Inside This Issue:

NM Commission on Access to Justice  6
Initial Meeting

First Judicial District Court  6
Court Closure

Thirteenth Judicial District Court  7
New Judge Appointed

In Memoriam  12

Legal Education Calendar
Writs of Certiorari

2004-NMCA-096: Cerrillos Gravel Products, Inc., Brad Aitken v. Board of County Commissioners of Santa Fe County and Rural Conservation Alliance

2004-NMCA-097: State v. Bertha Montoya Guzman


2004-NMCA-099: State v. Gina Franco

2004-NMCA-100: State v. Ignacio Mireles

2004-NMCA-101: State Farm Fire and Casualty Company v. Farmers Alliance Mutual Insurance Company

2004-NMCA-102: Josephine Deem v. Raymond Lobato and Susan Deem Lobato
In recognition of the generosity of Don L. and Mabel F. Dickason
The University of New Mexico School of Law
Proudly announces

Professor Jim Ellis
As recipient of the
Dickason Endowed Professorship

Since joining the UNM law faculty 27 years ago, Jim Ellis has worked on behalf of people with mental disabilities in the civil and criminal justice system. He has filed briefs in 13 cases in the U.S. Supreme Court and recently argued Atkins v. Virginia, in which the Court held that the execution of individuals with mental retardation violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

Please join us for his lecture

"People with Disabilities and the Supreme Court: Whose Constitution Is It Anyway?"

Wednesday - September 8, 2004
Lecture 5:30 pm
Reception following
UNM School of Law
Classroom 2401

THE LECTURE AND RECEPTION ARE FREE AND OPEN TO THE PUBLIC

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Date Order Filled ________________________ By __________________
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.

$89 Standard and Non-Attorney
$79 Governmental and Paralegal

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
Presenters: 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).

$99 Standard and Non-Attorney
$79 Senior Lawyers Division, Gov’t. and Paralegal

Health Law Symposium: New Laws 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.

$199 Standard and Non-Attorney
$179 Health Law Section, Gov’t. and Paralegal

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

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

TELESEMINARS

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

Notices 6-11
In Memoriam 12-13
Legal Education Calendar 14-15
Writs of Certiorari 16-17
Opinions 18-44
Advertising 45-52

MEETINGS

SEPTEMBER
8 Membership Services Committee, 1:30 p.m., State Bar Center
Bench and Bar Relations Committee, 3 p.m., State Bar Center
Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center
11 Ethics Advisory Committee, 10 a.m., Dines & Gross, P.C.
13 Historical Committee, noon, Church Street Cafe, Old Town
Taxation Section Board of Directors, noon, via teleconference
Lawyers Assistance Committee, 5:30 p.m., First Methodist Church

STATE BAR WORKSHOPS

SEPTEMBER
8 Immigration Workshop (in Spanish), 6 – 8 p.m., State Bar Center, Albuquerque
10 Lawyer Referral for the Elderly Workshop TOPIC: Nursing Home Medicaid, 9:30 a.m., Munson Senior Center, Las Cruces
21 Lawyer Referral for the Elderly Workshop, 10 a.m., Cibola Senior Center, Grants
22 Consumer Debt/Bankruptcy Workshop*, 6 – 8 p.m., State Bar Center, Albuquerque
Family Law Workshop, 5:30 – 7:30 p.m., Branigan Library, Las Cruces
30 Lawyer Referral for the Elderly Workshop TOPIC: Power of Attorney, 1:15 p.m., Meadowlark Senior Center, Rio Rancho

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.

FROM THE NEW MEXICO COURT OF APPEALS

Nos. 23,630 and 23,634: Cerrillos Gravel Products, Inc., Brad Aitken v. Board of County Commissioners of Santa Fe County and Rural Conservation Alliance 18
No. 23,373 State v. Bertha Montoya Guzman 21
No. 24,161: Luis Morales v. Ed Reynolds and Foamex, L.P. 25
No. 23,719: State v. Gina Franco 29
No. 23,450: State v. Ignacio Mireles 32
No. 23,665: State Farm Fire and Casualty Company v. Farmers Alliance Mutual Insurance Company 37
No. 23,089: Josephine Deem v. Raymond Lobato and Susan Deem Lobato 41

WITH RESPECT TO OPPOSING PARTIES AND THEIR COUNSEL:
I WILL REFRAIN FROM EXCESSIVE AND ABUSIVE DISCOVERY, AND I WILL COMPLY WITH REASONABLE DISCOVERY REQUESTS.

THE BAR BULLETIN is published weekly by the State Bar, 5121 Masthead NE, Albuquerque, NM 87109. It is distributed free to all New Mexico lawyers, other New Mexico bar members, and occasionally to out-of-state lawyers and others. The BAR BULLETIN is mailed to all New Mexico lawyers on the State Bar rolls and to nonlawyers enrolled in the Bar. The BAR BULLETIN is distributed on a fee basis to those who are not enrolled in the Bar. The BAR BULLETIN is published by the State Bar of New Mexico and is not a publication of The Albuquerque Journal or any other newspaper. The BAR BULLETIN is sold by subscription only. The BAR BULLETIN is the official publication of the State Bar of New Mexico. The views expressed in BAR BULLETIN are those of the writers and do not reflect official positions of the State Bar of New Mexico. The BAR BULLETIN is available at the Internet address www.nmbar.org. The BAR BULLETIN is a legal publication and does not allow for any non-publication of material. The BAR BULLETIN is available in print format. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.

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Contributions and announcements to the Bar Bulletin are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.
NOTICES

COURT NEWS

NM Supreme Court

Judicial Performance Evaluation Commission

Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., Sept. 21 at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

NM Board of

Legal Specialization

New Specialty Areas

The Board of Legal Specialization is pleased to announce the approval of two new areas of law eligible for specialization 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.

NM Commission

on Access to Justice

Initial Meeting

The New Mexico Commission on Access to Justice (ATJ) will hold its initial meeting from 1 to 4:15 p.m., Sept. 24 at the State Bar Center. The New Mexico Supreme Court created the commission as an independent, statewide body dedicated to expanding and improving civil legal assistance in New Mexico. The commission is composed of 18 members representative of the bar, judiciary and legal aid providers. The agenda for the meeting includes an overview of the Texas ATJ Commission and structure of the New Mexico ATJ Commission, including mission and goals, establishing working committees, and budget. Featured speakers at the meeting will include Chief Justice Petra Jimenez Maes and Justice Deborah Hankinson from the Texas ATJ.

Notice on Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

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 Snyder. 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. For more information call Celia Ludi, ADR program director, 827-5072.

Court Closure

The First Judicial District Court will close at noon, Sept. 10 in observance of the annual Santa Fe Fiesta Celebration. The court will reopen Sept. 13 and resume regularly scheduled hours.

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health and Probate Cases, 1976 to 1987

Pursuant to the Supreme Court Retention and Disposition Schedule, the First Judicial District Court will destroy exhibits filed with the court, in criminal, civil, children’s court, domestic, incompetency/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 Special 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.

Family Law

Brownbag Meeting

The next meeting will be at noon, Sept. 14 in the Grand Jury Room of the First Judicial District Court. Max August, the director of Children First: Co-Parenting Support Services, will provide an update on the Safe Haven Program. Also, several parents who have participated in the co-parenting classes provided by Children First will share their experiences. Send e-mail to sharonpino@pinolawoffice.com for more information.

Second Judicial District Court

Children’s Court

Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’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 Disposition 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 excluded. 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 Disposition 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. 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.

**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 located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on Sept. 6. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

**Notice to Attorneys**

Gov. Bill Richardson has announced his appointment of J. Michael Kavanaugh to fill the vacancy of Division XIV at the Second Judicial District Court, effective Sept. 11. Kavanaugh will assume Criminal Court cases assigned to Division XIV. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Sept. 11 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

**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) 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.

**Bernalillo County Metropolitan Court**

**Announcement of Vacancy**

One judicial vacancy on the Bernalillo County Metropolitan Court will exist as of Sept. 10 due to the selection of Judge J. Michael Kavanaugh by Gov. Bill Richardson to serve as judge of the Second Judicial District Court. The Chair of the Bernalillo County Metropolitan Court Nominating Commission solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications may be obtained via the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm or from the UNM School of Law, 1117 Stanford NE, Albuquerque, or mailed or e-mailed by calling Reva Chapman at 277-4700. The deadline for applications/nominations is 5 p.m., Sept. 15.

The Bernalillo County Metropolitan Court Nominating Commission will meet on Oct. 5 at the Bernalillo County Metropolitan Courthouse, NW corner of Lomas Blvd. and Fourth St., in Albuquerque.

**Pro Tempore Judge**

Effective Sept. 11, Pro Tempore Judge Cecilia Niemczyk will be assigned to the Metropolitan Court’s Criminal Division XIII and will assume all criminal cases previously assigned to Judge J. Michael Kavanaugh of Division XIII. This is pursuant to NMRA Rule 7-106E. Parties who have not previously exercised their right to challenge or excuse will have 10 days from the date of this notice, to challenge or excuse the Pro Tempore Judge pursuant to NMRA Rule 7-106D. Contact Gloria Pena, deputy court administrator, (505) 841-8105 for more information.
U.S. District Court for the District of New Mexico
Notice To Federal Practitioners

Senior Judge James A. Parker, Senior Judge C. LeRoy Hansen and Senior Magistrate Judge Don J. Svet will be moving their chambers from the Pete V. Domenici U. S. Courthouse on Lomas to the Courthouse at 421 Gold SW in Albuquerque during the week of Sept. 6. Their mailing address will be PO Box 669, Albuquerque, NM 87103.

STATE BAR NEWS
2004 Section Elections

In accordance with the Section Bylaws, 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 was 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, Bankruptcy Law, Business Law, Elder Law, Employment and Labor Law, Health Law, Indian Law, Real Property, Probate and Trust, and Solo and Small Firm Practitioners sections have been published in past issues. Nominating committee information for the Children’s Law; Commercial Litigation; Criminal Law; Natural Resources, Energy and Environmental Law; Prosecutors; Public Law and Taxation Sections follow:

Children’s 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:
Ted A. Martinez, Chair
1218 Lomas Blvd NW
Albuquerque, NM 87102-1856
Tel: 247-8171
Fax: 247-3163

Spencer Bert Atkins
PO Box 255
Alamogordo, NM 88311-0255
Tel: 437-3042
Fax: 437-3064

Philip T. Heisey
2nd Judicial District Attorney
520 Lomas Blvd NW
Albuquerque, NM 87102-2118
Tel: 841-7235
Fax: 841-7015

Rebecca Liggret
NM Children Youth & Families Department
1920 5th St.
Santa Fe, NM 87505-3467
Tel: 476-5472
Fax: 827-7476

Judy Flynn-O’Brien
UNM Institute of Public Law
MSC11 6000 One University of NM
Albuquerque, NM 87131-0001
Tel: 277-1050
Fax: 277-5483

Commercial Litigation 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
Position 5 2005 – 2007 term

Nominating Committee:
Thomas Gulley, Chair
Lewis and Roca Jontz Dawe LLP
PO Box 1027
Albuquerque, NM 87103-1027
Tel: 764-5400
Fax: 764-5480

David Bunting
Rodey Dickason Sloan Akin & Robb PA
PO Box 1888
Albuquerque, NM 87103-1888
Tel: 765-5900
Fax: 768-7395

Jack Hardwick
Sommer Udall Hardwick Ahern & Hyatt LLP
PO Box 1984
Santa Fe, NM 87504-1984
Tel: 982-4676
Fax: 988-7029

Gary Don Reagan
Reagan & Sanchez PA
1819 N. Turner #6
Hobbs, NM 88240-3834
Tel: 397-6551
Fax: 393-2252

Douglas Schneebeck
Modrall Sperling Roehl Harris & Sisk PA
PO Box 2168
Albuquerque, NM 87103-2168
Tel: 848-1800
Fax: 848-1882

Criminal Law Section
Positions to be filled:
Position 1 2005 – 2007 term
Position 2 2005 – 2007 term
Position 3 2005 – 2007 term

Nominating Committee:
David Crum, Chair
1005 Marquette Ave NW
Albuquerque, NM 87102-1937
Tel: 843-7303
Fax: 244-8731

Raul Lopez
510 Slate Ave. NW
Albuquerque, NM 87102-2157
Tel: 768-1134
Fax: 768-1124

Kari Morrissey
110 2nd St. SW #302
Albuquerque, NM 87102-3341
Tel: 244-0850
Fax: 244-0952

Matthew Torres
1412 Lomas Blvd. NW
Albuquerque, NM 87104-1236
Tel: 842-0392
Fax: 842-0686

Natural Resources, Energy and Environmental Law Section
Positions to be filled:
Position 1 2004 – 2006 term
Position 2 2004 – 2006 term
Position 3 2004 – 2006 term
Position 4 2005 – 2007 term
Position 5 2005 – 2007 term

Nominating Committee:
Richard Tully, Chair
PO Box 268
Farmington, NM 87499-0268
Tel: 327-3388
Fax: 564-8554

Carol Leach
NM Energy Minerals & Nat Resources Dept.
1220 S. St. Francis Dr.
Santa Fe, NM 87505-4000
Tel: 476-3200
Fax: 476-3220

Karen Fisher
NM Interstate Stream Commission
PO Box 25102
Santa Fe, NM 87504-5102
Tel: 476-0554
Fax: 564-8554
Prosecutors Section

Positions to be filled:

Position 1 2003 – 2005 term
Position 2 2003 – 2005 term
Position 3 2005 – 2007 term
Position 4 2005 – 2007 term
Position 5 2005 – 2007 term

Note: The number of positions varies from the Aug. 5 publication in the Bar Bulletin due to a resignation.

Nominating Committee:
Julie Ann Meade, Chair
NM Attorney General
PO Box 1508
Santa Fe, NM 87504-1508
Tel: 827-6693
Fax: 827-6988

Ann Follin Badway
NM Attorney General
111 Lomas Blvd. NW #300
Albuquerque, NM 87102-2368
Tel: 222-9000

Phyllis Bowman
NM PRC Insurance Fraud Bureau
PO Box 1269
Santa Fe, NM 87504-1269
Tel: 476-0560
Fax: 476-0479

Taxation Practice Section

Positions to be filled:

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

Nominating Committee:
R. Tracy Sprouts, Chair
Rodey Dickason Sloan Akin & Robb PA
PO Box 1888
Albuquerque, NM 87103-1888
Tel: 768-7356
Fax: 768-7395

John Hickey
White Koch Kelly & McCarthy PA
PO Box 787
Santa Fe, NM 87504-0787
Tel: 982-4374
Fax: 982-0350

Edward Hynson
University of Texas at Brownsville
96 Pizarro Ave.
Rancho Viejo, TX 78575-0676
Tel: 956-544-8932

Any section member who wishes to be considered for nomination to his or her section board of directors, or who wishes to recommend a section member for nomination, should contact a member of the section's nominating committee before Sept. 30.

Candidates must be members in good standing of the State Bar and a member of the section for 30 days prior to election. There is no restriction on consecutive terms or on the number of terms a board member may serve.

Each section nominating committee will publish its nominations in the Bar Bulletin. After publication, additional nominations may be made in the form of a petition signed by at least 10 attorneys who have been members of the section for 30 days or more. The petition must identify the position and term sought, and state that the member has agreed to the nomination. The deadline for submission of petitions to the State Bar is generally three to four weeks following publication of the nominating committee report.

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 aberkson@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.

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:

<table>
<thead>
<tr>
<th>Month</th>
<th>Days</th>
<th>Hours</th>
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<tbody>
<tr>
<td>September</td>
<td>9 of 15</td>
<td>1-5 p.m.</td>
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<td></td>
<td>10 of 15</td>
<td>9 a.m.-3 p.m.</td>
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<td>October</td>
<td>14 of 15</td>
<td>1-5 p.m.</td>
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<td></td>
<td>15 of 15</td>
<td>9 a.m.-3 p.m.</td>
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<tr>
<td>November</td>
<td>11 Closed for Veterans’ Day</td>
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<tr>
<td>December</td>
<td>12 of 15</td>
<td>9 a.m.-3 p.m.</td>
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<td></td>
<td>13 of 15</td>
<td>9 a.m.-3 p.m.</td>
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</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.

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

Annual Procurement Code Institute and Section Annual Meeting

The New Mexico Procurement Association (NMPPA) and the State Bar of New Mexico Public Law Section will present the 2004 New Mexico Public Procurement Institute from 8 a.m. to 12:30 p.m., Sept. 17 at the State Personnel Office Auditorium located at 2600 Cerrillos Rd., Santa Fe. The annual section meeting will follow at 12:30 p.m. Section members are encouraged to attend to meet each other and discuss future section activities whether or not they attend the institute. Institute attendees will receive 3.0 G and 1.0 E CLE credits. Registration forms may be obtained by contacting Ramona Gutierrez, (505) 827-2360 or Ramona.Gutierrez@state.nm.us and must be postmarked by Sept. 9 to obtain pre-registration prices. Prices are: $90 State Bar Public Law Section and NMPPA Members; $100 all others; $115 at the door. Payment should be remitted to Ramona Gutierrez, NMPPA-PCI, State Purchasing Division, Montoya Bldg, Room 2016, 1100 St. Francis Dr., Santa Fe, NM 87505. Registration may faxed to (505) 827-2484.

Young Lawyers Division/UNM Law School Mentorship Program

Attorney Mentors Needed

The Young Lawyers Division (YLD) and the University of New Mexico (UNM) Law School Mentorship Program matches New Mexico attorneys with UNM law students to help students learn more about the practice of law. The YLD is currently recruiting New Mexico attorneys to discuss practice areas and practice-related questions with law students on a regular basis. Attorneys will be matched with law students wanting to learn more about their practice area. Participating attorneys and students will be invited to attend two socials (dates and locations to be announced). In addition to attending these socials, each attorney will be expected to meet with their law student at least four times throughout the 2004-2005 academic year.

To volunteer as a mentor for this academic year, use the form posted on the State Bar’s Web site, www.nmbar.org, and fax the completed application to Erika Anderson at (505) 982-8513 no later than Sept. 16. If you have any questions, please contact Anderson at eanderson@nm.net or (505) 982-8405.

Young Lawyers Division

State Court of Appeals - A Judicial Luncheon

The Young Lawyers Division (YLD) invites you to join the judges of the New Mexico Court of Appeals for a judicial luncheon sponsored by YLD with an optional appellate argument to follow. The luncheon is from 12:30 to 1:30 p.m., Sept. 21 at the Court of Appeals Albuquerque Satellite Office, 1117 Stanford NE. Learn the rudiments of appellate state court practice, what judges love and hate, and get to know fellow YLD members. The optional appellate argument will focus on a city ordinance requiring the registration of sex offenders. Contact Brent Moore, (505) 476-3783, bmoore@nmenv.state.nm.us, or Erica Anderson, (505) 982-8405, eanderson@nm.net.
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, PA., 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 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.

Albuquerque Bar Association
Monthly Luncheon
Meet the Second Judicial District Court candidates at a luncheon from 11:45 a.m. to 1:30 p.m., Sept. 7 at the Petroleum Club. Candidates are Judge Marie Baca, Donald Harris, Christopher Schultz, Judge Linda Vanzi, Judge Kevin Fitzwater, Judge John Romero, Judge Valerie Mackie Huling, Alfred Quintana, Judge Michael Kavanaugh, Judge Sharon Walton, Judge Nan Nash, Kenny Morris and Judge Denise Barela Shepherd. Cost of the luncheon is $20 for members and $25 for non-members. Call (505) 243-2615 or visit www.abqbar.com to register or for more information.

Monthly Seminar
The Albuquerque Bar Association will hold an Alternative Dispute Resolution seminar immediately following their monthly luncheon. The seminar will be from 1:30 to 3:30 p.m., Sept. 7 at the Petroleum Club. The seminar will feature Judge Nan G. Nash and David P. Levin and will be worth 2.0 G CLE credits. Cost for the seminar is $40. Call (505) 243-2615 or visit www.abqbar.com for more information.

National Hispanic Bar Association
Annual Convention
Join attorneys from around the country in New York City, Oct. 9 to 12, for the National Hispanic Bar Association Annual Convention, at the Marriott Marquis Hotel in Times Square. The convention brings together the most influential Hispanics in the nation to discuss issues affecting the profession. Continuing legal education courses explore current issues in the fields of international trade, immigration, civil rights, employment law, settlement techniques, environmental law, white-collar crime, Sarbanes/Oxley compliance, appellate advocacy and election law. This year’s Convention will again feature the largest law job fair in the country and will be open to lateral attorneys for the first time in HNBA history. For more information or to register for the 2004 convention, visit www.hnba.com.

NM Hispanic Bar Awards Banquet
Join the New Mexico Hispanic Bar Association Sept. 17 in honoring Prof. Margaret E. Montoya, for receiving the NMHBA’s Liberty and Justice Award, and Henry F. Narvaez for receiving the NMHBA’s Attorney of the Year Award. The keynote speaker is New Mexico Lt. Gov. Diane D. Denish. The banquet will at the Radisson Hotel at Carlisle and I-40. Cocktails (no host bar) begin at 6 p.m., and the dinner and program begins at 7 p.m. Tickets are $60 per person, $100 per couple and $500 per table of 10 (individuals purchasing tables by Sept. 13 will be recognized in the program). Attendees should R.S.V.P. to (505) 797-6072, and send payment to NMHBA, PO Box 26326, Albuquerque, NM 87125.

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

Chapter of the Federalist Society
Panel Discussion
The UNM Law Students Chapter of the Federalist Society is sponsoring a panel discussion regarding the constitutionality of the Federal Sentencing Guidelines. The panel discussion will occur from 3 to 5 p.m., Sept. 10 at the UNM Law School, Room 2401. Judge Bobby Baldock of the Tenth Circuit Court of appeals, seated in Roswell will act as moderator. The panel will include:

Judge Paul Cassell
U.S. District Court for the District of Utah

John Cline
Jones Day law firm, San Francisco
Professor Leo Romero
UNM Law School

Kent Scheidegger
Legal Director of Criminal Justice
Legal Foundation in California.

Attendees will receive 2.4 G CLE credit hours for $5.

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 5 p.m.
Sept. 6: CLOSED

Thanksgiving Day Holiday:
Nov. 24: 8 a.m. to 5 p.m.
Nov. 25: CLOSED
Nov. 26: CLOSED

Special Exam Hours:
Dec. 3: 8 a.m. to 10 p.m.
Dec. 4: 9 a.m. to 10 p.m.
Dec. 10: 8 a.m. to 10 p.m.
Dec. 11: 9 a.m. to 10 p.m.
IN MEMORIAM

The Honorable Frank H. Allen, Jr., age 74, passed away on June 22. Allen was born in West Virginia on Jan. 7, 1930 to Frank H. Allen Sr. and Katherine McNeer Allen. Survivors include his wife, Joanna McGuire-Allen, of Albuquerque; the only daughter, Linley Allen, of Arlington, Wash.; three sons, John T. Allen and his wife, Patti, of Redmond, Wash.; David B. Allen and his wife Kathleen, of Albuquerque, and Brad Denison and his wife, Cindy, of Pagosa Springs, Colo.; and nine grandchildren. He is preceded in death by his parents; one son, Frank H. Allen III; and Joan McKinnon-Allen. Allen attended the University of West Virginia, and was a graduate of the University of Illinois School of Law. He was also a member of St. John's Episcopal Church.

Lorenzo Armijo Chavez, 90, died on Aug. 6. He was born in Magdalena on April 1, 1914 to Felipe L. Chavez and Roseldal Chavez, who preceded him in death, as did his brothers, Maj. Antonio A. Chavez and Dr. Demetrio A. Chavez. He is survived by his wife of 60 years, Sara Baca Chavez; three sons, Lawrence Anthony Chavez, Phillip Daniel Chavez and his wife, Adriana, from McAllen, Texas, and Martin Joseph Chavez, the mayor of Albuquerque; his only sister and brother-in-law, Mary and Ed Ward, of Rehobeth Beach, Del.; his sister-in-law, Gerry Chavez, of Denver, Colo.; eight grandchildren; three great-grandchildren; five nieces and two nephews; and many cousins. He attended school in Magdalena and graduated from Pio Nono High School, a Jesuit School in Milwaukee, Wis. He received his Bachelor of Arts degree in 1941 from the University of New Mexico. He then attended Georgetown Law School in Washington, D.C. as a full-time student, where he earned his Juris Doctor degree. Upon graduation, he became a law clerk for Justice Ambrose O’Connell in the Court of Custom & Patent Appeals in Washington, D.C. and then worked for the Reconstruction Finance Corporation in the District of Columbia, in charge of War Risk Insurance. He then became a special assistant to the Attorney General of the U.S. in charge of land condemnation in New Mexico. In 1946, he started his law practice in Albuquerque. During these early years, he was elected to the House of Representatives in the NM Legislature. He tried the first federal court case where a Native American served in the jury. In 1962, he founded and became the first president of the American Savings and Loan Association, Albuquerque. In the 1960s, he also served on the board of the International Academy of Trial Lawyers, of which he was a member for many years. He was a member of St. Bernadette Catholic Church, the State Bar of New Mexico, the District of Columbia Bar, the Petroleum Club, Four Hills Country Club, and many other organizations.

Sara Jane Foster, 53 died June 14 in Fort Defiance, Ariz. She was born Jan. 17, 1951 in Rehoboth into the Bitter Water People Clan for the Red Streak People Clan. Foster graduated from Grants High School in 1969 among the top ten. She received her Juris Doctorate Law Degree from the University of New Mexico Law School in May 1987. She was an attorney for the Navajo Nation Department of Justice. Survivors include her husband, Larry Foster of Deersprings, Ariz.; mother, Louise Benally Platero of Bluewater Lake; daughter Larra Foster of Albuquerque; sisters, Desbah Padilla of Grants, Cheryl Platero of Albuquerque, JoAnn Platero of Kirtland, Larrine Platero of Kayenta, Ariz., Linda Platero of Bluewater Lake, Luana Platero of Crownpoint, Michelle Platero of Phoenix, Patsy Platero of Flagstaff, Ariz., Ramona Roach of Vanderwagen; brothers, Chris Platero of Bluewater Lake, Phil Platero of Phoenix; and one grandchild. Foster was preceded in death by her father, Ramon Platero; son, Lawrence Foster; and brother, Stephen Platero.

Beloved Toby Grossman died May 25, 2004. She was admired by all who knew her, adored by her communities and recognized for her commitment to her friends, family and to the many organizations she helped lead and direct. She dedicated her life to child welfare, to her Jewish faith, and to the many people she cared about. The loves of her life were her husband, Leonard, and daughter, Jennifer Eve. She remained close to her sister and extended family and friends across the world. She was staff attorney for the American Indian Law Center for more than 30 years. She also sat on the boards of directors for both Congregation Albert and Hogares. Toby knew how to set priorities and used her talents to help many people solve difficult life challenges. She was certainly willing to help anyone with a need. Many of her family and friends owe their success to her. Toby was energetic, outgoing and genuinely loved the people she met. If you happened to find yourself in the same room with her, you were going to talk with her - guaranteed. She was anything but shy and retiring.

James Traynor Jennings was a plainspoken, prominent Roswell attorney; a community champion who helped lead the effort to replace the jobs that vanished when Walker Air Force Base closed during the 1960s. Jennings died June 10 at the age of 90 following a brief illness. A Tucumcari native, Jennings was born to J.H. “Red” and Theresa Traynor Jennings. His mother died when he was 6 years old and he grew up in El Paso, Texas, where his father served as a conductor on the Southern Pacific Railroad. He graduated from El Paso’s Cathedral High School in 1931 and would go on to Notre Dame University, where he graduated cum laude. He earned his law degree from the University of Texas and, soon after, returned to New Mexico and practiced law with G.T. Watts in Roswell. He and Frances Schultz were married in 1942 in Roswell. Jennings specialized in oil and gas law and was a staunch community advocate. He served as the first president of the Roswell Industrial Corp., which was formed to overcome the loss of jobs and stem the flight of residents when Walker Air Force Base was deactivated in 1967. At the time of his death, Jennings was with the Jennings and Jones law firm. He served as president of the State Bar of New Mexico; as a delegate to the American Bar Association House of Delegates for 16 years; the Board of Governors of the American Bar Association for three years; and as life member and fellows of the American Bar Foundation. In 1981, Jennings was honored with the State Bar of New Mexico Distinguished Service Award. Jennings is survived by his wife and six children: James T. Jennings, Jr., and wife, Ann, of Hernando, Miss.; Mary Maloney and husband, Dick, of Roswell; former Rio Rancho Mayor John Jennings and wife, Mikele; former Roswell Mayor Tom Jennings and wife, Mia; state Sen. Tim Jennings and wife, Pat; and Carol Rolfs, and husband, Michael of Barrington, Ill. He also had 22 grandchildren and eight great-grandchildren.
**Walter Robb Kegel**, age 79, passed away at home on April 28 following a lengthy illness. He was born on May 26, 1924 in Albuquerque. He graduated from Santa Fe High School in 1941, and went on to attend the University of Missouri at Columbia, where he obtained a Bachelor of Arts in Journalism, and a Juris Doctor in 1947. Kegel returned to New Mexico where he was elected to serve as district attorney for two terms beginning in the late 1950s. He served for several years as assistant attorney general and practiced law in Northern New Mexico for almost 50 years, during which time he was recognized for his service to the elderly and the poor. Kegel is survived by his wife, Virginia Martinez-Kegel; his children; Jay Kegel and wife, Kathy; Robert Kegel; David Kegel and wife Darlene; Margaret Kegel; and Kathy Kegel; and stepson Bob Lovato.

**Russell D. Mann** died Aug. 14 in Albuquerque. Mann was born in Fairfield, Ill., on Aug. 10, 1922. He graduated from Southern Illinois University in 1948 and received his Juris Doctor degree from St. Louis University School of Law in 1951. Mann served his country in France and the U.S. during World War II as a member of the U.S. Army. In 1950 he married Pauline I. Ward. He was admitted as a member of the state bar associations of Illinois and Missouri in 1951 and admitted to practice law in New Mexico in 1952. He had been a fellow of the American College of Trial Lawyers since 1975. Mann was a senior partner of Atwood, Malone, Mann & Turner, P.A. until 1995. He became a shareholder of the Modrall Law Firm that year. He held numerous positions of distinction with the State Bar of New Mexico, serving as a member of the New Mexico Board of Bar Commissioners from 1968 to 1976 and serving as president of the State Bar in 1973-1974. He was chairman of the New Mexico Judicial Council in 1980-1981 and served as a member of the New Mexico Board of Bar Commissioners from 2000 until 2003. In 1995 he received the Professionalism Award from the State Bar and has been listed in The Best Lawyers in America since 1985. Mann is survived by his wife, Pauline, of Roswell; sons Russell D. Mann, Jr., of Roswell; Larry E. Mann of Fort Lauderdale, Fla.; and grandson Chad R. Mann of Copperas Cove, Texas.

**Jack MacGee Morgan**, former long-time New Mexico State Senator, 80, saw his last sunrise early in the morning of Aug. 11 after a valiant battle against cancer. Morgan was born in Portales on Jan. 15, 1924 to the late George Albert and Mary Rosana Baker Morgan. A World War II veteran, he proudly served as an officer on the USS Mitchell, destroyer escort, in the U.S. Navy from 1942-1946. Jack graduated from the University of Texas at Austin, receiving his Bachelor of Business Administration in 1948 and his law degree in 1950. True to his commitment to public service, he accepted an appointment in 1973 to fill the unexpired term of then State Senator Don Hargrove. Jack represented San Juan County, District 1, from 1973 to 1988. During his terms, Morgan was instrumental in getting improved roads for the San Juan County area as well as leading an effort to bring a railroad to this area. He also held many leadership positions including chairman of the Senate Finance Committee. He also served on the Judiciary and Education Committees, the Revenue Stabilization Committee and the Environmental Health Study Committee and was chairman of the Four Corners Transportation Committee. He also served on and was past chairman of the Southwest Regional Energy Council. He was a member and past president of the Kiwanis Club in Portales and Farmington. He was also a member of the Elks Club in Farmington. Morgan served on the Board of Directors of Ziems Ford Motor Company, Merrion Oil Company, Arizona Public Service and Wells Fargo (formerly First National Bank of Farmington), and Farmington Museum Foundation, as well as other local boards. He was admitted to the New Mexico Bar in 1950 and practiced in New Mexico for his entire 54-year career. His practice varied, but his true love was estate planning. He placed more value on helping people than on making money. Morgan was a loving and devoted husband, father, grandfather, brother, uncle, friend and neighbor. Jack is survived by his wife of 57 years, Peggy Flynn Cummings Morgan; his children, Marilynn Morgan Montoya, Rebecca Morgan, Claudia Morgan-Gray, and Jack MacGee Morgan, Jr.; and other family.

**Nicholas J. Noeding** peacefully and with joy left this life on Aug. 10. Born in Taos on Nov. 4, 1948 he is survived by his wife, Jane; sons, Nick Noeding Jr., Henry Noeding, Brett Kelley and his wife, Mica; daughter, Kirsten Wells and her husband, Al; brother, Tom Noeding; sister, Barbara Mott and her children, Sara and Daniel; mother-in-law, Adelia Kastning; brother-in-law, Jerry Kastning and his wife, Barbara; special cousin, Louise Blair; and three grandchildren, Lauren, Braiden, and Korrin Wells. He was preceded in death by his parents, Otto and Faye Noeding of Taos. Nick had a long and wonderful career practicing labor and employment law. Noeding received his Juris Doctor degree in 1973 and Bachelor of Arts degree in 1970 from the University of New Mexico. In law school he served as business editor of The New Mexico Law Review and The National Resources Journal. He also edited the first edition of Civil Procedure in New Mexico, the principal treatise available on New Mexico Civil Procedure. He graduated in the top 5 percent of his undergraduate class. He is a long-time member of the National Health Lawyer’s Association, and its predecessor. He was a member of the Associated General Contractors of America, Labor Lawyers Council and had served as chief legal counsel to the State of New Mexico on labor relations’ matters. His life was made full and complete by the love of his family and friends.

**Glenn Garland Stiff**, a prominent Roswell attorney, died April 5 at Eastern New Mexico Medical Center. He suffered coronary arrest at the hospital as he was recovering from major surgery. Stiff was born Aug. 20, 1922 in Sweetwater, Texas, the son of Ray C. and Alamaza Kerr Stiff. His father was in the automobile business in Breckenridge, Texas, Carlsbad and Hobbs. Stiff graduated from Hobbs High School where he was recognized for his play on the basketball team. In 1944 he graduated from the University of Texas in Austin and joined the U.S. Navy. He attended Midshipman School in Chicago and was commissioned as an ensign. He served in Germany at the end of World War II. Stiff returned to the University of Texas in Austin and received his law degree in 1947. He practiced law briefly in Clovis before moving to Roswell in 1949 where he was associated with Howard Buckley, Lou Kimmell and Dick Bean. Later he was a partner with William C. Schauer before he entered private practice. He and Jaunita Singer were married in Roswell in 1950. Stiff served on the Roswell City Council and was president of the Roswell Country Club. Stiff is survived by his wife, Jaunita; his daughter, Carolyn Ann Nunnally and her husband, Jay; a grandson, Jason; a granddaughter, Katie Kistner; and a great-grandson, Kory Kistner, all of Coppell, Texas; and one brother, Lawson Stiff, of Lubbock, Texas.
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<thead>
<tr>
<th>Event Title</th>
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<th>Duration</th>
<th>Contact Information</th>
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<tr>
<td>ADR in the Practice of Law</td>
<td>September 7</td>
<td>Albuquerque Petroleum Club, Albuquerque Bar Association and the NM Defense Lawyers Association</td>
<td>2.0 G</td>
<td>(505) 243-2615</td>
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<td>When Counsel's Duties Conflict</td>
<td>September 7</td>
<td>Albuquerque Bar Association and the NM Defense Lawyers Association</td>
<td>2.0 G</td>
<td>(505) 797-6020</td>
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<td>2004 Professionalism: A Historical Perspective</td>
<td>September 8</td>
<td>Albuquerque Center for Legal Education of SBNM</td>
<td>3.8 G</td>
<td>(715) 855-0495</td>
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<td>Expert Opinions - Adjudication or Legislation?</td>
<td>September 9</td>
<td>Sterling Educational Serv.</td>
<td>8.0 G</td>
<td>(715) 855-0495</td>
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<td>Fundamentals of Workers' Compensation</td>
<td>September 9</td>
<td>Lorman Educational Services</td>
<td>6.6 G, 0.6 E</td>
<td>(800) 672-6253</td>
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<td>Social Security Law</td>
<td>September 14</td>
<td>Roswell</td>
<td>1.0 G</td>
<td><a href="mailto:pd@nmbar.org">pd@nmbar.org</a></td>
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<td>The Changing Role of Paralegals: What Every Attorney Needs to Know</td>
<td>September 10</td>
<td>State Bar Center - Albuquerque Center for Legal Education of SBNM</td>
<td>2.3 G, 1.0 E</td>
<td>(505) 797-6020</td>
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<td>How to Make a Private Company Acquisition</td>
<td>September 10</td>
<td>TRT, Inc.</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
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<td>Effective Time Management for Lawyers</td>
<td>September 13</td>
<td>TRT, Inc.</td>
<td>2.4 P</td>
<td>(800) 672-6253</td>
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<td>Legal Matters, Life Concerns: Planning for the Inevitable</td>
<td>September 14</td>
<td>State Bar Center - Albuquerque Senior Lawyers Division and Center for Legal Education of SBNM</td>
<td>4.8 G, 1.2 E, 2.1 P</td>
<td>(505) 797-6020</td>
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<td>Should My Client Litigate or Mediate</td>
<td>September 14</td>
<td>TRT, Inc.</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
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<td>Corporate Criminal Liability</td>
<td>September 18</td>
<td>Freedman, Boyd, Daniels, Hollander, Goldberg &amp; Cline</td>
<td>10.0 G</td>
<td>(505) 842-9960</td>
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<td><strong>Advanced Oil and Gas Land Institute</strong></td>
<td>Santa Fe Association Of Professional Landmen</td>
<td>7.2 G</td>
<td>(817) 847-7700</td>
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<td><strong>Is the Attorney-Client Privilege on the Ropes?</strong></td>
<td>Teleconference TRT, Inc.</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
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<tr>
<td>20</td>
<td><strong>Litigation Seminar</strong></td>
<td>State Bar Center, Albuquerque Westlaw</td>
<td>1.5 G</td>
<td>(800) 310-9650 Ext. 7101</td>
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<td><strong>Statutory Research</strong></td>
<td>State Bar Center, Albuquerque Westlaw</td>
<td>1.5 G</td>
<td>(800) 310-9650 Ext. 7101</td>
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<td>21</td>
<td><strong>Personal and Professional Liability Issues</strong></td>
<td>Teleconference TRT, Inc.</td>
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<td>(800) 672-6253</td>
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<td>22</td>
<td><strong>2004 Professionalism: An Historical Perspective</strong></td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
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<td>22</td>
<td><strong>Essential Issues of Arbitration</strong></td>
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<td>22</td>
<td><strong>Legal Writing and Reasoning</strong></td>
<td>State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
<td>8.3 G</td>
<td>(505) 797-6020</td>
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<td>23</td>
<td><strong>Advanced Gross Receipts and Compensating Taxation in New Mexico</strong></td>
<td>Albuquerque Lorman Education Services</td>
<td>8.0 G</td>
<td>(505) 797-6020</td>
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<td>23</td>
<td><strong>ALN - Advanced Estate Planning Practice Update-Fall 2004</strong></td>
<td>State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
<td>3.6 G</td>
<td>(505) 797-6020</td>
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<td><strong>Estate Planning</strong></td>
<td>Roswell Paralegal Division of NM</td>
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<td><a href="mailto:pd@nmbar.org">pd@nmbar.org</a></td>
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<td>23</td>
<td><strong>Experts: A Primer on Scientific Evidence Under Federal Standards</strong></td>
<td>Teleconference TRT, Inc.</td>
<td>2.4 G</td>
<td>(800) 672-6253</td>
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<td>23</td>
<td><strong>Legal Writing and Reasoning</strong></td>
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<td>(505) 797-6020</td>
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<td><strong>Just WHO is the Client?</strong></td>
<td>Teleconference TRT, Inc.</td>
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**G = General  E = Ethics  P = Professionalism  VR = Video Replay**

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### Petitions For Writ Of Certiorari Filed And Pending:

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Title</th>
<th>Date Filed</th>
<th>Date Filed</th>
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<tbody>
<tr>
<td>28,386</td>
<td>State v. Cruz (COA 23,880)</td>
<td>8/23/04</td>
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<tr>
<td>28,860</td>
<td>Aguilera v. Palm Harbor Homes (COA 23,821)</td>
<td>8/18/04</td>
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<td>28,870</td>
<td>Brooks v. Norwest (COA 23,423)</td>
<td>8/30/04</td>
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<td>28,869</td>
<td>Howard v. Ulibarri (12-501)</td>
<td>8/27/04</td>
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<td>28,866</td>
<td>CYFD v. Tara C. (COA 24,772)</td>
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<td>State v. Rodriguez (COA 23,455)</td>
<td>8/26/04</td>
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<td>28,864</td>
<td>Richardson v. Janecka (12-501)</td>
<td>8/26/04</td>
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<td>28,863</td>
<td>State v. Jernigan (COA 24,817)</td>
<td>8/17/04</td>
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<td>28,850</td>
<td>Berry v. Federal Kemp (COA 23,186)</td>
<td>8/12/04</td>
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<td>28,855</td>
<td>Matix v. Ricks Exploration (COA 24,211)</td>
<td>8/16/04</td>
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<td>28,856</td>
<td>Petties v. State (12-501)</td>
<td>8/16/04</td>
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<td>Enfield v. Old Line L&amp;I Ins. (COA 23,239)</td>
<td>8/30/04</td>
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<td>28,845</td>
<td>State v. Gomez (COA 24,787)</td>
<td>8/11/04</td>
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<td>Sanchez v. Allied Discount (COA 23,437/23,715)</td>
<td>8/10/04</td>
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<td>Zihnyk v. Buddy's, Inc. (COA 23,584)</td>
<td>8/6/04</td>
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<td>28,839</td>
<td>State v. Schells (COA 24,359)</td>
<td>8/2/04</td>
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<td>28,838</td>
<td>State v. Jones (COA 24,462)</td>
<td>8/2/04</td>
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<td>State v. Norvell (COA 24,743)</td>
<td>8/2/04</td>
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<td>Gutierrez v. Kiva, Inc. (COA 24,550)</td>
<td>7/29/04</td>
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<td>28,823</td>
<td>Payne v. Hall (COA 22,383)</td>
<td>7/21/04</td>
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<td>State v. Garcia (COA 24,369)</td>
<td>7/19/04</td>
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<td>6/21/04</td>
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<td>Tarin v. Tarin (COA 23,428)</td>
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<td>State v. Blea (COA 24,032)</td>
<td>9/16/03</td>
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<td>State v. Sharpe (COA 23,742)</td>
<td>10/10/03</td>
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<td>28,369</td>
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<td>12/5/03</td>
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<td>State v. Flores (COA 24,067)</td>
<td>12/16/03</td>
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<td>1/13/04</td>
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<td>1/20/04</td>
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<td>3/24/04</td>
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<td>3/30/04</td>
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<td>4/22/04</td>
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<td>5/17/04</td>
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<td>5/17/04</td>
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<td>Herrington v. State Engineer (COA 23,871)</td>
<td>5/17/04</td>
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<td>28,660</td>
<td>State v. Johnson (COA 23,463)</td>
<td>5/18/04</td>
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<td>Archuleta v. Santa Fe Police Department (COA 23,445)</td>
<td>5/24/04</td>
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<td>28,631</td>
<td>State v. Garcia (COA 23,353)</td>
<td>5/24/04</td>
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<td>State v. Waterhouse (COA 24,392)</td>
<td>5/24/04</td>
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<td>28,634</td>
<td>State v. Chompol (COA 22,187)</td>
<td>6/4/04</td>
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<td>State v. Gonzales (COA 22,580/22,612)</td>
<td>6/4/04</td>
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<td>Fernandez v. Espanola School (COA 23,032)</td>
<td>6/4/04</td>
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<td>Bakers v. BP America (COA 24,741)</td>
<td>6/4/04</td>
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<td>State v. Shaye (COA 23,554/23,594)</td>
<td>6/10/04</td>
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<td>State v. Madrid (COA 23,822)</td>
<td>6/10/04</td>
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<td>State v. Savage (COA 23,801)</td>
<td>6/10/04</td>
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<td>State v. Gutierrez (COA 24,731)</td>
<td>6/14/04</td>
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<td>6/22/04</td>
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<td>Chavez v. Sandoval (COA 24,232)</td>
<td>6/22/04</td>
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<td>28,759</td>
<td>State v. Carey (COA 23,707)</td>
<td>7/14/04</td>
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<td>28,663</td>
<td>State v. Dean (COA 23,409)</td>
<td>7/19/04</td>
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<td>State v. Franco (COA 23,719)</td>
<td>8/10/04</td>
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<td>28,788</td>
<td>Colrillos Gravel v. County Commissioners (COA 23,630/23,634)</td>
<td>8/10/04</td>
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<td>28,764</td>
<td>State v. Still (COA 24,525)</td>
<td>8/10/04</td>
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<td>State v. Perea (COA 23,557)</td>
<td>8/17/04</td>
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<td>Romero v. City of Santa Fe (COA 24,775)</td>
<td>8/17/04</td>
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<td>State v. Maese (COA 23,793)</td>
<td>8/17/04</td>
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<td>Battishill v. Farmers Insurance (COA 24,196)</td>
<td>8/23/04</td>
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<td>State v. Heinsen (COA 23,716)</td>
<td>8/24/04</td>
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**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 SEPTEMBER 1, 2004**

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**ALL CASES HELD IN ABEYANCE PENDING DISPOSITION**

**IN NO. 28,670, STATE V. SHAY**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Plaintiff v. Defendant</th>
<th>Date Writ Issued</th>
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<tr>
<td>NO. 28,674</td>
<td>State v. Avilucea (COA 23,964)</td>
<td>6/10/04</td>
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<tr>
<td>NO. 28,706</td>
<td>State v. Cavalier (COA 23,796)</td>
<td>6/22/04</td>
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<td>NO. 28,705</td>
<td>State v. Monger (COA 23,944/23,993)</td>
<td>6/22/04</td>
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<td>NO. 28,704</td>
<td>State v. Lopez (COA 23,531)</td>
<td>6/22/04</td>
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<td>NO. 28,703</td>
<td>State v. Armenta (COA 24,311)</td>
<td>6/22/04</td>
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<td>State v. Moreno (COA 23,893)</td>
<td>7/19/04</td>
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<td>NO. 28,652</td>
<td>State v. Abeyta (COA 23,804)</td>
<td>7/19/04</td>
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<td>NO. 28,751</td>
<td>State v. Perez (COA 24,474)</td>
<td>7/19/04</td>
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<td>NO. 28,750</td>
<td>State v. Horcasitas (COA 24,274)</td>
<td>7/19/04</td>
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<td>State v. Tave (COA 24,114)</td>
<td>7/19/04</td>
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<td>State v. Hensley (COA 23,966)</td>
<td>7/19/04</td>
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<td>NO. 28,745</td>
<td>State v. Torres (COA 24,683)</td>
<td>7/19/04</td>
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<td>NO. 28,805</td>
<td>State v. Garcia (COA 24,369)</td>
<td>8/10/04</td>
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<td>NO. 28,777</td>
<td>State v. Washington (COA 24,004)</td>
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**IN NO. 28,663, STATE V. DEAN**

<table>
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<tr>
<th>Case Number</th>
<th>Plaintiff v. Defendant</th>
<th>Date Writ Issued</th>
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<tr>
<td>NO. 28,665</td>
<td>State v. Self (COA 23,588)</td>
<td>7/19/04</td>
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<tr>
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<td>State v. Lopez (COA 23,531)</td>
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<tr>
<td>NO. 27,950</td>
<td>Breen v. Carlsbad Schools (COA 22,858/22,859)</td>
<td>9/30/03</td>
</tr>
<tr>
<td>NO. 28,038</td>
<td>Paule v. Santa Fe County Commissioners (COA 22,988)</td>
<td>10/27/03</td>
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<td>NO. 27,945</td>
<td>State v. Munoz (COA 23,094)</td>
<td>11/18/03</td>
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<td>NO. 27,817</td>
<td>Tomlinson v. George (COA 22,017)</td>
<td>12/15/03</td>
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<td>NO. 28,068</td>
<td>State v. Gallegos (COA 22,888)</td>
<td>2/3/04</td>
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<td>Jicarilla Apache Nation v. Rodarte (COA 22,336)</td>
<td>2/10/04</td>
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<td>NO. 28,225</td>
<td>Huntley v. Cibola General Hospital (COA 23,916)</td>
<td>2/29/04</td>
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<td>NO. 28,272</td>
<td>Lester v. City of Hobbs (COA 22,250)</td>
<td>3/16/04</td>
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<td>NO. 28,241</td>
<td>State v. Duran (COA 22,611)</td>
<td>3/31/04</td>
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<td>NO. 28,317</td>
<td>Turner v. Bassett (COA 22,877)</td>
<td>4/12/04</td>
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<td>State v. McDonald (COA 22,689)</td>
<td>4/13/04</td>
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<td>State v. Dedman (COA 23,476)</td>
<td>4/13/04</td>
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<td>NO. 28,286</td>
<td>State v. Graham (COA 22,913)</td>
<td>5/17/04</td>
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<td>NO. 28,270</td>
<td>State v. Paredes (COA 24,082)</td>
<td>6/23/04</td>
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<td>NO. 28,353</td>
<td>State v. Villa (COA 23,229)</td>
<td>6/30/04</td>
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<td>NO. 28,374</td>
<td>Smith v. Bernalillo County Commissioners (COA 22,766)</td>
<td>8/9/04</td>
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<td>NO. 28,380</td>
<td>Angel Fire v. Wheeler (COA 24,295)</td>
<td>8/9/04</td>
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<td>8/10/04</td>
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<th>Case Number</th>
<th>Plaintiff v. Defendant</th>
<th>Date of Order denying</th>
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<td>NO. 28,831</td>
<td>State v. Thompson (COA 24,169)</td>
<td>8/24/04</td>
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<td>NO. 28,835</td>
<td>State v. Fisher (COA 24,349)</td>
<td>8/25/04</td>
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<td>NO. 28,731</td>
<td>Valdez v. LeMaster (12-501)</td>
<td>8/26/04</td>
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<td>NO. 28,855</td>
<td>Munoz v. Tafoya (12-501)</td>
<td>8/26/04</td>
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<td>Ryan v. Highway Dept. (COA 22,615)</td>
<td>8/31/04</td>
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<td>Bruhn v. The Hartford (COA 23,501)</td>
<td>8/31/04</td>
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<td>NO. 28,402</td>
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<td>8/31/04</td>
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<td>State v. Moses M. (COA 23,250)</td>
<td>8/31/04</td>
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<td>NO. 28,210</td>
<td>Cassidy-Baca v. County Comm’t (COA 24,046)</td>
<td>8/31/04</td>
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A. JOSEPH ALARID, JUDGE

{1} In this case, we consider whether the Santa Fe County Board of County Commissioners (Board or the County) had the authority to suspend or revoke a mining permit it issued to Cerrillos Gravel Products, Inc. (Cerrillos Gravel). The district court ruled that the County had no authority to suspend or revoke a permit, and that any action to do so had to be filed in district court. The County appealed. We hold that, under the circumstances here, the County had the authority to suspend the mining permit, and reverse and remand to the district court.

BACKGROUND

{2} The record reflects that the mining company and the County have been at odds for many years. In any event, they agree that negotiations led to a 1996 settlement under which Cerrillos Gravel received a mining permit, on July 10, 1997, with twenty-four conditions. Cerrillos Gravel complied with some conditions, but, according to the County, failed to comply with others. In January 2000, the County issued a stop work order and notified Cerrillos Gravel that its permit had been revoked.

The matter was set for hearing before the Board. Before the Board could meet, the parties once again engaged in negotiations designed to allow Cerrillos Gravel to continue its operations in a way that was acceptable to the County. These negotiations resulted in a memorandum of understanding. However, when the memorandum of understanding was presented to the Board, it changed some of the provisions. Cerrillos Gravel appeared without its attorney, but a representative of the company said he thought the company would accept the changes. Cerrillos Gravel ultimately did not accept the changes, and the Board suspended the permit until certain conditions were met.

{3} Cerrillos Gravel filed an appeal in district court pursuant to Rule 1-074 NMRA 2004. During that appeal, Cerrillos Gravel persuaded the district court that the Board’s suspension of its permit was invalid because the Board did not have authority to do so. The County and the Intervenor filed petitions for certiorari, which we granted.

DISCUSSION

A. Standard of Review

{4} Because this appeal involves statutory construction, our review is de novo. Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066.

B. County Zoning Authority

1. Statutes

{5} Counties are creatures of statute, and have only the power granted by the Legislature, along with those powers necessarily implied to implement the express powers. See El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs, 113 N.M. 347, 349, 825 P.2d 1257, 1259 (Ct. App. 1991). Zoning statutes and ordinances are strictly construed. Id.

{6} Several statutes are relevant to a county’s authority to revoke or suspend a mining permit. NMSA1978, § 3-21-6(A)(1) (1981) provides that “[t]he zoning authority within its jurisdiction shall provide by ordinance for the manner in which zoning regulations, restrictions and the boundaries of the districts are . . . enforced.” NMSA 1978, § 3-21-10(B) (1965) provides:

B. [I]f any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure or land is used in violation of Sections
3-21-1 through 3-21-14 NMSA 1978, or any ordinance adopted pursuant to these sections, the zoning authority may institute any appropriate action or proceedings to:

1. Prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use;
2. Restrain, correct or abate the violation;
3. Prevent the occupancy of such building, structure or land; or
4. Prevent any illegal act, conduct, business or use in or about such premises.

7. NMSA 1978, Section 3-21-13(B), (C) (1965), entitled “Zoning enforcement by counties,” provides that county ordinances “may be enforced by prosecution in the district court of the county. Penalties for violations of these ordinances shall not exceed a fine of three hundred dollars ($300) and imprisonment for ninety days, or both.” Section 3-21-13(C) provides that the “district attorney and sheriff shall enforce these ordinances.” Section 3-21-13(B) is similar to NMSA 1978, § 4-37-3(A) (1993) providing that county ordinances “may be enforced by prosecution for violations of those ordinances in any court of competent jurisdiction,” and that penalties may not exceed $300 or ninety days imprisonment, or both. Id.

8. Consequently, we are faced with several statutes that present different interpretations of a county’s power in this context. Sections 3-21-6 and -10(B) grant counties broad power to enact ordinances to determine how their ordinances are enforced, and to “institute any appropriate action or proceedings” to prevent and abate violations.

9. Against these two broad statutes are two statutes providing that violations of county ordinances may be prosecuted in district court by the district attorney or sheriff, and limit the penalties that may be imposed to a nominal fine of $300, and imprisonment not to exceed ninety days, or both. See § 3-21-13; § 4-37-3(A). Cerrillos Gravel relies heavily on these two statutes to support its position that district court is the only permissible venue, arguing that these statutes are more specific.

10. When multiple statutes cover the same subject matter we attempt to harmonize them if possible. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599; State ex rel. Quintana v. Schneider, 115 N.M. 573, 575-76, 855 P.2d 562, 564-65 (1993). It is possible to do so here. The two statutes on which Cerrillos Gravel relies both provide that violations of ordinances “may be enforced by prosecution” in “court.” § 4-37-3(A); § 3-21-13(B). The word “may” is permissive, and is not the equivalent of “shall,” which is mandatory. See Gandy v. Wal-Mart Stores, Inc., 117 N.M. 441, 442-43, 872 P.2d 859, 860-61 (1994) (stating canon of construction that “shall” is mandatory and “may” is permissive). We believe the Legislature’s use of the word “may” is carefully chosen to express the intention that a quasi-criminal prosecution, with attendant criminal fines and imprisonment, is one option available to a county, in addition to other remedies. See City of Santa Fe v. Baker, 95 N.M. 238, 241, 620 P.2d 892, 895 (Ct. App. 1980) (noting that “[p]rosecution for violation of a municipal ordinance is a quasi-criminal proceeding”). Sections 3-21-13(B) and 4-37-3(A) do nothing more than recognize that, as a quasi-criminal prosecution, court would be the appropriate venue, and the district attorney and the sheriff would be the appropriate prosecutorial entity. Reading the statutes in this way gives the proper effect to the words “may,” and “shall,” in Section 3-21-13, and harmonizes Sections 3-21-6, -10, and -13 in a way that gives effect to each one.

11. But we disagree that Sections 4-37-3 and 3-21-13 provide the only remedy. It would be unreasonable to conclude that a county, faced with illegal land use, including violations that might endanger the health and safety of the public, would be limited solely to seeking criminal prosecution in court with a limitation of a nominal fine ($300), or ninety days imprisonment, or both. Such a limitation would allow the illegal use to continue, even at risk to the health and safety of the public. We have not recognized such a strict limitation on the remedy, and have recognized that, in addition to criminal prosecution, a county has the option to pursue an injunction, or file an abatement action, in district court. See Vaughn, 113 N.M. at 351, 825 P.2d at 1261 (noting that, when confronted with violations of zoning laws, a board may seek an injunction, file an abatement action, or pursue penalties in quasi-criminal proceedings).

2. Ordinances

12. Cerrillos Gravel persuaded the district court that Vaughn determined the result here. There, we held that the Bernalillo County Board of County Commissioners had no authority to revoke a special use permit. Id. at 351, 825 P.2d at 1259. Our decision in Vaughn was based on the rationale that “nothing in the applicable statute or ordinance specifically allows for the cancellation” of special use permits. Id. at 350, 825 P.2d at 1260. In Vaughn we carefully scrutinized the applicable county ordinances for authorization to revoke a special use permit, and found none. Id. at 349-50, 825 P.2d at 1259-60.

13. However, in contrast to Vaughn, the Land Development Code (the Code), Santa Fe County, N.M., Ordinance 1996-10 (1996), specifically allows for revocation of a mining permit. Section I.11(A) of the Code provides that failure to comply with the Code shall subject a mining operation to penalties, and expressly states that “[p]enalties may also include suspension or revocation of the . . . mining land use permit.” It further provides that “[t]he penalties in this paragraph will be imposed only after a hearing before the board.” [Id.] Consequently, this case is distinguishable from Vaughn because Santa Fe County has an ordinance specifically providing for cancellation or suspension of a mining permit, and has provided that such an action may occur administratively.

14. Our analysis is not confined solely to determining whether the County has enacted an ordinance allowing it to suspend or revoke a mining permit. The ordinance must “be authorized by statute.” Burroughs v. Bd. of County Comm’rs, 88 N.M. 303, 304, 540 P.2d 233, 234 (1975). Below, Cerrillos Gravel persuaded the district court that Vaughn, combined with the lack of any statutory language referring to “revoking” mining permits, meant that the Board had no authority to suspend its permit. Cerrillos Gravel continues that theme here, making several arguments that the statutes do not mention suspending or revoking permits. It argues that Section 3-21-13 does not contain language allowing suspension or revocation of a permit, and therefore that remedy is unauthorized. It suggests that Section 3-21-13 is the only statute addressing “penalties.” It argues that because revocation of a permit is not listed as a penalty, it is unauthorized. Cerrillos Gravel also argues that Section 3-21-10(B)’s grant of authority to “prevent” or “restrain” illegal use of land cannot include an administrative action to revoke a mining permit. It contends that, at most, the authority would
be limited to pursuing an injunction in district court.

{15} We disagree with these arguments because we are not persuaded that the absence of language including “revocation of any permit” in the enabling statutes requires us to hold that such authority is not authorized. Our law does not require that an ordinance precisely track the enabling statute, to be authorized. See City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 412-15, 389 P.2d 13, 16-18 (1964) (holding that an ordinance creating an historical district and requiring new buildings harmonize with existing structures was within the scope of the enabling statute allowing municipalities to zone consistently with a comprehensive plan “to promote the health and general welfare.”); cf. Gould v. Santa Fe County, 2001-NMCA-107, ¶ 18-19, 131 N.M. 405, 37 P.3d 122 (noting that “[a]n ordinance may duplicate or complement statutory regulations” so long as it does not permit “an act the general law prohibits, or prohibits an act the general law permits”) (internal quotation marks and citation omitted). The Legislature often enacts laws with a broad sweep, and cannot be fairly expected to expressly address every eventuality. See Investment Co. v. Reese, 117 N.M. 655, 661, 875 P.2d 1086, 1092 (1994) (stating that “[i]t is futile to expect statutory codes to be all-encompassing and to anticipate every eventuality”); Hughes v. Timberon Water & Sanitation Dist., 1999-NMCA-136, ¶ 17, 128 N.M. 186, 991 P.2d 16 (stating that we do not assume that the Legislature writes statutes with exquisite attention to detail).

{16} Allowing the Legislature to paint with a broad brush, and to leave the details to local governmental entities, is reflected in the enabling statute, which grants counties the authority to pass ordinances defining how their land use ordinances may be enforced. See § 3-21-6. The Legislature has also used broad language empowering a county to “prevent,” “restrain,” “abate,” and “correct” zoning violations. We read that language to reasonably include the authority to revoke permission to pursue the illegal activity, so long as a county has enacted an ordinance providing revocation as a penalty. The fact that the broad enabling legislation does not expressly authorize “suspension” or “revocation” of a mining permit does not require us to conclude that the Santa Fe County ordinance is beyond the authority granted by the Legislature.

{17} Cerrillos Gravel makes yet another argument based on Vaughn. The argument begins with the premise that Vaughn establishes an absolute prohibition on counties revoking a permit. The argument then relies on the rule of statutory construction that the Legislature is presumed to have knowledge of existing case law when it amends statutes. See State ex rel. Stratton v. Roswell Indep. Schs., 111 N.M. 495, 502-03, 806 P.2d 1085, 1092-93 (Ct. App. 1991). Cerrillos Gravel argues that Sections 31-21-10(B) and -13 have not been changed since Vaughn, and, therefore, the Legislature must be presumed to be content with Vaughn’s purported absolute prohibition on counties revoking permits.

{18} We reject this argument. As we have discussed, Vaughn does not hold that a county may never revoke a land use permit. It only holds that, under the facts there, the county could not do so. Moreover, legislative inaction is a tenuous guide to legislative intent. See Perry v. Williams, 2003-NMCA-084, ¶ 15, 133 N.M. 844, 70 P.3d 1283. Consequently, we disagree with Cerrillos Gravel’s argument that legislative inaction since Vaughn establishes the Legislature’s view that counties have no power to revoke land use permits.

{19} Finally, Cerrillos Gravel contends that even if there is an ordinance providing for suspension of a permit, the penalty provision does not apply to it because it qualifies as “an existing mining use” under the Code. It relies on language in Section 1.10(A) of the Code stating that an existing mining use “shall not be subject to the requirements of this Ordinance except as follows . . . .” Section 1.10 then imposes requirements on existing mining uses, including the requirement of a reclamation plan, and submission of various descriptions of current information concerning water, vegetation, wildlife, and the mining operation. In construing county zoning ordinances, we apply the same rules of construction that we use when we construe statutes. See Burroughs, 88 N.M. at 306, 540 P.2d at 236. We construe ordinances so as to accomplish the means sought to be accomplished, and will not read into an ordinance language that is not there, particularly if it makes sense as written. Id.

{20} Although the Code requires existing mining uses to comply with fewer requirements than those applicable to a new mine, an existing mining use is still subject to Code requirements. See the Code § 1.10. Even assuming that Cerrillos Gravel’s operation is an “existing mining use,” we reject its argument that the Code’s penalty provision would not apply to it. Even if it were excused from some “requirements” applicable to new mines, “penalties” are not “requirements.” Under Cerrillos Gravel’s view, the Code imposes requirements on “existing mining uses,” but the penalty provision would not apply if the operator did not comply with those requirements. We see nothing in the Code that would prohibit the application of penalties to an operator, including an operator of an “existing mining use,” who failed to comply with the applicable requirements. Rather, the Code’s plain language provides that “[i]failure to comply” with the Code shall subject the mining operator to penalties, and the penalty section contains no language suggesting that it applies only to new mines. See the Code, § 1.11(A). We conclude that Cerrillos Gravel’s interpretation of the Code is unsupported by the language in the ordinance and is unreasonable. See Burroughs, 88 N.M. at 306, 540 P.2d at 236 (stating that we follow the plain language of an ordinance, and will not read language into it if it makes sense as written).

{21} For all of these reasons, we conclude that Santa Fe County’s ordinance specifically providing for revocation or suspension of a mining permit, and suspension of the permit, are consonant with the Legislature’s grant of power to pass ordinances defining how land use ordinances may be enforced, see § 3-21-6, and within the Legislature’s grant of authority to institute “any appropriate action or proceedings” to confront violations of land use ordinances. See §§ 3-21-10(B). Consequently, the County had the authority to enforce its ordinance administratively and suspend Cerrillos Gravel’s mining permit.

{22} Once a permit is suspended or revoked, it may be the case that the zoning authority must invoke the power of the district court, by seeking an injunction or by filing an abatement action, against an entity that continues to conduct activities under a suspended or revoked permit. A quasi-criminal proceeding under Section 3-21-13 is another available option. But, we disagree with Cerrillos Gravel’s argument that the County had no authority to administratively suspend the mining permit it granted.

C. Vested Rights

{23} Cerrillos Gravel argues that, having obtained a permit, and having expended substantial sums of money developing its mine, it has a “vested right” to continue mining, that cannot be subsequently withheld, extinguished, or modified. The “vested right” doctrine has been recognized
in our law. See El Dorado, 89 N.M. at 319, 551 P.2d at 1366. There, the Court held that a property owner’s right to develop his subdivision vested after he had complied with the statutory prerequisites and obtained a determination from the county that he had complied, and that the county could not later attempt to change its position and deny approval. That situation calls for an equitable decision that the property owner is protected. However, this case is nothing like El Dorado. Cerrillos Gravel has not relied to its detriment and then had the County change its position. It cannot now argue that it need not comply with the argument that Cerrillos Gravel has a “vested right” to continue to operate without complying with legitimate conditions imposed by the County.

D. Other Issues
{24} Finally, Cerrillos Gravel offers us several other reasons why we should affirm. It argues that suspension of the permit was not accompanied by due process, and was not supported by the evidence. We do not address these issues because they were not reached by the district court. Once the district court ruled that the County had no authority to revoke the permit, the court did not reach any of the other issues raised in the case. Because the district court considered the case as an appellate court, under Rule 1-074, we believe it is appropriate to remand this case for the district court to consider the other issues in the first instance. See Buffett v. Vargas, 1996-NMSC-012, ¶ 7, 121 N.M. 507, 914 P.2d 1004 (determining that, after deciding the key issue on certiorari, Supreme Court would remand to the court of appeals for consideration of other issues raised in the appeal).

Cerrillos Gravel contends, any entity with a permit from the government could expend money, and then operate in any fashion it chose, and be immunized from governmental attempts to revoke permission or force compliance with permit conditions and the law, including laws designed to protect public health, welfare, and safety. That view cannot be sustained. We reject the argument that Cerrillos Gravel has a “vested right” to continue to operate without complying with legitimate conditions imposed by the County.

{25} For these reasons, we reverse the decision of the district court, and remand for further proceedings.

{26} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

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Certiorari Denied, No. 28,766, Aug. 3, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-097

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus
BERTHA MONTOYA GUZMAN,
Defendant-Appellant.
No. 23,373 (filed: June 2, 2004)

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY
KEVIN R. SWEAFAEA, District Judge

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Opinion

JAMES J. WECHSLER, CHIEF JUDGE

{1} Defendant Bertha Montoya Guzman appeals from her conviction of vehicular homicide, accidents involving death or personal injuries, tampering with evidence, and aggravated driving while under the influence of intoxicating liquors. She argues on appeal that the district court erred in denying her motion to dismiss for the State’s failure to comply with Rule 5-604 NMRA 2004 and that the evidence was insufficient to support her convictions. We affirm.

Procedural History
{2} The State commenced this prosecution by criminal information. Defendant waived arraignment and entered a plea of not guilty on August 9, 2000, establishing the latest date to commence trial under Rule 5-604(B)(1) as February 9, 2001. Trial was set for January 8, 2001 before Judge Neil P. Mertz, the original judge assigned to this case. On January 2, the State filed a stipulated joint motion for a continuance. The motion stated that the State had failed to provide Defendant with all discovery and witness interviews and that the district attorney’s office was not prepared for trial because of a change of administration. Defendant stipulated to the continuance. On January 5, Judge Richard A. Parsons, who was assigned to the case as judge pro tempore after the death of Judge Mertz, granted the motion for continuance without a hearing. On January 19, the court sent notice to counsel setting trial for April 30 and further stating “Counsel to seek extension of time, if necessary.”

{3} On February 27, eighteen days after the date for commencement of trial under Rule 5-604, the court entered a nunc pro tunc order opposed by Defendant, stating:

This matter coming on for consideration by the Court upon Petition of the State of New Mexico, by and through Clint Wellborn, Seventh Judicial District Attorney, for an extension of time pursuant to Rule 5-604 NMRA of the District Court Rules, and the Court having considered said petition and being sufficiently advised, The Honorable Richard A. Parsons (Pro Tempore), District Court Judge and trial judge in this cause;

NOW, THEREFORE, IT IS
ORDERED that an extension of time is GRANTED to and including May 7, 2001, pursuant to the District Court Rules.

On March 30, Defendant filed a motion to dismiss for failure to timely commence trial. The State responded, arguing that Judge Parsons had orally granted a sixty-day extension on January 5, and that he had subsequently granted an additional thirty-day extension because the April 30 trial date was outside of the sixty-day extension originally granted. The State contended that it had been delayed in sending Judge Parsons a written order on the extension until February 27 “due to the press of business.”

Judge Kevin R. Sweazea held a hearing on the motion to dismiss on April 20. At the hearing, Defendant argued that the rule was not followed, mandating dismissal, because a verified petition was necessary and the judge could not enter an order without a verified petition several days after the date to commence trial had passed. Defendant further argued that the order was not a proper nunc pro tunc order because the acts necessary to support the order had not been performed and the judge did not have the authority to grant the order without the proper procedure being followed. She contended that the State had the obligation to seek an extension and that she did not need to show prejudice, but that she did file her jury instructions, motion in limine, and voir dire, as required by the court. She asserted that the prosecutor had made no attempt to abide by the rule, and therefore, there could be no technical violation of a rule that was not followed in the first place.

The State called Judge Parsons as a witness over Defendant’s objection. Judge Parsons testified that he had more than thirty jury trials set starting January 8. He granted the continuance on January 5. During the week of January 16, after the original prosecutor left the district attorney’s office, Judge Parsons orally granted a sixty-day extension to the successor prosecutor in an ex parte communication. Although Judge Parsons thought that there was a sixty-day extension, the prosecutor did not prepare an order. When the order was ultimately prepared in the latter part of February, Judge Parsons signed the nunc pro tunc order filed on February 27 knowing that it was opposed. He did not recall granting an additional thirty-day extension, but testified that his intent was to extend the time to commence trial through May 7.

After Judge Parsons’ testimony, Defendant additionally argued that she did not agree to an extension of the time to commence trial. Defendant acknowledged that the State had argued what amounted to good cause to have extended the rule, but contended that the failure to file a verified petition was fatal, even without prejudice to Defendant, because the State had the burden under the rule.

Judge Sweazea denied the motion to dismiss. He found that Judge Parsons acted sua sponte by orally granting the extension in January and memorialized his action in the February 27 order and that Defendant, although objecting to the order, did not file a motion to reconsider or to set aside the order. He concluded that Judge Parsons had the inherent authority to grant an extension for a maximum of ninety days sua sponte by virtue of Rule 5-604(E). Judge Sweazea certified the order for interlocutory appeal. Defendant filed an application for an interlocutory appeal from Judge Sweazea’s order. This Court granted and then quashed the application. A jury convicted Defendant of all charges after trial in January 2002.

**Application of Rule 5-604**

The purpose of Rule 5-604 is to “assure the prompt trial and disposition of criminal cases.” *State v. Flores*, 99 N.M. 44, 46, 653 P.2d 875, 877 (1982); *State v. Eden*, 108 N.M. 737, 41-42, 779 P.2d 114, 118-19 (Ct. App. 1989). It is to be applied with common sense and not used to effect technical dismissals. *Id.* The operation of the rule is not jurisdictional. *See State v. Vigil*, 85 N.M. 328, 332, 512 P.2d 88, 92 (Ct. App. 1973). By analogy to civil cases, it is not designed to allow a defendant to “sleep upon” rights under the rule while the state continues “prosecution of a case which is subject to being dismissed upon motion.” Id. at 332, 512 P.2d at 92. A defendant must file a motion to dismiss to trigger a dismissal. *Id.*

Although Judge Sweazea may not have denied the motion to dismiss specifically based on Defendant’s failure to act in filing the motion to dismiss, he found that Defendant did not move to reconsider or set aside the February 27 order. The timeliness of Defendant’s actions was part of the record before Judge Sweazea. Therefore, to the extent Judge Sweazea did not base his ruling on Defendant’s actions in the case, it would not be unfair to Defendant to rely on that ground even though it was not relied on by Judge Sweazea. *See State v. Franks*, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct. App. 1994) (stating that the district court’s ruling may be affirmed on basis not relied upon by the district court as long as the new basis is not unfair to appellant). We review Judge Sweazea’s decision under the de novo standard of review. *See State v. Wilson*, 1998-NMCA-084, ¶ 8, 125 N.M. 390, 962 P.2d 636 (“We review the district court’s application of Rule 5-604 de novo.”).

The verified petition required by Rule 5-604 ensures that the judge has the information necessary to determine if an extension is proper. Although the State did not follow the rule by filing a verified petition, when we consider Defendant’s actions in their entirety, we do not believe that dismissal comports with the purpose of Rule 5-604. Trial was set with thirty-one days remaining to commence trial. Defendant stipulated to a continuance. Judge Parsons informed the prosecutor that he intended to grant an extension, but the rule date passed without an order because the prosecutor did not take appropriate action. Defendant did not have any responsibility until that point; she did not have any obligation to “bring on [her] trial.” *State v. Mascarinas*, 84 N.M. 153, 155, 500 P.2d 438, 440 (Ct. App. 1972) (internal quotation marks and citation omitted). When the rule date passed, trial was set in eighty days. To obtain a dismissal, Defendant then had the responsibility to file a motion to dismiss rather than “sleep upon” her rights. *Vigil*, 85 N.M. at 332, 512 P.2d at 92 (internal quotation marks and citation omitted). Defendant did not take action, but the prosecutor and the judge did. Even though the prosecutor did not act properly under the rule by filing a verified petition for an extension, eighteen days after the rule date, the judge entered an order extending the time for trial. After the order, Defendant waited another thirty-one days before filing a motion to dismiss.

Giving consideration to the purpose of Rule 5-604 to assure a prompt trial and the way Rule 5-604 is to be applied, we do not agree with Defendant that Judge Sweazea misapplied the rule. Although Defendant did not agree to an extension under the rule, she stipulated to a joint motion for continuance which, as she concedes, set forth good cause for an extension. When the time came for her to take action to assert her rights under the rule, she did not do so. She did not even act within a reasonable time after the prosecutor and the judge took action to correct the oversight that resulted in the passing of the rule date.

Although Defendant had the right to a prompt trial under Rule 5-604, Defendant’s actions do not indicate that she believed
her rights under the rule to be significant. She did not act promptly to protect them. We agree with Defendant that the State has the obligation to conduct the prosecution of its case in a timely manner. See State v. Sanchez, 2000-NMCA-061, ¶ 9, 129 N.M. 301, 6 P.3d 503. However, a defendant may waive the requirements of the rule. See State v. Sanchez, 109 N.M. 313, 316, 785 P.2d 224, 227 (1989) (stating that the defendant and his attorney’s actions in signing a plea agreement after the rule date had passed indicated an implicit agreement to suspend the rule such that prudence and common sense would not require an extension); State v. Eskridge, 1997-NMCA-106, ¶¶ 10, 12, 124 N.M. 227, 947 P.2d 502 (affirming denial of the defendant’s motion to dismiss because the defendant had waived his rights under the rule). Given Defendant’s actions, dismissal of this case would be a technical application of the rule. It is contrary to our common sense to apply the rule to dismiss this case because there was not a prompt trial when we consider the way Defendant herself treated her right to a prompt trial. Cf. State v. Jaramillo, 2004-NMCA-041, ¶ 15, __ N.M. ___, 88 P.3d 264 [No.23,191 (N.M. Ct. App. Feb. 13, 2004)] (declining to ignore the defendant’s failure to move for dismissal when such action indicated the defendant intended to benefit from, and was not unduly delayed by, delay in bringing case to trial). Defendant waived her rights under Rule 5-604 by her actions.

**Sufficiency of the Evidence**

14] Defendant argues that the evidence was insufficient to support her convictions for vehicular homicide, accidents involving death or personal injuries, and tampering with evidence. The State presented evidence at trial that Defendant consumed six to eight beers before leaving the Golden Spur tavern and heading home on Elm Street at approximately 2:00 a.m. The victim left the Golden Spur minutes before Defendant, carrying a twelve pack of Budweiser beer. Defendant admitted that she hit something as she drove home and that she stopped and made a U-turn in order to investigate but did not see anything. Upon arriving home, Defendant told Johnny Simmons, her boyfriend, that she had hit something. Simmons, a part-time deputy sheriff, was also intoxicated. Defendant and Simmons went outside and discovered part of a twelve pack of Budweiser beer lodged in the damaged grille of Defendant’s truck. Simmons left, stating that he would investigate and return. Defendant went to sleep. Simmons located the victim’s body near the intersection of Elm and Third Streets and informed the police. The police also found dark green vehicle parts and scattered beer cans near the victim’s body. The victim was wearing dark clothing and had a blood alcohol content of .319 at the time of his death.

15] The next morning, at approximately 5:45 a.m., two state police officers went to Defendant’s house. The officer who testified observed that Defendant’s green pickup truck had damage to its front right side and windshield. Defendant told the officer that she had not consumed any alcoholic drinks after the accident. The officer took Defendant to the hospital where her blood was drawn and tested, showing a blood alcohol level of .13.

16] We review the evidence in the light most favorable to supporting the district court’s verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict. State v. Alvarez-Lopez, 2003-NMCA-039, ¶ 26, 133 N.M. 404, 62 P.3d 1286. We do not reweigh the evidence or determine the credibility of witnesses. See In re Ernesto M., Jr., 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. Instead, a “conviction stands if there is evidence of either a direct or circumstantial nature to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to the conviction.” State v. Curry, 2002-NMCA-092, ¶ 13, 132 N.M. 602 52 P.3d 974.

17] In order to convict Defendant of vehicular homicide, the State had to prove: (1) Defendant operated a motor vehicle; (2) while under the influence of intoxicating liquor; (3) causing the death of the victim. UJI 14-240 NMRA 2004. The jury was instructed:

A person is under the influence of intoxicating liquor when as a result of drinking such liquor the person is less able, to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.

UJI 14-243 NMRA 2004. The jury was additionally instructed that the State had to prove that:

The act of the defendant was a significant cause of the death of [the victim]. The defendant’s act was a significant cause of death if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death and without which the death would not have occurred.


18] Defendant contends that there was no “evidence of a causal link” between Defendant’s driving while intoxicated and the victim’s death. See State v. Munoz, 1998-NMSC-041, ¶ 23, 126 N.M. 371, 970 P.2d 143. She points out that the State’s accident reconstruction expert assigned the cause of the accident to “pedestrian error” and that the expert agreed with Defendant that she was operating her vehicle in a safe manner. Defendant further suggests that she “could only reasonably be expected to evade a pedestrian who was visible to her; [the victim’s] dark clothing and doubtlessly erratic movements would have precluded this.”

19] Even though the victim was wearing dark clothing and was intoxicated when hit, as Defendant argues, a jury could reasonably find that there was a significant causal link between Defendant’s intoxicated driving and the victim’s death. See id. An autopsy revealed that the victim was struck by a vehicle, suffered a skull fracture, and died of blunt force head injuries. There was no indication at the scene that Defendant took any evasive action prior to hitting the victim. A toxicologist testifying for the State testified that once a blood alcohol level exceeds .10, the individual’s field of vision narrows “significantly” and reaction time is slowed. This evidence allows the reasonable conclusion that if Defendant had not been driving intoxicated, she could have avoided hitting the victim. See id. ¶ 22 (observing that when the State presents evidence that had the defendant not been driving intoxicated, she could have “applied [her] brakes or otherwise been able to avoid ramming the victim[]”, and therefore it was proper to hold the defendant criminally responsible for the consequences of her unlawful behavior). There was substantial evidence to support the conviction.

20] There was also substantial evidence to support Defendant’s conviction for accidents involving death or personal injuries. In order to convict Defendant of accidents involving death or personal injuries, the State was required to prove that Defendant (1) operated a motor vehicle; (2) was involved in an accident which caused great bodily harm or death of the victim; (3) failed to stop and/or failed to remain at the scene of the accident; and (4) failed to...
render reasonable aid to the victim. NMSA 1978, § 66-7-201 (1989); NMSA 1978, § 66-7-203 (1978). Defendant, while driving her truck, collided with the victim and admitted that she thought he could have been a person on a bicycle. She went home after making a U-turn to investigate. Defendant argues that it was reasonable for her to leave the scene upon not seeing the victim and to report the accident to her intoxicated boyfriend, an off-duty deputy, who then went to investigate. However, viewing the evidence in the light most favorable to the verdict, we cannot say that the jury could not have concluded otherwise. See State v. Clifford, 117 N.M. 508, 512, 873 P.2d 254, 258 (1994) (stating that we will not “reweigh the evidence nor substitute our judgment for that of the jury”).

{21} Defendant similarly argues that there was insufficient evidence to support her conviction for tampering with evidence. Defendant argues that the State failed to prove, as required by NMSA 1978, § 30-22-5 (1963), that the tampering was done with “intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.” The State’s theory, as reflected in the jury instructions, was that Defendant placed “parts and pieces from her [truck] in a bag and placed the bag in her home and/or aided or abetted . . . Simmons in removing and/or hiding a package of beer that was lodged in the grille of her [truck]” with the intent “to prevent the apprehension, prosecution or conviction of herself.”

{22} Generally, intent is established by circumstantial evidence. See State v. Gallegos, 109 N.M. 55, 66, 781 P.2d 783, 794 (Ct. App. 1989) (stating that intent is usually inferred from the facts of the case, rather than direct evidence); State v. Gattis, 105 N.M. 194, 200, 730 P.2d 497, 503 (Ct. App. 1986) (stating that intent can be inferred from an accused’s acts, conduct, and words). Agent Blakeney, one of the investigating agents, testified that he found a partial twelve pack of Budweiser and motor vehicle parts in a bag in Defendant’s home. Defendant told Blakeney that Simmons had removed the beer cans from the grille of her truck. Simmons denied removing the beer cans from Defendant’s grille even though his fingerprints were found on one of the cans and on the bumper of Defendant’s vehicle. From this evidence, the jury could reasonably conclude that Defendant placed the articles in her home or assisted Simmons in doing so with the requisite intent. We will not reweigh the evidence. See State v. Rojo, 1999-NMSC-001, ¶ 26, 126 N.M. 438, 971 P.2d 829 (stating that jury could infer intent to tamper with evidence from physical and circumstantial evidence presented at trial). There is sufficient evidence to support each element required to sustain Defendant’s conviction for tampering with evidence.

{23} Finally, while mentioning that she contested the sufficiency of the evidence for the aggravated driving while intoxicated conviction, Defendant failed to make the argument in her brief in chief. Therefore, the issue is deemed abandoned. See State v. Ciarlotta, 110 N.M. 197, 201, 793 P.2d 1350, 1354 (Ct. App. 1990) (stating that issues not argued in the brief in chief are deemed abandoned).

Conclusion

{24} We hold that the district court did not err in denying Defendant’s motion to dismiss for the State’s failure to comply with Rule 5-604 and that the evidence was sufficient to support her convictions. Accordingly, we affirm the district court’s judgment and sentence.

{25} IT IS SO ORDERED.

JAMES J. WECHSLER,
Chief Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge
IRA ROBINSON, Judge
OPINION

LYNN PICKARD, JUDGE

The two cases on appeal here present an opportunity to examine the standard announced in Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, which expanded the set of circumstances under which a worker may pursue an independent tort action outside of the exclusivity provision of the Workers’ Compensation Act (the Act), NMSA 1978, § 52-5-1 (1990). We hold that neither of these cases meets the requirements of the test set forth in Delgado, 2001-NMSC-034, ¶ 26. We consolidate the cases and affirm both district court decisions in favor of Defendants.

FACTS AND PROCEEDINGS

The Morales case

Plaintiff Morales was an employee of Defendant Foamex, L.P. d/b/a Foamex International, Inc. (Foamex), where Defendant Reynolds was his supervisor. Morales had been working at Foamex for three and one-half years at the time of the incident that gave rise to this action. On November 21, 2001, Morales was fixing an O-ring on a pump that carries a chemical called toluene diisocyanate (TDI) from a storage tank to a mix head in Foamex’s plant. As Morales was fixing the pump “even though they knew that [Morales] would suffer grave injuries as a result of such conduct.” Foamex and Reynolds moved for summary judgment, arguing that Morales had not raised a factual issue regarding whether their actions had been wilful or intentional. The district court granted summary judgment, and Morales appeals.

The Fernandez case

Plaintiff Fernandez was an employee of Defendant Brown-Minneapolis Tank Co. (Brown) for two years when the incident at issue in his case occurred. Fernandez was working on the scaffolding of a tank, approximately sixteen feet above ground. A metal sheet slipped from the hands of another employee who was working on the scaffolding above Fernandez. The sheet hit Fernandez on the side of the head and caused him to fall and sustain injuries. Fernandez was not wearing safety gear.

After receiving benefits under the Act, Fernandez filed an action in district court, alleging that Brown had negligently and intentionally failed to provide him with adequate safety equipment. Brown filed a motion to dismiss for failure to state a claim. The district court dismissed the claim. Fernandez appeals.

The purpose of the Act is to “assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers.” NMSA 1978, § 52-5-1 (1990). The Act fulfills this purpose through a bargain in which an injured worker gives up his or her right to sue the employer for damages in return for an expedient settlement covering medical expenses and wage benefits, while the employer gives up its defenses in return for immunity from a tort claim. Delgado, 2001-NMSC-034, ¶ 12. If an employer falls within the scope of the Act, the benefits and
The remedies provided therein are the exclusive remedy for that employer’s workers who are injured or killed in accidents “arising out of and in the course of” their employment. Section 52-1-9.

The Act makes an exception to the general rule of exclusivity of remedies for events that are not “accident[s],” NMSA 1978, § 52-1-2 (2003); Delgado, 2001-NMSC-034, ¶ 13. Actions on the part of the employer or the worker can render the injuring event non-accidental. On the worker’s part, an event is considered to be non-accidental if it resulted from intoxication, willfulness, or intentional self-infliction. NMSA 1978, § 52-1-11 (1989). This results in the worker losing any and all benefits. See Delgado, 2001-NMSC-034, ¶ 14. On the employer’s part, an event was traditionally considered to be non-accidental if the employer actually intended to deliberately inflict harm on the worker. Id. ¶ 16. Historically, this was the only situation that would result in the employer losing the benefit of exclusivity and becoming open to tort liability. Id.

In Delgado, our Supreme Court broadened the scope of the accident exception with respect to employers. In light of the Act’s express provision that it should not be construed to favor either the employer or the worker, § 52-5-1, the Court expressed concern that there was a lower standard for finding that a worker had lost his or her benefits than for finding that an employer had lost its protection from tort liability. Delgado, 2001-NMSC-034, ¶ 24. To end this disparity, our Supreme Court held that in addition to acts intended to cause harm, willful acts by an employer would also result in the employer’s loss of immunity from tort liability. Id. The Court announced a three-prong test to be applied equally to workers and employers in order to determine whether an event is non-accidental. Id.

Illfulness renders a worker’s injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury. Id. ¶ 26.

Beyond this boundary, the Court did not elaborate on the boundaries of what type of conduct qualifies under the exception to exclusivity. However, the facts of Delgado are helpful in illustrating what type of employer conduct the Court sought to address in broadening the non-accidental exception. The worker was employed at a smelting plant that distilled copper ore by heating rock to temperatures greater than 2,000 degrees so that usable ore would separate from unusable slag. Id. ¶ 3. The slag drained into a 15-foot tall, 35-ton iron cauldron known as a “ladle,” which workers would ordinarily empty on a regular basis by using a “mudgun” to stop the flow of molten slag long enough for a specialized device called a “kress-haul” to remove the ladle. Id. On the night that Delgado died, the work crew was shorthanded and was under pressure to work harder to recoup recent losses. Id. ¶ 4. The ladle was filling at an unusually fast pace and had reached the point where it would normally need to be emptied, but the mudgun was not working. Id. Although the employer’s supervisors had the option of shutting down the furnace in order to stop any more molten slag from accumulating in the ladle while the workers emptied it, they did not. Id. Instead, they ordered Delgado to remove the ladle of molten slag using the kress-haul alone, despite the fact that molten slag was continuing to accumulate in the ladle and spilling over its brim and despite the fact that he had never done such a task before. Id. When Delgado saw the situation, he radioed for help, explaining that he was neither qualified nor able to perform the removal task. Id. ¶ 5. Delgado’s requests were denied. Id. He again protested and asked for help, and again his supervisors insisted that he perform the dangerous operation. Id. He eventually came up from the tunnel “fully engulfed in flames” and sustained third-degree burns all over his body that led to his death. Id. When Delgado’s estate sued the employer for wrongful death, the district court dismissed the complaint. Id. ¶ 7. Even though it found that the employer “did engage in a series of deliberate or intentional acts which they knew or should have known would almost certainly result in serious injury or death,” this showing did not suffice under the actual intent test. Id. (internal quotation marks omitted).

Our Supreme Court’s decision in Delgado stems from this egregious employer conduct: a combination of deadly conditions, profit-motivated disregard for easily implemented safety measures, complete lack of worker training or preparation, and outright denial of assistance to a worker in a terrifying situation. The Court’s concern was that employers could send workers into certain injury or death, but then defend themselves by saying they were motivated by profit rather than by a desire to injure the worker. The present cases, the first to reach us from what appears to be a growing pool of Delgado claims, highlight the need to determine whether an accident meets the requirements of Delgado as a matter of law. That determination must bear in mind the type of unconscionable conduct that Delgado sought to deter.

Two federal cases have applied the Delgado standard, each finding that the employer’s conduct at issue was nowhere near the egregious actions of the employer in Delgado. In Cordova v. Peavey Co., 273 F. Supp. 2d 1213, 1216 (D. N.M. 2003), the worker’s hand was caught in an auger when another worker began to operate the auger. The worker alleged that several intentional acts and omissions on the part of the employer caused the accident, including the failure to provide adequate training and supervision, the failure to provide a safety guard device, and the assignment of the plaintiff worker to a job outside of his temporary employment contract. Id. at 1219. The United States District Court found that the worker did not present adequate evidence that his employer should have reasonably anticipated that its actions would lead to the accident. Id. It also found that there was “no evidence that [the employer] expected any of its actions to result in [the worker’s] injury or that [the employer] utterly disregarded the consequences of these actions.” Id. In closing, the court noted that it would not construe Delgado to undermine the safety device provision of the Act, NMSA 1978, § 52-1-10 (1989). Id. at 1220 & n.5.

In the most recent federal case, the Tenth Circuit affirmed the grant of summary judgment against a worker who sought to argue intentional misconduct under Delgado. Wells v. U.S. Foodservice, Inc., 2004 WL 848606 (10th Cir. April 21, 2004) (not selected for publication). In that case, a delivery person who was injured when a heavy box fell on his back alleged that his employer intentionally or wilfully failed to provide a device that would prevent cargo from slipping inside the shipping truck. Id. at *1. The court noted that while the employer may not have provided the
cargo-securing device, the worker had not shown that the device would have prevented the accident and had also failed to comply with several safety regulations. *Id.* at **2-3. The court affirmed the grant of summary judgment for the employer, concluding that “[a]t best, even under his theory, Defendants’ conduct was negligent and not intentional.” *Id.* at *3.

{13} As both of these federal cases illustrate, the mere assertion that the employer did or did not do something that somehow led to the injurious event is not adequate to meet the requirements of *Delgado*. We agree with the *Cordova* court that there is no indication that *Delgado* was “intended to eviscerate other essential provisions of the [Act], or otherwise affect the [Act’s] applicability to worker injuries caused by negligence.” *Cordova*, 273 F. Supp. 2d at 1220. Instead, *Delgado* merely sought to deter the type of extreme employer conduct discussed above. Negligence on the part of the employer does not expose the employer to tort liability, just as negligence on the part of the worker does not preclude relief under the Act. *See Gough v. Famariss Oil & Ref. Co.*, 83 N.M. 710, 714, 496 P.2d 1106, 1110 (Ct. App. 1972), modified on other grounds by *Delgado*, 2001-NMSC-034, ¶¶ 24-26.

{14} We also agree with the federal courts that the requirements of *Delgado* inform the plaintiff’s burden when facing a pre-trial motion to dismiss or motion for summary judgment. *Delgado* requires the worker to plead and show that “a reasonable person would expect the injury suffered by the worker to flow from the intentional act or omission.” *Delgado*, 2001-NMSC-034, ¶ 27. Furthermore, in the context of summary judgment, once the defendant has made a prima facie showing of entitlement to summary judgment, the worker must provide evidence of the “subjective state of mind of the . . . employer.” *Id.* ¶ 28. The worker can demonstrate this by showing that the employer never considered the consequences of its actions or that the employer considered the consequences of its actions and expected the injury to occur. *Id.* So as not to eviscerate the essential provisions of the Act, we hold that plaintiffs must plead or present evidence that the employer met each of the three *Delgado* elements through actions that exemplify a comparable degree of egregiousness as the employer in *Delgado* in order to survive a pre-trial dispositive motion.

{15} A similar requirement at the pre-trial stage arises in our cases involving intentional infliction of emotional distress (IIED). In IIED cases, we require the court to determine “as a matter of law whether conduct reasonably may be regarded as so extreme and outrageous that it will permit recovery under the tort of intentional infliction of emotional distress.” *Padwa v. Hadley*, 1999-NMCA-067, ¶ 9, 127 N.M. 416, 981 P.2d 1234. “When reasonable persons may differ on that question, it is for the jury to decide, subject to the oversight of the court.” *Id.* The reason for this threshold determination is the need to strike a balance between the rights of the injured party and the personal liberty of the party charged with the offensive conduct. *See id.* ¶ 11. Because of these competing interests, the IIED claim must be handled in such a way that “the social good from recognizing the tort will not be outweighed by unevenly and invasive litigation of meritless claims.” *Hakkila v. Hakkila*, 112 N.M. 172, 178, 812 P.2d 1320, 1326 (Ct. App. 1991) (discussing IIED in the marital context).

{16} Workers’ compensation cases raise a similar balance of interests. The need to provide a forum for the egregious conduct of employers like that in *Delgado* must be tempered by the need to preserve the bargain of the Act in a meaningful way. Exposing employers to the costs of litigating a full trial on the merits of every case in which a worker alleges some wilful conduct or claims that safety was ignored due to profit motive would deprive employers of their benefit from the Act’s bargain. Even unsuccessful claims would be a significant drain on an employer’s financial resources if all questions of employer intent, no matter how slight, were sent to a jury.

{17} In order to maintain the balance of interests embodied in the Act’s bargain, we believe that it is appropriate for a district court to grant summary judgment to an employer when a worker who pursues a tort claim under *Delgado* cannot demonstrate willful conduct that approximates the employer’s conduct in *Delgado* under the three-prong test. Without some evidence of the objective expectation of injury, the subjective state of mind of the employer, and the causal relationship between the intent and the injury, a worker cannot prevail under *Delgado*. When no evidence supports any one of these three prongs or when reasonable jurors could not differ on them, summary judgment for the employer is appropriate and in keeping with the intent of the Act.

{18} Similarly, in order to survive a motion to dismiss under Rule 1-012(B)(6) NMRA 2004, a plaintiff must allege all three *Delgado* elements: wilful conduct akin to the employer’s conduct in *Delgado*, the employer’s state of mind, and a causal connection between the employer’s intent and the injury.

2. Application to the Morales case

{19} Morales appeals from the district court’s grant of summary judgment. “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. If the movant makes a prima facie showing that he or she is entitled to summary judgment, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts that require a trial on the merits. *Roth v. Thompson*, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992).

{20} The Morales complaint stated that Defendants “willfully and/or intentionally ordered Plaintiff to perform the above described task even though they knew that Plaintiff would suffer grave injuries as a result of such conduct.” There were no further allegations of wilfulness or indica of intentional conduct. Foamex and Reynolds moved for summary judgment, arguing that Morales had no evidence of wilfulness. In support of its motion, Foamex and Reynolds argued that there was no issue of worker inexperience, supported by Morales’s deposition in which he stated that he had done the same job as he was doing when he was injured, using the same safety equipment, six to twelve times previously. Foamex and Reynolds also countered a potential attack on the safety equipment and procedures in use during the incident through a deposition in which Morales admitted that he had never been told not to change his safety hood, that he had never been told not to use standard safety procedures, and that he did not remember whether he followed standard safety procedures on the day in question. Foamex and Reynolds also refuted the notion that they were short-cutting safety procedures for economic gain by submitting excerpts from Morales’s co-worker William Shutes, stating that he was not aware of any pressure from their supervisor to get the job done quickly. In addition, a deposition from another Foamex employee stated that an alternative safety device, the self-contained breathing apparatus (SCBA), was available, but not preferable, because it was heavy, awkward, and only supplied
15 minutes of breathing air.

{21} At this point, Morales had the burden to demonstrate specific evidentiary facts that would require a trial on the merits. See id. Specifically, Foamex had provided evidence that there was neither objective risk of injury nor subjective intent under Delgado. It was Morales’s burden to show that there was a genuine factual question as to whether these elements were present and to show that Foamex’ and Reynolds’ conduct approximated the employer conduct in Delgado.

{22} We view the evidence in the light most favorable to Morales, as the party opposing summary judgment. Knapp v. Fraternal Order of Eagles, 106 N.M. 11, 12-13, 738 P.2d 129, 130-31 (Ct. App. 1987). Morales presented evidence that the hood on his safety gear had popped off on other occasions in the past. He also presented evidence that he had suggested to management that repairs be done using the SCBA equipment, but that he had not used an SCBA during the incident. Morales highlighted management’s knowledge that the SCBA was safer than the other type of gear used. Finally, Morales presented evidence that Foamex management knew that TDI is a dangerous chemical.

{23} Even accepting all of this as true, it is not enough to enable Morales to survive summary judgment. Morales did not demonstrate that it was reasonable to anticipate that sending him to work on this pump would cause his injury. To the contrary, Morales had worked on a pump with the same equipment numerous times before, and his safety hood had even popped off in the past without causing any injury. The fact that TDI is a dangerous chemical is undisputed, but the presence of a dangerous chemical alone is not enough to show employer wilfulness. The availability of other, better safety equipment does not equate with a showing that a reasonable person would have anticipated that Morales’s completion of a routine job using routine equipment would lead to an injury. There is also no evidence of Foamex’s failure to consider the consequences of having Morales work on the pump or of Foamex’s disregard of risks to Morales that it did consider. Again to the contrary, there was evidence that Foamex had considered the positive and negative aspects of the supplied air hood and the SCBA and had made a rational choice based on a number of safety factors. Thus, neither the first nor the second prong of the Delgado test is satisfied.

{24} In addition, the events that occurred in this case do not approach the type of incidents that Delgado sought to prevent. The acts or omissions that Morales argues did not cause the injurious event in the way that the acts of the employer in Delgado caused Delgado to be set on fire. Delgado contemplated employers “willfully injuring [their] workers.” 2001-NMSC-034, ¶ 31. There is no indication that Foamex or Reynolds knew or should have known that their actions were the equivalent of sending Morales into certain severe injury or death. Summary judgment for Foamex was appropriate.

3. Application to the Fernandez case

{25} Fernandez appeals from the district court’s decision to grant Brown’s motion to dismiss. Although Plaintiff submitted an affidavit in support of his complaint and another affidavit with his motion for rehearing, the district court dismissed the complaint because it failed to state a claim as a matter of law without considering these documents. Therefore, Brown’s motion to dismiss was not converted to a motion for summary judgment under Rule 1-012(B)(6), and the proper standard of review is that which we use for a motion to dismiss. See Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 114 N.M. 676, 678-79, 845 P.2d 770, 772-73 (1992). “We review a ruling on a grant of a motion to dismiss de novo, accepting all well-pleaded factual allegations as true and resolving all doubts in favor of the sufficiency of the complaint.” Stoneking v. Bank of Am., N.A., 2002-NMCA-042, ¶ 4, 132 N.M. 79, 43 P.3d 1089. Dismissal is only proper when the law does not support a claim under the facts presented. Id.

{26} We begin by noting that because the district court denied Fernandez’s motion to amend his complaint, we do not consider the amended complaint on appeal. In his original complaint, Fernandez made factual allegations that Brown had supplied him with the proper safety equipment in the past, but not on the day of his accident. The complaint alleged negligence and intentional tort, both premised on Brown’s failure to furnish safety equipment. Fernandez also stated that Brown “could reasonably anticipate that Plaintiff Fernandez would be placed in a position of risk as a result of the failure to provide the proper safety equipment.”

{27} At the outset, Fernandez’s negligence claim was properly dismissed. As explained above, the Act is the exclusive remedy for workers harmed by an employer’s negligence. See Segura v. Molycorp, Inc., 97 N.M. 13, 16, 636 P.2d 284, 287 (1981). Delgado did not change this principle.

{28} As to the intentional tort claims, these bare allegations are insufficient to state a claim under Delgado. Accepting Fernandez’s allegations as true, there is no indication that the failure to provide safety devices was anything but negligent in this case. The facts that Brown had supplied safety devices in the past and “could have reasonably anticipated that an injury would occur,” even if proved to be true, are not enough to satisfy the subjective intent prong of Delgado. The allegations by Fernandez do not show that Brown either failed to consider the consequences of not providing the safety equipment or disregarded the threat of harm to Fernandez. See Delgado, 2001-NMSC-034, ¶ 26.

{29} Much like in Morales’s case, the employer acts and omissions alleged here did not approach the certainty or egregiousness of the employer in Delgado. Thus, the trial court was correct to grant Brown’s motion to dismiss.

4. Other issues

{30} The employer in the Fernandez case also contends that Fernandez’s claim is precluded because it falls within the safety device provision of the Act, which provides its own exclusive remedy. The employer in the Morales case also raises the issue of estoppel based on the fact that Morales had already accepted a settlement from Foamex through the workers’ compensation system, which included his agreement not to pursue other claims. Because we decide these cases on the basis of Morales’s and Fernandez’s failure to meet the requirements of Delgado, we need not address these other issues.

CONCLUSION

{31} We affirm the grant of summary judgment to Reynolds and Foamex, holding that Morales did not demonstrate that there was a genuine issue of material fact as to their intent. We affirm the dismissal of Fernandez’s complaint, holding that he failed to state a claim upon which relief can be granted.

{32} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge
OPINION

MICHAEL E. VIGIL, JUDGE

{1} Defendant was convicted of one count of possession of a controlled substance (cocaine) and one count of tampering with evidence (cocaine). NMSA 1978, § 30-31-23 (1990); NMSA 1978, § 30-22-5 (2003). She appeals, contending that: (1) fundamental error was committed when the trial court failed to instruct the jury that her presence in the vicinity of the cocaine or her knowledge of the existence or location of the cocaine, is not, by itself, possession; (2) the failure of her attorney to request the instruction on constructive possession or to object to the instruction given by the trial court on constructive possession resulted in ineffective assistance of counsel; (3) there was insufficient evidence to support the two convictions; and (4) her convictions for both possession and tampering with evidence violate her right to be free from double jeopardy. We hold there was no fundamental error, that Defendant received effective assistance of counsel, and that substantial evidence supports the convictions. However, the conviction and sentence for both crimes violates Defendant’s double jeopardy rights. We therefore affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{2} Defendant went to Lawrence Nickerson’s (Nickerson) apartment with her boyfriend, and the men started playing dominoes. Defendant ate some shrimp cocktail. She testified she saw a bottle of Tylenol on the table and started playing with it, but Nickerson told her to leave it alone and he took the bottle. She said she then used the bathroom, opened the door a crack and started fixing her hair in the bathroom when the police arrived. When the police came, she had been at the apartment for thirty to forty-five minutes. Defendant does not know if the bottle she handled was the same Tylenol bottle that was later found under the bathroom window.

{3} The police went to Nickerson’s apartment in several different vehicles to execute a search warrant for cocaine. This was an efficiency apartment which consisted of one room which served as bedroom, livingroom, and kitchen, with a walled-off bathroom in the corner nearest to the entry door. When the police arrived, there were people out in front of the apartment, and the police, who were seven or eight in number, began screaming, “Get on the ground. We’re the police. We have a search warrant.” Eight seconds later, Officer Moyers knocked on the partially open apartment door, yelled loudly that he was a police officer executing a search warrant, waited a few seconds, and entered the apartment. Officer Moyers was the first officer to enter the apartment. The first officer to enter the premises always takes care of the people inside, and immediately goes to the bathroom to make sure evidence is not flushed down the toilet.

{4} Upon entering the apartment, Officer Moyers saw two males sitting on the couch. After ordering them both to the ground, he went directly to the bathroom. The door was partially opened, and he completely opened the door. He saw Defendant standing between the toilet and the bathroom window facing him, towards the door. Officer Moyers pulled her out of the bathroom and put her on the ground next to the bathroom door. He then looked into the toilet. There was no contraband in the toilet, and it was not running, so he concluded it had not been flushed.

{5} Officer Edmondson’s testimony was different. He was the second officer to enter the apartment. Upon entering, he saw that Officer Moyers had already secured one individual, and to his left he saw Defendant and a male. When he started securing the male, he said Defendant ran to the bathroom and swung the door shut, but it did not latch. Officer Edmondson testified he saw Defendant in the bathroom through the open door, facing the bathroom window. He did not see anything in Defendant’s hand, and he did not see her throw anything outside the window. The police released Defendant after checking to see if she had any warrants.

{6} The police found drug paraphernalia but no cocaine in the apartment. To make sure he did not miss anything in the bathroom, Officer Moyers searched it again. He looked into the water tank of the toilet, but found nothing. He then looked at the window, which was open, and saw a hole in the screen, large enough for a hand to reach through. He and another officer then walked behind the apartment and the second officer found a Tylenol bottle underneath the bathroom window. The contents appeared to be crack cocaine, which was confirmed by subsequent tests. Defendant was at another apartment nearby, and Officer Moyers motioned to her to return. She did, and she was arrested. Defendant denied throwing the Tylenol bottle through the bathroom window.

{7} Johnny Shaw testified on Defendant’s behalf. He and Nickerson were standing in the kitchen area when a warning came from a lookout that police were approaching. Before the police got out of their cars,
Nickerson threw the Tylenol bottle through a hole in the kitchen window towards the street, which was in the direction of the bathroom window. This was actually a window where the air conditioner used to be, and the screen on this window was also torn. Nickerson then sat on the couch in the apartment, and the police entered the apartment.

{8} The trial centered on whether Defendant threw the Tylenol bottle out of the bathroom window. The State argued to the jury in its opening statement and closing argument that Defendant committed the crimes by throwing the Tylenol bottle outside the bathroom window. In closing, the prosecutor argued,

[Defendant] says she was already in the bathroom. And I would just tell you, this whole case revolves on her running away when the police officers come in, because that shows guilty knowledge. That shows, "I've got dope. I've got to get rid of it." So if you don't believe that she ran away, that she ran into that bathroom, then you shouldn't find her guilty.

Defendant's attorney countered in his opening statement and closing argument that Defendant was not guilty because she was already in the bathroom when the police arrived, and she did not throw the Tylenol bottle through the window. In his opening statement, Defendant's attorney asserted, "What this boils down to is whether or not the State can prove beyond a reasonable doubt that [Defendant] had that Tylenol bottle in her hand and that she did in fact throw it out the window." On appeal, Defendant continues arguing that she was convicted of possession of the cocaine and tampering with evidence based on the "inference that she had thrown the bottle from the window." We resolve Defendant's arguments on appeal on this basis.

{9} The jury was given the following jury instruction based on UJI 14-3102 NMRA 2002 on the elements necessary to convict Defendant of possession of cocaine:

For you to find the Defendant guilty of Possession of a Controlled Substance, To-Wit: Cocaine as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. The Defendant had Cocaine in her possession;
2. The Defendant knew it was Cocaine or believed it to be Cocaine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law;
3. This happened in New Mexico on or about the 14th day of May, 2002.

The jury instruction in UJI 14-3130 NMRA 2004, defining possession states:

A person is in possession of Cocaine when she knows it is on her person or in her presence, and she exercises control over it.

Even if the substance is not in her physical presence, she is in possession if she knows where it is, and she exercises control over it.

Two or more people can have possession of a substance at the same time.

A person's presence in the vicinity of the substance or her knowledge of the existence or the location of the substance, is not, by itself, possession.

UJI 14-3130 (emphasis added). The first sentence of this instruction is designed to be used in a controlled substance case in which possession is an element and is in issue, and one or more of the second, third, and fourth sentences "may" be used, "depending on the evidence." Use Note to UJI 14-3102. The jury was given this instruction except for the emphasized portion in Instruction No. 6.

DISCUSSION

Jury Instructions

{10} Defendant argues it was error for the trial court not to include that portion of UJI 14-3130 emphasized above in its instruction. However, Defendant did not object to the instruction as given, and she did not tender a requested instruction of her own which included the omitted phrase. State v. Barber, 2004-NMSC-019, ¶ 8, 92 P.3d 633, (No. 27,938, (May 19, 2004)); Rule 12-216(B)(2) NMRA 2004 (providing appellate court discretion as an exception to the preservation rule to review questions involving fundamental error or fundamental rights). Our Supreme Court recently reiterated that fundamental error, must go to the foundation of the case or take from the defendant a right which was essential to h[er] defense and which no court could or ought to permit h[er] to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

Barber, 2004-NMSC-019, ¶ 8 (quoting State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942)).

{11} Defendant contends that "[t]he only issue for the jury to decide in this case was whether the State had met the legal standard for proving constructive possession[,]" and that "the question of her 'possession' of the contraband was the central issue of the case and the keystone of her defense." She argues she "was charged with 'possessing' drugs that no one saw her with, outside a house that was not hers, found on the ground outside the window to a room where she happened to be doing her hair, in a bottle that could have been there for any amount of time." Defendant continues that "c[learly this jury was hung up on whether the State had met the legal standard for constructive possession" because during deliberations, it sent a question to the court which asked, "WITH REGARDS TO INSTRUCTION NO. 6, WHAT DETERMINES WHETHER 'SHE EXERCISES CONTROL OVER IT'[?]" and the trial court simply responded, "Please reread the instruction and apply ordinary meanings to the terms in the instruction." Therefore, she concludes, the sentence omitted from the possession instruction addressed a "critical determination akin to a missing elements instruction" and the failure to include it in the instruction constitutes fundamental error under State v. Mascareñas, 2000-NMSC-017, ¶ 20, 129 N.M. 230, 4 P.3d 1221. We disagree.

{12} If Defendant's possession of the cocaine was an issue in the case based on her handling of the Tylenol bottle before the police arrived, she would have been entitled to have the jury instructed as set forth in the last sentence of UJI 14-3130. See State v. Phillips, 2000-NMCA-028, ¶ 8, 128 N.M. 777, 999 P.2d 421 (stating constructive possession exists when accused has knowledge of drugs and exercises control over them; where accused does not have exclusive control over the premises where the drugs are found, the mere presence of the contraband is not enough to support an inference of constructive possession; additional circumstances or incriminating statements are required). However, this was not the basis on which the case was tried.
Instead, the whole issue in the case was whether Defendant threw the Tylenol bottle out of the bathroom window, knowing that the bottle contained cocaine. Under these circumstances, Defendant would not have been entitled to the instruction, even if she had requested it. See State v. Mireles, 84 N.M. 146, 148, 500 P.2d 431, 433 (Ct. App. 1972) (stating not to refuse instruction which does not state defendant’s theory). Therefore, there was no fundamental error in not giving the omitted sentence from the instruction on possession. Barber, 2004-NMSC-019, ¶ 9 (stating in fundamental error analysis for failure to give instruction, first question is whether defendant would have been entitled to instruction had he requested it).

Ineffective Assistance of Counsel

13) Defendant argues that the failure to object to the instruction on constructive possession, just discussed, and counsel’s failure to tender an instruction containing the last sentence of UJI 14-3130 constitutes ineffective assistance of counsel. We disagree.

14) Defendant was constitutionally entitled to effective assistance of counsel. State v. Plouse, 2003-NMCA-048, ¶ 6, 133 N.M. 495, 64 P.3d 522. She was denied effective assistance of counsel, if she can prove both (1) that her counsel’s performance fell below that of a reasonably competent attorney, and (2) that her deficient performance prejudiced the defense. Id. However, counsel is presumed competent unless Defendant succeeds in proving both prongs, id., and a prima facie case is not made when a plausible, rational trial strategy or tactic can explain defense counsel’s conduct. Id. ¶ 17; State v. Swavola, 114 N.M. 472, 475, 840 P.2d 1238, 1241 (Ct. App. 1992).

15) In light of the evidence, which we have summarized above, it was rational for defense counsel to conclude that the best defense to both charges was that Defendant did not throw the Tylenol bottle outside the bathroom window when the police arrived, knowing that cocaine was inside it. Substantial evidence was available and used at trial which, if believed by the jury, would have resulted in an acquittal. We have already stated why Defendant was not entitled to an instruction containing the last sentence of UJI 14-3130 with this defense. Defendant was not denied her right to effective assistance of counsel.

Sufficiency of the Evidence

16) Defendant argues that because the evidence could be interpreted to be that multiple drug addicts and dealers stayed in the apartment, and she did not, and they also had access to the yard where the Tylenol bottle was found because all the windows in the apartment were either missing or had holes in them, pure speculation would have to be relied on to prove she exercised dominion and control over the cocaine. Therefore, she concludes, the evidence fails to prove that she possessed the cocaine. We disagree.

17) In reviewing the sufficiency of the evidence, “[w]e consider the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict.” State v. Estrada, 2001-NMCA-034, ¶ 40, 130 N.M. 358, 24 P.3d 793. “This court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.” Id. (quoting State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)).

18) During the search of the apartment, police found pipes to smoke crack cocaine and baking soda, which can be used to convert cocaine into crack cocaine, and other crack cocaine paraphernalia. Defendant testified that she was in the apartment for about thirty to forty-five minutes prior to the search, and while in the living room, she saw a Tylenol bottle on the table and played with it. The second officer who entered the apartment testified Defendant ran to the bathroom when he entered, the window to the bathroom was open, and the screen was torn. Police then found a Tylenol bottle outside of the apartment near the bathroom window and it contained crack cocaine. This constitutes substantial evidence that Defendant knew or believed that the Tylenol bottle had crack cocaine inside it, and that she ran to the bathroom and threw the bottle out the window when the police arrived. The evidence was sufficient to prove that Defendant possessed the cocaine.

Double Jeopardy

19) Defendant contends that she cannot be convicted of and sentenced for both possession of a controlled substance (cocaine) and tampering with evidence (cocaine) without violating her constitutional right to be free from double jeopardy. See U.S. Const. amend. V (“No person shall... be subject for the same offence to be twice put in jeopardy of life or limb.”). We review this claim de novo. State v. Mora, 2003-NMCA-072, ¶ 16, 133 N.M. 746, 69 P.3d 256.

20) The Double Jeopardy clause protects against both successive prosecutions and multiple punishments for the same offense. Swafford v. State, 112 N.M. 3, 7, 810 P.2d 1223, 1229 (1991). This is a multiple punishment case, and our analysis of the issue turns on two questions: (1) was Defendant’s conduct unitary; and (2) if so, did the legislature intend to impose multiple punishments for such unitary conduct. Id. at 13, 810 P.2d at 1233.

21) Consistent with the instructions on which the verdicts were rendered, we conclude that Defendant’s conduct was unitary. As stated above, the central issue for the jury to decide was whether Defendant was in the bathroom without the Tylenol bottle, or whether she ran to the bathroom and threw it outside the bathroom window when the police arrived. By its verdict, the jury determined that Defendant had the Tylenol bottle in her possession when the police arrived, and she immediately ran to the bathroom and threw the bottle outside the window. The facts here do not establish that the illegal acts of possessing the Tylenol bottle when the police arrived on the one hand, and immediately running to the bathroom, and throwing it outside the window on the other hand, are “separated by sufficient indicia of distinctness.” Id.; see Mora, 2003-NMCA-072, ¶ 18 (finding unitary conduct when criminal sexual contact and attempted criminal sexual penetration “all took place within the same short space of time, with no physical separation between the illegal acts”). The State argues that the conduct is not unitary because the evidence can be interpreted to be that Defendant possessed the Tylenol bottle and cocaine contents before the police arrived, and she subsequently tampered with that evidence when the police arrived by throwing the bottle outside the bathroom window. We reject the State’s argument, because this was not the basis on which the case was tried, and we will not allow the State to change its position on appeal. See State v. Hurst, 34 N.M. 447, 449, 283 P. 904, 904 (1929) (stating party, having acquiesced in theory of the case as presented by the court’s instructions to the jury, cannot, after verdict, shift his position and change the theory of the case).

22) We now determine whether the legislature intended multiple punishments for that unitary conduct. “Absent a clear expression of legislative intent, a court must first apply the Blockburger v. United States, 284 U.S. 299, 304 (1932) test to the elements of each statute. If that test establishes that one statute is subsumed
within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” Swafford, 112 N.M. at 14, 810 P.2d at 1234. A statute is subsumed within another for double jeopardy purposes if all the elements of that statute are included within the elements of the other statute. Id. at 9, 810 P.2d at 1299. Tampering with evidence is an offense which can be committed in alternate ways: by “destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.” Section 30-22-5(A). We only look to the elements of the offense as charged to the jury and disregard the inapplicable statutory elements in determining whether possession of cocaine is subsumed within tampering with evidence. Mora, 2003-NMCA-072, ¶ 21. Here, the jury was instructed that in order to find Defendant guilty of tampering with evidence, the State was required to prove to its satisfaction beyond a reasonable doubt that she “threw cocaine out the window” with the requisite intent. Here, Defendant’s conviction for possession of cocaine is subsumed within the conviction for tampering with evidence because Defendant possessed the cocaine when she was in the act of throwing it out the window. See State v. Medina, 87 N.M. 394, 395, 534 P.2d 486, 487 (Ct. App. 1975) (holding that one cannot commit the crime of distribution of marijuana without also committing the crime of possession of that same marijuana). We therefore conclude that the crimes of possession of a controlled substance (cocaine) and tampering with evidence (the same cocaine) are the same for double jeopardy purposes in this case. {23} In light of the foregoing, we hold that Defendant’s conviction and sentence for both possession of a controlled substance (cocaine) and tampering with evidence (the same cocaine) violate Defendant’s right to be free from multiple punishments for the same offense.

CONCLUSION

{24} We hold that Defendant’s convictions and sentences for both possession of a controlled substance (cocaine) and tampering with evidence (the same cocaine) based on unitary conduct violates the constitutional prohibition against double jeopardy. We reverse and remand to the trial court with instructions to vacate Defendant’s conviction and sentence for possession of a controlled substance (cocaine). We affirm in all other respects.

{25} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, No. 28,794, Aug. 3, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-100

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
IGNACIO MIRELES,
Defendant-Appellant.
No. 23,450 (filed: June 17, 2004)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
RICHARD J. KNOWLES, District Judge

PATRICIA A. MADRID
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Santa Fe, New Mexico
for Appellee

JOHN B. BIGELOW
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NANCY M. HEWITT
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Santa Fe, New Mexico
for Appellant

OPINION

CYNTHIA A. FRY, JUDGE

{1} Defendant appeals his convictions for second degree murder (firearm enhancement) and shooting from a motor vehicle (great bodily harm). Defendant argues that: (1) the trial court violated his Fifth Amendment right against self-incrimination in ordering him to submit to a psychological evaluation; (2) the trial court erred in allowing the State to cross-examine Defendant’s expert witness with portions of Defendant’s otherwise inadmissible custodial statement; (3) his sentences for second degree murder and shooting from a motor vehicle violate his right to be free from double jeopardy; (4) the jury should have determined that Defendant was not guilty by reason of insanity or guilty but mentally ill; (5) there is insufficient evidence to support Defendant’s conviction for shooting from a motor vehicle; and, (6) the trial court abused its discretion by not ordering a sixty-day diagnostic evaluation pursuant to NMSA 1978, § 31-20-3(C) (1985). We affirm.

BACKGROUND

{2} In May 2000, Defendant and three friends—J.J. Royal, Corey Hamilton, and Anthony Guevara—drove to a convenience store. Royal was driving and Hamilton was in the front passenger seat. Defendant and Guevara were seated in the back seat. Guevara testified that Hamilton went inside the store to purchase cigarettes, and that Royal got out of the car to talk to Victim who was using a payphone outside the store. Defendant and Guevara remained in the car.

{3} Guevara, Hamilton, and Royal subsequently witnessed Defendant shoot Victim. Guevara testified that Royal and Victim approached the car together. Guevara believed that the parties were going to give Victim a ride. Guevara saw Victim open the car’s back door at which time Defendant, who was still inside the car, shot Victim. Guevara testified that Victim fell to the ground and attempted to “take off running.” Guevara further testified that he thought Defendant stepped out of the car and may have fired the weapon.

{4} Hamilton testified that after getting cigarettes from the store and getting back into the car, he saw Defendant shoot Victim when Victim opened the car’s back door. Hamilton observed Victim fall backwards
toward the ground and then take off running. Hamilton testified that he heard between three and five shots fired, and that Defendant had one leg in the car when he shot Victim.

{5} Royal testified that he had offered Victim a ride in the car to smoke marijuana. After Royal got back into the car, he saw Defendant shoot Victim three or four times from inside the car. Royal testified that Victim fell and then got up and ran, and that Defendant got out of the car and shot Victim again while he was on the ground.

{6} Witnesses from an apartment building across the street from the store also saw the shooting. Zarena Maryboy testified that she lived on the second floor of the apartment building opposite the convenience store. Maryboy stated that, after hearing a gunshot, she looked out her apartment window and saw Victim lean into a car, and then get out of the car and run to the back of the store. She believed a man in the car’s back seat shot Victim from inside the car. Maryboy testified that when Victim ran to the back of the store, Defendant ran after Victim and shot him again. Maryboy indicated that three or four shots were fired, and that the shooter jumped head first back into the car after the shooting.

{7} Another witness from the apartment building, Scott Mooreman, saw Victim lean into the car and, after hearing a shot, saw Victim grab himself around the face. Mooreman testified that Victim tried to run away, but that the shooter pursued Victim and shot him in the back while Victim was running and then shot Victim again after Victim fell to the ground.

{8} Royal testified that following the shooting, he put the car in reverse and started to drive off, at which time Defendant—who had gotten out of the car to pursue Victim—jumped back into the car’s back seat. Royal then drove to a friend’s house.

{9} Several days later, officers apprehended and arrested Defendant. Defendant gave officers a post-arrest, custodial statement, which the trial court ultimately suppressed on the basis that, although voluntary, the statement was made in violation of Defendant’s Miranda rights.

{10} At trial, defense witness Robert Colby, a psychotherapist and psychological evaluator, on direct examination referred to and relied upon portions of Defendant’s post-arrest, custodial statement to support his opinion that Defendant was insane at the time of the shooting. The trial court then allowed the State to refer to other portions of the custodial statement to cross-examine Colby. In addition, the State presented the testimony of Dr. Dan Seagrave, a forensic psychologist, who opined that Defendant’s actions resulted from taking the drug ecstasy. We discuss the remaining facts more fully in conjunction with the issues.

**DISCUSSION**

**Compelled Psychological Examination on the Issue of Defendant’s Sanity**

{11} Defendant contends that the trial court erred in ordering him to submit to a psychological examination pursuant to the State’s request. Prior to trial, Defendant notified the trial court and the State that he planned to present an insanity defense. In support of his defense, Defendant intended to rely on the results of a psychological examination conducted by Colby. In response, the State requested that Defendant submit to a forensic examination by its chosen expert, Seagrave. The trial court responded to the request by giving Defendant a choice: if Defendant wanted to present his own expert testimony on the issue of his sanity, then he was required to submit to the evaluation requested by the State; Defendant could decline to be evaluated by Seagrave, but if he did so, the trial court would not permit him to present Colby’s testimony. Defendant objected to the court-ordered evaluation on the ground that it violated his privilege against self-incrimination contrary to Article 2, Section 15 of the New Mexico Constitution and the Fifth Amendment of the United States Constitution. Although Defendant submitted to the evaluation by Seagrave, at trial he maintained his objection to the testimony resulting from the compelled examination.

{12} This case presents a matter of first impression in New Mexico: whether a compelled psychological examination violates the Fifth Amendment rights of a criminal defendant who raises insanity as an affirmative defense, and who intends to present expert testimony as to his sanity at trial. Because this is a constitutional question, we apply de novo review. See State v. Attaway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994).

{13} Preliminarily, we clarify that although Defendant argues that the compelled examination violated his rights, Defendant does not contend that Seagrave’s testimony conveyed any particular incriminatory statements to the jury. In other words, Defendant’s Fifth Amendment claim of error pertains solely to Seagrave’s testimony as it relates to the issue of sanity. Accordingly, this case does not require us to address the connected but distinct question of whether information obtained during a compelled psychological examination may be introduced for the purpose of proving whether a defendant committed the charged criminal acts. See Rule 5-602(E) NMRA 2004 (prohibiting the admission of statements made by a person during a mental examination on issues other than sanity, ability to form specific intent, or competency to stand trial); see also United States v. Byers, 740 F.2d 1104, 1111 n.8 (D.C. Cir. 1984) (“Where testimony . . . is introduced not on the defendant’s sanity but to prove that he committed the criminal act in question, of course a different issue is presented.”); United States v. Madrid, 673 F.2d 1114, 1120-21 (10th Cir. 1982) (analyzing the federal rule of criminal procedure that prohibits the admission of statements made by a defendant on the issue of guilt during a court-ordered psychological examination); People v. Tally, 7 P.3d 172, 182 (Colo. Ct. App. 1999) (recognizing the distinction between admitting a statement to prove guilt and admitting a statement to prove sanity); see generally 1 Wayne R. LaFave, Substantive Criminal Law § 8.2(c) (2d ed. 2003) (“There is general agreement that the [Fifth Amendment] privilege extends to such admissions [on the issue of the conduct charged], although courts have differed upon the means by which the privilege is to be enforced.”).

We further clarify that this case does not require us to address Defendant’s Sixth Amendment rights. Although Defendant requested and was denied the presence of counsel at his court-ordered examination, on appeal he makes no argument that the compelled examination violated his right to counsel. See Powell v. Texas, 492 U.S. 680, 684-85 (1989) (emphasizing the importance of the distinction between Fifth Amendment claims and Sixth Amendment claims regarding compelled psychological examinations).

{14} On the narrow issue presented by Defendant, we affirm the trial court. Numerous other jurisdictions have reached the same conclusion, although they do not all rely on the same reasons, and in some cases the analysis depends on statutes not present here. See 1 LaFave, supra, § 8.2(c) (discussing the competing theories underlying the conclusion that where a defendant raises an insanity defense, a psychiatric examination is not a per se violation of the right against self-incrimination); see also Byers, 740 F.2d at 1111 (recognizing that “virtually all other circuits” have found that a court-ordered examination does not violate the privilege against self-incrimina-
tion where the defendant raises an insanity defense); State v. Martin, 950 S.W.2d 20, 24 (Tenn. 1997) (pointing out that “[v]irtually every federal and state court jurisdiction” has found no violation of the Fifth Amendment in the use of evidence from a court-ordered psychological examination that is requested to rebut the defendant’s claim of insanity). As discussed below, we adopt the reasoning that it would be unfair to deny the State a psychological examination conducted by its own expert in a situation like this one, where Defendant raises the insanity defense, which is supported by his own expert witness, and where the State cannot prevail unless it proves Defendant is sane.

{15} We find general guidance in United States Supreme Court decisions arising in the context of capital sentencing. In Estelle v. Smith, 451 U.S. 454 (1981), the trial court sua sponte ordered the defendant to undergo a competency examination. Id. at 465. Unlike this case, however, the defendant had raised no issues regarding his mental status. Id. at 466. Then, at sentencing, the state introduced evidence obtained during the competency examination for the purpose of enhancing defendant’s sentence. Id. Under these circumstances, the compelled examination plainly violated the defendant’s right not to incriminate himself because the defendant did not voluntarily consent to the examination after being informed of his right to remain silent, and he did not know that his disclosures might be used against him. Id. at 468. In so holding, the United States Supreme Court acknowledged the distinction between such a case and one like Defendant’s, observing that “[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.” Id. at 465.

{16} Subsequent to Estelle, in Buchanan v. Kentucky, 483 U.S. 402 (1987), the United States Supreme Court confronted the difficulty presented when the defendant initiates a psychological examination in order to prove a mental-status defense. The Court concluded that the prosecution may use those examination results during capital sentencing. Id. at 423-24. Buchanan is different from the case at hand because the disputed evidence resulted from an examination that the defendant requested, id. at 422-23, whereas in this case the disputed examination was court-ordered at the State’s request. Nonetheless, these cases illuminate the important distinction between a psychological examination that is initiated entirely at the behest of the trial court or the State, and an examination that is imposed in order to rebut claims made by a defendant. Defendant’s case falls squarely in the latter category.

{17} In concluding that the compelled examination did not violate Defendant’s rights, we also rely on general notions of fairness, which we consider in light of the fact that the State had to prove beyond a reasonable doubt that Defendant was sane. See UJI 14-5101 NMRA 2004. This would seem to put the State at a significant and unfair disadvantage if it could not muster its own evidence on the issue of sanity. “Such practical considerations of what constitutes a fair but effective criminal process are rightly taken into account in determining the reach of the Fifth Amendment privilege against self incrimination.” See 1 LaFave, supra, § 8.2(c). We find persuasive the rationale that notions of a “fair state-individual balance” and “judicial common sense” permit a court-ordered psychological examination under these facts. See Byers, 740 F.2d at 1111-13 (analyzing various justifications and concluding that courts “have denied the Fifth Amendment claim primarily because of the unreasonable and debilitating effect it would have upon society’s conduct of a fair inquiry into the defendant’s culpability”).

{18} Finally, with respect to the parties’ dispute about whether the trial court has authority to order a psychological examination in the first instance, although it is true that there is no specific statutory authorization for a compelled examination, we agree with the trial court that it had the inherent authority to order the examination in order to ensure fairness in the judicial process. See In re Jade G., 2001-NMCA-058, ¶ 27, 130 N.M. 687, 30 P.3d 376 (“[E]ven though specific judicial authority is not delineated by statute, or stated in a rule of court, a court may exercise authority that is essential to the court’s fulfilling its judicial functions.”). Indeed, within constitutional limits, “[t]he basic purpose of a trial is the determination of truth.” State v. Gonzales, 1996-NMCA-026, ¶ 13, 121 N.M. 421, 912 P.2d 297 (internal quotation marks and citation omitted). Here, in order to determine whether Defendant was insane at the time of the shooting, the fact finder necessarily had to rely on expert testimony; the trial court’s order provided the jury with two expert viewpoints and facilitated the truth-seeking process.

Use of Defendant’s Non-Mirandized, Custodial Statement in Cross-Examination of Defendant’s Expert Witness

{19} Defendant argues that the trial court erred in allowing the State to cross-examine his expert witness, Colby, with portions of Defendant’s otherwise inadmissible custodial statement. Specifically, Defendant argues that the admission of portions of the custodial statement contravenes James v. Illinois, 493 U.S. 307 (1990), in which the United States Supreme Court refused to expand the impeachment exception to the exclusionary rule to witnesses other than a testifying defendant. Id. at 320. The State counters that Defendant agreed that the expert could be cross-examined on anything relied upon by Colby to form his opinion, including the statement. The State further argues that even if Defendant had not agreed as much, the cross-examination of Colby constituted testing of the basis of expert opinion as expressly permitted by Rule 11-705 NMRA 2004. We agree with the State that because Defendant explicitly agreed to the admission of the custodial statement as it pertained to Colby’s expert opinion, Defendant waived this issue on appeal.

{20} Defendant made the custodial statement to police when they arrested him three days after the shooting. The trial court subsequently granted Defendant’s motion to suppress the statement. Although the trial court rejected Defendant’s argument that the statement was involuntarily made, the trial court found the custodial statement inadmissible because Defendant had not waived his Miranda rights. Thus, Defendant succeeded in preventing the admission of the custodial statement in its entirety. However, Defendant agreed that if Colby relied on the custodial statement for his opinion that Defendant was insane, then the State could rely on portions of the statement to cross-examine Colby. As discussed below, the testimony at trial was consistent with this concession by Defendant.

{21} On direct examination, Colby testified that, in his opinion, Defendant was legally insane. In support of his opinion, Colby indicated that he relied in part on statements that Defendant made to police. Specifically, Colby related portions of Defendant’s custodial statement where Defendant said that he perceived himself to be a soldier of God; that God had told him to commit the crime; that he perceived himself to be the anti-Christ or the devil; that Victim was a demon and Defendant acted to protect his friends; and that his actions were somehow
related to shooting dice and to having an ability to predict the future.

{22} On cross-examination, the trial court permitted the State to question Colby with specific references to different portions of the custodial statement in which Defendant suggested that he was motivated by a plan to rob Victim and take his life, and that he knew his actions were wrong. The State asked Colby why his psychological evaluation did not focus on the statements about robbing the victim. Thus, the State’s line of questioning sought to establish that Defendant’s actions stemmed not from insanity, as indicated by Colby, but from a plan to take Victim’s gold jewelry. Defendant did not object to this line of questioning, likely because he had previously agreed that the State could question Colby about the custodial statement because it formed part of the basis of his expert opinion.

{23} The contents of the custodial statement arose once again during testimony by the State’s expert witness, Seagrave, with respect to the issue of whether ingestion of the drug ecstasy caused Defendant to be psychotic at the time of the crime. On direct examination Seagrave had opined that ecstasy had induced Defendant’s psychotic mental state. In response, on cross-examination, Defendant used portions of the custodial statement in an effort to attribute Defendant’s behavior to a continuing psychosis unrelated to ecstasy.

{24} In summary, Defendant’s expert witness relied on the custodial statement in forming his opinion; without objecting, Defendant therefore conceded that the State could cross-examine Colby with the custodial statement; Defendant did not object when the State proceeded with the cross-examination as previously agreed; and Defendant relied on portions of the statement in cross-examining the State’s expert witness. We therefore conclude that Defendant waived this issue for purposes of appeal. See State v. Gilbert, 98 N.M. 77, 84, 644 P.2d 1066, 1073 (Ct. App. 1982) (“Defendant may not predicate error on his own conduct.”); see also State v. Gutierrez, 91 N.M. 54, 55, 570 P.2d 592, 593 (1977) (“This Court will not consider an objection by the appellant raised for the first time in his brief in chief.”).

**Double Jeopardy**

{25} Defendant argues that he could not have committed second degree murder without also committing shooting from a motor vehicle. According to Defendant, therefore, the trial court violated his right to be free from double jeopardy by sentencing him on his convictions for both crimes. See U.S. Const. amends. V, XIV; N.M. Const. art. II, § 15. The State contends that there was no double jeopardy violation because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crime. We agree with the State.

{26} The double jeopardy clause protects against multiple punishment for the same offense. See Swafford v. State, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). We apply a two-part inquiry to address Defendant’s claim of impermissible multiple punishment under two separate statutes. Id. at 13, 810 P.2d at 1233. First, we consider whether the conduct underlying the offenses is unitary. Id. If the conduct is separate and distinct, no double jeopardy violation has occurred and the inquiry is at an end. Id. at 14, 810 P.2d at 1234. If, however, the conduct is unitary, we next address whether the legislature intended multiple punishments for unitary conduct. Id. If the legislature did not intend to create separately punishable offenses, the double jeopardy clause will prohibit punishment for both offenses. Id.

{27} Defendant argues that his convictions for second degree murder and shooting at or from a motor vehicle involve unitary conduct because the shots were fired at the same time and thus were not separated by either time or space. Contrary to Defendant’s assertions, however, evidence was presented that Defendant, while inside the car, shot Victim three or four times and then got out of the car and shot Victim again. Specifically, witness Royal testified that Defendant shot Victim three or four times when Victim approached and opened the door of the car in which Defendant was seated. Royal testified further that when Victim fell and then got up and began to run away, Defendant got out of the car and shot Victim again. Another witness, Maryboy, testified that she was inside an apartment across the street from the store when she heard three or four shots, looked out the window, and saw Victim leaning inside a car. Maryboy then saw Victim run behind the store and a person in the backseat of the car get out of the car, chase after Victim, and then shoot Victim again when Victim fell down.

{28} The foregoing evidence supports a jury determination that the conduct underlying the crimes was not unitary, but was instead separated by both time and distance because, in between shots, Victim ran and Defendant got out of the car to pursue and shoot Victim again. See, e.g., State v. Cooper, 1977-NMSC-058, ¶ 59, 124 N.M. 277, 949 P.2d 660 (holding that “indicia of distinctness include the separation between the illegal acts by either time or physical distance, the quality and nature of the individual acts, and the objectives and results of each act” (internal quotation marks and citation omitted)); see also Swafford, 112 N.M. at 14, 810 P.2d at 1234 (holding that “similar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses”).

{29} Even if the conduct were unitary, however, we would affirm on the basis that the legislature intended to provide multiple punishments for the offenses of second degree murder and shooting into or from a vehicle. See, e.g., State v. Gonzales, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992) (holding that the legislature intended separate punishments for unitary conduct that violates both the first-degree murder statute and the statute proscribing shooting from or into an occupied motor vehicle). First, because each statute requires proof of an element that the other statute does not require, we begin with a presumption that the legislature intended to punish the offenses separately. See Swafford, 112 N.M. at 14, 810 P.2d at 1234. Specifically, second degree murder requires that the defendant know that his actions create a strong probability of death or great bodily harm, an element that is not required for shooting from a motor vehicle. See NMSA 1978, § 30-2-1(B) (1994); UJI 14-211 NMRA 2004. Conversely, shooting from a motor vehicle requires that the acts be done while in a motor vehicle but does not require the same mens rea as for second degree murder. See NMSA 1978, § 30-3-8(B) (1993); UJI 14-344 NMRA 2004; cf. State v. Varela, 1999-NMSC-045, ¶ 18, 128 N.M. 454, 993 P.2d 1280 (holding the crime of shooting at a dwelling is not a lesser included offense of second degree murder because each crime requires a different mens rea).

{30} Second, a consideration of each crime shows that the statutes are designed to combat distinct evils, which provides further indicia of legislative intent confirming the presumption that the offenses are separately punishable. Specifically, the second degree murder statute is designed to discourage and punish the unlawful killing of people,
whereas the shooting at or from a motor vehicle statute is designed to protect the public from property damage and personal injury caused by gunfire from a motor vehicle, such as in a drive-by shooting. See, e.g., Gonzales, 113 N.M. at 225, 824 P.2d at 1027; see also State v. Elmgquist, 114 N.M. 551, 553, 844 P.2d 131, 133 (Ct. App. 1992) (recognizing that in enacting Section 30-3-8, the legislature was concerned with conduct designed to terrorize or intimidate).

We therefore conclude that the legislature intended separate punishments for each crime.

Sufficiency of Evidence in Support of the Conviction for Second Degree Murder

{31} Defendant argues that he should have been found either not guilty by reason of insanity or, alternatively, guilty but mentally ill. According to Defendant, there was overwhelming evidence that he suffered from various mental disorders and, in contrast, there was insufficient evidence to support a guilty verdict. To address Defendant’s claim, we consider the evidence in the light most favorable to the verdict, and we determine whether a rational trier of fact could have found that the State established the elements of second degree murder beyond a reasonable doubt. See State v. Coffin, 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477.

{32} A jury finding of insanity is proper when, at the time of a crime’s commission, because of a specific and longstanding mental disease, a defendant did not know what he was doing or understand the consequences of his act; or did not know that his act was wrong; or could not prevent himself from committing the act. See UJI 14-5101. A jury finding of guilty but mentally ill is appropriate when, at the time of the crime’s commission, a substantial disorder of thought, mood, or behavior impaired the defendant’s judgment but did not amount to insanity as described above. See id.; see also State v. Neely, 112 N.M. 702, 707, 819 P.2d 249, 254 (1991) (distinguishing between a jury verdict of insane versus a verdict of guilty but mentally ill).

{33} Defendant’s expert witness, Colby, testified that at the time of the shooting, Defendant was suffering from both visual hallucinations and thought delusions. Based on those symptoms as well as a report from when Defendant was confined at a juvenile detention facility, Colby diagnosed an acute psychotic episode. Considering the psychotic episode in combination with Defendant’s documented history of mental disturbances, Colby testified that, in his opinion, Defendant was legally insane at the time of the shooting.

{34} In response to Colby’s testimony, the State presented testimony by its own expert witness, Seagrave, who opined that Defendant did not suffer from a longstanding mental disease as required for insanity, but instead that Defendant’s voluntary use of the drug ecstasy caused a drug-induced psychosis, bizarre delusional beliefs, and misinterpretation of reality such that Defendant believed that he had to shoot Victim in order to protect himself and his friend, Royal. Further supporting the State’s theory of a drug-induced psychosis, witnesses Guevara and Hamilton testified that prior to the shooting, Defendant had been taking ecstasy for several days and had been acting “crazy in the head.” Guevara testified that Defendant had not acted that way before he took ecstasy.

{35} A review of both experts’ testimony indicates that both believed Defendant to be psychotic at the time of the crime, with Colby opining that the psychosis resulted from pre-existing, serious psychological diagnoses and Seagrave opining that the psychosis resulted from an ecstasy-induced psychosis. Thus, the evidence from both experts may have supported a verdict of guilty but mentally ill. See id. It was the fact-finder’s prerogative, however, to reject the testimony of both experts and determine that Defendant was neither legally insane nor mentally ill. See, e.g., State v. Jason F., 1998-NMSC-010, ¶ 29, 125 N.M. 111, 957 P.2d 1145 (explaining that in the context of a fact-finder’s rejection of expert testimony on the issue of competency, recognizing that while expert opinion may be compelling, expert testimony is opinion, not fact); see also State v. Alberico, 116 N.M. 156, 164, 861 P.2d 192, 200 (1993) (recognizing that a jury does not have to accept an expert’s opinion as conclusive even though opinion may be uncontroversial); State v. James, 85 N.M. 230, 232, 511 P.2d 556, 558 (Ct. App. 1973) (holding that a jury, in determining whether or not a defendant is insane, is not required to accept expert opinion).

{36} In rejecting the view that Defendant was insane or mentally ill, the jury may have been influenced by Seagrave’s testimony that Defendant’s responses to a psychological test indicated that Defendant was trying to exaggerate or fabricate psychological problems. In addition, both Colby and Seagrave testified that jail staff who monitored Defendant reported concerns that he might be “malingering,” that is, exaggerating his symptoms of mental illness. Similarly, the jury may have been influenced by evidence suggesting that Defendant’s encounter with Victim arose out of a plan to rob Victim. Viewing this evidence in the light most favorable to the verdict and making all reasonable inferences in support of the verdict, this provides sufficient evidence for the jury to find Defendant guilty of second degree murder. See Coffin, 1999-NMSC-038, ¶ 73.

Sufficiency of Evidence for Conviction for Shooting from a Motor Vehicle

{37} Defendant argues that irrespective of the jury’s rejection of his insanity defense, his conviction for shooting from a motor vehicle is not supported by substantial evidence. Defendant concedes, however, that evidence was presented that Defendant, while seated in the car, shot Victim. This evidence is sufficient to support Defendant’s conviction, which requires proof that the defendant willfully discharged a firearm from a motor vehicle with reckless disregard for another. § 30-3-8(B); see, e.g., State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (stating that substantial evidence exists if any rational jury could have found each element of the crime to be established beyond a reasonable doubt).

{38} We reject Defendant’s argument that his actions were not “reckless” because he shot directly at Victim. “Reckless disregard” requires that Defendant’s conduct created a substantial and foreseeable risk and that Defendant disregarded such risk and was wholly indifferent to the consequences of his conduct and the welfare and safety of others. See UJI 14-344; UJI 14-1704 NMRA 2004; Elmgquist, 114 N.M. at 553, 844 P.2d at 133 (recognizing that the crime shooting into an occupied vehicle requires recklessness and the total disregard for others). Defendant’s act of shooting directly at Victim satisfies this definition.

That Defendant accurately shot Victim does not negate that his conduct was reckless. If anything, his accuracy reflected an increased substantial and foreseeable risk.

{39} In conjunction with his sufficiency of the evidence issue, Defendant argues also that the “[l]egislature could not have intended that this statute [§ 30-3-8(B)] apply to the situation where the motor vehicle is the mere locus of the crime, not the means by which the crime is committed” or, put another way, that Section 30-3-8(B) is intended to apply to drive-by shootings rather than a situation such as
the present involving a vehicle that was not moving. Because there is no indication that Defendant raised this argument below, we review Defendant’s conviction for fundamental error based on his contention that his actions do not constitute the elements of this crime as a matter of law. See State v. Cearley, 2004-NMCA-79, ¶ 9, 92 P.3d 1284 [No. 23,707 (N.M. Ct. App. May 14, 2004)]. We are unpersuaded by Defendant’s contention because the unambiguous language of the statute does not require that the vehicle be in motion. See State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990) (“When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.”); State v. Elliott, 89 N.M. 756, 757, 557 P.2d 1105, 1106 (1977) (“Statutes are to be given effect as written and, where free from ambiguity, there is no room for construction.”). 

Trial Court’s Refusal to Order a Sixty-Day Evaluation

Defendant argues that the trial court erred in not ordering a sixty-day evaluation for Defendant pursuant to Section 31-20-3(C). We review the trial court’s sentencing determination for an abuse of discretion. See State v. Cawley, 110 N.M. 705, 712, 799 P.2d 574, 581 (1990).

Upon entry of a judgment of conviction, the court has four basic options:
1. sentence the defendant, executing the sentence by committing him to jail or prison, NMSA 1978, Section 31-20-2 (1993); (2) defer imposition of sentence, Section 31-20-3(A); (3) sentence the defendant and suspend in whole or in part execution of the sentence, Section 31-20-3(B); or (4) commit the defendant to a period of diagnosis prior to sentencing, Section 31-20-3(C).

State v. Clah, 1997-NMCA-091, ¶ 19, 124 N.M. 6, 946 P.2d 210. As we stated in State v. Sinyard, “[r]ead in their entirety, the sentencing statutes evidence a legislative intent that the trial court have a wide variety of options by which to sentence,” 100 N.M. 694, 697, 675 P.2d 426, 429 (Ct. App. 1983), and the trial court has broad discretion in determining whether or not to order a diagnostic evaluation for a defendant. Id.

In the present case, the State argued that a sixty-day evaluation was not necessary because the trial court had before it evidence of nine years of psychological evaluations, as well as the testimony of two mental health experts. We hold that it was within the court’s discretion, based on the information before it, to conclude that a diagnostic evaluation was not merited.

CONCLUSION

Based on the foregoing discussion, we affirm.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge 

WE CONCUR:
JONATHAN B. SUTIN, Judge
IRA ROBINSON, Judge

Mutual Insurance Company (Farmers), seeking indemnification or subrogation of the settlement. The trial court determined that: (1) Farmers is the primary insurer; (2) State Farm provided adequate notice to Farmers; but (3) the settlement amount was unreasonable, and therefore, Farmers was not required to reimburse State Farm for the entire settlement amount; and (4) State Farm was entitled to prejudgment interest on the amount it was reimbursed. Farmers appeals. The request for oral argument is denied. We affirm.

BACKGROUND

Woodruff, an elderly woman who uses a wheeled-walker to move around, visited a laboratory located in the SFMDG building. When exiting the building, Woodruff’s walker reportedly caught on a tear in the floor mat. As a result, Woodruff fell and broke her right femur. Woodruff made a claim against SFMDG, and, in June 1998, SFMDG passed the claim on to its insurer, State Farm. SFMDG had a property management agreement with Kokopelli, which required Kokopelli, among other things, to inspect the property as necessary, to accomplish repair and maintenance of the property, and to maintain full-time response capability for maintenance emergencies. SFMDG had also hired a janitorial service to clean the building. The janitorial service was not required to take care of

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-101


APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
JAMES A. HALL, District Judge

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CLAUDIA J. JOSEPH
THE SIMONS FIRM, L.L.P.
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for Appellee

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for Appellant

O P I N I O N

RODERICK T. KENNEDY, Judge

Mary Woodruff (Woodruff) filed a claim for personal injuries suffered after a fall which occurred on May 15, 1998, while she was a visitor at an office building owned by Santa Fe Medical Dental Group (SFMDG). SFMDG is managed by Phoenix Limited d/b/a Kokopelli Management Services (Kokopelli). State Farm Fire and Casualty Company (State Farm), which insured SFMDG, eventually settled Woodruff’s claim, and filed a complaint for declaratory judgment against Kokopelli’s insurer, Farmers Alliance

BAR BULLETIN - SEPTEMBER 2, 2004 - VOLUME 43, NO. 35 37
The interest. Farmers appeals, arguing that at a later proceeding, the trial court granted required to reimburse State Farm $250,000. Edition involved in the settlement negotiations, whereby it had a reasonable opportunity to be involved in the settlement negotiations and that its insurer was Farmers, and sent notification of Woodruff’s claim to the agent, asking the agent to forward the information to Farmers.

In the meantime, State Farm investigated Woodruff’s claim and engaged in settlement negotiations with her. State Farm reached a tentative settlement agreement with Woodruff for $170,000, but the negotiations did not end there because Woodruff’s attorney “needed to verify” the amount with his client. The settlement agreement was not finalized because, during negotiations, it was discovered that Woodruff had developed a serious infection in her leg, requiring more hospitalization. State Farm eventually settled Woodruff’s claim for $375,000. After failing in its attempt to receive reimbursement from Farmers, State Farm filed an action for declaratory judgment against Farmers. Both parties filed motions for summary judgment. The trial court granted partial summary judgment in favor of State Farm, finding that the primary insurer with respect to Woodruff’s claim was Farmers, and the secondary insurer was State Farm; that SFMDG was not negligent as to Woodruff’s claim; and that any negligence that occurred was solely on the part of Kokopelli.

The trial court denied State Farm’s motion for summary judgment as to the reasonableness of the settlement, and denied Farmers’ motion in its entirety. A trial was held on the remaining issues. Following trial, the trial court determined that the settlement agreement between State Farm and Woodruff was unreasonable; that a reasonable settlement amount was $250,000; that Farmers was given adequate notice by State Farm whereby it had a reasonable opportunity to be involved in the settlement negotiations with Woodruff; and that Farmers was required to reimburse State Farm $250,000. At a later proceeding, the trial court granted State Farm’s motion for prejudgment interest. Farmers appeals, arguing that the trial court erred in determining that it was the primary insurer; erred in deciding that Farmers must indemnify State Farm in the amount of $250,000, because State Farm did not engage in adequate efforts to involve Farmers; and erred in awarding prejudgment interest.

**DISCUSSION**

**Primary/Secondary Insurer Standard of Review**

The issue of primary and secondary insurer was decided in a summary judgment proceeding. The parties agree that the material facts are not disputed and that this Court reviews de novo the question of law presented by this issue. See Barncastle v. Am. Nat’l Prop. and Cas. Cos., 2000-NMCA-095, ¶ 5, 129 N.M. 672, 11 P.3d 1234 (noting that, when the parties agree regarding the material facts, the standard of review on appeal from summary judgment is de novo).

**“Other” Insurance Clauses**

Both parties also agree that the insurance policies involved in this case contain “other” or “excess” insurance clauses, which are in conflict with each other in that each attempts to make the other insurer primarily liable. The parties agree that “other” insurance clauses such as those included in the two insurance policies in this case would act to leave an insured without any coverage at all, and are therefore held to be “mutually repugnant” and cancel each other out. See CC Hous. Corp. v. Ryder Truck Rental, Inc., 106 N.M. 577, 580-81, 746 P.2d 1109, 1112-13 (1987).

**Closest to the Risk**

Below, and on appeal, both parties have agreed that, if the “other” insurance clauses in the two policies cancel each other out, the test to apply in determining which insurer is primary and which is secondary is the “closest to the risk” test discussed in Branchal v. Safeco Insurance Co. of America, 106 N.M. 70, 71, 738 P.2d 1315, 1316 (1987). Because both parties agree that the insurer that is closest to the risk is the primary insurer, we limit our discussion to this closest-to-the-risk analysis. In Branchal, our Supreme Court relied on a Minnesota decision to determine which automobile insurer was primarily liable and which was secondarily liable for damages claimed by an injured passenger. Id. (relying on Transamerican Ins. Co. v. Austin Farm Ctr., Inc., 354 N.W.2d 503 (Minn. Ct. App. 1984)).

**Transamerican v. Branchal, 106 N.M. at 71, 738 P.2d at 1316. This closest-to-the-risk doctrine was reaffirmed in Tarango v. Farmers Ins. Co. of Ariz., 115 N.M. 225, 226-27, 849 P.2d 368, 369-70 (1993). However, neither Branchal nor Tarango discuss the doctrine at any length; both cases simply adopt the result reached in Transamerican, that the insurer of the vehicle involved in an accident is closer to the risk than the insurer of the passenger in that vehicle. We therefore look to Minnesota case law.**

Minnesota courts have developed two different tests to use in determining which of two insurers is closest to a particular risk. One is a three-part test that is primarily applicable to automobile cases. Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 660-61 (Minn. Ct. App. 1992). This is the test that was applied in Transamerican. In cases not involving automobiles, Minnesota courts apply a broader test requiring a determination of the “total policy insuring intent” based on the primary policy risks and the primary function of each policy. Illinois Farmers, 480 N.W.2d at 661; Interstate Fire & Cas. Co. v. Auto-Owners Ins. Co., 433 N.W.2d 82, 86 (Minn. 1988). This broader approach, involving a more helpful review than the “mechanical application” of the three-part test, is applied when two policies are intended to cover risks that differ in size and type. North Star Mut. Ins. Co. v. Midwest Family Mut. Ins. Co., 634 N.W.2d 216, 223 (Minn. Ct. App. 2001); see also Illinois Farmers, 480 N.W.2d at 661. As discussed below, the insurance policies in the case before us cover risks that differ in size and type, and the policies contain liability coverage unrelated to automobiles. Therefore, we apply the broader test discussed in the Minnesota cases cited above, and analyze the policies to determine the primary risks contemplated by each policy, and the primary functions of each policy.

**State Farm’s policy is labeled a “Business Policy,” and provides business liability coverage in the amount of $5,000,000. The premium for the policy, which includes coverage for damage to SFMDG’s buildings as well as the liability coverage, is listed as $12,924. Farmers’ policy is labeled a “BUSINESSOWNERS POLICY,” and provides coverage for liability and medical expenses in the amount of $1,000,000. The premium for the policy is listed as $284. Farmers’ policy lists Kokopelli as its named insured, while State Farm’s policy lists SFMDG as its named insured. Neither**
party argued below that its particular liability policy was not designed to cover a plaintiff’s injuries.

{10} The primary policy risks contemplated by the State Farm policy included risks associated with the entire premises in which SFMDG operated, and all types of risks associated with those premises. The primary policy risks contemplated by the Farmers policy included the duties performed by Kokopelli at the SFMDG premises. As noted above, Kokopelli’s duties included supervision of the premises and maintenance aimed at preventing dangerous conditions from developing. For example, the chairman of the management committee for SFMDG, Dr. Kenneth Brooks, stated in his affidavit that Kokopelli was responsible for supervising and inspecting janitorial work, and that “repair or removal of a torn floor mat is a maintenance issue fully within the scope of Kokopelli’s obligations as manager.” An affidavit of Ronald Trujillo, State Farm Claims Specialist, stated that Kokopelli’s representative, Simon, told Trujillo that Kokopelli’s employee “walked the Property daily inspecting for maintenance needs,” and that “if a maintenance issue such as a torn floor mat existed, Kokopelli would be aware of it.”

{11} Farmers argues that the torn floor mat that caused Woodruff’s fall belonged to SFMDG and was included in the property insured under State Farm’s policy, and therefore, State Farm’s insurance policy was specifically intended to insure against risks connected to the disrepair of the floor mat. State Farm counters by arguing that the cause of Woodruff’s accident was Kokopelli’s failure to perform its duties, and that, even if the floor mat was owned by SFMDG, its maintenance was under Kokopelli’s control. The essential facts in this case, therefore, are these: (1) an injury was caused by a dangerous condition on the SFMDG premises; (2) one insurer provided liability coverage for risks caused by the dangerous condition; and (3) another insurer provided liability coverage to the entity charged with preventing such risks from developing on the premises. In reviewing the primary policy risks and primary functions and the circumstances of this case, we find that the insurance policy covering the entity charged with preventing the risk is closer to the risk and therefore is the primary insurer. See Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 80-81 (Minn. Ct. App. 1997) (determining that pastor’s professional liability insurer was closer to the risk that pastor would cause harm to persons he was counseling, as compared to church’s comprehensive general liability policy, which provided general coverage for occurrences of many types). Therefore, the trial court was correct in determining that Farmers was the primary insurer in this case.

Notice to Farmers

{12} Farmers argues that it was not given a reasonable opportunity to be involved in the settlement negotiations with Woodruff, and therefore, State Farm was not entitled to indemnification in the amount of $250,000. The trial court found that State Farm notified Kokopelli of Woodruff’s claim in August 1998, notified Farmers’ agent of the claim in May 1999, and notified Farmers of the claim directly in April 2000. The trial court found that all of the notifications were made prior to final settlement of Woodruff’s claim and constituted adequate notice to Farmers. There is no suggestion that Farmers is challenging the factual basis for the finding of adequate notice, including the attempts that were made with regard to notice to Farmers. Instead, Farmers is claiming that the factual finding that the notice was adequate was erroneous because the late direct notice to Farmers deprived it of a reasonable opportunity to be involved in the settlement proceedings. We review findings of fact made by the trial court to determine if they are supported by substantial evidence. See Griffin v. Guadaluppe Med. Ctr., 1997-NMCA-012, ¶22, 123 N.M. 60, 933 P.2d 859.

{13} Here, State Farm provided notice of Woodruff’s claim to Kokopelli’s representative, Simon, in May 1999. At that time, Simon was uncooperative when State Farm suggested he report the claim to Kokopelli’s insurer and insisted that only State Farm was responsible for the claim. When State Farm was informed of the name of Kokopelli’s insurer in May 1999, it immediately notified Farmers’ agent, Northern New Mexico Insurance Agency. State Farm requested that Farmers’ agent forward State Farm’s letter of notification to Farmers “so that [Farmers] can set up a claim for Kokopelli.” In June 1999, Farmers’ agent told State Farm’s agent that he had spoken with Simon and had been instructed not to report the claim to Farmers. State Farm’s agent responded that he was not sure that Farmers’ agent could refuse to report the claim, and that he believed that Farmers’ agent “needed to report the claim.” Despite this, Farmers’ agent failed to contact Farmers about the claim. On April 10, 2000, State Farm sent direct notice to Farmers, including extensive detail about Woodruff’s accident and injuries, and asking for “immediate funds to indemnify” Kokopelli for its negligence. On April 26, 2000, State Farm sent another letter to Farmers asking to know immediately how much Farmers would contribute toward settlement and requesting a response by April 28. Farmers responded with two letters, on April 27 and May 4, 2000, stating that it was investigating the claim and did not understand why State Farm believed Farmers to have any liability in the case. State Farm settled with Woodruff on May 2, 2000. On May 10, 2000, State Farm informed Farmers that it had settled the claim.

{14} There was substantial evidence to support the trial court’s finding that notice to Farmers was adequate. For example, State Farm gave notice to Farmers’ agent approximately one year prior to settlement. See Jackson Nat’l Life Ins. Co. v. Receconi, 113 N.M. 403, 412, 827 P.2d 118, 127 (1992) (determining that notice to the agent of a company constitutes notice to the company even when the agent does not actually pass on the information to the company). Although Farmers argues that State Farm cannot rely on notice to its agent because he was told by Farmers’ agent that the claim would not be forwarded to Farmers, the last communication between the two agents involved State Farm’s agent informing Farmers’ agent that he believed the claim needed to be reported to Farmers. In addition to notice to Farmers’ agent, Farmers was directly notified of the full details of the case, including details of the settlement negotiations, over three weeks prior to settlement. In response, Farmers stated only that it was investigating the claim. Farmers engaged in only limited investigation of the claim, and made no other efforts to be involved in the settlement negotiations or to have the settlement postponed. Based on this substantial evidence, we reject Farmers’ argument that it had inadequate notice.

Reasonableness of Settlement

{15} Farmers argues that the trial court erred in concluding that it should reimburse State Farm in the amount of $250,000. Farmers argues that it should not be required to pay any amount to State Farm, particularly because of its claim that it had inadequate notice and could not participate in the proceedings. As discussed above, Farmers had adequate notice of the claim, but chose not to participate in defense of its insured or in settlement negotiations. How-
ever, although Farmers did not participate in the settlement of the claim, it was not precluded from arguing that the settlement amount of $375,000 was unreasonable. See Am. Gen. Fire and Cas. Co. v. Progressive Cas. Co., 110 N.M. 741, 746, 799 P.2d 1113, 1118 (1990). The trial court agreed with Farmers that the settlement amount was unreasonable, and found that State Farm was entitled to only $250,000, out of the total $375,000 settlement, because a reasonable settlement should not have exceeded $250,000. This finding is supported by substantial evidence which is binding on us on appeal. See Griffin, 1997-NMCA-012, ¶ 22. The trial court found that Farmers was the primary insurer for the claim, and therefore Farmers is bound by the settlement reached between State Farm and Woodruff. See Rummel v. Lexington Ins. Co., 1997-NMSC-041, ¶ 59, 123 N.M. 752, 945 P.2d 970.

{16} The trial court based the amount of a reasonable settlement on various facts, including medical bills incurred by Woodruff of almost $107,000, pain and suffering and significant decrease in the quality of life suffered by Woodruff, a tentative settlement agreement in October 1999 of $170,000 that coincided, however, with the significant worsening of Woodruff’s injuries, and the ultimate placement of Woodruff in a nursing home. The trial court also considered the facts that the claim had not gone to litigation, the investigation of the claim was not sufficiently thorough as to Kokopelli’s employees, there was a possibility that a defense would have been provided by Kokopelli’s employees, and there was a possibility of assessing comparative fault against Woodruff. Farmers does not challenge any of these determinations, but instead argues only that it should not be liable for any amount. Essentially, Farmers is arguing that the entire settlement was unreasonable. Farmers does not point to any evidence to support this argument. In any event, the evidence cited above supports the trial court’s determination of the amount of a reasonable settlement, and we affirm the trial court’s decision on this issue.

Prejudgment Interest

{17} After trial, State Farm filed a motion for prejudgment interest, which was granted by the trial court. An award of prejudgment interest is reviewed under an abuse of discretion standard. See NMSA 1978, § 56-8-4(B) (1993) (allowing the district court to exercise its discretion in awarding prejudgment interest); Delisle v. Avallone, 117 N.M. 602, 609, 874 P.2d 1266, 1273 (Ct. App. 1994) (stating that a trial court’s decision on prejudgment interest will stand absent a showing that the decision is contrary to all logic and reason). The trial court, in determining whether prejudgment interest should be awarded, may consider whether State Farm caused unreasonable delay in adjudication of its claims and whether Farmers had previously made a timely and reasonable offer of settlement to State Farm. See § 56-8-4(B)(1)(2) (stating that the trial court, in determining prejudgment interest, may consider whether the plaintiff unreasonably delayed adjudication and whether the defendant made a settlement offer to the plaintiff).

{18} Farmers argues that State Farm delayed in responding to discovery requests, which resulted in a need to file a motion to compel production of documents. Farmers also claims that State Farm made it clear that it would not accept any offer less than its full demand. State Farm argues that it attempted to resolve the case for approximately six months prior to filing suit. State Farm also argues that it objected to the production of its claim file, which it had a right to do, and that Farmers made no effort to pursue the matter until almost a year later. Finally, State Farm argues that the onus under Section 56-8-4 is on Farmers to make an offer of settlement, and one was never made. It was up to the trial court to resolve the issue, and determine whether prejudgment interest should be awarded. There is nothing to suggest that the trial court abused its discretion in this regard. We affirm the decision to award prejudgment interest.

CONCLUSION

{19} Based on the foregoing, we affirm the trial court’s decision.

{20} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

CElia FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge
OPINION

IRA ROBINSON, JUDGE

{1} Petitioner Josephine Deem (Grandmother) appeals from the district court order terminating visitation with her granddaughter (Child). See Grandparent’s Visitation Privileges Act (the GV A), NMSA 1978, § 40-9-1 to -4 (1993, as amended through 1999). Relying upon Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion), the district court determined that a change in the joint custody arrangement between Child’s parents to sole custody with Father provided a sufficient basis to terminate visitation. On appeal, Grandmother raises the following arguments: the district court misapplied the United States Supreme Court decision in Troxel; the change in the custody arrangement did not constitute a showing of good cause under Section 40-9-3(A) of the GV A; and the district court erred when it terminated the existing court-ordered visitation without an evidentiary hearing. We reverse and remand with instructions.

BACKGROUND

{2} Grandmother is the maternal grandmother of Child. Parents (Mother and Father) of Child were divorced in August 1995 when Child was one year old. The parenting plan agreed upon at the time of the divorce granted joint legal custody to Mother and Father, with Father having primary physical custody of Child. In the first few years of Child’s life, Grandmother developed a good relationship with Child, and, after the divorce, Mother’s visitation with Child took place at Grandmother’s home. Subsequently, however, relations between Grandmother and Father became strained and her visits with Child all but ended. In December 1998, Grandmother filed a petition seeking regular visitation with Child to which Father objected.

{3} On February 7 and 11, 2000, after Father requested a continuance of the trial, District Court Judge James Hall conducted a hearing on temporary visitation privileges while the trial on the merits of the visitation petition was pending. See Section 40-9-2(G). At the conclusion, the district court determined that it was in the best interests of Child to have visitation with Grandmother, and temporary visitation was ordered pending a full hearing. The court stated that the interim visits would also serve to provide information to the court for the hearing on the merits. In response to Father’s expressed concerns, the district court imposed several restrictions on the visitation, including that it be supervised, that the supervisor report to the court on the visits, that Grandmother’s son and daughter not be present, and that Father’s sister or brother could attend the visits as observers.

{4} On May 3 and 8, 2000, Judge Hall conducted a trial on the merits of Grandmother’s petition for visitation. After considering the factors set forth in Section 40-9-2(G) and giving special weight to the parents’ wishes under Troxel, Judge Hall determined that it was in Child’s “best interests to have regular, limited visitation with [Grandmother] under certain conditions.” Again, in response to Father’s concerns, the court set limitations on the visitation, including continuing the supervised visitation, prohibiting Grandmother from giving Child any gifts during visitation, prohibiting Grandmother’s son and daughter from being present, and allowing Father to provide an additional observer at visitation. Judge Hall entered his findings of fact and conclusions of law on July 24, 2000. None of the findings of fact was challenged by either party. See Stueber v. Pickard, 112 N.M. 489, 491, 816 P.2d 1111, 1113 (1991) (stating that the unchallenged finding of the district court was binding on appeal).

{5} On October 2, 2001, Mother and Father entered into a stipulated order in the divorce case giving Father sole legal and physical custody of Child “until such time as [Mother] petitions this court for a modification thereof.” The order had been signed by Mother and Father and their respective divorce attorneys and also stated “that this order shall have no adverse effects on the association rights of [Mother’s] family with [Child].” However, when the order was submitted to the district court, Judge Carol Vigil presiding, the court deleted that provision of the stipulated order on jurisdictional grounds because the grandparent visitation case was before Judge Hall. With that modified order, Father then moved within two weeks to terminate Grandmother’s visitation, claiming that as the sole legal custodian of Child he was now entitled to the presumption that his decision regarding visitation was in Child’s best interests. Grandmother responded that this single change in circumstance between the parents regarding legal custody was insufficient under the GV A to terminate the court-ordered visitation.

{6} A hearing on Father’s motion was set with an initial time allocation of one and one-half hours. In support of continued visitation, Grandmother subpoenaed three witnesses: Mother, Mother’s attorney in the divorce proceedings, and the supervisor of the visits between Grandmother and Child.
When the hearing was called, however, the court had set aside only thirty or forty minutes to hear the motion. Grandmother reminded the court of the amount of time that had initially been scheduled for the hearing and pointed out that she had three witnesses prepared to testify. The district court, with Judge Daniel Sanchez now presiding on rotation, did not allow Grandmother to call the witnesses and permitted only a profer of their testimony by Grandmother’s attorney. Mother would have testified that she did not intend for the change in custody to affect Grandmother’s visitation and that had been one of the conditions for giving sole custody to Father. Her attorney would have testified that all parties had signed off on that condition in the stipulated order before Judge Vigil struck that provision from the order. The visitation supervisor would have testified about what she observed during the visits between Grandmother and Child and also that she thought the visits were good for Child. Grandmother argued to the court that Judge Hall had previously conducted a full hearing on whether visitation would be in the best interests of Child and applied a Troxel analysis to the facts of the case before granting visitation. Therefore, she argued, Father now had the burden under the GVA to come forward with evidence that there was a change in the best interests of Child after the court had awarded visitation.

After hearing the arguments of counsel and reviewing the stipulated order regarding custody, the court summarized that Troxel gave Father, as the sole custodial parent, the discretion to terminate the visitation. Under Troxel, the court opined, Father “as a fit parent and sole legal custodian” was “entitled to a presumption that his decision not to allow visitation between his child and [Grandmother] is in the best interests of his child.” The district court also found that the change in legal custody was a material change in circumstances. The court then granted the motion to terminate Grandmother’s visitation effective immediately even though a visit with Child was scheduled for later that day. This appeal ensued.

DISCUSSION

Grandmother argues that the district court’s misapprehension of Troxel led to the erroneous termination of the previously ordered visitation with Child. She argues that the court erred by not permitting her to present evidence to rebut the presumption stated in Troxel that a parent’s decision with regard to grandparent visitation is made in a child’s best interest. Finally, she contends that the court incorrectly concluded that the change in Child’s legal custody provided a sufficient basis to terminate the visitation. Grandmother contends that under the GVA a change in legal custody between the parents does not by itself constitute good cause for modifying the original court order granting visitation. See § 40-9-3. “This appeal raises questions of law, which we review de novo.” Williams v. Williams, 2002-NMCA-074, ¶ 8, 132 N.M. 445, 50 P.3d 194.

Father responds that the sole basis of Judge Hall’s decision to grant visitation was that the district court felt that it had to make the decision because Mother and Father disagreed over visitation by Grandmother. Father argued below that under Troxel he was entitled to a presumption that his decision not to allow visitation was in the best interests of Child. He stated that he continued to oppose any court-ordered visitation between Child and Grandmother, and that, as sole legal and physical custodian, he alone had the discretion to make the determination regarding visitation. On appeal, he argues that the district court, relying on Troxel, correctly deferred to Father’s decision regarding visitation with Grandmother. He also contends that because Mother relinquished joint custody, her wishes regarding with whom Child may associate “no longer have [have] legal significance.”

Troxel v. Granville

In Troxel, the United States Supreme Court held in a plurality opinion that a Washington state statute authorizing nonparental visitation with a child, as applied to the facts of that case, unconstitutionally infringed on the due process right of the mother to make decisions concerning the care, custody, and control of her children. Troxel, 530 U.S. at 66-67, 75. The Supreme Court articulated several concerns raised by the case. The first concern was the "breathtakingly broad" nature of the Washington statute. Id. at 67. The statute allowed any third party seeking visitation to bring any decision by parents concerning visitation with their children to a state court for review. Id. Second, the Supreme Court noted, "[t]he problem here is not that the [trial court] intervened, but that when it did so, it gave no special weight at all to [the mother's] determination of her daughters’ best interests.” Id. at 69. Third, the Supreme Court was concerned that the trial court had “placed on [the mother], the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters.” Id. The Supreme Court stated this decisional framework “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.” Id. Finally, the Court noted that the mother had not denied visitation entirely to the grandparents. Id. at 71. The dispute had not been over whether visitation should be allowed, but rather over how much visitation there should be. Id. The combination of these factors led the plurality to conclude that the visitation order in that case was unconstitutional. Id. at 72.

But the Court in Troxel specifically declined to find either the statute in question or grandparent visitation statutes in general to be unconstitutional. Id. at 73. Observing “the changing realities of the American family,” id. at 64, and that, in response to those changes, all fifty states had enacted grandparent visitation statutes, id. at 73 n.*, the plurality concluded that “[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter,” id. at 73.

Grandparent’s Visitation Privileges Act

In New Mexico, grandparent visitation privileges are conferred by statute. “No grandparent visitation right existed at common law.” Gutierrez v. Connick, 2004-NMCA-017, ¶ 15, 120 N.M. 794, 87 P.3d 552 (relying on Lucero v. Hart, 120 N.M. 794, 799, 907 P.2d 198, 203 (Ct. App. 1995)). In New Mexico, the GVA states that in certain defined circumstances a “district court may grant reasonable visitation privileges to a grandparent of a minor child.” See § 40-9-2(A). In this case, Grandmother petitioned for visitation under Section 40-9-2(A) which applies in the event of a dissolution of marriage, legal separation, or the establishment of a parent-child relationship. Factors to be assessed by the district court when considering whether to grant visitation privileges to a grandparent include the following:

1) any factors relevant to the best interests of the child;
2) the prior interaction between the grandparent and the child;
3) the prior interaction between the grandparent and each parent of the child;
4) the present relationship between the grandparent and each parent of the child;
(5) time-sharing or visitation arrangements that were in place prior to filing of the petition; 
(6) the effect the visitation with the grandparent will have on the child; 
(7) if the grandparent has any prior convictions for physical, emotional or sexual abuse or neglect; and 
(8) if the grandparent has previously been a full-time caretaker for the child for a significant period.

Section 40-9-2(G). “[G]randparents, in seeking application of the GVA, have the burden to show that visitation is appropriate.” Ridenour v. Ridenour, 120 N.M. 352, 356-57, 901 P.2d 770, 774-75 (Ct. App. 1995); Williams, 2002-NMCA-074, ¶ 16.

Under the GVA, grandparents must first meet the threshold requirements listed in Section 40-9-2(A)-(F) to be entitled to pursue visitation and then must present evidence relevant to the factors listed in Section 40-9-2(G)(1)-(5). Ridenour, 120 N.M. at 356, 901 P. 2d at 774.

Further, in Lucero, this Court recognized additional factors which may be taken into account by the district court when considering a petition for grandparent visitation privileges, which included:

(1) the love, affection, and other emotional ties which may exist between the grandparent and child; (2) the nature and quality of the grandparent-child relationship and the length of time that it has existed; (3) whether visitation will promote or disrupt the child’s development; (4) the physical, emotional, mental, and social needs of the child; (5) the wishes and opinions of the parents; and (6) the willingness and ability of the grandparent to facilitate and encourage a close relationship among the parent and the child.

Lucero, 120 N.M. at 800, 907 P.2d at 204; accord Williams, 2002-NMCA-074, ¶ 9.

13 This Court analyzed the GVA in light of the Troxel opinion in Williams, 2002-NMCA-074. The parents in Williams had challenged the award of the grandparent visitation, arguing that it was a violation of their rights and that the district court had been “constitutionally required to defer to their opinion.” Id. ¶ 8. They also argued that the district court had not given special weight to their opposition to grandparent visitation. Id. ¶ 15. After a careful comparison of the parents’ case to Troxel, this Court affirmed the award of grandparent visitation, concluding that the district court had given “appropriate weight to the wishes of Parents and did its best to accommodate those wishes in fashioning its visitation order.” Id. ¶ 24. In arriving at this conclusion, we stated the following:

We agree with Parents that, as a general proposition, Troxel does require courts to give special consideration to the wishes of parents, and appropriately so. However, we do not read Troxel as giving parents the ultimate veto on visitation in every instance. Troxel may have altered, but it did not eradicate, the kind of balancing process that normally occurs in visitation decisions.

Id. ¶ 23. Similarly, in this case, Father argued that Grandmother’s visitation should be terminated because he was now the sole legal custodian of Child and did not want visitation between the two.

15 Section 40-9-3(A) of the GVA permits the district court to “modify the privileges or order [granting visitation privileges] upon a showing of good cause by any interested person.” In this case, the court determined that the change of Child’s legal custody constituted “a material change of circumstance.” Grandmother argued that the change in the custody arrangement between Mother and Father was not by itself sufficient to constitute “good cause shown” under the GVA for terminating the original visitation order. In this case, she pointed out, Father had always been the de facto sole custodian of Child, and Judge Hall had considered that as one of the factors in granting visitation.

16 This Court has previously held that grandparent visitation privileges are not derivative of the rights of the parents but rather exist independently under the GVA. “Grandparent visitation rights are derived from statute and are not contingent on the continuation of the parent-child legal relationship.” Lucero, 120 N.M. at 798, 907 P.2d at 202 (quoted authority and quotation marks omitted); see also Ridenour, 120 N.M. at 357, 901 P.2d at 775. In Lucero, this Court held that the trial court, upon the proper showing, “could authorize grandparent visitation even though Grandmother’s son had relinquished his parental rights” to permit stepparent adoption. 120 N.M. at 798, 90 P.2d at 175; see § 40-9-2(F). Under the GVA, grandparents may petition for visitation in other circumstances including when the grandchild has been adopted, Section 40-9-2(E), and when one or both parents have died, Section 40-9-2(B).

17 There is nothing in Troxel or the resulting case law to suggest that the Supreme Court considered the presumption that a fit parent acts in the best interests of his or her child to be other than a rebuttable presumption. See Troxel, 530 U.S. at 87 (Stevens, J. dissenting); accord McGovern v. McGovern, 33 P.3d 506, 511 (Ariz. Ct. App. 2001); Fenn v. Sherriff, 1 Cal. Rptr. 3d 185, 195 & n.4 (Cal. Ct. App. 2003); Crafton v. Gibson, 752 N.E.2d 78, 96-97, 98 (Ind. Ct. App. 2001); Herrick v. Wain, 838 A.2d 1263, 1273 (Md. Ct. Spec. App. 2003); Blakely v. Blakely, 83 S.W.3d 537, 545 (Mo. 2002); Glidden v. Conley, 820 A.2d 197, 204-05 (Vt. 2003).

18 As this Court has stated, the presumption does not create a “bright-line test for the consideration of parental rights in the visitation context” that would give parents the “ultimate veto on visitation in every instance.” Williams, 2002-NMCA-074, ¶ 16, 23; see also Herrick, 838 A.2d at 1273 (“If the custodial parent’s preference were absolute, the need for a grandparent visitation statute would be obviated, for a parent could deny visitation without recourse.”). The presumption simply alters the weighing process to give special weight to the wishes of the parents. Williams, 2002-NMCA-074, ¶ 23. The district court must still engage in a fact-specific analysis as it weighs the factors set forth in the GVA. Judge Hall, after a four day trial, had crafted a resolution that considered the factors defined in the GVA and our case law, as well as giving special weight to the parents’ wishes under Troxel. In this case, there was already a court order in place granting Grandmother visitation. Because Father was attempting to modify that order, he had the burden of establishing good cause for that modification under Section 40-9-3(A). The court relied on the language in Troxel that “there is a presumption that fit parents act in the best interests of their children,” 530 U.S. at 68, to summarily terminate the visitation between Grandmother and Child without allowing Grandmother the opportunity to rebut that presumption. However, Troxel does not shift the burden away from a parent who seeks to modify an existing order granting grandparent visitation. Consequently, the district court erred when it perfunctorily deferred to Father in the matter of visitation.
See Fenn, 1 Cal. Rptr. 3d at 195 (“Giving the parent’s determination ‘special weight’ is different than insulating the parent’s determination from any court intervention whatsoever.”).  

Additional Issues on Appeal  
{19} Father raises two arguments on appeal. First, he claims that after Troxel the GVA on its face is unconstitutional and, second, that in Williams this Court violated the separation of powers between the Legislature and the judiciary. Father’s constitutional claim is that Troxel requires a court to give special weight to the wishes of the parents, while the GVA does not require the court to do so. He acknowledges that Lucero, in listing additional factors for consideration, stated that a court “may consider” the parents’ wishes but contends that this language falls short because it is not mandatory. See Lucero, 120 N.M. at 800, 907 P.2d at 204.  


{21} Contrary to Father’s contentions, Troxel does not mandate a determination that the GVA is facially unconstitutional. Troxel does not prohibit judicial intervention when a parent refuses grandparent visitation, but does require that a court accord “some special weight to the parent’s own determination” when applying a nonparental visitation statute. 530 U.S. at 70. The GVA is capable of, and has been, interpreted to accord deference to the parents’ wishes, although the statute itself does not specifically require such deference. See, e.g., Connick, 2004-NMCA-017, ¶ 17; Williams, 2002-NMCA-074, ¶ 21-24; Ridenour, 120 N.M. at 354, 901 P.2d at 772. We note that the language of the GVA is more narrowly drafted than that of the Washington statute at issue in Troxel. If the Supreme Court did not conclude that the “breathtakingly broad” Washington statute was invalid on its face, then it is reasonable for this Court to conclude that the GVA is not unconstitutional on its face. Further, in Troxel the Supreme Court stated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se. 530 U.S. at 73. Rather, the Supreme Court, agreeing with Justice Kennedy in his dissent, stated that “the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied.” Id.  

{22} Father also contends that this Court, in enacting the GVA, required a determination from any court intervention whatsoever. First, he claims that after Troxel the GVA on its face is unconstitutional and, second, that in Williams this Court violated the separation of powers between the Legislature and the judiciary. Father’s constitutional claim is that Troxel requires a court to give special weight to the wishes of the parents, while the GVA does not require the court to do so. He acknowledges that Lucero, in listing additional factors for consideration, stated that a court “may consider” the parents’ wishes but contends that this language falls short because it is not mandatory. See Lucero, 120 N.M. at 800, 907 P.2d at 204.  

Conclusions  
{23} We reverse the district court’s order terminating Grandmother’s visitation. Mindful of the time that has passed since the termination order was granted, we remand to the district court for an evidentiary hearing. In the interest of judicial economy, given the history of this case and the fact-specific nature of the inquiry, we remand the case to the original presiding judge, Judge Hall, to determine whether, at the present time and as circumstances now exist, it would be in Child’s best interests to continue visitation with Grandmother and whether a guardian ad litem should be appointed for Child. See Lucero, 120 N.M. at 799, 907 P.2d at 203 (stating that when there is a parental challenge to grandparent visitation, the court “should also consider whether it would be beneficial to appoint a guardian ad litem to represent the child in the face of conflicting interests”).  

IT IS SO ORDERED.  
IR A ROBINSON, Judge  

WE CONCUR:  
A. JOSEPH ALARID, Judge  
RODERICK T. KENNEDY, Judge
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16 “The World of the International Criminal Court”
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OCTOBER
7 Tribal Education Leaders Summit on Legal Education
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7 Indian People, Indian Law Convocation
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Under the general supervision of the County Attorney and Deputy County Attorney, performs internal counsel duties such as draft ordinances, review contracts, consult in matters of potential liability, attend public meetings and hearings on behalf of the Board of County Commissioners, County Manager, Elected Officials, Department Directors, and other appointed boards and commissioners. Defends and/or represents the county in limited litigation matters. J.D. from an accredited university and a valid license to practice in the State of New Mexico. Minimum of one (1) year experience as a practicing attorney preferred, but not required. Salary: $52,555. Closing Date: September 10, 2004. For more information or to apply: Doña Ana County Human Resources, 180 W. Amador Ave., Las Cruces, NM 88001 Phone# (505) 647-7200 Toll Free# 1-877-827-7200 Fax# (505) 647-7302. Doña Ana County job application, completed in full required. Resume accepted but not in lieu of application. Application and job announcement available on website: www.co.dona-ana.nm.us. “An Equal Opportunity Employer”

Assistant District Attorney
The Second Judicial District Attorney’s office in Bernalillo County is looking for both entry-level and experienced prosecutors. Salary and job assignments will be based upon experience and the District Attorney Personnel and Compensation Plan. If interested please send a resume and letter of interest to Jeff Peters, Human Resources Director, District Attorney’s Office, 520 Lomas Blvd., N.W., Albuquerque, NM 87102, or e-mail Jpeters@da2nd.state.nm.us

Litigator
Bauman, Dow & León, P.C. seeks a highly motivated litigator with at least 2 years experience. We offer a very attractive salary and benefit package, and a collegial work environment. All inquiries will be treated as confidential. Resumes should be mailed to PO Box 30684, Albuquerque, New Mexico 87190 or faxed to (505) 883-3194

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.

Lawyer A Position
The New Mexico Public Education Department is seeking an attorney in the Office of General Counsel. This attorney will review allegations of educator misconduct and ethical violations; review evidence and prepare administrative pleadings and related correspondence; research laws and rules; represent the Public Education Department at administrative hearings involving a person’s educator license; advise Department staff on assigned issues related to education law, educator licensure, criminal/civil law and procedures, professional ethics, background checks, rules of evidence, EEOC, employment law; provide other legal services at the direction of the General Counsel. Must hold a valid NM bar license and have 6 years legal experience, 3 of which involved administrative or court litigation. Salary: $42,322 - $75,240 per year w/benefits, depending on experience. Term. Send a letter of interest, a copy of your résumé and 15-page or less writing sample to Public Education Department, Human Resources- Rm 209, 300 Don Gaspar, Santa Fe, NM 87501-2786; fax-505-827-5066. Deadline: September 10, 2004. The State of NM is an EOE.

Assistant City Attorney
The City of Rio Rancho is accepting applications for the position of Assistant City Attorney. This is a challenging position for those who wish immediate immersion into the broad area of municipal law. General responsibilities include contracts, land use, personnel/human resources/labor law, legislative drafting, etc. Particular emphasis will be placed on human resources experience and risk management. Applicants must be already admitted to the Supreme Court of New Mexico and have a minimum of three years as a practicing attorney. Salary range is $50,000 to $66,000 (DOQ), plus bar fees, MCLE, and other fringes. Please send resume to the City of Rio Rancho, Human Resources Department, P.O. Box 15550, Rio Rancho, NM 87174-0550. EOE.

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. MST. A copy of the Request for Proposals may be obtained by calling (505) 574-0003.

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.

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.

Positions Wanted

Enthusiastic
Hard-working, 24 year old who recently sat for the July 2004 New Mexico Bar Exam seeking an Associates Position with an Albuquerque Law Firm. My interests include international law, business law, real estate law and water rights law. I am a native New Mexican, an Honors Alumni of the University of New Mexico, and a graduate of California Western School of Law in San Diego, CA. My previous experience includes being a research assistant to the Director of International Studies Program, clerking in Madrid, Spain for an International Law Firm specializing in business and anti-trust law, and working as a legal assistant to an Albuquerque attorney specializing in real estate law. Additionally, I am bilingual and read and write Spanish. Please e-mail CatlinZanetti@hotmail.com or call 710-3852.
**OFFICE SPACE**

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

**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.

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**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.

**Downtown Office Space Available 400 Gold Ave**
Executive Suite includes; reception, conference rooms, breakroom, T-1 internet access. Call 314-1300.

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Best location in town, one block or less from the new federal, state, metropolitan courts. 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 Cafe 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.

**Downtown**
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**Downtown Office Space Available 400 Gold Ave**
Executive Suite includes; reception, conference rooms, breakroom, fax/copy services. Offices start $450/month. Suites also available 600 to 5000sf, negotiable lease terms and improvements. Covered on site parking. Call Daniel 241-3803, e-mail daniel@armstrongbros.com.

**Offices for Lease**
Downtown - Spacious remodeled offices with furnished secretarial space. ($450.00 - $650.00) Two conference rooms; including utilities, janitorial, Cat. 5 networking, DSL internet; phones, security and free parking. Walking distance to all courts - Congenial atmosphere. Call Deborah (505) 843-9171.

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LEGAL WRITING AND REASONING

Walter Lowney

September 22 or 23, 2004
State Bar Center

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Choose One:  □ September 22  □ September 23

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8:30 a.m.  Workshop Introduction and Overview
9:15 a.m.  Drafting Legal Correspondence
10:00 a.m.  Break
10:15 a.m.  Writing a Fast, Coherent Draft
11:15 a.m.  Organizing a Legal Argument
Noon  Lunch provided
1:00 p.m.  Applying the Law to Your Facts
2:00 p.m.  Drafting Advisory Letters and Office Memos
2:30 p.m.  Break
2:40 p.m.  Drafting Court Memoranda and Appellate Briefs
3:40 p.m.  Break
3:50 p.m.  Editing Paragraphs, Sentences and Word Choice
4:50 p.m.  Workshop Closing
5:00 p.m.  Adjourn

□ $199 Standard and Non-Attorney  □ $179 Governmental and Paralegal

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