are higher.” Id. at 127. However, the NAS Report noted that “[t]here is a plausible contrary hypothesis . . . in which examinees who fear being falsely accused have strong emotional responses that mimic those of the truly deceptive,” in which case “field conditions might have more false-positive errors than are observed in the laboratory and less accuracy.” Id. Furthermore, the NAS Report noted that “[s]ubstantial experience with clinical diagnostic and screening tests suggests that laboratory models, as well as observational field studies of the type found in the polygraph literature, are likely to overstate true polygraph accuracy.” Id. at 128.

[31] The NAS Report also identified several specific issues that may affect the accuracy of any polygraph examinations that have not been fully researched. First, while individual differences in physiological makeup, personality traits, and sociocultural group identity may affect the accuracy of the polygraph, the research on these individual differences is scant. See id. at 134-37. Second, while examiner expectancies of guilt may influence either the examiners’ judgments of the polygraph charts or the examinees’ physiological responses during the examination, “[t]he evidence is too limited to draw any strong conclusions about whether examiners’ expectancies affect polygraph test accuracy.” Id. at 138. Third, “given the few studies performed, the few drugs tested, and the analogue nature of the evidence, a conclusion that drugs do not affect polygraph validity would be premature.” Id. at 139. Fourth, while some empirical research indicates mental and physical countermeasures can decrease the likelihood of a polygraph examination detecting deceptive examinees, id. at 143, the NAS Report noted the limitations of that research, id. at 143-44. The NAS Report specifically stated “we do not know of scientific studies examining the effectiveness of countermeasures in contexts where systematic efforts are made to detect and deter them.” Id. at 151.

[32] In Anderson, we considered the known or potential rate of error in the DNA profiling process at issue in that case. 118 N.M. at 298-99, 881 P.2d at 43-44. Similar to the State in this case, the defendant in Anderson argued that the accuracy rates of the DNA profiling process in that case were invalid for a number of reasons. While we noted that the deficiencies in calculating the rate of error was troubling, we stated the deficiencies in that case “[s]poke to the weight of the evidence and not to its admissibility.” Id. at 299, 881 P.2d at 44. In this case, we reach the same conclusion. Polygraph results are far from conclusive; however, as the NAS Report concluded, numerous studies have shown that polygraph tests can detect deception at rates well above chance. In fact, testimony at the evidentiary hearing indicates that the degree of accuracy of polygraph examinations is similar to many diagnostic techniques employed in the medical field, including magnetic resonance imaging (MRI), CAT scanning, ultrasound, and x-ray film. The opponent of polygraph evidence has ample opportunity through cross-examination and argumentation to cast doubt upon the results of any particular polygraph examination that have been admitted into evidence.

[33] The State nevertheless argues that the rate of error for polygraph evidence is unknown because the base rate is unknown. The district court found that the base rate, or ground truth, is “the proportion of people in a population as they relate to a particular trait in issue.” In the context of the polygraph, the base rate is generally the percentage of persons in a sample who are telling the truth. For example, if a polygraph study involved 100 subjects, and 85 of the subjects were actually telling the truth, the base rate would be 85%. The base rate does not measure the accuracy of the polygraph, which is the ability of the polygraph itself to correctly identify deceptive subjects and truthful subjects. The base rate is a measure only of the percentage of truthful subjects in the sample population. The true base rate is unknowable, but is theoretically important because it defines the degree of confidence properly afforded a particular polygraph result. Following are two examples used by the State to illustrate the point. In both examples the polygraph is assumed to be 90% accurate in detecting deception. Therefore, with a population of 100 subjects, the polygraph would correctly identify 90 of the subjects as either truthful or deceptive, while incorrectly identifying the remaining 10 subjects.

[34] In the first example, we assume a base rate of 50%, that is 50 of the 100 subjects are being truthful in their polygraph examination. Thus, with an accuracy rate of 90%, the polygraph will correctly identify 45 persons as deceptive and 45 persons as truthful, and it will incorrectly identify 5 persons as deceptive and 5 persons as truthful:

<table>
<thead>
<tr>
<th></th>
<th>Not Deceptive</th>
<th>Deceptive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pass</td>
<td>45</td>
<td>5</td>
</tr>
<tr>
<td>Fail</td>
<td>5</td>
<td>45</td>
</tr>
</tbody>
</table>

In the second example, we assume that only 10% of the 100 subjects are being truthful, while the remaining 90% are being deceptive. As a result, 81 of the 90 deceptive subjects will be accurately identified as deceptive and the remaining 9 will be incorrectly identified as truthful. Therefore, in this sample of 100 subjects, 9 truthful subjects will pass, but 9 deceptive subjects will also pass. Of the 18 subjects deemed to have passed the polygraph, there is only a 50% likelihood that any individual subject was actually truthful:

<table>
<thead>
<tr>
<th></th>
<th>Not Deceptive</th>
<th>Deceptive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pass</td>
<td>9</td>
<td>9</td>
</tr>
</tbody>
</table>
Fail 1 81
These examples illustrate the importance of the base rate: in a pool with a higher percentage of deceptive subjects, the likelihood that a passed polygraph indicates actual truthfulness decreases. Specifically, in the first example a passed polygraph examination is 90% likely to be correct; whereas, in the second example, a passed polygraph is only 50% likely to be correct.

35 We cannot determine the base rate in the context of the polygraph because we cannot determine in advance how many persons are telling the truth and how many are not. However, the base rate has no effect on the reliability of the polygraph—regardless of whether 50% or 90% of the sample population is deceptive, the accuracy of the polygraph remains unchanged. The base rate only affects the confidence that we have in making decisions based on the results of any one polygraph examination. The accuracy of the polygraph in both of the above examples was the same, but in the second example we would have less confidence than in the first example that a passed polygraph examination was correct. Nonetheless, even in the second example, evidence that a subject passed a polygraph examination has a tendency to make the existence of a fact more or less probable than it would be in the absence of the evidence. Prior to the subject passing the polygraph examination, we would have assumed only a 10% chance that subject was truthful. After passing the examination, though, the likelihood the subject was truthful has increased to 50%. Therefore, the fact that the base rate is unknowable does not preclude admissibility under Rule 11-702. It simply provides another basis for the opposing party to cast doubt upon the results of a particular polygraph examination through cross-examination and argumentation. We now turn to whether standards exist controlling the polygraph.

iv. Maintenance of standards controlling the technique
36 Additionally, we examine “the existence and maintenance of standards controlling the technique’s operation.” Daubert, 509 U.S. at 594. The district court found that “[t]here are no set standards [for the administration of the control question polygraph] other than those set out in Rule 11-707,” which the court concluded were insufficient.
37 In this state, it is unlawful to “practice polygraphy for any remuneration without a licence issued by the [regulation and licensing] department in accordance with the Private Investigators and Polygraphers Act.” NMSA 1978, § 61-27A-3(E) (1993). To qualify for a license to practice polygraphy, a person must meet the requirements of NMSA 1978, § 61-27A-6(G) (1993), which states:

G. The department shall issue a license for polygrapher to a person who files a completed application accompanied by the required fees and who submits satisfactory evidence that the applicant:

(1) is at least eighteen years of age;
(2) possesses a high school diploma or its equivalent;
(3) has not been convicted of a felony or misdemeanor involving moral turpitude;
(4) has graduated from a polygraph examiners course approved by the department and:

(a) has completed a probationary operational competency period and passed an examination of ability to practice polygraphy; or
(b) has submitted proof of holding, for a minimum of two years immediately prior to the date of application, a current license to practice polygraphy in another jurisdiction whose standards equal or surpass those of New Mexico.

38 Furthermore, Rule 11-707(B) imposes additional restrictions on who can testify as an expert witness regarding polygraph results. A polygraph expert must have “at least five (5) years’ experience in administration or interpretation of polygraph examinations or equivalent academic training.” Rule 11-707(B)(1). Also, the polygraph expert must have “successfully completed at least twenty (20) hours of continuing education in the field of polygraph examinations during the twelve (12) month period immediately prior to the date of the examination.” Rule 11-707(B)(3). Between the restrictions governing who can perform polygraph examinations in this state and those governing who can testify regarding polygraph results, sufficient standards are in place controlling the polygraph examiner.
39 Also, Rules 11-707(C) and (E) contain a number of prerequisites to the admission of polygraph results:

C. Admissibility of results.
Subject to the provisions of these rules, the opinion of a polygraph examiner may in the discretion of the trial judge be admitted as evidence as to the truthfulness of any person called as a witness if the examination was performed by a person who is qualified as an expert polygraph examiner pursuant to the provisions of this rule and if:

(1) the polygraph examination was conducted in accordance with the provisions of this rule;
(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;
(3) prior to conducting the polygraph examination the polygraph examiner was informed as to the examinee’s background, health, education and other relevant information;
(4) at least two (2) relevant questions were asked during the examination; and
(5) at least three (3) charts were taken of the examinee.

E. Recording of tests. The pretest interview and actual testing shall be recorded in full on an audio or video recording device.

It has been noted by one commentator that “[t]he treatment of the technical aspects of polygraph examination protocol, [Rule 11-707] goes far beyond the case law or statutes of any other jurisdiction in providing usable standards.” James R. McCall, Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert, 1996 U. Ill. L. Rev. 363, 388 (1996).
40 The American Polygraph Association (APA), the leading polygraph professional association, has developed protocol standards for the polygraph similar to those contained in Rule 11-707. See American Polygraph Association, Division III: APA Standards of Practice (Jan. 10, 1999), available at http://www.polygraph.org/standards.htm. Under these standards, prior to examination, the polygraph examiner must make a reasonable effort to determine whether an examinee is fit for polygraph testing by inquiring into the medical and
psychological condition of the examinee, as well as any recent drug use by the examinee, APA Standard 3.4.1; the polygraph instruments must be APA approved and have been calibrated, APA Standard 3.5; and a pretest interview must be conducted where the examiner both discusses with the examinee the polygraph process and the issues to be tested and ensures that the examinee recognizes and understands each question, APA Standard 3.8. During the examination, the questions used must be clear and distinct, APA Standard 3.9.3; the questions used must be balanced in terms of length and impact, APA Standard 3.9.4; the examiner must collect a sufficient number of charts, APA Standard 3.9.5; standardized chart markings should be used, APA Standard 3.9.7; and either an audio or audio/video recording of the pretest and in-test phase of the examination must be made, APA Standard 3.9.8. As for scoring the chart, the examiner must use numerical scoring, APA Standard 3.10.1; and the examiner’s notes must have “sufficient clarity and precision so that another examiner could read them,” APA Standard 3.10.2.

{41} Based on the foregoing, we conclude sufficient standards are in place governing the control question polygraph technique, so as to allow expert testimony on the subject to be admissible. In order for polygraph expert evidence to be admissible under Rule 11-707, the polygraph examination must be conducted in a particular manner by a qualified examiner. Furthermore, as previously explained, the APA has established even more detailed standards of practice in order to ensure the utmost degree of accuracy in detecting truthfulness or deception with the polygraph.

v. Acceptance by relevant scientific community

{42} Finally, while “general acceptance is not a requirement for admissibility under [Rule 11-702], it is a factor the court may consider.” Anderson, 118 N.M. at 299, 881 P.2d at 44. As the United States Supreme Court noted in Daubert, “a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism.” 509 U.S. at 594 (quotation marks and quoted authority omitted). In this case, the district court concluded that “[c]ontrol question polygraph tests are not accepted in the relevant scientific community at a significant level, particularly considering the age of the technique.”

{43} In arguing whether the control question polygraph has been generally accepted by the relevant scientific community, the parties have identified four surveys of psychologists’ opinions regarding polygraph examinations, including: The Gallup Organization, Survey of Members of the Society for Psychological Research Concerning Their Opinion of Polygraph Test Interpretation, 13 Polygraph 153 (1984) [hereinafter Gallup Survey]; Susan L. Amato, A Survey of Members of The Society for Psychophysiological Research Regarding the Polygraph: Opinions and Implications (1993) (unpublished Master’s thesis, University of North Dakota) (on file with the University of North Dakota Library) [hereinafter Amato Survey]; W.G. Iacono & D.T. Lykken, The Validity of the Lie Detector: Two Surveys of Scientific Opinion, 82 J. of Applied Psychol. 426 (1997) [hereinafter Iacono Survey]; and Honts et al., General Acceptance of the Polygraph by the Scientific Community (Mar. 9, 2002) (unpublished paper presented at the meetings of the American Psychology Law Society, on file with author) [hereinafter Honts Survey]. Of these four surveys, the district court found the Iacono survey to be the most reliable, and relied exclusively on that survey in drawing its conclusion that control question polygraph examinations do not enjoy general acceptance within the scientific community.

{44} In the Gallup Survey, conducted in 1982, a random sample of 155 members of the Society for Psychophysiological Research were interviewed regarding their opinion of the use of polygraph testing procedures to detect deception. Gallup Survey, supra, at 154. When asked their opinion of polygraph tests for interpreting whether a subject is or is not telling the truth, 61% of the respondents agreed that the polygraph is a useful diagnostic tool when considered with other available information. Id. at 157. An additional 32% agreed that the polygraph is of questionable usage and is entitled to little weight against other information. Id. Only 3% believed that the polygraph is of no usefulness. Id. In 1993, Amato replicated the Gallup Survey in an effort to determine if there were any changes in the scientific community’s opinions on the validity of the polygraph in the preceding ten years. Amato Survey, supra, at 1. The Amato Survey received 136 total responses, for a response rate of approximately 30%. Id. at 2. This time, when asked the same question as in the Gallup Survey, 60% of the respondents agreed that the polygraph is a useful diagnostic tool, 37% agreed it is of questionable usage, and 2% believed it was of no usefulness. Id. at 3.

{45} In 1997, two groups of scientists were surveyed in an attempt to “more thoroughly assess current scientific opinion about polygraphy.” Iacono Survey, supra, at 427. The first group surveyed by Iacono was the same one used in both the Gallup Survey and the Amato Survey—the Society of Psychophysiological Research. Id. at 428. Questionnaires were sent to 216 society members, and 195 members responded. Id. at 429. Of those who responded and had an opinion on the polygraph, only 36% believed that the control question technique is “based on scientifically sound psychological principles or theory”; whereas, 77% believed the guilty knowledge test is based on sound psychological principles. Id. at 430. The second group surveyed was the Fellows of Division 1 (General Psychology) of the American Psychological Association. Id. at 428. Questionnaires were mailed to 249 APA Fellows, and 168 usable questionnaires were returned. Id. at 429. In this group, only 30% believed the control question technique is based on sound psychological principles and 72% believed the same of the guilty knowledge test. Id. at 430.

{46} Finally, in 2002, a paper was presented at the meetings of the American Psychology Law Society (APLS) that was based on two surveys: one of the APLS and one of the SPR. Honts Survey, supra, at 1, 8. Only 55 out of 205 APLS members responded, and 38 out of 366 SPR members responded. Id. at 8. Of those who responded, 96% of the APLS members and 91% of the SPR members believed that polygraph studies published in scientific peer-reviewed journals are “based on generally accepted scientific methodology.” Id. at 14. When asked to compare the usefulness of the polygraph to other specific examples of commonly admitted evidence, more than half of the respondents believed that polygraph evidence is as useful or more useful than a psychologist’s opinion of parental fitness, a psychologist’s opinion regarding malingering, an eyewitness identification of a robbery suspect, a psychological assessment of dangerousness, and a psychological assessment of temporary insanity. Id. at 15. Finally, slightly more than half of the APLS respondents and slightly less than half of the SPR respondents believed that the accuracy of judicial verdicts would be increased if polygraph test results were admitted as evidence at trial. Id. at 16.
{47} As noted earlier in this opinion, see supra ¶ 27, there is a heated debate in the scientific community on the validity of the control question polygraph examination. This debate is reflected by the competing surveys cited above. The Iacono Survey was conducted by Dr. William Iacono, Professor of Psychology at the University of Minnesota, who testified on behalf of the State at the evidentiary hearing below. The Amato Study was a Master’s thesis conducted under the guidance of Dr. Charles Honts, Professor of Psychology at Boise State. Dr. Honts also was the lead scientist of the Honts Study. He testified on behalf of the Respondents at the hearing below. The hearing below was not the first time that Dr. Iacono and Dr. Honts have been on opposing sides in the debate over the admissibility of polygraph examination results. Compare David C. Raskin, Charles R. Honts & John C. Kircher, The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in Modern Scientific Evidence: The Law and Science of Expert Testimony § 14-2.0 (David L. Faigman et al. eds., 1997); with William G. Iacono & David T. Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in Modern Scientific Evidence, supra, ¶ 14-3.0. Based on the foregoing, we cannot conclude that the control question polygraph has been generally accepted within the scientific community. However, we also cannot conclude that the control question polygraph has been uniformly rejected by the scientific community. This factor thus carries little weight in our Alberico/Daubert analysis of the control question polygraph.

IV. CONCLUSION

{48} Based on the foregoing, we conclude that the control question polygraph examination is sufficiently reliable to satisfy Rule 11-702. In so holding, we are cognizant of a number of potential problems with polygraph results, such as the use of physical and mental countermeasures to “beat the polygraph” and the influence on results of examiner expectancies. The district court was correct to be concerned by these problems; however, as we noted earlier in the opinion, any doubt about the admissibility of scientific evidence should be resolved in favor of admission. See supra ¶ 16. The remedy for the opponent of polygraph evidence is not exclusion; the remedy is cross-examination, presentation of rebuttal evidence, and argumentation. See Daubert, 509 U.S. at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

{49} Our reaffirmation of Rule 11-707 is also based, at least in part, on principles of fairness. Often the same government officials who vigorously oppose the admission of exculpatory polygraphs of the accused find polygraph testing to be reliable enough to use in their own decision-making. Federal and state governments rely upon the results of polygraph examinations for a variety of law enforcement purposes, even in jurisdictions where polygraph evidence is inadmissible. For example, the polygraph is used to determine whether there is probable cause to arrest and whether to prosecute. See Johnson v. Schneiderheinz, 102 F.3d 340, 342 (8th Cir. 1996) (holding that a police officer reasonably relied upon polygraph results, among other factors, in making his decision to arrest); Brodnicki v. City of Omaha, 75 F.3d 1261, 1267 (8th Cir. 1996) (stating that the county attorney was under a “duty” to review the polygraph evidence in that case “as part of his role as advocate for the state”); Bennett v. City of Grand Prairie, 883 F.2d 400, 405-06 (5th Cir. 1989) (holding that a magistrate judge may consider polygraph results when determining whether probable cause exists to issue an arrest warrant). Polygraphs have also been employed to make various disciplinary and sentencing decisions. See Lenea v. Lane, 882 F.2d 1171, 1174 (7th Cir. 1989) (holding that polygraph results are admissible in prison disciplinary proceedings); United States v. Chaney, 1996 WL 187515, *1 (10th Cir.) (holding that the district court may use a defendant’s polygraph examination to determine the amount of restitution in an embezzlement case). Most jurisdictions also approve of requiring polygraph examinations as a condition of probation. See Anne M. Payne, Annotation, Propriety of Conditioning Probation on Defendant’s Submission to Polygraph or Other Lie Detector Testing, 86 A.L.R. 4th 709 (1991).

{50} In short, we believe a categorical exclusion of polygraph results would be unwise. See United States v. Schefer, 523 U.S. 303, 318 (1998) (Kennedy, J., concurring in part and concurring in judgment) (doubting the wisdom of a per se exclusion of polygraph evidence). Therefore, we refuse to repeal Rule 11-707; instead, we order the district courts in the pending cases to comply with Rule 11-707 in determining whether to admit polygraph examination results. The proponents of such polygraph evidence are not required to independently establish the reliability of the examiner’s testimony under Rule 11-702.

{51} IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Chief Justice
PATRICIO M. SERNA, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVÉZ, Justice

APPENDIX

No. CS 2003-00026 (Supreme Court No. 27,915)

Second Judicial District Court
County of Bernalillo
State of New Mexico

KEVIN LEE, et al.,
Petitioners,

versus

HON. LOURDES MARTINEZ,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction:

Pursuant to Supreme Court Order issued in this matter, this Court is directed to enter findings of fact and conclusions of law. Given the tremendous volume of information presented by the parties as well as the testimony of several of the leading authorities on the issues decided, the Court has taken upon itself to provide an introductory section that includes an overview of
the status of the law on polygraph examinations nationwide in both state and federal courts and a description of the polygraph examination process with the hope that it will assist the reviewing court. The findings of fact and conclusions of law follow these sections.

While many of the materials presented by both sides are worthy of note, a recent publication, The Polygraph and Lie Detection (PALD), a 2003 publication of the National Academy of Sciences (NAS), is particularly helpful. PALD focuses on the use of the polygraph in relation to employee screening. But since most of the research is in the area of event-specific investigations, its analysis of that research is highly useful in this context as well.


The Court recommends the two sources listed above for excellent overviews of some of the issues. In addition to the above, the parties to this action provided many exhibits, articles on nearly every aspect of polygraph examinations, studies relating to polygraph examinations, transcripts of testimony, and caselaw.

Without trying to oversimplify the issues presented, in evaluating the standards adopted in State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993), and restated in State v. Anderson, 118 N.M. 284, 881 P.2d 29 (1994), the testimony and arguments tended to gravitate to a number of key issues:

First, whether there is a theory and whether it can be and has been tested. This includes the effect of base rates in determining reliability of test results in assisting the trier of fact and determining the balance between the probative value and prejudicial effect of the testimony;

Second, whether the theory or technique has been subjected to peer review and publication;

Third, whether there is a known potential rate of error in using polygraph techniques as well as whether there are standards that exist and are maintained that control the technique’s operations;

Fourth, acceptance of the test in the relevant scientific community; and,

Fifth, whether the technique is based on well-recognized scientific principles and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

To the extent possible, the findings of fact will be set out in sections that will address each of these factors.

POLYGRAPH EXAMINATION PROCEDURES

A polygraph examination combines interrogation with physiological measurements made by the instrument, or polygraph. The instrument typically measures and records an examinee’s heart rate, blood pressure, rate and depth of respiration and flow of electrical current at the skin surface as an examiner poses questions that require yes or no answers. Blood pressure is measured by a cuff over the biceps. Electrodermal activity (activity of the eccrine sweat glands) is measured by electrodes on the palm or on two fingers. Rate and depth of breathing are measured by pneumographs located on the chest and abdomen. Fluctuations in the heart and blood are recorded by a cardiophygmograph, while a galvanometer records the body’s electrical activity. The sensors attached to the examinee are connected to the instrument by wires.

The data is recorded by analog or digital technology. Because the first analog instruments recorded the data with several pens writing lines on a piece of moving paper, the record of the examinee’s physiological responses is known as the polygraph chart.2

The instrument does not measure or detect lies directly. Instead, proponents believe it measures physiological responses that are stronger when an examinee lies than at other times. A lie in response to a question may cause a reaction such as fear of detection or psychological arousal that changes heart rate, blood pressure, breathing rate, or skin conductance relative to what they were before the question was asked and relative to what they are after control questions are asked.3

Polygraph testing is used for three main purposes: 1. Screening of job applicants by law enforcement or other government agencies (preemployment screening); 2. Screening by agencies involved in national security of current employees; and 3. Investigating specific incidents, as in criminal cases.4 When police conduct a polygraph test of a suspect, it is considered to be under adversarial conditions. In contrast, when defense counsel asks a client to take a privately administered test, it is called a “friendly” test. If the client passes the friendly test, defense counsel will often attempt to enter the results into evidence, and this is the more typical background for an evidentiary hearing like the present one.5

There are three major questioning techniques used in polygraph examinations: the relevant-irrelevant test (RIT), the guilty knowledge test (GKT), and the control question or comparison question test (CQT). The CQT’s “are the most widely used techniques in criminal investigations and judicial proceedings.”6 Because the CQT is the most used test in criminal cases and because the tests in the instant cases were apparently CQT’s, this Court’s analysis will focus on that technique. Under Rule 11-707 NMRA 2003, tests using any

2 Id. at 13.
3 Id.
4 Id. at 11-12.
of the three techniques would be admissible if that Rule’s criteria were met.

The CQT tries to determine if the examinee is lying in response to a specific question or questions about the incident at issue (relevant questions). This involves comparing physiological responses to the relevant questions with physiological responses to control questions. Because the cuff on the arm begins to hurt after several responses to control questions. Because the examiner will be correctly classified as truthful or deceptive on the polygraph test to follow. Where the polygrapher in the probable-lie control question chooses control questions during the pretest interview to suit each examinee, the directed-lie control questions are a small set of simple questions that are “much easier to standardize.”

After the test, the charts are scored by a polygrapher or by a computer. Each relevant question response is measured against an adjacent control question response. Scores for each comparison range from +3 to -3. When the response to the control question is much stronger than to the relevant question, it is scored +3, indicating truthfulness. A score of -3 indicates a much stronger response to the relevant question relative to the response to the control question, indicating deception. If the two responses are about the same, the score is 0, with scores of ±1 and ±2 for intermediate values. The scores for all three charts are totaled. Examinees with scores of +6 or greater are considered truthful; those with scores of -6 or lower are deemed to be lying. Scores between ±5 and -5 are inconclusive. The total score may range from approximately +30 to -30.

But see United States v. Galbreath, 908 F.Supp. 877, 894 (D.N.M. 1995), where the leading proponent of polygraph evidence, Dr. David Raskin, scored the defendant’s charts as +32. Charts may also be scored by computers using standardized algorithms, a relatively recent development.

**ADMISSIBILITY OF POLYGRAPH EVIDENCE IN OTHER STATE COURTS**

Eighty years ago, polygraph evidence was held inadmissible because it was not “sufficiently established to have gained general acceptance in the particular field in which it belongs.” See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The standards for the admission of scientific evidence were changed by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and many states, including New Mexico, adopted those standards. See State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993). Consequently, supporters of polygraph evidence sought its admission under the new standards. They have had little success before courts that have maintained pre-Daubert standards or courts that have adopted Daubert.


These per se states ban polygraph evidence, including test results, offers to take the test, as well as refusals to take the test.
test, for a variety of reasons. These courts found that the polygraph has not been proven valid or reliable or that it has not been generally accepted in the scientific community.11 But a more salient reason for the outright ban is that the prejudice in a jury trial outweighs the probative value of corroborating a witness’s credibility. See State v. Porter, 698 A.2d 739 (Conn. 1997) (“State appellate courts, for whom Daubert is not mandatory authority, largely agree with our assessment that the prejudicial impact of polygraph evidence outweighs its probative value.”) Id. at 773.

Four of the above states (Massachusetts, North Carolina, Oklahoma, and Wisconsin) had admitted polygraph evidence for years, but have since returned to a per se ban. See Commonwealth v. Mendez, 547 N.E.2d 35, 41 (Mass. 1989)(citing inter alia dangers of confusing jury and usurping jury’s role and the “overwhelming authority throughout the court system”) and State v. Dean, 307 N.W.2d 628, 653 (Wis. 1981) (“Adequate standards have not been developed in the last seven years since the decision to admit polygraph evidence on stipulation to guide the trial courts in exercising their discretion in the admission of polygraph evidence. The lack of such standards heightens our concern that the burden on the trial court to assess the reliability of stipulated polygraph evidence may outweigh any probative value the evidence may have.”)


In these states, stipulation usually means both parties agree prior to a subject taking a test that the results will be admissible and that the adversely affected party retains the right to cross-examine the polygraph examiner and otherwise to attempt to impeach the polygraph evidence. See, e.g., State v. Valdez, 371 P.2d 894 (Ariz. 1962). Generally, these appellate decisions do not claim that the evidence is probative or becomes reliable due to the stipulation. See Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983). Some courts, however, have concluded that the stipulation makes the test reliable -- it raises the examinee’s fear and leads to the selection of more impartial examiners, tending to produce more accurate results.12

Two (2) other states admit stipulated results but in limited circumstances. See State v. Yodsmakis, 281 N.W.2d 255 (N.D. 1979)(post-trial proceedings) and State v. Souel, 372 N.E.2d 1313 (Ohio 1978) (for corroboration or impeachment only).

Louisiana and Michigan allow the admission of polygraph evidence without stipulation but only in post-trial proceedings. See State v. Catanese, 368 So.2d 975 (La. 1979) and People v. Barbara, 255 N.W.2d 171 (Mich. 1977).

South Carolina generally bars admission of polygraph evidence, but the decision is now left to the discretion of the trial judge after a hearing applying Rules of Evidence 702 and 403. See State v. Council, 515 S.E.2d 508 (S.C. 1999).

**ADMISSIBILITY OF POLYGRAPH EVIDENCE IN FEDERAL COURTS** United States v. Scheffer, 523 U.S. 303 (1998) held that military courts’ per se rule excluding polygraph evidence did not violate a defendant’s right under the Fifth or Sixth Amendment to present a defense. Beyond this holding, the decision lacks precedential value, given the fractured makeup of the Court’s three opinions.

In contrast to the majority of state courts, only two federal circuits have a per se rule barring admissibility. See United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003), Petition for Certiorari Filed, (July 11, 2003)(NO. 03-5297) and United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974)(citing the Circuit’s decision in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Most federal appellate courts leave admission of polygraph evidence to the discretion of the trial courts, but generally such evidence is excluded on the basis of Daubert/Rule 402 or both. See United States v. Black, 78 F.3d 1, 7 (1st Cir. 1996)(generally inadmissible); United States v. Santiago-Gonzalez, 66 F.3d 3, 6 (1st Cir. 1995)(admissible if agreed to in plea bargain); United States v. Kwong, 69 F.3d 663, 668 (2nd Cir. 1995)(balancing test under Rule 403); United States v. Lee, 315 F.3d 206, 214 (3rd Cir. 2003)(noting lack of per se exclusionary rule and admissibility to rebut claim of coerced confession but declining to rule on admissibility at trial or revocation hearing), Petition for Certiorari Filed, (June 2, 2003)(N0. 02-11166); United States v. Posado, 57 F.3d 428, 434 (5th Cir.1995) (must meet Rule 702 and Rule 403 standards); United States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (Rule 403 standard, but results generally inadmissible, especially if unstipulated); United States v. Lea, 249 F.3d 632, 640 (7th Cir. 2001) (“[W]e continue to hold that a district court need not conduct a full Daubert analysis in order to determine the admissibility of standard polygraph evidence, and instead may examine the evidence under a Rule 403 framework. Nonetheless, we posit that the factors outlined by the Supreme Court in Daubert remain a useful tool for gauging the reliability of the proffered testimony, as reliability may factor into a 403 balancing test.”).

See also United States v. Williams, 95 F.3d 723, 729-30 8th Cir. 1996) (suggesting non-stipulated evidence may be admissible under Daubert if Rule 403 is met) and United States v. Waters, 194 F.3d 926 (8th Cir 1999) Daubert hearing unnecessary where 403 not met despite defendant passing test requested and given by prosecution); United States v. Cordoba, 194 F.3d 1053 (9th Or. 1999) (must meet 702 and 403); United States v. Cali, 129 F.3d 1402 (10th Cir. 1997)(evidence properly excluded under 403 where requested Daubert hearing not held); United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998) (Honts-administered polygraph inadmis-

---

11 The Legal Relevance of Scientific Research on Polygraph Tests, Per se Exclusion § 19-1.2.1 in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders eds., 2002)

12 Faigman et al § 19-1.2.3, fn. 73 and 74.
sible under 702 and under 403).

“Leaving discretion to trial courts rather than prescribing a per se rule does not seem to have changed practice substantially.” That is, “even when presented with an opportunity to admit polygraph evidence, most [federal] district courts are decidedly reluctant to do so.” See State v. Porter, 698 A.2d 739, 776-77 (Conn. 1997).

One rare case admitting polygraph evidence was United States v. Galbreth, 908 F.Supp. 877 (D.N.M. 1995). In Galbreth, Judge Vasquez admitted the expert opinion testimony of Dr. Raskin, the nation’s leading supporter of the validity of polygraph evidence, after finding it met the reliability criteria of Rule 702 and Daubert as well as being more probative than prejudicial under Rule 403. Dr. Raskin had given Galbreth a polygraph test, which the court described as “a properly conducted examination by a highly qualified, experienced, and skillful examiner.” Id. at 896. However, this ruling carries little weight due to its procedural placement.

The judge ruled from the bench after a hearing in March, 1995. In July, 1995, the case went to trial. At the conclusion of the Government’s case-in-chief, the Government dismissed the charges (income tax evasion). Galbreth’s polygraph evidence was never presented to the jury. On October 4, 1995, the judge issued a “Memorandum Opinion and Order” that detailed her ruling on the admission of the polygraph evidence. The Order was therefore unappealable and dicta.

State v. Porter, 698 A.2d 739, 777, n. 76 (Conn.1997) described Galbreth this way:

The most substantial of the few federal opinions permitting polygraph evidence at trial comes from the District Court of New Mexico. United States v. Galbreth, supra, 908 F.Supp. 877. The Tenth Circuit Court of Appeals had only addressed the question of polygraph admissibility before Daubert had been released; see United States v. Soundingsides, 820 F.2d 1232, 1241-42 (10th Cir.1987); so the court in Galbreth felt free to formulate its own standard. The court accepted that Daubert provided the proper threshold standard; id., at 878; and then relied largely on testimony by Raskin to conclude that polygraph evidence satisfied Daubert and rule 403 of the Federal Rules of Evidence. Id., at 895. Although the court in Galbreth did address many of the concerns that have motivated us to retain our per se rule of exclusion, it did so by recounting only the most pro polygraph studies and information. Id., at 885-93. We believe that a more balanced review of the polygraph literature, such as we have conducted in the present case, reveals substantially more uncertainty regarding the effectiveness and prejudicial impact of the polygraph test than the court in Galbreth acknowledged.

Dr. Raskin scored the test as +29, and Dr. Honts scored it as +32, indicating a high probability of truthfulness. The Government’s expert, Dr. Barland, found the charts to be inconclusive. Galbreth at 894.

A critical issue was whether Galbreth knowingly failed to report income. Had Dr. Raskin testified, he would have been permitted to state that Galbreth’s “answers to the relevant questions regarding his knowledge and intent [were] consistent with a truthful polygraph outcome.” Id. at 895. (Emphasis added.) As the judge put it:

Dr. Raskin concluded that Defendant was truthful in his statements that he did not realize his returns under reported his taxable income. At trial, Defendant intends to call Dr. Raskin as an expert witness to testify about the testing procedures, to explain how the test was evaluated and to explain his interpretation of the results. Dr. Raskin is expected to testify that the results are indicative of a truthful polygraph test outcome with regard to the relevant questions. Dr. Raskin will not testify as to his personal opinion that Defendant was in fact telling the truth.

Id. at 878.

The testimony would therefore not be limited to Galbreth’s credibility but would cover his substantive answers to questions concerning his guilt or innocence. The judge would have allowed the assistant U.S. Attorney to cross-examine Dr. Raskin and to present the Government’s expert to refute any of Dr. Raskin’s testimony relating to the polygraph technique in general or to the specific application of that technique in this case.” Id. at 896. There was no mention of permitting the Government to give Galbreth a polygraph exam.

By contrast, another district court in United States v. Crumby, 895 F. Supp. 1354, 1363 (D.Ariz. 1995) admitted the evidence with severe limitations while noting that “the prejudicial effect of permitting the jury to hear the specific responses to the question of whether Defendant committed the ultimate crime in the case is overwhelmingly prejudicial.” That is, Crumby could introduce evidence that he took and passed the test if (1) he gave notice to the prosecutor, (2) took a government-administered test, (3) introduced the evidence only to support his credibility, if attacked, under Rule 608(a), and (4) the specific questions and physiological data were not introduced into evidence, although the general nature of polygraphy could be discussed by the experts under Rule 702. Id. at 1365. In Crumby, Dr. Raskin again testified, but unlike the Galbreth prosecutor, the U.S. Attorney did not offer any expert testimony as to the validity of the theoretical basis for the polygraph, nor contest Dr. Raskin’s testimony regarding the known error rate. The Crumby decision failed to mention any of the studies that challenge the validity of polygraph tests.

Galbreth and Crumby are exceptions, even within their own federal circuits, to the general rule that polygraph evidence is not admitted in federal courts. See United States v. Call, 129 F.3d 1402 (10th Cir. 1997) and United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) (barring evidence under Rule 702 due to lack of known error rate for real life exams, controversy in scientific community regarding validity of theory behind test, and lack of controlling standards).

**FINDINGS OF FACT**

### Decision theory and base rates

1. Measuring validity of polygraph test results is crucial to determining their admissibility. The following definitions come from PALD, page 29, et seq.

2. **Decision theory** is a scientific approach that applies basic statistics to real world problems. It is used to attempt to predict the...
utility of a test when there is a high degree of uncertainty before a test is conducted.
3. Reliability is a term used to indicate repeatability across different times, places, subjects, and conditions.
4. Test-retest reliability is the extent to which the same procedure, including the examiner, test format, and equipment used to examine the same subject for the same purpose yields the same result on repetition.
5. Inter-rater reliability is the extent to which different examiners would draw the same conclusions about a given subject at a given time for a given examination.
6. A measurement is considered valid if it measures what it is supposed to measure.
7. Criterion validity refers to how well a measure captures what it is supposed to capture. In the case of a polygraph test, does it show deception when the test subject is in fact deceptive and show lack of deception when the subject is truthful. This is synonymous with accuracy.
8. Without accuracy or criterion validity no test or procedure can be considered valid.
9. Construct validity refers to how well explanatory theories and concepts account for performance of a test. Users can have greater confidence in a test when evidence of its accuracy is supported by evidence of construct validity. In other words, when there is a chain of plausible mechanisms that explain both the empirical findings of the test and evidence that each test mechanism operates as the theory prescribes.
10. A positive polygraph test result means that the test indicates deception. A negative polygraph test result means that the polygraph indicates no deception. Therefore, a false positive result means the test indicates deception when the test subject is being truthful and a false negative result means the test indicates no deception when the test subject is not being truthful.
11. Decision threshold is the cutoff point for deciding whether a result is positive or negative. Even though polygraph test results, like other diagnostic tests, are usually presented in a yes or no answer format, the actual score is not presented in that fashion. In other words, there is a cutoff point, below which or above which the test is not scored as a positive or negative. These cutoff points are policy choices made by polygraphers. If they are set incorrectly, it increases the chance for a false negative or false positive result.
12. The literature and the presentations focused to a great extent on the issue of base rates. Base rates are an essential element in establishing a level of confidence in the outcome of a diagnostic test. Base rates dictate whether a diagnostic test is worth considering at all.
13. Base rate refers to the proportion of people in a population as they relate to a particular trait in issue. For example, in polygraph testing, the percent of truth tellers versus deceivers would result in the base rate. While the cases refer to the rate of error, that is not the only number that a court should consider in determining admissibility under Rule 11-403 NMRA 2003. Even though a particular piece of information may have some slight tendency to make the existence of a fact of consequence more or less probable, the confidence one could have in that information in relation to the circumstances of the case may be so low as to render the evidence inadmissible under Rule 11-403 NMRA 2003.
14. The confidence level in decision theory is a function of the error rate and base rate. To be complete in evaluating any diagnostic test, accuracy has two components. In the polygraph context, these components are: How likely is the test to be positive (indicating deception) if lying is present; and, how likely is the test to be negative (indicating a lack of deception) if lying is not present.
15. In the world of medicine, for example, Dr. Zelicoff noted that in diagnosing strep throat that the disease is seasonal. During certain seasons, strep is so rare. that the test result does not significantly add to our confidence level. That’s because due to seasonal fluctuation, the base rate of possible strep is so low, that even though the test accuracy is high, a positive test result does not increase our confidence that a decision made based on the test result will be correct.
16. In polygraph use, knowledge of the base rate can help decide whether the result of a polygraph test is worthy of consideration in making an important decision. In the employee screening contest, the NAS focused on base rate since the percentage of spies is assumed to be very low. Dr. Zelicoff quoted the former Secretary of Energy as saying “I in 10,000 employees of the Department of Energy are spies.
17. The accuracy rates of polygraph examinations are, at best, debatable in real life contexts. However, even if one assumes a high accuracy rate, the test is of little utility because of the low confidence level in the test result.
18. The NAS noted that if you use a test with 90% accuracy and an 80% threshold value (see p.61, PALD) and the test is used in a population with .1% (one in 1000) spies, the test would identify an average of 1606 as deceptive, only 8 of whom would be spies. PALD p.47.
19. Dr. Iacono used a similar example to illustrate the problem as it might apply in the criminal context. If you assume a base rate of 90% guilty and 90% test accuracy (and a maximum threshold value) and apply those assumptions to 100 criminal defendants who take polygraph tests, the resulting confidence level in the test result is notable. Of the 90 guilty, 81 will fail the test and 9 will pass. The 81 test failures will not be disclosed to the jury, the court or the prosecution, of course, but the 9 passed tests will be disclosed. Of the innocent, 9 will pass and 1 will fail. The passes will be disclosed and the one failure will not. Of the 18 passed tests, there are only 9 (50%) who are factually not guilty. In other words, the confidence level of the test in its application is only 50-50. See Resp. Exhibit 4.
20. Petitioners have some arguments to address this illustration. First, they note that the base rate is not truly knowable. A defendant is, after all, presumed innocent and to clump an individual in with all others accused is to violate basic principles of American jurisprudence. Second, petitioners argue that the standard under Rule 11-401 NMRA 2003, is any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
21. The argument points out that even though the confidence level of the test result in the context of these assumptions is only 50-50, it still makes a fact in issue more or less probable. In other words, even though the confidence level is merely 50%, the argument goes, it is still a 40% improvement over the pre-test 90% figure. To rephrase, before the test result, given the population, one could be confident that any one of the population who denied culpability was 90% likely to be not telling the truth. After passing the test, one could be only 50% confident that the denial was untrue. That move from a 90% confidence the testimony is false to a 50% confidence the testimony is false makes it more probable it is truthful than it was before and, so the argument goes, it is relevant.
22. The base rate issue is part of this Court’s analysis of the field study reliability and is a major issue raised directly by Respondents. Therefore its effect must be considered as
it relates to polygraph evidence. This Court finds that, if polygraph testimony is reliable enough to be admissible, it would be deceptive to testify to the type of testimony offered in the past, such as claims that there is a 90% chance the test subject was truthful or that the test is 90% accurate.

23. Dr. Raskin and Dr. Honts both testified that in the absence of a known base rate, a base rate of 50% should be assumed. Both also testified that juries tend to work out their own base rates. In other words, in considering the strength of other evidence, juries give more or less weight to polygraph evidence.

24. The Court agrees that the base rate in an individual case is basically either unknowable or, at best, is a moving target based on the strength of all of the non-polygraph evidence. Yet it exists. To assume a base rate of 50% is no more reliable than any other assumption and is misleading. If any level of accuracy is testified to, it is either directly or inferentially suggestive of a confidence level in the result that is directly tied to a base rate most appropriately to be determined by the finder of fact. If the art of polygraphy were to ever achieve sufficient reliability for admissibility, it would be appropriate to prohibit any percent of accuracy to be introduced on direct examination. In other words, it would be inappropriate to testify that the test reflects a 90% probability that the test subject was truthful if it is not possible to accurately express how confident the jury could be in that number given the population of test subjects. Any probative value of such testimony would be substantially outweighed by the danger of confusion of the issues, misleading the jury, and undue waste of time.

Known rate of error in operation

25. The only way to determine the “rate of error in operation” of the polygraph test procedure is to test the operation of the procedure and determine its reliability or accuracy.

26. To test a theory, one must start with a hypothesis.

27. There is no sound scientific theory upon which polygraph is based.

28. Dr. Honts claims to have a hypothesis that is being tested, that of whether a comparison question test accurately diagnoses truth and deception. However, there is no explanation as to why it does so if it does indeed do so.

29. There is no lie response. There is no one testable physiological manifestation of a lie. Polygraphs test physiological responses to questions and, if there is a physiological response, the thinking is that if the response is greater for a relevant question than for a comparison question, then it means the response to the relevant question is likely to be deceptive. However, any physiological response to any question could be caused by any one of a number of emotions such as shame, anxiety, guilt, fear, tension, or other emotional responses not understood. There is no single underlying process reflected in responses to questions that are measured by the polygraph. The polygraph measures a variety of psychological and physiological processes, including some that can be consciously controlled.

30. In the comparison question test, one emotional or physiological response to the relevant question could cause a measurable result on the polygraph and a completely different emotional or physiological response to the comparison question could cause a measurable result on the polygraph. Yet the level of response for each of the two responses is what is measured and compared, resulting in the gauge of truth-telling.

31. The comparison questions are not determined in advance and are either directed lie or probable lie questions. A directed lie means in the pre-test interview the test subject is told to lie to the question which will supposedly result in the physiological response. A probable lie is similar in operation, but is a question like: “Have you ever taken anything of value that did not belong to you?” Pre-test procedures sometimes include card tricks or similar techniques to convince the test subject that the test is working and will detect deception. No standards exist for how the pre-test procedures will be conducted or for how the comparison question will be formulated.

32. The vast majority of the tests upon which the claimed accuracy of polygraph examinations is based are laboratory tests, as opposed to field tests.

33. In most laboratory tests, the subject is given a series of written instructions and during the course of following those instructions will or will not “steal” an item. Then the subject is immediately subjected to a polygraph examination.

34. In most field tests, results of polygraph examinations by various law enforcement agencies are examined to determine if they were correct.

35. The accuracy of a test in the field can only be determined if objective truth is known. If objective truth is not known, then you cannot determine if the test accurately detected deception.

36. The method for determining objective truth in field tests is usually based on whether or not there was ultimately a confession either by the subject of the polygraph or by others who then exonerate the test subject. If nobody confesses, then the result is not considered in determining accuracy.

37. This technique effectively limits the ability to measure polygraph accuracy in the field, since all test results are thrown out if there is not a confession. It is highly unlikely that subjects in a field study would confess if they passed the polygraph. A fair assumption is that a guilty subject would have a vested interest in passing the polygraph. That is one of the ideas proponents assert to argue that the stress of facing the relevant question would result in a more pronounced response than the control question. If it’s so important to pass, why would anyone who’s successfully passed the polygraph in a real life setting then decide to reveal the truth? Why would the subject bother taking the polygraph in the first place if the point wasn’t to try to get away with it? If that assumption is correct, and this Court, based on years of experience on the bench and in a criminal practice, as well as after reviewing all of the evidence and testimony in this case, finds that it is, field studies do not produce a reliable error rate. None of the errors are likely to admit they were “errors”.

38. Conversely, the truly innocent person who is scored as having failed the polygraph examination is also highly unlikely to confess to the crime they did not commit. Again, this error would not reach the final tally of test “success” since the result would not be considered at all as there was no confession. If the innocent person falsely confessed, which appears to happen from time to time, that would also inflate the accuracy figures of the field study and distort the claimed error rate.

39. Experimental field studies are the most compelling type of field validation study. This would be a study in which a variable of interest is manipulated among polygraph examinations in real-life settings. No experimental field studies are found in any of the literature on polygraph validity. PALD at 109-110.

40. At the top of research hierarchy is the peer reviewed publication. No specific incident field investigations are found in the higher levels of research hierarchy. PALD at 114.

41. The field test results suggest that poly-
graph examinations are an effective interrogation tool because they seem to produce a significant number of confessions. This utility is separate from polygraph validity. According to NAS: “There is substantial anecdotal evidence that admissions and confessions occur in polygraph examinations, but no direct scientific evidence assessing the utility of the polygraph. Indirect evidence supports the idea that a technique will exhibit utility effects if examinees and the public believe that there is a high likelihood of a deceptive person being detected and that the costs of being judged deceptive are substantial.... there is no evidence to suggest that admissions and confessions occur more readily with the polygraph than with a bogus pipeline - an interrogation accompanying the use of an inert machine that the examinee believes to be a polygraph.” PALD at 214-215.

42. Because there is no underlying theory explaining why polygraphs detect deception, it limits the ability to determine effectiveness in contexts that vary from the lab settings or the limited number of field tests. For example, the majority of polygraph test results offered in evidence in New Mexico (all of the test results in the cases in issue in these appeals) are offered by the defendant.

43. Because laboratory tests are so dissimilar from the complex matrix of variables that can occur in real life, they are not sufficiently useful for determining the accuracy of polygraph testing in real life contexts.

44. The context of a polygraph test offered by a defendant differs in many material ways from the lab setting and field tests. First, the delay between the targeting of the defendant and the test is often significant. Second, the pressure to perform is different since the result of the test will not be disclosed if the defendant fails the test. Third, given the delay, the defendant may become habituated to answering questions about the pending charges and therefore may not react as strongly to relevant questions during the polygraph test. Fourth, the polygrapher is “friendly” to the defense. Fifth, the opportunity for the defendant to learn and utilize counter-measures is increased.

45. An example of the types of problems that are inherent in most laboratory studies was demonstrated by a laboratory study conducted by Dr. Iacono which was designed to introduce some real stressors into the test dynamic, stressors that are more likely to mimic real life situations. Dr. Iacono went to a population that Dr. Raskin used for one of his lab studies, prisoners. But instead of using the traditional Raskin approach of offering a nominal financial reward if the test is “beaten”, Dr. Iacono generated some real pressure. He told the prisoners that he would pay them if they “beat” the polygraph, but that the payment would be to all of the prisoners or none. He told them that he expected a certain percentage to be successful and, that if they fell below that percentage nobody would get paid and he would publish the names of the prisoners who failed to pass the polygraph in the prison. At the conclusion of the test he paid everyone and didn’t publish any names. However, the test accuracy fell from Dr. Raskin’s 94% to 72%, even though it was the same population group. As Iacono described it, he set up a group contingency threat, where each test subject would be concerned about the consequences of the test outcome. The study was published in The Journal of Applied Psychology, a peer reviewed publication. TT, 6/24/03, 46-48.

46. The Iacono prisoner study is one example of what can happen if a key and relevant variable is altered to more closely approach real life. Unfortunately, there are not enough studies that try to answer these types of questions.

47. No scientific field studies of the friendly polygrapher scenario have been conducted. Even the variables, the risk of significant impact is great. In the normal scenario, the scenario from which the field studies have been derived, the test is conducted in an adversarial setting. The goal of the police officer conducting the test is to catch somebody. The focus is intense and the consequences of failing the polygraph are great.

48. In the friendly polygraph there is no adversarial atmosphere.

49. The Rosenthal Effect is a phenomenon that has been recognized in psychology for approximately thirty years. It recognizes that psychologists and scientists and others who have an investment in a theory are likely to unconsciously arrange an experiment in such a way that they get favorable results. It is the reason that it is necessary that test results need to be replicated by an independent researcher.

50. The Rosenthal Effect can affect an individual polygraph examiner because the hypothesis in an individual test involves the examiner’s sense of whether the test subject is guilty or not. The examiner necessarily has access to the case facts and interviews the examinee in a pre-test interview. Based on the case information and how the inter-view develops -- for example the examinee might seem truthful -- it can affect the attitude of the examiner. The Court noted the following statement from Dr. Honts: “In my experience in New Mexico in testifying before juries clearly indicates that, (the jury will make use of the polygraph as they see fit) and that they have decided to convict despite a polygraph that showed the person was truthful.” TT, 7/3/03, 114. The context of the statement and the observation of the witness led the Court to conclude that Dr. Flouts was invested in the outcome and that he was surprised that a jury could reach a different conclusion.

51. The risk of the Rosenthal Effect is exacerbated by the lack of standards in the profession.

52. There is no requirement that the test subject be drug free. However, drugs that act to decrease responding in a general way will not normally affect the control question test because the scoring is based on comparing responses to two types of questions. The problem is, there is at least one study that indicates that alcohol could reverse the responses in a control question setting. Dr. Iacono was unable to duplicate the result of the study. More research needs to be done in this area.

53. Since it is not clear what emotional triggers will result in a particular reading in a polygraph chart and since different emotions may produce a given polygraph response in the control versus the relevant question, there is no way to determine if the drug may affect one emotional response, but not another.

54. There are no standards which dictate whether an examiner should use a probable lie versus a directed lie versus a relevant-irrelevant test.

55. There is no restriction regarding testing mentally ill individuals. However there is at least one study that indicates that psychopaths are not more able to defeat the polygraph than others.

56. While there are supposed guidelines that dictate the form of relevant question, they seem to be subject to unreasonable interpretation by practitioners. Dr. Raskin, on the one hand takes the position that intent is not a proper subject for a relevant question, yet claims that asking a relevant question regarding whether touching the victim’s penis was for “sexual purposes” is not problematic. TT, 7/1/03, 217-218. (Regarding the questions asked in State v. Robinson, one of the pending cases).

57. At this point there remains no licensing requirement for polygraphers in New
Mexico.
58. There is no blind proficiency testing requirement in New Mexico.
59. Covert counter-measures consist of simple techniques such as biting the tongue, flexing the toes, or performing mentally stressful math exercises. These activities, if timed to take place during the control question phase of the test, can artificially augment the “involuntary” physiological response.
60. Counter-measures are effective in affecting polygraph test outcomes. One laboratory study indicates that with less than a half-hour training or explanation, the likelihood of a false test result increases by 50%. There is a consensus among scientists that counter-measures are effective. Some studies indicate that merely reading about countermeasures is insufficient to affect test outcomes, but more research is necessary in this area. See State v. Porter, 241 Conn. 57, 113, 698 A. 2nd 739, 768 (1997).
61. This Court shares the concern of the Connecticut Supreme Court in Porter, noting the informal study cited in that case where twenty-seven inmates were given fifteen minutes of instruction by a fellow prisoner (who had been instructed by Dr. Lykken) before reporting for a polygraph exam regarding an alleged infliction of prison rules. All twenty-seven privately admitted their guilt and twenty-four passed the polygraph. Id., at 241 Conn. 114, 698 A.2d 768. Although that study is appropriately criticized by Dr. Raskin, see Faigman, § 19-2.2.2 FN 72, the specter of the ease of communicating how to successfully utilize counter-measures remains.
62. Experienced examiners could not detect counter-measures in the lab study.
63. There are no properly conducted studies regarding the effectiveness of counter-measures in real life by sophisticated test subjects.
64. In PALD, the authors note: “Notwithstanding the limitations of the quality of the empirical research and the limited ability to generalize to real world settings, we conclude in populations of examinees, such as those represented in polygraph research literature, untrained in counter-measures, specific instance polygraph tests for specific investigations can discriminate lying from truth well above chance and well below perfection, and accuracy may be highly variable across situations.” Id. at 214.
65. However, there is no guarantee that the populations of test subjects that are likely to offer the test in evidence in New Mexico are “untrained in counter-measures.” Also, it must be kept in mind that the context of all of the research referred to was in relation to specific investigations in either laboratory settings or field studies based on adversarial test situations. As a result, the conclusion that tests in those situations can discriminate lying from truth “well above chance” is irrelevant to the inquiry of this Court.
66. Computer scoring of test results is a recent development. However, the algorithms for the programs are based on certain assumptions:
• that the probability of truth or deception in real-world situations can be determined from the score on a control question test (the basic assumption of lie detection);
• that the scores stored in the computer accurately represent the scores to be expected from truthful or deceptive subjects obtained under circumstances similar to those in the instant test;
• that 50 percent of those who are tested with the instrument are deceptive (the base rate problem discussed elsewhere). See Faigman, § 19-3.3.9. Because of the problems with field studies no database meeting the above criteria exists. The computer scoring results in an expressed confidence level presented as a percent likelihood that the test subject is truthful. Examiners will testify, for example, that the test score shows the likelihood that the subject was truthful is 93.3%. As discussed above, this is without a scientific basis and deceptively ignores the problem with base rates.
Acceptance in the Relevant Scientific Community
4. The relevant scientific community is The Society for Psychophysiological Research and Fellows in Division One of the American Psychological Association, a division of the American Psychological Association General Psychology Group broadly versed in principles of psychology.
5. There have been four attempts to survey the relevant scientific community for its views of the validity of polygraph examinations.
6. Of the four attempts, the most reliable is the survey conducted by Dr. Iacono and published in The Journal of Applied Psychology, a peer reviewed publication.
7. While Dr. Honts is critical of the methodology, the response rate was the highest by far, and the survey clarified potential ambiguities found in the other surveys. The Court finds it significant that the article relating to the Iacono survey and the results were selected by the publisher of a book on research methodology to be used as an exemplar of how to do similar types of research. Further, unlike the Iacono survey, the other surveys did not distinguish between control question tests and guilty knowledge test.
8. 36% of those responding felt the control question polygraph test was based on scientifically sound psychological principles and theory. This compares with 22% who agreed with that statement regarding the directed lie test and 77% who agreed with the question in the guilty knowledge test. 9. A significant majority also agreed that a “friendly” test was more likely to be passed than an adversarial test. 99% believed that counter-measures might work.
10. On the issue of the weight to be given laboratory studies as opposed to field studies, only 17% believed that results of laboratory studies should be given substantial weight.
11. The Iacono survey results were consistent with the NAS view that the high levels of accuracy claimed by practitioners have rarely been reflected in empirical research. NAS, p. 107.
12. Control question polygraph tests do not enjoy general acceptance within the relevant scientific community.
13. This finding is even more significant given the length of time the polygraph has been in use. The polygraph is not “cutting edge” technology that would tend to be esoteric. It is technology that would be familiar to members of The Society for Psychophysiological Research and Fellows in Division One of the American Psychological Association.
CONCLUSIONS OF LAW
1. Polygraph test results and the conclusions derived from them are not based upon an overarching theory. To the extent it is merely argued that there is a hypothesis that the test reliably detects deception, that hypothesis has not been subjected to field research. The existing laboratory research, given the problems described above, is woefully inadequate to support admissibility in court in real life contexts.
2. There is no theory, as stated above. The technique has been subjected to limited peer review publication. The conclusions of the relevant publications do not enhance confidence in the test results, particularly considering the effectiveness of counter-measures.
3. The potential rate of error is vague and unreliable. Given the effect of ignoring base rates as endorsed by proponents, the reliability of test results as reflected in an
actual percentage misrepresents the confidence level in the test.
4. There are no set standards other than those set out in Rule 11-707 NMRA 2003. Those standards are insufficient for the reasons set out above.
5. Control polygraph tests are not accepted in the relevant scientific community at a significant level, particularly considering the age of the technique.
6. The technique is not based upon well-recognized scientific principles and is not capable of supporting opinions based upon reasonable probability rather than conjecture.
7. If the risk of counter-measures is ignored, there is an argument that all of the studies taken together support a conclusion that a successful polygraph result makes a fact in issue more or less probable. However, given the state of the art of polygraphy, the limited probative value polygraph test results is substantially outweighed by the danger of confusion of the issues, undue delay, and waste of time and therefore polygraph evidence becomes inadmissible under Rule 11-403 NMRA 2003.
8. At least one court has found that testimony that someone has passed a polygraph examination is extrinsic evidence of a specific instance of conduct (passing the polygraph) that supports a witness’s credibility, and is therefore inadmissible under Rule 11-608 B. US v. Piccinonna, 729 F.Supp. 1336, 1338 (S.D.Fla. 1990), aff’d by U.S. v. Piccinonna, 925 F.2d 1474 (11th Cir. 1991).
9. Because of the inherently subjective nature of the test procedure, the polygraph examination can not be repeated. Successful repetition of a test is the cornerstone of the scientific method. It lacks test-retest reliability.
10. The results of polygraph testing are not sufficiently reliable for admissibility in courts in New Mexico.

Richard J. Knowles
District Judge

I. BACKGROUND

{2} On January 7, 2001, a Domino’s Pizza delivery truck was parked in the restaurant’s lot on Third Street, also known as State Road 51 (road), in Truth or Consequences, New Mexico. The unattended truck rolled down the lot’s steep incline, crossed the road, entered the property of Cortez Gas Company (gas company), and struck a propane gas storage tank on the property. The tank exploded; the resulting fire damaged residential property in the area. Plaintiffs, who lived in the surrounding area, filed their first amended complaint against the gas company, Domino’s Pizza, the State Highway and Transportation Department (Highway Department), and the City. Plaintiffs sought relief for personal injury and property damage.

{3} Plaintiffs’ amended complaint alleged that the City maintained the road; that there were at least two substantially similar incidents of vehicles rolling out of the parking lot, crossing the road, and entering the gas company’s property; that the City “knew or should have known of these incidents”; and that the City “failed to take reasonable steps to ensure the public safety.” Plaintiffs further alleged that the City knew or should have known there were no barriers on or near the road to prevent motorists from colliding with a propane gas storage tank on the gas company’s property and that the City’s negligence caused the collision resulting in Plaintiffs’ injuries. These same allegations were directed toward the Highway Department.

{4} The City filed a summary judgment motion, primarily arguing that the City neither constructed, owned, nor maintained the road; that the City had no agreement with the Highway Department to participate in maintenance of the road; that installation
of a barrier was not a maintenance function; and that immunity was not waived under the TCA, Section 41-4-11(A) (withdrawing immunity for negligence in the maintenance of roadways). The Highway Department likewise filed a motion for summary judgment, acknowledging that the Highway Department had a duty to ensure the safety of the motoring public on the road but emphasizing that the duty did not extend to the protection of private property adjacent to the road; that there was no basis under engineering principles for a barrier on the road; that installation of a barrier is a design, not a maintenance, function; that even if the Highway Department had a duty to install a barrier, such installation would require a redesign and reconstruction of the road; and that the Highway Department was therefore immune from liability under the TCA, Section 41-4-11(B) (granting immunity for design defects of any roadway). In support of its position, the Highway Department attached the affidavit of one of its engineers, Paul Gray.

{5} The trial court, determining that there were no material facts in dispute and that immunity was not waived for either entity under the TCA, dismissed all claims against both the City and the Highway Department on August 5, 2002. The court also concluded that the installation of guardrails was a design issue and found the following pertinent facts:

5. Third Street, in the vicinity where this incident occurred, is a public highway owned and maintained by the [Highway Department].

6. Third Street, in the vicinity where this incident occurred, was designed by the [Highway Department] and built on a right-of-way owned by the [sic] New Mexico.

7. The [City] has established, by uncontested evidence, that it did not contractually undertake any responsibilities with reference to this portion of Third Street.

8. Neither the [City] nor the [Highway Department] created the alleged dangerous condition.

9. The Plaintiffs have offered no competent evidence as to what they contend the [City] could have done to have prevented this incident including what preventive measures, within the control of the [City], would have prevented this incident.

   . . .

17. The Affidavit of Paul W. Gray, Assistant District Engineer, has not been controverted, by an expert to design liability, design immunity, and reconstruction immunity under the Tort Claims Act. The time for furnishing such an expert has long since expired.

{6} Plaintiffs subsequently settled their claims against the Highway Department. They appeal as to the City only.

II. DISCUSSION

A. Standard of Review

{7} Whether the TCA bars Plaintiffs’ claims against the City is a question of law, which we review de novo. See Rutherford v. Chaves County, 2003-NMHC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199; Godwin v. Mem’l Med. Ctr., 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273. Generally, the existence of duty is determined as a matter of law. Koenig v. Perez, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). Plaintiffs contend that in this case, the existence of duty is a mixed question of law and fact. See Eckhardt v. Charter Hosp. of Albuquerque, 1998-NMCA-017, ¶¶ 36, 39, 124 N.M. 549, 953 P.2d 722 (stating that where the existence of duty depends on the resolution of disputed facts, the jury properly resolves the conflicting evidence).

As we discuss below, the material facts in this case are not in dispute. We therefore agree with the City that duty here is purely a question of law.

{8} Summary judgment is considered a drastic measure and is to be used with the utmost caution. Pollock v. State Highway & Transp. Dep’t, 1999-NMCA-083, ¶ 5, 127 N.M. 521, 984 P.2d 768. We may find summary judgment proper if material facts are undisputed and only the legal interpretation of those facts remains. Rule 1-056(C) NMACRA 2004; Gavitt v. Overland Sheepskin Co. of Taos, 1996-NMCA-032, ¶ 29, 121 N.M. 710, 917 P.2d 1382; Godwin, 2001-NMCA-033, ¶ 23. If the undisputed facts establish that the movant is entitled to judgment as a matter of law, then we will not disturb the trial court’s order. See Goodman v. Brock, 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972); Godwin, 2001-NMCA-033, ¶ 23. “The movant has the burden of establishing a prima facie case showing there was no genuine issue of material fact. A prima facie showing is evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” Pollock, 1999-NMCA-083, ¶ 5 (internal quotation marks and citations omitted). Once a prima facie case is made, the party opposing the motion has the burden to demonstrate with admissible evidence that a reasonable doubt exists as to a genuine factual issue. Koenig, 104 N.M. at 666, 726 P.2d at 343; Goodman, 83 N.M. at 792-93, 498 P.2d at 679-80; Pollock, 1999-NMCA-083, ¶ 6; Savinsky v. The Bromley Group, Ltd., 106 N.M. 175, 176, 740 P.2d 1159, 1160 (Ct. App. 1987).

{9} We turn now to the question of whether immunity was waived for the City under the TCA. Following our resolution of that matter, we discuss Plaintiffs’ discovery challenges to summary judgment.

B. Immunity

{10} Section 41-4-4(A) of the TCA provides government entities with immunity from liability for any tort, except as waived in other sections of the TCA. Plaintiffs argue that the relevant waiver in this case is negligent maintenance; the waiver reads as follows:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury . . . or property damage caused by the negligence of public employees while acting within the scope of their duties during the construction, in subsequent maintenance of any . . . roadway . . . .

Section 41-4-11(A).

{11} Whether the City had either a statutory or a common law duty to maintain the road is dispositive on the issue of immunity. See § 41-4-2(B) (“Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty.”); Eckhardt, 1998-NMCA-017, ¶ 36 (agreeing that a negligence claim is premised on the existence of a duty); Gallegos v. Trujillo, 114 N.M. 435, 439, 839 P.2d 645, 649 (Ct. App. 1992) (concluding that the absence of a duty precludes waiver of immunity); Johnson v. Sch. Bd. of Albuquerque Pub. Sch. Sys., 114 N.M. 750, 751, 845 P.2d 844, 845 (Ct. App. 1992) (“Duty or responsibility is not provided in the Tort Claims Act; it must be found outside the Act either at common law or by statute.”). We therefore proceed directly to that issue.
{12} The City’s position was that it had no duty to maintain the road; therefore, it was the City’s burden to show that no material fact existed regarding this issue. See Pollock, 1999-NMCA-083, ¶ 5. The City met its burden with the following evidence: (1) an affidavit from the superintendent of the City’s Street Department that the road is part of the state highway system and that the City did not construct the road; did not own the road, did not maintain the road, had no agreement with the Highway Department to assume responsibility for maintaining the road, and received no funding from the Highway Department to maintain the road and (2) the Highway Department’s answer to interrogatories, acknowledging that the Highway Department constructed and maintained the road.

{13} The City’s having established its prima facie case, the burden shifted to Plaintiffs to show a material issue of fact existed regarding this issue. (1) lock fact existed. Plaintiffs, the government entities being sued all owned the roads in question. See, e.g., Lerma v. State Highway Dept., 117 N.M. 782, 784-85, 877 P.2d 1085, 1087-88 (1994) (remanding for a jury to determine if the Highway Department breached its duty to protect the public from foreseeable harm on a state highway); Ryan v. State Highway & Transp. Dep’t, 1998-NMCA-116, ¶¶ 1, 9, 125 N.M. 588, 964 P.2d 149 (holding that whether the Highway Department had notice of an alleged dangerous condition on a state road was a jury question precluding summary judgment); Blackburn v. State, 98 N.M. 34, 36, 644 P.2d 548, 550 (Ct. App. 1982) (determining that the State was not immune from a negligent maintenance suit where the plaintiffs claimed the State failed to install adequate traffic controls on a state road).

{17} Plaintiffs provide no facts to support their assertion that the City has jurisdiction to install traffic control devices or otherwise make improvements on the road. Plaintiffs seem to argue that the general duty to protect the public creates the duty to maintain a road. New Mexico law is otherwise. It predicates the responsibility to maintain on jurisdiction, and it is that responsibility that gives rise to the duty to protect the public. See Rutherford v. Chaves County, 2002-NMCA-059, ¶ 12, 132 N.M. 289, 47 P.3d 448 (“Th[e] responsibility to maintain is simply another way of saying that the County, as opposed to some other governmental entity, has jurisdiction over the road in question. This responsibility in turn gives rise to a duty to [protect] the public . . . from foreseeable harm on the highways . . . .” (internal quotation marks and citation omitted)), aff’d, 2003-NMSC-010, ¶ 25.

{18} Plaintiffs cite to Moore v. State, 95 N.M. 300, 301, 621 P.2d 517, 518 (Ct. App. 1980), and Largo v. Aichison, Topexa and Santa Fe Railway Co., 2002-NMCA-021, ¶¶ 13, 15-16, 131 N.M. 621, 41 P.3d 347, and insist that the City could have shared responsibility with the Highway Department for maintaining the road. Whether or not the City could assist the Highway Department is not the point. In Moore, there was no question that the City of Albuquerque and the Highway Department jointly maintained the highway where the accident occurred; both entities had entered into a memorandum agreement regarding construction on that particular highway. Moore, 95 N.M. at 301, 621 P.2d at 518. Clearly, governmental entities can share maintenance responsibilities by agreement. The undisputed evidence in this case, however, is that the City did not share the responsibility. Moore does not hold that a city is required to share this responsibility. In Largo, we held that the legislature had not abrogated the defendant railroad’s common law duty to place warnings at dangerous railroad crossings, despite a state statute giving authority to government entities to install warning devices. Largo, 2002-NMCA-021, ¶ 15. While Largo involved the duty of parties to warn, the
defendant was not a governmental entity, and the waiver of government immunity that we discuss later was not at issue. In this case, there is no question that the Highway Department had the sole responsibility to maintain Third Street in the vicinity where the accident occurred. Consequently, the waiver of immunity in Section 41-4-4(A) of the TCA does not apply to the City because it had no duty upon which negligence could be premised.

{19} Citing to Rutherford, 2002-NMCA-059, Plaintiffs argue that the fact the propane gas tanks were forty feet from the road does not preclude liability for negligent maintenance. In Rutherford, this Court found that the government entity had a duty to protect the traveling public from known dangers, such as flooding on roadways. Id. ¶¶ 12-13. However, in Rutherford, the parties did not dispute that the government entity being sued was responsible for maintaining the road in question. Id. ¶ 12. This Court did not impose on another government entity a duty to maintain a road it did not own; that is what Plaintiffs, in essence, are asking us to do in this case. We decline to do so.

{20} From this undisputed evidence, we conclude and hold that the City did not have a duty to maintain the road, as contemplated under the waiver of immunity in the statute. The negligent maintenance waiver, therefore, is inapplicable. See Noriega v. Stahmann Farms, Inc., 113 N.M. 441, 444, 827 P.2d 156, 159 (Ct. App. 1992) (noting that the plaintiff’s evidence did not support a claim that the government entity owned the road and that there was therefore no basis for the negligent maintenance waiver of immunity); Johnson, 114 N.M. at 755, 845 P.2d at 849 (holding that because the government entity had no responsibility for maintaining the crosswalk, the street maintenance waiver was inapplicable). Accordingly, we reject Plaintiffs’ argument that material facts exist as to whether immunity was waived for the City’s actions.

{21} Plaintiffs allege various theories, some not in the context of the actual maintenance of the road, pursuant to which the City should have done one thing or another that Plaintiffs claim would have prevented the accident. Plaintiffs claim that (1) the City’s notice of the alleged dangerous condition gave rise to a duty to notify the highway department to remedy the situation, (2) the City was negligent in approving the propane facility, (3) the City could have erected barriers or curbs in the parking lot to prevent vehicles from leaving it or signs in the parking lot to warn motorists to engage their parking brakes, (4) the City could have erected barriers or curbs on either side of the street to prevent vehicles from leaving the parking lot and entering the propane business, and (5) the City could have altered the ingress into and egress from the parking lot so that vehicles would not leave the parking lot and enter the propane business. To the extent that items (4) and (5) involve maintenance of the road, we hold that the City had no duty for the reasons expressed above. As for items (1) through (3), they do not even involve maintenance of the road in the context of this case, and there is therefore no applicable waiver of immunity for them. Similarly, items (4) and (5) appear to involve design, and Section 41-4-11(B) grants immunity for design issues. Importantly, too, the accident for which Plaintiffs are suing was not an accident that happened in the road. In effect, Plaintiffs are arguing that the presence of a condition on one side of the road, which might spill over to the other side of the road, creates a duty on the part of a state entity to alter the road and areas off the road so that the road becomes a barrier to those conditions. We do not believe that the waiver of immunity for negligence in the maintenance of roads was intended to reach as far as Plaintiffs want it to reach in this case.

{22} None of Plaintiffs’ contentions affects our determination that there is no duty under the undisputed facts. For all of these reasons, we also reject Plaintiffs’ argument that material facts exist as to whether immunity was waived.

C. Discovery

{23} Plaintiffs assert two discovery challenges: (1) the trial court granted summary judgment before Plaintiffs completed discovery, and (2) the court ended discovery prematurely when it determined the deadline had expired for Plaintiffs to obtain an expert. As to the first challenge, Plaintiffs assert that once the City and the Highway Department had filed their summary judgment motions, Plaintiffs “were given less than one month to conduct discovery with regard to the City and the State.” Plaintiffs point out that the Highway Department’s motion, filed on March 6, 2002, was accompanied by the affidavit of Paul Gray in an expert capacity as a design engineer. Plaintiffs declare they had less than twenty days to respond with an expert, since they allege that the hearing on both motions occurred on March 27, 2002. As to the second challenge, Plaintiffs complain that the scheduling order gave them until July 31, 2002, to submit their final witness list and that the trial court therefore incorrectly found that the time for them to contravene Paul Gray’s affidavit with an affidavit of their own expert had ended. Citing Sun Country Savings Bank of New Mexico v. McDowell, 108 N.M. 528, 534, 775 P.2d 730, 736 (1989), Plaintiffs conclude that the trial court erred by “clearly violating the rule that a court should not grant summary judgment before a party completes discovery” and that, accordingly, we should reverse summary judgment. Because the two challenges are so closely related, we consider them together.

{24} Our review of the record does not support Plaintiffs’ contention that they had less than a month to conduct discovery and less than twenty days to respond with an expert. The City’s motion was filed on January 16, 2002. While the Highway Department’s motion was filed on March 6, 2002, as Plaintiffs indicated, the motions hearing did not occur until May 16, 2002. The affidavit of expert witness Paul Gray was attached to the Highway Department’s motion. Plaintiffs therefore had four months to conduct discovery after the City’s motion, more than two months to conduct discovery after the Highway Department’s motion, and more than two months to respond with an expert.

{25} We also disagree that Sun Country Savings Bank supports Plaintiffs’ conclusion. In that case, our Supreme Court observed that “as a general rule, a court should not grant summary judgment before a party has completed discovery, particularly when further factual resolution is essential to determining the central legal issues.” Id. (citation omitted). The Court then discussed “critical factors” appellate courts consider before determining if summary judgment was premature: whether the nonmoving party had sufficient time to conduct necessary discovery, whether the nonmoving party gave the court certain information about the particular evidence it still needed, whether the moving party responded to discovery requests, and whether the nonmoving party sought at the motion hearing a continuance to complete discovery. Id. After considering the factors in light of the record, the Supreme Court rejected the plaintiff’s contention that the trial court erred in granting summary judgment prior to completion of discovery. Id. at 535, 775 P.2d at 737. The defendant in Sun Country Savings Bank had two and a half months to complete critical discovery—from the
time the plaintiff filed the summary judgment motion to the time it was granted. Id. at 534-35, 775 P.2d at 736-37.

{26} We apply the same factors to the record in this case. In Plaintiffs’ initial response to the City’s summary judgment motion, filed February 6, 2002, they stated that they had not yet propounded interrogatories and requests for production upon the City and that they had only deposed the City’s fire chief. However, by the time of the motion hearing, Plaintiffs had also deposed two former City Commissioners and two former City Managers, as well as the Highway Department’s maintenance supervisor and its district traffic engineer for the area in question. In addition, Plaintiffs received responses from the City to their interrogatories and their request for production of documents.

{27} Plaintiffs do not suggest on appeal what additional discovery would place a material fact at issue. They do not point us to any information they gave to the trial court as to the particular evidence they still needed from the City or what expert testimony they wished to offer. Plaintiffs did not mention discovery in their supplemental response to the City’s motion filed May 8, 2002. They do not suggest that the City failed to respond to their discovery requests. Nor do Plaintiffs indicate that they sought at the motion hearing a continuance to complete discovery. Under these circumstances, we hold that the trial court did not err in granting summary judgment. See id.

{28} For the foregoing reasons, we affirm the trial court’s grant of summary judgment in favor of the City.

III. CONCLUSION

{29} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

LYNN PICKARD, Judge

JONATHAN B. SUTIN, Judge

OPINION

MICHAEL E. VIGIL, Judge

{1} The State filed a petition to impose an eight year habitual offender sentence on grounds that under a plea and disposition agreement Defendant admitted to being a habitual offender based on three prior felonies, and he was subject to the enhancement because he violated his plea and disposition agreement. The trial court dismissed the petition, finding it lacked jurisdiction because the Defendant had completed serving his term of incarceration and parole when he was brought before the court on the petition. The State makes several arguments that the trial court had jurisdiction to impose the enhanced sentence, all of which assume Defendant violated the plea and disposition agreement. We hold that Defendant did not violate the plea and disposition agreement, and therefore he was not subject to the enhanced sentence. We affirm the trial court on this basis.

FACTS

{2} Defendant and the State entered into a plea and disposition agreement in which they agreed that Defendant would plead guilty to the fourth degree felony offense of possession of methamphetamine, two misdemeanor offenses of possession of paraphernalia, resisting arrest, and also admitted to being a habitual offender based on three prior felonies. They also agreed that Defendant would be sentenced to a prison term totaling three years, followed by a one-year period of parole. Further, “[t]he State will at this time withhold imposition of the eight year habitual, pending completion of the period of parole without reoffending for a drug, theft, or felony offense.” The trial court approved the agreement after conducting a hearing at which Defendant admitted to having three prior felony convictions. Consistent with the agreement, a judgment and order of commitment and partial suspended sentence was filed. Pertinent part, Defendant was adjudged guilty of possession of methamphetamine, possession of drug paraphernalia, resisting arrest, and of being a habitual offender based on three prior felonies. Defendant was ordered to serve a sentence of three years with the New Mexico Department of Corrections, followed by a one-year parole period. Further, “the State withholds imposition of an eight (8) year enhancement on the charge of CONTROLLED SUBSTANCES POSSESSION PROHIBITED for being an habitual offender, pending completion of the period of parole without re-offending for a drug, theft, or felony offense.”

{3} Defendant was released on parole November 5, 2001, subject to conditions, with the parole term expiring on October 21, 2002, “unless extended by an act of . . . revocation.” On May 20, 2002, a report of parole violation was filed alleging that Defendant violated six conditions of parole: failing to successfully complete counseling, failing to pay probation costs, failing
to report to his probation officer, changing residence without permission, and that he submitted a urine sample, “that tested positive for Amphetamines.” Defendant was arrested for the parole violation, waived his right to a hearing, and admitted the parole violations. The revised expiration of Defendant’s parole was December 27, 2002, and he served the remainder of his parole in prison.

(4) On July 1, 2002, the State filed a petition to impose eight year habitual offender penalty, alleging that the Defendant had admitted to violating his conditions of parole. It also filed a supplemental criminal information alleging that Defendant was a habitual offender based on three prior felonies, and it requested that a bench warrant for his arrest be issued to insure his presence at a hearing on the State’s petition. The State’s request for the arrest warrant was granted. The State also wrote a letter on July 2, 2002, to the Central New Mexico Correctional Facility where Defendant was incarcerated, requesting, “that you return this inmate to our custody as soon as he completes his time with you.” When Defendant’s parole expired on December 27, 2002, he was returned to the Grant County Detention Center, where he was formally arrested on the outstanding bench warrant. The State did not formally request a hearing until December 31, 2002.

(5) Defendant immediately filed a motion to dismiss the State’s petition on grounds that he had fully served his underlying sentence, and the trial court therefore lacked jurisdiction to impose the enhanced eight year sentence. The State’s response and amended response was that Defendant admitted he violated his parole, and he was therefore subject to the enhanced sentence. Further, the trial court had jurisdiction to impose the enhanced sentence because Defendant was previously adjudged a habitual offender when he was originally sentenced, and no adjudication that Defendant was a habitual offender was taking place after Defendant completed serving his underlying sentence. Finally, the State argued, the bench warrant and the State’s request for Defendant’s detainer were issued before his parole expired, demonstrating an intent to maintain jurisdiction to impose the enhanced sentence.

(6) Defendant’s first appearance on the bench warrant was on January 6, 2003. Defendant orally moved to dismiss the proceedings on grounds that he had completed serving his sentence. The trial court agreed to review the pleadings and applicable cases, and released Defendant from custody under stringent conditions with the understanding that the State’s motion to impose the enhanced sentence was still pending. On January 31, 2003, the trial court filed its order finding that Defendant had completed his term of incarceration and parole and therefore it lacked jurisdiction to impose the enhanced sentence requested by the State. See State v. Gaddy, 110 N.M. 120, 123, 792 P.2d 1163, 1166 (Ct. App. 1990) (holding enhancing a defendant’s sentence as a habitual offender is precluded “after the defendant has completely served that underlying sentence, no matter when the habitual offender proceedings were initiated”). Accordingly, the State’s petition to impose the enhanced sentence was dismissed. The State appeals.

DISCUSSION

(7) A plea agreement is a form of contract between the State and a defendant. See State v. Mares, 119 N.M. 48, 51, 888 P.2d 930, 933 (1994) (stating that “[a] plea agreement is a unique form of contract the terms of which must be interpreted, understood, and approved by the trial court”). “Plea agreements, absent constitutional or statutory invalidity, are binding upon both parties[].” State v. Santillanes, 98 N.M. 448, 451, 649 P.2d 516, 519 (Ct. App. 1982). Since the trial court did not address any ambiguities in the plea and disposition agreement before accepting it, and there is no other relevant extrinsic evidence to resolve any ambiguity in the agreement, we rely on the rules of contract construction, construing any ambiguity in favor of the defendant. State v. Fairbanks, 2004-NMCA-005, ¶ 15, 134 N.M. 783, 82 P.3d 954. “Under these circumstances, contract interpretation is a legal issue that this Court reviews de novo.” Id.

(8) The State asserts, any claim that Defendant served his ‘entire sentence’ must be viewed within the context of the Plea and Disposition Agreement, Defendant’s parole, Defendant’s revocation of parole, Defendant’s admissions to being a habitual offender and a parole violator, and the consequences of such behavior following the imposition of the original, underlying sentence. We agree. The plea and disposition agreement states, “[t]he State will at this time withhold imposition of the eight year habitual, pending completion of the period of parole without reoffending for a drug, theft, or felony offense.” The State’s right to seek the enhanced sentence depended, in the first instance, on whether Defendant committed “a drug, theft, or felony offense” while on parole. Paraphrasing, Defendant agreed not to commit a “drug offense,” a “theft offense,” or a “felony offense” while on parole. Defendant was subject to the enhanced sentence if he committed any such “offense” while on parole. Looking at the plain meaning of the word “offense,” we conclude it means a violation of the criminal laws. See Black’s Law Dictionary 1232 (Rev. 4th ed. 1968) (defining “offense” to be “[a] crime or misdemeanor; a breach of the criminal laws.”). So construed, the terms of the plea and disposition agreement provide that Defendant is subject to the enhanced sentence if he commits a drug, theft or any felony crime, while on parole.

(9) The record shows nothing more than that Defendant admitted to failing to successfully complete counseling, failing to pay probation costs, failing to report to his probation officer, changing residence without permission, and submitting a urine sample that tested positive for amphetamines. None of these acts constitutes a crime. The positive urine test by itself fails to prove the crime of possession of amphetamines or any other crime under the criminal code. See State v. McCoy, 116 N.M. 491, 496, 864 P.2d 307, 312 (Ct. App. 1993) (holding positive drug test alone is insufficient proof of knowledge or intent to prove possession of drug).

(10) The State and Defendant could have agreed that he would be subject to the enhanced sentence if he violated any terms and conditions of his parole, or if he used a controlled substance. See State v. Sanchez, 2001-NMCA-060, ¶ 2, 130 N.M. 602, 28 P.3d 1143 (discussing and enforcing plea agreement in which the defendant admitted to being a habitual offender, and the State agreed not to bring habitual offender enhancement unless defendant was “found to have used a controlled substance while on probation as a result of a chemical test of body fluids”); State v. Freed, 1996-NMCA-044, ¶ 3, 121 N.M. 569, 915 P.2d 325 (discussing and enforcing plea agreement in which the defendant admitted to being a habitual offender and was subject to a habitual offender enhancement if he violated any of the conditions of his probation or parole); Santillanes, 98 N.M. at 450, 649 P.2d at 518 (discussing and enforcing plea agreement in which the defendant admitted to committing previous felonies and was subject to a habitual

Bar Bulletin - August 20, 2004 - Volume 43, No. 34
The State is premised on the assumption that the parole violations constituted a violation of the terms and conditions of the plea and disposition agreement. The issue can be resolved on the plea and disposition agreement itself and the undisputed facts. See Fairbanks, 2004-NMCA-005, ¶ 12 (stating permissible to affirm trial court on basis of argument not made below, where basis is not fact-dependent and issue could be resolved on the plea agreement itself); State v. Torres, 1999-NMSC-010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (stating that appellate court may affirm on grounds not relied on by the trial court unless those grounds rely upon facts that the appellant did not have an opportunity to address in the proceedings below).

CONCLUSION

{11} We are affirming the trial court on the basis of an argument not made to the trial court. However, every argument made by the State is premised on the assumption that the parole violations constituted a violation of the terms and conditions of the plea and disposition agreement. The issue can be resolved on the plea and disposition agreement itself and the undisputed facts. See Fairbanks, 2004-NMCA-005, ¶ 12 (stating permissible to affirm trial court on basis of argument not made below, where basis is not fact-dependent and issue could be resolved on the plea agreement itself); State v. Torres, 1999-NMSC-010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (stating that appellate court may affirm on grounds not relied on by the trial court unless those grounds rely upon facts that the appellant did not have an opportunity to address in the proceedings below).

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
MICHAEL D. BUSTAMANTE, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-095

STELLA R. KIRBY, Plaintiff-Appellant,
versus
TAD RESOURCES INTERNATIONAL, INC., a/k/a TAD TECHNICAL SERVICES CORPORATION, a/k/a ADECCO-TAD RESOURCES INTERNATIONAL, a/k/a ADECCO EMPLOYMENT SERVICES, INC., a/k/a ADECCO SA, a/k/a ADECCO INTERNATIONAL, Defendants/Third-Party Plaintiffs-Appellees,
versus
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, Third-Party Defendant-Appellee.
No. 23,930 (filed: July 16, 2004)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
WILLIAM P. LYNCH, District Judge

EARL METTLER
METTLER & LECUYER, P.C.
Albuquerque, New Mexico
for Appellant

MATTHEW T. BYERS
MCCORMICK, CARAWAY, TABOR & RILEY, L.L.P.
Carlsbad, New Mexico
for Appellee Adecco Employment Services, Inc.

DONALD A. DECANDIA
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Albuquerque, New Mexico
for Appellee The Guardian Life Insurance Company of America

Opinion

JONATHAN B. SUTIN, Judge

{1} Plaintiff was denied long-term disability benefits under her employer’s group insurance policy. The gut issue is whether, under ERISA, she can seek judgment against the ERISA plan itself as an entity when the disability insurer in control of administration of the plan has been dismissed on res judicata grounds and is not a party and Plaintiff cannot directly obtain a judgment against the insurer. The district court held she could not. We reverse.

BACKGROUND

{2} Plaintiff Stella Kirby sought damages stemming from the denial by Guardian Life Insurance Company of America (Guardian) of her claim for long-term disability benefits under a group insurance policy purchased by her employer TAD Resources International, Inc., whose successor-in-interest is Adecco SA (collectively referred to as Employer). Plaintiff had received disability benefit payments for about one year, after which payments ceased. Her initial complaint, filed in April 1999, named Guardian and Employer and asserted seven counts under state law for breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, fraud, negligent misrepresentation, unreasonable delay, violations of the Unfair Insurance Practices Act, and violations of the Unfair Practices Act.

{3} Before any responsive pleading was filed, Plaintiff filed an amended complaint that varied from the original complaint only by the addition of some minor language and by reordering some of the counts. Guardian filed a motion to dismiss the amended complaint on the ground Plaintiff’s state law claims were
preempted by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (1974, as amended through 2004) (ERISA). The district court dismissed the amended complaint on preemption grounds, but granted Plaintiff fifteen days to file a second amended complaint seeking recovery under ERISA. We refer to the court’s order of dismissal of the amended complaint as “the preemption order of dismissal” as we proceed through the procedural morass that followed.

{4} Plaintiff filed a second amended complaint in December 1999, in which she kept Employer as a defendant but dropped Guardian as a defendant. The structure of the second amended complaint was different than that of the first in that, in attempted compliance with the preemption order of dismissal, the second amended complaint alleged that the action was brought “in part” under provisions of ERISA and asserted a claim for failure to pay benefits. However, the second amended complaint also asserted state law claims for fraud and negligent misrepresentation based on allegations that Employer erroneously misled Plaintiff into believing that her medical insurance would continue as a converted policy if she paid Employer a premium for the coverage.

{5} Nearly a year after Plaintiff filed the second amended complaint, the district court granted Plaintiff’s attorney’s motion to withdraw as counsel based on irreconcilable differences. Thereafter, Plaintiff’s new attorney and Employer’s attorney filed a stipulation indicating that Plaintiff would file a third amended complaint based on ERISA. Based on the stipulation, the district court entered an order dismissing the second amended complaint without prejudice and ordering Plaintiff to file a third amended complaint.

{6} Plaintiff’s third amended complaint, filed in March 2001, asserted, as her sole claim, a claim under 29 U.S.C. § 1132(a)(1)(B) for wrongful denial of benefits. The third amended complaint continued to name Employer as a defendant, but also added the disability plan, naming Long-Term Disability Plan of Tad Resources International, Inc. (the Plan) as a separate defendant. In addition, the third amended complaint once again included Guardian as a defendant. Guardian responded with a motion to dismiss asserting that the claims in the third amended complaint were barred by the doctrine of res judicata related to the preemption order of dismissal. Guardian also asserted that the district court lost jurisdiction to allow Plaintiff to file a third amended complaint against Guardian because Plaintiff never appealed the preemption order of dismissal. On September 12, 2001, Plaintiff filed a motion requesting the court to reconsider an apparently verbal determination by the court granting Guardian’s motion to dismiss the third amended complaint. On September 20, 2001, the court, based on res judicata, entered an order granting Guardian’s motion to dismiss the third amended complaint as to Guardian, which we will refer to as “the first res judicata order of dismissal.” On October 24, 2001, Plaintiff withdrew her motion to reconsider.

{7} In January 2002, Plaintiff filed a motion to reverse Guardian’s administrative denial of benefits under the Plan on the grounds it was erroneous, without support in the administrative record, and arbitrary and capricious. Plaintiff asserted that she had a right to recover the benefits against the Plan and that a claims processor such as Guardian was not a necessary party for Plaintiff to obtain that relief. She sought a judgment ordering the Plan to pay disability benefits. Employer responded, asserting, among other things, that it was not a proper party defendant, that the court lacked jurisdiction, and that Plaintiff failed to exhaust administrative remedies.

{8} Meanwhile, using an alias summons issued in February 2002 Plaintiff re-served Guardian “as administrator of Adecco/ TAD Technical Long-Term Disability Insurance Plan, No. G-290956.” She also served summons and alias summons on the various legal incarnations of Employer in its capacity as administrator of the Plan, as well as on the United States Department of Labor. Thereafter, in April 2002 the court permitted Employer to amend its answer to include a third-party complaint against Guardian seeking indemnification if Employer were eventually ordered to pay benefits to Plaintiff. The court also remanded the case to the Plan and Employer for a period of sixty days to allow for the completion of the administrative appeal process that the court concluded had been started but not finished when Plaintiff’s benefits were first denied. Consideration of Plaintiff’s motion to reverse Guardian’s denial of benefits was deferred pending this remand.

{9} While the case was on remand, Guardian filed a second motion to dismiss the third amended complaint in response to having been served in its capacity as the Plan administrator. Guardian reiterated previous arguments it had made in its first motion to dismiss the third amended complaint, and added the grounds that Plaintiff’s failure to appeal the first res judicata order of dismissal precluded her from trying to bring Guardian back into the lawsuit and that, even if Plaintiff could bring Guardian back into the lawsuit as the Plan administrator, Plaintiff’s claims would nevertheless be precluded by collateral estoppel. Plaintiff responded that re-service on Guardian was made only to perfect service on the Plan, not to re-assert previously dismissed claims against Guardian. Guardian’s reply indicated that, whatever Plaintiff’s characterization of its procedural activity, Plaintiff was attempting in effect to recover from Guardian, a claim and recovery precluded under res judicata and collateral estoppel. The district court thereafter, in July 2002, entered an order ruling that “Plaintiff’s claims against Guardian in the Third Amended Complaint are barred by res judicata and collateral estoppel.” We refer to this second dismissal of the third amended complaint granted in Guardian’s favor as “the second res judicata order of dismissal.”

{10} The parties then, during September through December 2002, filed a series of competing motions in an attempt to bring the case to a close. Guardian filed a motion seeking dismissal or summary judgment against Employer on Employer’s third-party complaint against Guardian. Employer filed a motion for summary judgment against Plaintiff on the theory that Plaintiff could not recover benefits from Employer because Employer was the wrong party to sue under ERISA. Plaintiff filed a motion for default judgment or summary judgment against the Plan. In her motion, Plaintiff asserted that a default judgment was proper because no answer had been filed on behalf of the Plan; or, alternatively, no factual dispute existed as to whether Plaintiff qualified for benefits under the Plan and she was entitled to benefits as a matter of law. Guardian took the position that Plaintiff’s motion “should be denied because Guardian is the only party from whom Plaintiff would have been entitled to obtain benefits, and Plaintiff’s claims against Guardian have long since been dismissed.” Plaintiff replied that “while res judicata insulates Guardian from a direct action by Plaintiff in this case, it does not affect Guardian’s ultimate liability as insurer of the Plan.” The record indicates nothing resulted from the admin-
Administrative proceeding on remand.

{11} In February 2003, following a hearing on all outstanding motions, the district court issued a letter ruling analyzing the issues and announcing that it was dismissing Plaintiff’s third amended complaint as to all parties. The court prefaced its letter ruling by stating that Plaintiff’s “decision not to include [Guardian] as a defendant in her Second Amended Complaint is fatal to her cause of action for ERISA benefits.” The court acknowledged the “complex and confusing” nature of ERISA law and noted a split of authority concerning what entity is the proper defendant in an ERISA action. Further, the court stated that in light of its prior decisions granting Guardian’s motions to dismiss, the court could not grant any of Plaintiff’s various motions seeking to establish her right to benefits under the Plan, stating:

ERISA provides that an employee benefit plan may sue or be sued as an entity, and that any money judgment against an employee benefit plan shall be enforceable only against the plan as an entity. In reality there is no such entity. Guardian has full discretionary authority over benefit claims, and by virtue of failing to assert any claims against Guardian in her Second Amended Complaint, [Plaintiff] is unable to obtain benefits from Guardian. I decline to enter a judgment against the Plan when [Plaintiff] is precluded from recovering against the party that funds the Plan.

(Citation omitted.) Further, the court concluded that summary judgment in favor of Employer was appropriate “[b]ecause Guardian had sole discretion to determine and pay benefits under the long-term disability plan.” The court implemented its letter decision with a series of orders. Plaintiff appeals from three of the orders, namely, (1) an order denying Plaintiff’s motion for default or summary judgment against the Plan, (2) an order denying Plaintiff’s motion to reverse the denial of ERISA plan benefits, and (3) an order granting summary judgment in favor of Employer.

{12} Plaintiff does not appeal from or otherwise attack on appeal the dismissal of her ERISA claim against Guardian. Her points on appeal are: (1) the Plan, being an ERISA plan, is the proper defendant in a claim for benefits under §§ 1132(a)(1)(B), 1132(d)(1), and 1132(d)(2); (2) Plaintiff was entitled to a default or summary judgment against the Plan; (3) dismissal of Guardian did not preclude Plaintiff from proceeding to judgment against the Plan; and (4) the district court erred in dismissing Employer, the Plan administrator.

DISCUSSION

I. Whether Plaintiff Can Pursue a Judgment Against the Plan

{13} Whether Plaintiff can pursue a judgment against the Plan ultimately depends on whether the dismissal of Guardian precludes Plaintiff on res judicata or collateral estoppel grounds from obtaining a judgment against the Plan. The theory under which Guardian asserts preclusion is that, for the purpose of benefits, Guardian is the Plan, and that the Plan is simply a nominal party because a judgment against the Plan would in effect be a judgment against Guardian, in that Plaintiff cannot recover any benefits except from Guardian. Therefore, according to Guardian, its dismissal, being final, with prejudice, and unattackable, precludes Plaintiff from proceeding to judgment against the Plan even if ERISA were otherwise to permit a judgment against the Plan as an entity.

A. Standard of Review

{14} We review summary judgment de novo when the material facts are undisputed. Palmer v. St. Joseph Healthcare P.S.O., Inc., 2003-NMCA-118, ¶ 17, 134 N.M. 405, 77 P.3d 560. “We interpret the intention of Congress and the meaning of its statutes de novo.” Id. We start with what ERISA provides.

B. ERISA

{15} Section 1132(a) of ERISA authorizes eight separate claims to enforce different rights under the statute. Plaintiff’s third amended complaint asserted a § 1132(a)(1)(B) claim for benefits, which we refer to as Plaintiff’s “benefits claim.” Section 1132(a)(1)(B) reads:

A civil action may be brought -- (1) by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.[]

Plaintiff’s benefits claim was ascertainable in state court, pursuant to § 1132(e)(1), which states that, except for actions under subsection (a)(1)(B), the federal district court has exclusive jurisdiction of civil actions brought by a participant or beneficiary, and which provides for concurrent federal and state jurisdiction of claims under subsection (a)(1)(B). There exists no issue on appeal regarding the propriety of state district court subject matter jurisdiction.

{16} In regard to Plaintiff’s benefits claim against the Plan, we examine ERISA § 1132(d) in addition to § 1132(a)(1)(B). Section 1132(d), titled “Status of employee benefit plan as entity,” reads, in part:

(1) An employee benefit plan may sue or be sued under this subchapter as an entity . . .
(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

C. The Nature of the Plan

{17} Under 29 U.S.C. § 1003(a)(1), “[w]ith few exceptions not relevant here, ERISA applies to all employee benefit plans that are established or maintained by an employer ‘engaged in commerce or in any industry or activity affecting commerce.’” Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 417 (4th Cir. 1993) (citation omitted). The plan must be established pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). “[T]he establishment of a plan may be accomplished through the purchase of insurance.” Custer, 12 F.3d at 417; see 29 U.S.C. § 1002(1). Long-term disability insurance is a type of insurance that can accomplish the establishment of an ERISA welfare plan. 29 U.S.C. § 1002(1)(A). Numerous ERISA cases involve such plans. See, e.g., Layes v. Mead Corp., 132 F.3d 1246, 1249 (8th Cir. 1998) (invoking § 1132(a)(1)(B) claim for denial of benefits against insurer having discretionary authority to administer and interpret long-term disability plan). An employer may delegate fiduciary responsibilities to an insurer in administering a plan. See Wojciechowski v. Metro. Life Ins. Co., 75 F. Supp. 2d 256, 261 (S.D.N.Y. 1999).

{18} Employer purchased a group plan offered by Guardian that primarily included basic term life and long-term disability insurance. This group plan defines “Plan” as meaning “the Guardian group plan purchased by the employer.” The Certificate
of Coverage provided to employees insured by the group plan defines the group plan to mean “the Guardian group plan purchased by your employer.” Provisions of a “master group policy” (the policy) apply to the group plan of insurance. More particularly, the policy’s long-term disability income insurance provisions apply to the “Guardian group long term disability income insurance plan the employer bought.”

{19} Under ERISA, every benefit plan “shall provide for one or more named fiduciaries who . . . shall have authority to control and manage the operation and administration of the plan.” 29 U.S.C. § 1102(a)(1). The “named fiduciary” is the one “named in the plan instrument.” 29 U.S.C. § 1102(a)(2). A fiduciary is defined in ERISA as one who “exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan.” 29 U.S.C. § 1002(21)(A).

{20} The policy contains a Statement of Erisa Rights, which states, among other things, “ERISA imposes duties upon the people, called ‘fiduciaries,’ who are responsible for the operation of the employee benefit plan. They have a duty to operate the plan prudently and in the interest of plan participants and beneficiaries.” Under the policy and the Plan, a claim with respect to long-term disability plan benefits is made through a “Claims Procedure” pursuant to which the “Plan Administrator” furnishes a claim form to the claimant and submits the completed form to Guardian. Guardian is named as “the Claims Fiduciary with discretionary authority to determine eligibility for benefits and to construe the terms of the plan with respect to claims.” If Guardian denies the claim, Guardian provides to the Plan Administrator, for delivery to the claimant, a notice setting forth specific information relating to the denial. The Claims Procedure states that these “procedures are required under the provisions of ERISA.”

{21} In its disposition letter, the district court stated, [there is no dispute that:] . . . [Employer] provided an employee benefit plan to its employees that included long-term disability benefits through Guardian. [Employer] was both the plan sponsor and plan administrator, while Guardian was the claims fiduciary. [Employer] had no discretionary control over the outcome of [Plaintiff’s] request for long-term disability benefits. Guardian had the sole discretion under the plan to make decisions about which employees would qualify for long-term disability benefits. No party disputes this statement. While acknowledging that a benefit plan may be sued as an entity under § 1132(d)(1) and also acknowledging the enforceability of any money judgment only against the plan as an entity under § 1132(d)(2), the court determined that, “[i]n reality there is no such entity” because Plaintiff was “precluded from recovering against the party [Guardian] that funds the Plan.”

D. Whether Plaintiff Can Sue the Plan

1. The Case Law on Who Should Be Sued

{22} The parties cite numerous cases that relate to § 1132(a)(1)(B) actions, none of which, however, address the issue of whether Plaintiff can sue the Plan with Guardian having been dismissed as it was. The cases are, therefore, of limited value. We tend to agree with Employer’s comment regarding the district court having found ERISA confusing and difficult to understand: “A reading of the cases presented by the parties in their briefs, below and in this Court, should explain [the court’s] befuddlement. If this Court reads the quotes given out of context, it can come up with myriad methods to resolve this case. If this Court reads the opinions in full, it will determine that some of the courts [which] have made blanket statements have cited cases that do not stand for the proposition given.” No case of which we are aware can be followed for the result Guardian posits and the district court reached. None of the cases discussed by Guardian persuasively conclude that an insurer, such as Guardian, who has discretionary authority to administer and interpret the plan is the plan, and is therefore inseparable from the plan so that a benefits claimant is precluded from pursuing a judgment against the plan as an entity when the insurer was earlier dismissed under circumstances such as those in this case. Those circumstances are a dismissal of the insurer with prejudice based first on preemption and then, as a result of the preemption dismissal, on res judicata and collateral estoppel grounds, where the question of the insurer’s liability for benefits has not actually been litigated.

{23} One or more cases state that the proper party defendant in a § 1132(a)(1)(B) benefits claim is the party that controls the administration of the plan. See, e.g., Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997) (“The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan.”); see also Hunt v. Hawthorne Assoc., Inc., 119 F.3d 888, 907-08 (11th Cir. 1997) (holding a § 1132(a)(1)(B) claim to enforce payment of benefits was a claim solely for equitable relief and thus not assertable against the plan itself as a separate entity). Other cases state that ERISA permits benefits claims only against the plan as an entity or that, at the very least, the plan is a necessary party. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985) (emphasizing that ERISA permits benefits claims only against the plan as an entity, which was the self-funded employer welfare benefit plan); Roeder v. ChemRex Inc., 863 F. Supp. 817, 828 (E.D. Wis. 1994) (“An ERISA plan is the only proper defendant when a claim is made for benefits or for a clarification of benefits under the ERISA civil enforcement statute, 29 U.S.C. § 1132(a)(1)(B);”) Colley v. Sandia Corp., No. CIV. 99-994 JP/LFG, at 4-6 (D.N.M. May 2, 2000) (mem. and order) (“The proper conclusion is simply that when a plaintiff seeks against a plan a money judgment, which is enforceable only against the plan, that plan must be before the court and is a necessary party. This position does not create disharmony within the statute”; and also stating that, although numerous decisions . . . have proceeded without the plan as a defendant,” usually on the ground that suing an entity with administrative control is sufficient, no court that has done so has “reconciled its position with [§ 1132(d)] and explained why an entity other than the plan should be responsible for a judgment.”); see also Hemphill v. Unisys Corp., 855 F. Supp. 1225, 1234 (D. Utah 1994) (determining that the plaintiff should amend his complaint to add the plan to assure he has stated an ERISA claim against a proper party). The lines of cases and apparent divergence of authority are discussed in Everhart v. Allmerica Financial Life Ins. Co., 275 F.3d 751, 754 (9th Cir. 2001); see
also Hall v. Lhaco, Inc., 140 F.3d 1190, 1194 (8th Cir. 1998) (“[T]here is a split in authority concerning whether a party other than the ERISA plan itself is the only proper party defendant on a claim pursuant to ERISA § 1132(a)(1)(B); Blum v. Spectrum Rest. Group, Inc., 261 F. Supp. 2d 697, 707-08 (E.D. Tex. 2003) (same)."

24 At least one case indicates an identity between the plan and its administrator having discretionary authority. See Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1485, 1490 (7th Cir. 1996) (stating that “[t]he appropriate defendant for a denial of benefits claim would be the Plan, which in this case is ‘PruCare,’ where PruCare was the administrator of the plan and also vicariously liable for its agent’s determination that benefits were not necessary, causing the plaintiff to be discharged from a hospital without rehabilitation); see also Cook v. Liberty Life Assurance Co., No. CIV. 00-408-B, 2002 WL 482572, at *2 n.3 (D.N.H. 2002) (mem. and order) (stating the court would be strongly inclined toward the position that an insurer with authority to determine and pay long-term disability benefits is a proper party defendant because there existed no ‘practical distinction between a judgment against the Plan and a judgment against [the insurer] as Plan administrator’). Another court has indicated that a joint and several liability judgment can be rendered against both the assets of the plan and the assets of the insurer. See Pecor v. Northwestern Nat’l Ins. Co., 869 F. Supp. 651, 653 (E.D. Wis. 1994) (decision and order) (stating also that “[a] suit for benefits is a suit against the plan, and in this case, a suit against the insurance company with whom the plan contracted to provide the [life insurance] benefits at issue”).

2. Analysis of Whether Plaintiff Can Sue the Plan

25 A participant or beneficiary unquestionably is given a right under § 1132(a)(1)(B) to sue a plan as an entity. Although authority exists to the contrary, see Hunt, 119 F.3d at 908 n.54 (stating that § 1132(d)(2) “contemplates legal relief and does not apply to an action to recover benefits under § 1132(a)(1)(B)”), we read subsections 1132(a)(1)(B) and (d) to permit an action against a plan for past due and future benefits wrongfully denied, and to require a judgment for those benefits to be enforced against the plan. See Roeder, 863 F. Supp. at 822, 828 (stating a § 1132(a)(1)(B) claim is “equitable in nature,” allowing “an award of equitable relief—a clarification of [a claimant’s] right to past or future benefits,” yet determining that a declaratory judgment clarifying a right to benefits would be, in effect, a money judgment payable from the plan). Although, as indicated, Hunt holds that a § 1132(a)(1)(B) claim for benefits can seek only equitable relief against entities other than the plan and not a money judgment enforceable against a plan, Hunt, 119 F.3d at 907-09, we find no analysis in Hunt or other cases, see, e.g., Hall, 140 F.3d at 1196, persuading us that a judgment for past and future benefits under § 1132(a)(1)(B) should not be considered a money judgment under § 1132(d)(2). One wonders whether the Eleventh Circuit’s equitable action theory may have arisen primarily in order to deny a benefits claimant a jury trial. See Hunt, 119 F.3d at 907 (indicating the court’s decisions were consistent with an earlier one holding § 1132(a)(1)(B) claimants were not entitled to a jury trial); see also Steeple v. Time Ins. Co., 139 F.R.D. 688, 691 (N.D. Okla. 1991) (stating the reasoning of the Eleventh Circuit was not compelling, since “almost any breach of contract case could be turned into an equitable matter,” and that “[e]ven if . . . expenses were ongoing, a damage award based on the present value of expected future expenses was certainly possible”).

26 Further, notwithstanding the fact that financial benefits owed and payable by the Plan would be benefits paid by Guardian under the disability policy, we do not view the Plan and Guardian as identical entities with respect to benefits claims. Nothing in subsections 1132(a)(1)(B) or 1132(d) says or reasonably suggests that a plan referred to in those subsections cannot be liable for benefits as an entity separate from an insurer that issues a disability policy purchased by an employer. See 29 U.S.C. § 1002(21)(A) (defining a fiduciary, stating that “a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its [the plan’s] assets” (emphasis added)). The same can be said of the policy and the Plan: Nothing in the policy or the Plan says or reasonably suggests that the Plan cannot be liable for benefits as an entity separate from Guardian.

27 We are not persuaded by Guardian’s position that, due to Guardian’s dismissals, a judgment in this case against the Plan would necessarily be unenforceable in any action or proceeding. At least one case indicates the contrary. In Colley, the federal district court sitting in New Mexico determined that a plan was the proper and necessary party defendant and dismissed the plan administrator who denied long-term disability benefits. Colley, Civ. 99-994 JP/LFG at 5-7. The court saw little concern about this status of the parties, because it would be the administrator’s “decision that will ultimately be reviewed and [the administrator] will still be subject to this court’s jurisdiction and judgments with respect to its denial of Plaintiff[’]s long term disability benefits.” Id. at 6. The court in Colley further stated “[w]hen [a party] acts in its capacity as plan administrator, it steps into the shoes of the [p]lan.” Id.; see also Pecor, 869 F. Supp. at 653 (permitting a joint and several liability judgment against both the assets of a plan and the assets of the life insurance company with whom the plan contracted for life insurance benefits). Thus, Plaintiff’s benefits claim was appropriately pursued against the Plan.

28 That Guardian was dismissed as a party defendant on the preemption and then res judicata/collateral estoppel grounds relied on by the district court does not, in our opinion, preclude Plaintiff from pursuing a judgment against the Plan. Guardian’s res judicata and collateral estoppel defenses were not appropriately applied to preclude Plaintiff’s action against the Plan. The res judicata/collateral estoppel dismissals stemmed solely from the preemption order of dismissal. Although none of the dismissals can be reopened, they can be inspected. None originated from an adjudication of the merits of Plaintiff’s benefits claim or from a determination of non-liability for benefits under ERISA. Rather, the original dismissal, i.e., the preemption order of dismissal, was of state law claims based solely on ERISA preemption. It is true that Guardian as insurer under the policy would ultimately be responsible to pay benefits to which a plan participant or beneficiary would be entitled. However, we do not think it is a logical or even practical necessity that we conclude the Plan, as an entity, cannot be determined to be liable for benefits despite the preemption order of dismissal and subsequent res judicata/collateral estoppel dismissals originating from the preemption order of dismissal.

29 Furthermore, Guardian appeared in
its individual corporate capacity when it sought dismissal of the state law claims in the amended complaint on preemption grounds. Guardian appeared in its fiduciary or representative capacity when it sought dismissal of the ERISA benefits claim in the third amended complaint on res judicata grounds. The Plan, also faced with a request for an order of dismissal of the amended complaint that Plaintiff did not have a full and fair opportunity to litigate any right to benefits. See Shovelin, 115 N.M. at 297, 850 P.2d at 1000 (stating that “[i]f the movant introduces sufficient evidence to meet all elements of this [collateral estoppel] test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation”).

Guardian cites several cases to support its res judicata position. See Slaughter v. AT&T Info. Sys., Inc., 905 F.2d 92 (5th Cir. 1990); Bordonaro v. Union Carbide Corp., No. CIV.A.01-1177, 2002 WL 32824 (E.D. La. 2002) (order and reasons); Guiles v. Metropolitan Life Ins. Co., No. CIV.A.00-5029, 2001 WL 1454041 (E.D. Pa. 2001) (mem. and order); Duran v. Redsoor Co., 977 S.W.2d 690 (Tex. Ct. App. 1998). Each of these cases involved an action by the plaintiff asserting state law claims, followed by an ERISA-based action. We discuss each of these cases.

In Slaughter, the plaintiff’s first action was for breach of contract against her employer. Slaughter, 905 F.2d at 93. That action was dismissed, “barred on grounds that limitations had run.” Id. Her second action was for denial of benefits under ERISA, involving what the court described as an action against “an unfunded benefit plan, self-administered by [the plaintiff’s employer],” which, as such, was an action against the employer, since “the entity from which [the plaintiff sought] recovery is really [the employer].” Id. at 94.

In Guiles, the plaintiff’s first action was an Americans With Disabilities Act claim against her employer; the second was an ERISA claim for denial of disability benefits. Guiles, 2001 WL 1454041, at *1. The first action was dismissed with prejudice based on a settlement. Id. Relying on Slaughter, the court invoked res judicata to preclude the second action against the plaintiff’s employer, the employer’s investment committee, and the employer’s short-term and long-term disability plans. Guiles, 2001 WL 1454041, at *2-3. The court’s analysis did not include any detail as to plan administration or plan fiduciaries, although it seems clear that the plans were employer-administered plans. Id. Interestingly, in discussing, but not analyzing the validity of the employer’s argument, the court in a footnote note set out the plaintiff’s contentions that because the plans could be sued as separate entities under § 1132(d), they were separate entities for res judicata purposes. Id. at *2 n.3. The court stated:

If the benefit plan is provided by the employer and is internal to the employer, than [sic] that fact would create the close or particular relationship with the party in the original action that would satisfy the second res judicata element. As the defendants noted during the hearing on their motion for summary judgment, employee benefit plans may not always have the close or particular relationship with the employer that is necessary for res judicata purposes. If the benefit plan is an independent third party plan, then claim preclusion would not necessarily apply.

In Bordonaro, the plaintiff sued first for damages under state law for sexual harassment and intentional infliction of emotional distress, and then under ERISA for denial of long-term disability benefits. Bordonaro, 2002 WL 32824, at *1. The first action was dismissed as unrelated to the parties’ request after they reached a settlement agreement. Id. The court discussed and followed Slaughter and Guiles, although the court appears to have relied more on interpretation of release language in the settlement agreement from the first action than on res judicata. Bordonaro, 2002 WL 32824, at *1-3.

In Duran, the plaintiff sued his employer for wrongful termination and sought damages for “benefits, retirement and medical benefits” that he would have received had he not been terminated. 977 S.W.2d at 692. He then sued his employer under ERISA as administrator of the employer’s benefit plan. Id. at 691, 693. The first action ended in a jury verdict awarding the plaintiff damages for wrongful termination, including damages for loss of employment benefits. Id. at 692-93. The court precluded the ERISA claim to prevent the plaintiff from relitigating the facts and damages decided in the first action against the employer in a different capacity, holding that the plaintiff had already received an award for loss of the same benefits he was seeking in the ERISA action. Id. at 693.
These cases are distinguishable and do not compel a res judicata result in the present case. These cases do not contain analyses that compel a conclusion that an insurer such as Guardian, which is an independent third party providing an insurance policy, and which is also the plan fiduciary in control of the Plan, should necessarily be treated as the same party as the Plan, or in privity with the Plan, when it is sued in the first action in its individual, corporate capacity for state law violations, and the Plan for which it is the fiduciary and which houses its insurance policy is sued in the second action. Unlike the present case, Slaughter and Guiles involved employer-controlled plans. Further, and most important, in each of the cases the merits of the plaintiff’s damages claims were either tried or settled, and the plaintiff was essentially seeking a second bite of the same apple.

Guardian also relies on Hunt to support the res judicata dismissal, because in Hunt the entity bearing the ultimate responsibility for denial of the claim for a lump sum benefit was voluntarily dismissed with prejudice as a party to the action by the plaintiff apparently for strategic reasons. Hunt, 119 F.3d at 911. The court in Hunt held this dismissal to be “an adjudication on the merits . . . on all claims [the plaintiff] had brought against the [entity],” and stated that the adjudication thus included the plaintiff’s claim that the entity wrongfully refused to pay the plaintiff the lump sum benefit he sought. Id. at 911 n.63. Hunt is distinguishable because the dismissed entity’s capacities were never different; additionally, the basis for the dismissal of the entity differed significantly from the basis for Guardian’s initial dismissal.

In sum, under the circumstances of the present case, where Guardian controlled administration and interpretation of the plan with discretionary authority over benefits, we do not consider the Plan and Guardian to be identical or inseparable in regard to Plaintiff’s benefits claim under § 1132(a)(1)(B). We determine that the Plan may be sued for benefits, as subsections 1132(a)(1)(B), (d)(1), and (d)(2) plainly indicate. We hold that Plaintiff’s benefits claim against the Plan is not barred under res judicata or collateral estoppel. We also determine that a judgment against the Plan for past due and future benefits is enforceable only against the Plan as an entity, as § 1132(d)(2) plainly states. We make no determination whether in a § 1132(a)(1)(B) action the Plan must be sued and can only be sued. We render no opinion on whether Plaintiff, were she to obtain a judgment against the Plan, can succeed in some action or proceeding to enforce the judgment. That will need to be determined at the time Plaintiff attempts to enforce any judgment she may obtain. We therefore leave for another day the issue of whether a judgment against the Plan can ultimately be satisfied in this case.

II. Whether Plaintiff Was Entitled to Default or Summary Judgment Against the Plan

Plaintiff asserts that because neither Employer nor Guardian, nor any other person or entity, defended the Plan as an entity and a party against the third-party complaint, Plaintiff was entitled to a judgment by default against the Plan. Plaintiff also asserts that if she was not entitled to a default judgment, she was nevertheless entitled to summary judgment because no response to her motion for summary judgment raised a genuine issue of material fact and she was entitled to judgment as a matter of law.

Plaintiff’s motion seeking these judgments set forth the following material facts, among others: To obtain service on the Plan, Plaintiff served summons on Employer and Guardian as administrators of the Plan, and no answer was filed by any party on behalf of the Plan. Further, Plaintiff stated that the weight of the evidence presented in the administrative proceeding showed she was disabled and entitled to benefits under the Plan, indicating that her treating physician stated she was disabled and that delay in receipt of her benefits was detrimental to her condition. To support this statement Plaintiff attached an exhibit to the motion consisting of an unsigned letter from a physician discussing Plaintiff’s medical condition. Plaintiff incorporated by reference the additional specific facts contained in her earlier filed brief in support of her motion to reverse. Most of the facts were taken from documents obtained from Guardian’s “claim record” in discovery. Plaintiff requested that “the [P]lan . . . be ordered to pay disability benefits to [Plaintiff] retroactively from the date of cessation to the present, and continuing unless and until she is no longer disabled.”

Guardian responded to Plaintiff’s motion for default or summary judgment. Based on Guardian’s view that it and the Plan were indistinguishable, Guardian disputed that no answer was filed by any party and stated that Guardian had filed a motion to dismiss the third-party complaint as against Guardian, which was granted. Guardian disputed that Plaintiff was entitled to benefits, incorporating by reference the contents of other documents it filed in the case. Furthermore, Guardian responded that the merits at issue, the issue would not be whether Plaintiff was disabled, but whether Guardian abused its discretion in denying benefits. Guardian further responded with the assertion the issue was moot due to the res judicata dismissal of Guardian.

Although the basis for the district court’s denial of Plaintiff’s default or summary judgment motion against the Plan was the res judicata/collateral estoppel dismissal of Guardian, we hold that the denial of the motion on this erroneous basis does not turn the motion into one we must grant on appeal. That we determine Plaintiff should not be precluded due to Guardian’s res judicata/collateral estoppel dismissal from seeking a judgment against the Plan as a separate entity does not mean the Plan lay naked and unprotected before the court. Both Employer and Guardian were very much involved in the case. Guardian persuaded the district court that Guardian and the Plan were inseparable and, therefore, Plaintiff could state no claim against the Plan if Guardian were not a party based on its res judicata/collateral estoppel dismissal. Employer persuaded the court that it was not a proper party. Virtually the entire history of the case involved a battle fought in the procedural arena and on the issue of the actionable status of parties, and not in the merits arena of whether Plaintiff was entitled to benefits. By our reversal on the issue of whether Plaintiff can proceed against the Plan, the battlefield has moved to the merits of the denial of benefits. We conclude that the Plan did not default. Further, while no default was entered by the clerk, see Rule 1-055(A) NMRA 2004, even were the Plan technically in default, we think that due to the peculiar procedural history of this action and the issues presented, adequate bases exist to reach the merits of Plaintiff’s benefits claim against the Plan. See Springer Corp. v. Herrera, 85 N.M. 201, 202-03, 510 P.2d 1072, 1073-74 (1973) (indicating it is the policy of the law to look with disfavor on default judgments and that cases be decided on their merits, and stating further that a motion to set aside a default judgment is addressed to the sound discretion of
the court), overruled on other grounds by Sunwest Bank v. Rodriguez, 108 N.M. 211, 770 P.2d 533 (1989). We further conclude that the summary judgment proceeding based on Plaintiff’s motion lacked both a meaningful procedural basis as well as sufficient evidentiary basis for a judgment on the merits.

III. The Dismissal of Employer was Appropriate

{43} Although Plaintiff cites cases stating that a plan administrator can be liable, Plaintiff affirmatively states that she is not seeking relief against Employer in its individual capacity. Yet, because Employer was determined by the court to be the Plan administrator, Plaintiff seeks to keep Employer in the lawsuit because it is the Plan sponsor and administrator. At oral argument, Plaintiff sought to impose on Employer the capacity of a co-fiduciary under 29 U.S.C. § 1105(a)(3), arguing that under §§ 1104 (fiduciary duties) and 1105(a)(3) (liability for breach of co-fiduciary), Employer should remain a defendant because, as a “co-fiduciary,” Employer at the very least had a duty to prevent Guardian from breaching Guardian’s obligations under the Plan, and that Employer should remain a party so it can act on behalf of the Plan and effectuate the judgment Plaintiff seeks against the Plan.

{44} Although the sponsor and administrator of the Plan, Employer’s duties and functions under the Plan were ministerial and minimal. Employer had no duties or obligations or discretionary authority in regard to making a determination whether beneficiaries or participants were entitled to benefits. Nothing in the Plan indicates in any way that, were there to be a judgment against the Plan on Plaintiff’s benefits claim, Employer would be required to act or would have authority or power to act in any manner as administrator or as a fiduciary to carry out the judgment or to see that the judgment was satisfied.

{45} We do not find under the ERISA definition of fiduciary, see § 1002(21)(A), or under the language of the Plan, anything that would bring Employer within the concept of fiduciary or co-fiduciary. Since Plaintiff is not seeking a determination of Employer’s liability in its individual capacity, and since Employer as administrator had no authority or discretion in regard to acting on Plaintiff’s benefits claim and had merely ministerial duties in regard to claim forms, we fail to see how Employer could be a proper party. Employer’s mere existence as sponsor and plan administrator with no control over the administration of the Plan and no authority or discretion in regard to acting on a benefits claim does not assist Plaintiff in advancing toward a judgment for benefits under the Plan.

{46} We hold that Employer is not a proper party in the circumstances of this case. See Terry v. Bayer Corp., 145 F.3d 28, 35-36 (1st Cir. 1998); Layes, 132 F.3d at 1249-50; Bordonaro, 2002 WL 32824, at *3; Henderson v. Transamerica Occidental Life Ins. Co., 120 F. Supp. 2d 1278, 1282 (M.D. Ala. 2000); Wojcikowski, 75 F. Supp. 2d at 261; see also 29 C.F.R. § 2509.75-8, D-2 (1976) (stating that an entity which merely processes claims “is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan”).

CONCLUSION

{47} We affirm the district court’s dismissal in favor of Employer of the third amended complaint. We reverse the district court’s dismissal in favor of the Plan of the third amended complaint. Plaintiff is entitled to proceed against the Plan on the merits of her benefits claim. We affirm the district court’s denial of Plaintiff’s motion for default judgment or, alternatively, for summary judgment. We remand for further proceedings consistent with this opinion.

{48} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge
WILLIAM LAZAR

APPELLATE PRACTICE

505-988-7100 • lazar@nets.com

I prepare and update every month a cumulative digest of current-year N.M. opinions. It is available by email, free of charge, as a service to the bar. Please contact me to subscribe.

S T E V E H. M A Z E R

Former Bankruptcy Trustee is now available for referrals and consultations. Mr. Mazer is a state-certified bankruptcy specialist.

His office is located at:
122 Tenth St. NW
Albuquerque, NM 87102
Telephone: (505) 243-1112 or Fax (505) 243-2998

Mr. Mazer can also be contacted by e-mail at shmazer@nm.net
Free initial consultation provided.

We’ve grown to 175 attorneys...

Jontz Dawe Gulley & Crown, P.C.

is pleased to announce that it has joined withLewis and Roca LLP

ALBUQUERQUE LAWYERS

PARTNERS
Dennis Jontz
Thomas Dawe
Thomas Gulley
Ross Crown
Jeffrey Albright

OF COUNSEL
Marilyn O’Leary

ASSOCIATES
Margaret Foster
Cynthia Loehr
Daniel Opperman
Rebecca Walker

Lewis and Roca Jontz Dawe
201 Third St. NW, 19th Floor
Albuquerque, NM 87102
505.764.5400
www.lewisandroca.com
★ His intellectual property law (patent, trademark and copyright) work has included application, licensing, opinion and litigation matters.
★ Harris is the only New Mexico patent lawyer listed in all seven of those editions of The Best Lawyers in America which have listed the intellectual property law practice category (1991-1992 through the 2003-2004 editions). He also has the highest category legal ability rating in Martindale-Hubbell.
★ His scientific background, helpful in patent work, includes nine years as a physicist at Sandia National Laboratories, a Ph.D. in physics from Rice University, and a B.S. in physics (with honors) from the University of Texas.
★ In 2003 he spoke on intellectual property law at the New Mexico Bar Convention (where he was rated 4.67 out of 5) and taught a patent law course at the UNM School of Law.

* Cited in leading treatise, CHISUM ON PATENTS (Matthew Bender)

SCHOOL OF LAW
Calendar of Events

SEPTEMBER
8 Dickason Lecture
“People with Disabilities and the Supreme Court: Whose Constitution Is It Anyway?”
Professor Jim Ellis
UNM School of Law  RM 2401
Lecture & reception 5:30 - 7:30 PM
16 “The World of the International Criminal Court”
Roeof Haveman, Lecturer
UNM School of Law  RM 2401
Lecture & reception 5:30 - 7:30 PM

OCTOBER
7 Tribal Education Leaders Summit on Legal Education
Classroom 2401
10:00 AM – 3:30 PM
7 Indian People, Indian Law Convocation
UNM School of Law
Classroom 2401
4:00 PM
22 Distinguished Achievement Awards Dinner – HONORING
Ranne Miller, Maureen Sanders & Peter Winograd
UNM Student Union Building
5:30 PM Reception - 7:00 PM Dinner
28 Ramo Lecture on International Justice
“Terrorism and the Rule of Law”
The Honorable Lord Peter Goldsmith QC
Attorney General Great Britain
UNM School of Law Forum
Lecture & reception 5:00 - 8:00 PM
For more information please call
Herb Wright, (505) 277-1038

Attorney Positions Available

e Twelfth Judicial District Attorney's Office in Otero and Lincoln County has two positions available. An Associate Trial Attorney position is open in the Alamogordo Office. is position is in the DWI Unit and is open to new law school grads who have taken the July bar exam and are awaiting results. More experienced attorneys are also encouraged to apply. Salary range is consistent with the New Mexico District Attorney's Association Pay and Compensation Plan. Also available is a Senior Trial Attorney position in our Lincoln County office. is position requires prior prosecution experience, residency or relocation in Lincoln County and the ability to supervise employees. Interested individuals should send a letter of interest and a resume to District Attorney Scot Key, 1000 New York Ave., Room 301, Alamogordo, NM 88310 or fax to 434-2507.

MEDIATION - ARBITRATION

NORMAN L. GAGNE

BUTT THORNTON & BAEHR PC
(505) 884-0777 (505) 889-8870(f)
nlgagne@btblaw.com
CLE Seminars
FOR Criminal Defense Lawyers
BY Criminal Defense Lawyers

JURY SELECTION MADE FUN
8:30-1:00 National jury selection expert, Michael Stout, will provide an intensive, specialized four hour session on techniques and practice for the best voir dire you can imagine. An area of immense interest and importance for all lawyers, this jury selection training will improve your skills demonstrably.

WORKING WITH THE MEDIA—AND MAKING THE MEDIA WORK WITH YOU
2:00-4:00 Not so long ago lawyers could refuse to talk to a reporter, taking refuge in the old adage "Don’t try your case in the media." No more. If a reporter is asking you about your case, the case is already in the media. Your challenge—and obligation—is to make the story say what you want it to say. Former reporter and newspaper publisher Laurie Knowles, now an appellate public defender, will facilitate discussions and hands-on demonstrations to help show you how. Other trainers are Randi McGinn, Mark Donatelli and Sheila Lewis.

Friday, September 24, 2004 ~ 7.3 CLE Credits; UNM School of Law, Albuquerque; For registration information contact by email: nmcdladir@aol.com, or call 986-9536. Sponsored by the New Mexico Criminal Defense Lawyers Association.
**Classified**

**Positions**

**Assistant District Attorney**
The Ninth Judicial DA’s office is accepting applications for the position of Assistant District Attorney. The position is a general fund (not grant funded) position. This position will allow an attorney the opportunity to prosecute Juvenile, Misdemeanor and Felony cases. The salary range is $34,000 to $48,000 depending upon experience. Please send resumes to Brett J. Carter, District Attorney, 700 North Main, Suite 16, Clovis, NM 88101; or e-mail to bcarte@da.state.nm.us. Position opened until filled.

**Assistant District Attorney**
The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Carlsbad, Eddy County and Hobbs, Lea County. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan with starting salary range of an Assistant District Attorney to a Senior Assistant District Attorney ($38,384.00-$45,012.28) dependent upon experience. Please send resume to Thomas A. Rutledge, District Attorney, 102 N. Canal, Ste. 200, Carlsbad, NM 88220; or e-mail to truttle@da.state.nm.us.

**Contract Attorney Position**
Downtown law firm has unique part time, independent contract positions available providing legal advice. Some flexibility in scheduling. Great supplement to private practice. Positions require at least 3 yrs. practice experience, and you must like dealing with people. Work includes daily phone advice with clients, document review, and research in criminal and civil law in a friendly atmosphere. Computer skills and Spanish speaking helpful. Will train for position. Fax resume to 242-6225 or mail to Administrator, The Jaffe Law Firm, P.O. Box 809, Albuquerque, NM 87103-0809.

**Attorney Position**
Downtown law firm is looking for attorney with 3 to 25 yrs. experience, who likes dealing with people. Work consists of extensive phone advice to clients, document review, and research in criminal and civil law in a friendly atmosphere. Computer skills and Spanish speaking helpful. Will train for position. Fax resume to 242-6225 or mail to Administrator, The Jaffe Law Firm, P.O. Box 809, Albuquerque, NM 87103-0809.

**Associate Attorney**
Shoobridge Law Firm P.C., seeks a motivated associate attorney. Please forward resume to attorney William Shoobridge, 701 North Grimes St., Hobbs, NM 88240, 505-397-2496.

**Attorney**
Law firm of Hennighausen & Olsen, L.L.P., is accepting resumes for an attorney with experience and an interest in water law, real estate and civil litigation. Salary commensurate with experience. Please send resume, references and a writing sample to: Managing Partner, Hennighausen & Olsen, L.L.P., P.O. Box 1415, Roswell, New Mexico 88202-1415.

**Public Defenders**
The Public Defender Department is seeking entry and mid-level attorneys for positions throughout the state. Competitive salaries; excellent benefits. Please contact John Stapleton at (505) 470-0724 or e-mail at jstapleton@nmnd.state.nm.us. The State of New Mexico is an equal opportunity employer.

**New Mexico Human Services Department**
Come work in an exciting program with a dedicated team! NM HSD, Child Support Enforcement Division is seeking to fill 4 Lawyer-O, Attorney positions located in Farmington (DOL #43798), Albuquerque (DOL #42689), Santa Fe (DOL #42686), and Las Cruces (DOL #42684). Each position requires a Juris Doctor, current licensure with the State Bar of New Mexico, and 1 year total legal experience. Salary ranges from $18,041 to $32,073 per hour. Interested individuals must apply using the DOL Job Order Number(s) listed at any NM Department of Labor Workforce Center statewide. For DOL information, please call 505-827-7434 or any DOL office statewide. Please bring a resume and copy of your NM bar card for application purposes. Upon completion of the NM DOL application process, please send a copy of your resume, bar card, NM DOL Job Referral Form, and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. For general information, you may contact: Marty Ferraro at 505-827-7756 or by e-mail, marty.ferraro@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

**Attorney**
Seeking attorney to handle residential foreclosure cases. Prior foreclosure or real estate title experience required. Fax resume with references to 254-4722 or mail to PO Box 3509, Alb 87190.

**Associate Attorney**
Rapidly growing, successful small litigation law firm is seeking an exceptional attorney with an excellent academic background, who is self disciplined, well organized, a team player, committed to growing the firm, and to providing the highest quality of legal services to the firm’s clients. We focus on insurance defense litigation and general civil practice. We offer an excellent salary and benefits package. Partnership track for right person. Please send resume to John S. Stift & Associates, L.L.C. 400 Gold Avenue, Suite 1300W, Albuquerque, NM 87102, email resumesabq@aol.com, or fax to (505) 243-5855.

**Paralegal**
Small, fast-paced, law office seeks paralegal experienced in civil litigation, collection, and advanced bookkeeping. Please send resume and salary requirements to PO Box 27557 ABQ, NM 87125. Attn: Wanda.

**Part-Time Legal Secretary**
**Nob Hill Area**
Small law firm seeks part-time legal secretary with strong civil litigation experience in insurance defense. Experienced in Word Perfect, TimeSlips. M-Th, 4 to 5 hours/day, 16 to 20 hrs/wk. Great job for parent of school age children. Please send resume and references to John P. Massey, Massey Law Office,. 3616 Campus Boulevard NE, Albuquerque, New Mexico 87106; or fax to (505) 268-6629.

**Land Use/Real Estate Paralegal**
The Rodey Law Firm is accepting resumes for a land use/real estate paralegal with experience in various aspects of land use, planning and zoning and real estate development. Familiarity with land use laws, ordinances, plans, policies and procedures desirable. Experience in real estate transactions also important. Position requires good verbal and written communication skills, initiative and willingness to work as part of a team. Working knowledge of MS Word required. Must be detail oriented with ability to assess priorities. Firm offers comprehensive benefit package. Forward resumes to hr@rodey.com or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87125.

**Legal Secretary**
Santa Fe law firm seeks an experienced legal secretary. Position requires a team player with strong word processing skills including proficiency with MSWord. Excellent work environment, salary and benefits. Fax resume and references to Karen Kilgore at 505/982-0350 or email to mkk@wkkm.com.
Receptionist/Secretary F/T
The Bregman Law Firm, P.C. seeks a responsible highly personable candidate with a positive, can-do attitude to serve as its front desk staff member and to deliver exceptional customer service to our clients. Duties include answering 6-line phone, transcription, mail, word processing (Win 95/Word), calendar, correspondence, file creation, filing, faxing, e-mail, and extensive client contact. The successful candidate will be professional, detail-orientated, highly organized and a quick learner. Ex. salary + benefits DOE with opportunity to advance. Fax resume to 761-8280 or email to sam@bregmanlawfirm.com

Public Notice
Be advised that the Governing Body of the Town of Edgewood will be accepting proposals to contract for Legal Services. Proposals must be submitted no later than 12:00 p.m. on September 3, 2004. For more information please call Karen Alaard, Clerk-Treasurer at 286-4518. Robert Stearley, Mayor

Experienced Litigation Assistant
North Valley two attorney law firm with busy civil caseload needs experienced litigation assistant/officer manager with two or more years experience. Perfect for an organized self-starter that needs flexibility more than benefits. $15.00 per hour. Knowledge of MSWord, Timeslips, and dictation preferred. Respond to P.O. Box 10565, Albuquerque, 87184.

Legal Services Contract
The County of Grant is soliciting proposals for limited legal services for Grant County, on an “as needed” basis, commencing January 1, 2005. Deadline for proposals is September 24, 2004, at 3:00 p.m. MDT. A copy of the Request for Proposals may be obtained by calling (505) 574-0003.

Paralegal Position F/T
The Bregman Law Firm, P.C. seeks an articulate, motivated paralegal, with 2-5 years experience to join our fast-paced busy litigation and collection practice. Excellent writing and research skills required. Salary and benefits DOE. Fax resume to 761-8280 or email to sam@bregmanlawfirm.com.

OFFICE SPACE

Professional Office Suites Downtown
Large offices with separate secretarial area. Free client parking, receptionist, library/conference room, kitchen, telephone, high-speed Internet connection, copier, fax and security. Call Lynda, (505) 842-5924.

Louisiana/Candelaria Corner

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $195 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Journal Center II
Share new office space down the street from the State Bar building. Contact Stephen Eaton, (505) 837-9200.

Downtown Office Space
Free standing 6400 sf building, multiple offices, conference rooms, plenty of off street parking. Contact Bill Campbell Agency L.L.C. 828-0094.

One Office Available
Best location in town, one block or less from the new federal, state, and private buildings. Lease includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner. Contact Thomas Nance Jones, (505) 247-2972.

Downtown Space For Office/Residence
Beautiful space at 411 Tenth Street SW located within the City’s Downtown Redevelopment Project. Three blocks from soon-to-be-open Flying Star Café and downtown Central Avenue shops, dining and night life. Currently zoned RC and very suitable as a home office or residence. $950 per month, 2 room, 1 bath w/ kitchen appliances. Served as a law office for David Serna for over 20 years. Fully landscaped with automatic sprinklers in front and back yards. Private enclosed back yard with fruit trees Redwood table and built-in brick barbecue grill. Alarm system for main building and detached garage in addition to flood light motion detectors in both front and back. Large Oak desk with matching four-shelf bookcase available w/ lease. Please call Cindy or Karen at 821-0807.

New Executive Suites in Nob Hill
Amenities include paid utilities, phone with private number and voicemail, keyed mailbox, secured parking, conference room use, break room, T-1 internet access. Call 314-1300.

Jurassic Park Law Office
One office available near Natural History Museum with four attorneys. Share phone system with modem, library, fax, copier, library/conference room and kitchenette. Vaulted ceilings, ample parking, utilities and maintenance included; great setting. $410/month. One month free rent. Call Tito D. Chavez at 345-0541 or Janet Hernandez at 243-2900.

Office Space
Available November 1, Uptown office space on Pennsylvania N.E. Suite with three offices, two secretaries, shared reception area, two shared conference rooms and shared breakroom. Includes parking, janitorial, security. Rent negotiable on additional services. Call 266-8787.

Professional Historic Building
Next to Downtown, Full floor or less. On site parking. Call Stan Schneider or Barbara Morgan, NAIVaughan Co. 797-1100.

For Lease - Downtown

CONSULTING

Cardio-Legal Consultation
Our meticulous case reviews uncover details essential to favorable outcomes. Experienced, academic, widely published New Mexico Cardiologists (adult and pediatric). Reasonable rates. NM legal references. Contact: mdheartlegal@yahoo.com.

Legal Nurse Consultant
Certified Legal Nurse Consultant with over 10 years of experience assisting attorneys nationwide. Over 20 years of clinical experience. Able to assist with any case where injury, illness or medical care is at issue. Contact: MEDLEGALRN2004@yahoo.com or toll-free 888-732-7779 for our free informational newsletter.

SERVICES

CD and Tape Transcription
Call Legal Beagle at 883-1960.
2004 PROFESSIONALISM:
An Historical Perspective

Presented by:
Thomas E. Chavez, Ph.D. & Richard L. Gerding, Esq.

Moderated by:
The Honorable Pamela B. Minzner
New Mexico Supreme Court

2004 Professionalism Self-Study NOW AVAILABLE

Name: ________________________________
Organization: ___________________________ Bar #: ________
Address: ______________________________________________________
City/State/Zip: _____________________________
Phone: ________________________________

☐ MC ☐ Visa ☐ Discover ☐ AX ☐ PO#_________ ☐ Check#_______
Card #: ________________________________ Exp.: ________________

$59 per person, $5 shipping & handling (if mailed) ☐ DVD ☐ VHS
Mail this form to: Center for Legal Education of the NM State Bar Foundation, PO Box 92860
Albuquerque, NM 87199 or fax, (505) 797-6071.

IMPORTANT NOTICE: The 2004 Professionalism: An Historical Perspective is a purchase. The tape is yours to keep. Please be sure to return the Certificate of Completion to the Center for Legal Education of the State Bar of New Mexico. CLE will file your credits and pay the necessary MCLE filing fees.
During these past 50 years, we have helped attorneys and their clients attain successful solutions in a wide variety of matters. We invite you to take advantage of our extensive experience and knowledge.

Our Litigation Services include:
- Class Action Settlement Administration
- Forensic Accounting
- Business Valuation
- Divorce Settlements
- Expert Witness Testimony
- Shareholder Litigation
- Damage Calculations
- Professional Malpractice
- Intellectual Property
- Trademark and Patent Infringement

REDW LLC
The Rogoff Firm

www.REDW.com/505.998.3200
6401 Jefferson St NE
Albuquerque, NM 87109

Ed Street, Litigation & Valuation Services
Susan Hansen, Settlement Administration
Ron Rivera, Managing Partner