The yucca (*Yucca glauca*) was adopted as the state flower on March 14, 1927. New Mexico school children labored for months on considering the state’s flowers. Finally, they favored the yucca. It was seconded by the New Mexico Federation of Women’s Clubs and was officially adopted. The yucca is also known as the “Lamparas de dios” which translates to “Lamps of the Lord” due to the bright mass of white flowers that protrude from a center stalk within the plant. Its needle-sharp leaves have given it the common name, Spanish bayonet.

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2004-NMCA-129: Taos Municipal Schools Charter School v. Michael J. Davis


2004-NMCA-133: Holm O. Bursum, IV v. Kimberly S. Bursum
Get Involved in
State Bar Committees

By joining you will:
• Help Strengthen the Legal Profession
• Work on Legal Causes of Interest
• Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. Review the descriptions and complete the form below to request an appointment for 2005.

Please check the committee(s) you wish to join.

- Alternative Methods of Dispute Resolution (ADR) – Promotes and provides legal education and training in the use of alternative dispute resolution processes.
- Bench and Bar Relations – Plans the statewide Bench and Bar Conference.
- Client Relations - Advises the State Bar Client Attorney Assistance Program (CAAP), which attempts to resolve minor problems that clients may have with their attorneys. CAAP includes the State Bar’s Client Protection Fund, fee arbitration panel, peer assistance program and unauthorized practice of law complaints.
- Delivery of Legal Services to People with Disabilities – Provides information and assistance to ensure access to counsel for persons who have a disability.
- Diversity in the Legal Profession – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.
- Historical – Acquires, maintains and submits for publication historical information relating to the bar.
- Law Office Management – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.
- Lawyers Assistance – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.
- Lawyers Professional Liability – Advises the State Bar regarding risk management activities.
- Legal Services and Programs: Planning Subcommittee – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor.
- Legal Services and Programs: Pro Bono Subcommittee – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.
- Legal Services and Programs: Funding Subcommittee - Encourages and explores ways to fund non-profit organizations that provide free civil legal services for low-income New Mexicans.
- Membership Services – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance program agreements with vendors of products and services.
- NM Medical-Legal - Addresses issues of mutual concern to both professions.
- Public Legal Education – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.
- Quality of Life – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.
- Technology Utilization – Assists with the development and promotion of electronic technology applications for the legal profession.
- Women and the Legal Profession – Addresses issues affecting women as lawyers and judges and monitors substantive issues of women served by the legal system.

Name: ________________________________________
Address: ______________________________________
City/State: _________________________ Zip: ________
Telephone: ________________ Fax: ________________
E-mail: ______________________________________

Mail To: State Bar of New Mexico, Membership and Communications Department, PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 828-3765
Request by E-mail: membership@nmbar.org
The Board of Bar Commissioners and staff would like to express our appreciation to the 2004 section chairs whose terms expire on December 31, 2004. We welcome the volunteers who will serve as chairs in 2005.

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<tr>
<th>Section</th>
<th>2004 Chair</th>
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<tr>
<td>Appellate Practice</td>
<td>Frances C. Bassett</td>
<td>Steven L. Tucker</td>
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<tr>
<td>Bankruptcy Law</td>
<td>Ronald E. Holmes</td>
<td>Alice Nystel Page</td>
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<tr>
<td>Business Law</td>
<td>Cheryl Pick Sommer</td>
<td>Bradley D. Tepper</td>
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<td>Children’s Law</td>
<td>Linda Yen</td>
<td>Anthony J. Ferrara</td>
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<td>Commercial Litigation</td>
<td>Thomas P. Gulley</td>
<td>Stephen J. Lauer</td>
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<td>Criminal Law</td>
<td>David G. Crum</td>
<td>Michael W. Kiernan</td>
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<td>Elder Law</td>
<td>Elaine S. Wright</td>
<td>Kevin D. Hammar</td>
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<td>Employment &amp; Labor Law</td>
<td>Eric R. Miller</td>
<td>Cindy J. Lovato-Farmer</td>
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<td>Family Law</td>
<td>John D. Watson</td>
<td>Linda Ellison</td>
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<td>Health Law</td>
<td>Jennifer L. Stone</td>
<td>John A. Bannerman</td>
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<td>Indian Law</td>
<td>J. Pamela Ray</td>
<td>Rosemary Maestas-Swazo</td>
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<td>Natural Resources, Energy</td>
<td>Brian Howard Lematta</td>
<td>Daniel W. Long</td>
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<td>&amp; Environmental Law</td>
<td>Julie Ann Meade</td>
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<td>Prosecutors</td>
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<td>Solo &amp; Small Firm Practitioners</td>
<td>Marjorie A. Rogers</td>
<td>Marjorie A. Rogers</td>
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<td>Taxation</td>
<td>Richard J. Shane</td>
<td>Martin Esquivel</td>
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Section membership provides networking and educational opportunities in these areas of law and types of practices. Sign up by February 1 on the 2005 State Bar of New Mexico Dues and Licensing Form or join at any time online at www.nmbar.org.
Last Chance Professionalism

Professionalism: An Historical Perspective

Wednesday, December 29, 2004  •  10 a.m. - Noon or 11 a.m. - 1 p.m. or 12:30 - 2:30 p.m.
2.0 Professionalism CLE Credits

Join historian and accomplished writer Thomas E. Chavez, PhD, Executive Director of the National Hispanic Cultural Center in Albuquerque, and Richard L. Gerding, Esq., 2003 recipient of the New Mexico Bar Association’s Professionalism Award, as they take you on a unique journey through New Mexico’s legal history that is both educational and entertaining. Moderated by The Honorable Pamela B. Minzner of the New Mexico Supreme Court and Jan Gilman-Tepper, Esq., Chair of the New Mexico Board of Minimum Continuing Legal Education.

$59 Standard and Non-Attorney

Electronic Discovery and Evidence - Part 1 and 2

Tuesday, January 11 and Wednesday, January 12, 2005  •  (Teleseminar)
11 a.m. - Noon  •  State Bar Center  •  2.4 General CLE Credits (1.2 G available for each day)


Individuals and businesses are connected as never before, electronically exchanging information in documents, e-mail notes and, more recently, instant messages. No longer tethered to desktops, information is now transmitted via ubiquitous wireless devices. The volume of information is unprecedented and raises a series of issues for litigators: Is this information discoverable in litigation? If so, what are the rules and principles that limit its discovery? How is the information managed? Are instant messages discoverable, too? Courts and litigators are still working toward answers to these and many other questions that will substantially impact litigation. Both from the perspective of the defense and plaintiff’s bar, this two-part program will examine developing case law and review ongoing efforts to adopt new rules governing electronic evidence.

$129 Standard and Non-Attorney

Tax Treatment of Contingency Fee Awards After Banaitis v. Commissioner

Tuesday, January 18, 2005  •  (Teleseminar) 11 a.m. - Noon  •  State Bar Center
1.2 General CLE Credits

Participants: Kenneth W. Gideon, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, D.C.; and James Serven, Moya Giles, LLP, Denver

The federal income tax treatment of contingency fees is in dispute. Today, geography – the location of the client – determines how taxable damage awards are treated for federal income tax purposes. Some federal appellate circuits have adopted the rule that contingency fees are taxable twice – once to the taxpayer and again to the attorney who drafted the contingency fee arrangement. Other circuits hold that a taxable damages award is taxable only once. Where a client resides has a dramatic impact on their tax position and impacts how an attorney should draft contingency fee arrangements to reduce their adverse tax impact. This program will discuss the majority and minority rule, the role of state law, and the Supreme Court’s pending decision on this matter in Banaitis v. Commissioner.

$67 Standard and Non-Attorney

FOUR 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.nnbar.org, click CLE, then Educational Programs
Mail: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________  NM Bar # ________________
Street __________________________________ City/State/Zip ________________
Phone ____________________________  Fax ____________________________  Email ____________________________
Purchase Order (Must be attached to be registered) Check enclosed __________ Make check payable to CLE of the SBNM
☐ VISA  ☐ MasterCard  ☐ American Express  ☐ Discover
Credit Card # ____________________________ Exp. Date __________
Authorized Signature ____________________________
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• Professionalism Tip •

With respect to my clients:

I will work to achieve lawful objectives in all other matters, as expeditiously
and economically as possible.

Meetings

State Bar Workshops

January
26
Consumer Debt/Bankruptcy Workshop*,
6:00 p.m., State Bar Center

26
Family Law Workshop, 5:30 p.m.,
Branigan Library, Las Cruces

27
Consumer Debt/Bankruptcy Workshop*,
5:30 p.m., Branigan Library, Las Cruces

February
23
Consumer Debt/Bankruptcy Workshop*,
6:00 p.m., State Bar Center

23
Family Law Workshop, 5:30 p.m.,
Branigan Library, Las Cruces

24
Consumer Debt/Bankruptcy Workshop,
5:30 p.m., Branigan Library, Las Cruces

*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.

January
5
Employment and Labor Law Section
Board of Directors, noon, State Bar
Center

5
Trial Practice Section Board of
Directors, 4:30 p.m., State Bar Center

6
Elder Law Section Board of Directors,
11:30 a.m., State Bar Center

8
Ethics Advisory Committee, 10 a.m.,
Dines & Gross, PC.

10
Taxation Board of Directors, noon, via
teleconference

12
Committee on Women and the Legal
Profession, noon, Lewis and Roca Jontz
Dawe, LLP

12
Children’s Law Section Board of
Directors, 11:30 a.m., Annual Meeting,
3 p.m., Marriott Pyramid North

12
Attorney Support Group, 5:30 p.m.,
First Methodist Church
NOTICES

COURT NEWS

NM Supreme Court Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules and Civil Forms

The Supreme Court is considering Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules and Civil Forms. Attorneys who would like to comment on the proposed revisions should send written comments by Dec. 31 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

Law Library Notice of Closing

The Supreme Court Law Library has extended its hours to include 8 a.m. to 6:30 p.m. Monday to Thursday, 8 a.m. to 5:30 p.m. Friday, and 8 a.m. to 3 p.m. Saturday. However, the library will be closed or have restricted hours on the following days:

- Dec. 27 to 29: 8 a.m. to 5 p.m.
- Dec. 30: 8 a.m. to 1 p.m.
- Dec. 31 to Jan. 1: Closed

The Board Governing the Recording of Judicial Proceedings

Notice Regarding Taking of Depositions

According to the Rules of Civil Procedure 1-030, Subparagraph E, “Review by witness; changes; signing,” it is the deponent or a party’s responsibility to request, before completion of the deposition, that the deponent review the transcript within 30 days after being notified by the court reporter that the transcript is available. The court reporter is not allowed to request, instruct, suggest or otherwise inform the deponent or parties about this Rule. If the subject of this Rule does not occur before the completion of the deposition, the court reporter shall indicate “Not Requested” on the Certificate of Completion inserted at the conclusion of the transcript. Contact (505) 821-1440 or ccr@ccrboard.com for more information.

NM Board of Legal Specialization

Comments Sought

The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the Board and appropriate specialty committees. The Board and specialty committees encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Natural Resources Law – Oil and Gas
Phillip T. Brewer

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, Jan. 4 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.

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 Jan. 3. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

Holiday Court Closings

As approved by the Supreme Court, the Second Judicial District Court will close for the Christmas and New Year’s holidays as follows:

- Dec. 30, the Court will close at noon
- Dec. 31, the Court will be closed all day

Eleventh Judicial District Court

Notice to Attorneys

Effective Jan. 1, 2005, Judge Sandra Price will assume all of the court cases that are assigned to Judge Douglas Echols in Division III. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 3, 2005 to challenge or excuse Judge Price pursuant to Supreme Court Rule 1-088.1.

Bernalillo County Probate Court

Holiday Closures

The Bernalillo County Probate will be open Dec. 27 to 30, closed Dec. 31, and open Jan. 3, 2005 and beyond. Attorneys needing to file a probate case during the time the Probate Court is closed should contact the Second Judicial District Court, 841-7451 or 841-7425, regarding its holiday hours.

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

Suspension of 2005 Annual Federal Bar Dues

With the concurrence of all active Article III Judges in the District of New Mexico, it is ordered that as of Jan. 1, 2005, the annual attorney bar dues of $25 shall be suspended for the calendar year 2005. All delinquent dues must be paid. The administrative order may be viewed on the court’s Web site at www.nmcourt.fed.us.

STATE BAR NEWS

Attorney Support Group Monthly Meeting

The next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but because of the New Year’s holiday the January meeting date has been changed. The group will resume its regular schedule in February.

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

Bankruptcy Law Section

Brownbag Luncheon

Increase your Internet IQ while you have some lunch at the Bankruptcy Law Section’s Brownbag at noon, Jan. 21, 2005 in the
training room on the 10th floor (10327) of U.S. Bankruptcy Court. The State Bar’s Web master, Veronica Cordova, will give a presentation on how attorneys can better use the SBNM’s Internet resources including the attorney/firm finder, discussion groups, legal forms, career center and online registration/shopping features.

Board of Bar Commissioners

Important Message to Membership

The article entitled “Personal Responsibility and the Cult of Victimhood in Tort Law” published in the Dec. 2 issue of the Bar Bulletin did not reflect the views of the Board of Bar Commissioners or the State Bar of New Mexico. The views expressed were solely those of the author. The State Bar of New Mexico and the Board of Bar Commissioners will announce, at a later date, a uniform policy regarding the form and content of articles that may be published in the Bar Bulletin. In the meantime, the NM Trial Lawyers Association has been invited to submit a response for publication in the Bar Bulletin.

Meeting Summary

The Board of Bar Commissioners met on Dec. 17 at the State Bar Center in Albuquerque. Action taken at the meeting follows:

• Approved the Nov. 4 meeting minutes as submitted;
• Accepted the October financials and executive summary;
• Reviewed the accounts receivable aging report as well as the executive director’s travel reimbursements and credit card file;
• Reviewed health insurance quotes and reported that the Bar’s health insurance increased 26 percent;
• Accepted the 2005 New Mexico State Bar Foundation Budget;
• Reviewed the 2004 audit schedule;
• Held an executive session and ratified action taken in executive session;
• Held the annual meeting; no resolutions or motions were presented for consideration;
• Reported that the Supreme Court approved the Bar’s 2005 budget and swore in the new officers;
• Reported on the CLE at Sea cruise;
• Appointed the Board’s internal committees (Finance, Executive, CLE Oversight, Annual Awards, Personnel and Policy/Bylaws)
• Received the 2005 Board meeting schedule as follows: Jan. 28, April 1, May 20, July 15, Sept. 22 (changed from Sept. 15 due to change in annual meeting dates), Oct. 28 and Dec. 9;
• Received an update regarding the Alternative Methods of Dispute Resolution Committee regarding the committee becoming a section;
• Tabled discussion regarding LREP/Aging issues;
• Discussed monitoring/regulating judicial campaigns and decided to contact other bars to find out what they are doing with regard to judicial campaigns;
• Received a report on the Public and Legal Services Department for 2005; the department has expanded its hours to full time to better serve the public;
• Approved recommendations to pay two claims made to the Client Protection Fund;
• Appointed liaisons to Supreme Court committees/boards;
• Received a report on the Reciprocity Committee meeting and reviewed the comments received from the voluntary bars regarding the draft rule; the Board tabled a decision on reciprocity until the Jan. meeting in order to solicit input from the membership; the draft rule will be published in the Bar Bulletin and e-mailed to the membership for comment;
• Received a report from the Annual Meeting Planning Committee regarding plans for the 2005 annual meeting in Ruidoso, Sept. 22-24;
• Received input from the president of the NM Trial Lawyers Association on an article published in the Dec. 2 issue of the Bar Bulletin titled “Personal Responsibility and the Cult of Victimhood in Tort Law”; the Board decided to publish a disclaimer in the Bar Bulletin stating that the article was not a position of, or reflective of, the views of the Board of Bar Commissioners or the State Bar and invite the NM Trial Lawyers Association to submit a response for publication in the Bar Bulletin;
• Received a report on amendments to the Unauthorized Practice of Law Statutes 36-2-27 and 36-2-28 and authorized the UPL Subcommittee to present and lobby for the statute amendments without expending any Bar funds at the 2005 legislative session;
• Approved a proposal from the Lawyers Professional Liability Committee regarding limited liability corporations and limited liability partnerships and authorized the committee to request the NM Supreme Court to enter an order adopting the new Rule 24-106 of the Rules Governing the New Mexico Bar;
• Tabled the Bylaws/Policies Committee report to the Jan. meeting in order for the committee to make additional amendments to the editorial policy;
• Received a report on legislative advocacy compliance for the Family Law Section; the section is considering taking a position regarding amendments to the Guardian Ad Litem Statute, Section 40-4-8, for the purpose of providing technical assistance and of lobbying the 2005 legislative session; and
• Presented the outgoing commissioner plaques.

Note: The minutes in their entirety will be available on the Bar’s Web site following approval by the Board at the Jan. 28 meeting.

Board of Editors

Vacancy

The State Bar Board of Editors will have one attorney-position vacancy to fill beginning in 2005. The Board of Editors serves as the editorial board for the Bar Bulletin, reviewing content, topics for articles and substantive legal articles. The opening is a two-year term, beginning Jan. 1, 2005 and ending Dec. 31, 2006, and could be renewable for one additional two-year term.

Interested attorneys should have previous publishing/editing experience and be available to review articles regularly, as well as be able to attend board meetings in person or by teleconference quarterly.

If interested, send resumes by Dec. 31 to Keith Thompson, PO Box 92860, Albuquerque, NM 87199; or e-mail to kthompson@nmbar.org.

Children’s Law Section

Notice of Annual Meeting

The Children’s Law Section will hold its annual meeting at 3 p.m., Jan. 12, 2005, in conjunction with the 2005 New Mexico Children’s Law Institute. The section’s Board of Directors will meet at 11:30 a.m. that day. All events will take place at the Marriott Pyramid North in Albuquerque, 5151 San Francisco Rd. NE. The annual meeting provides section members the opportunity to meet each other and to discuss future section activities. Section members are
encouraged to attend the annual meeting whether or not they attend the conference, and members need not be registered for the conference in order to attend the meeting. Questions can be directed to outgoing Chair Linda Yen, (505) 841-5164.

Employment and Labor Law Section
Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets on noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Jan. 5. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

Family Law Section
Guardian Ad Litem Statute

The Board of Directors of the Family Law Section hereby notifies all members of the section that it is considering taking a position in regards to amending the Guardian Ad Litem Statute, Section 40-4-8 for the purpose of providing technical assistance and of lobbying the 2005 Legislative Session.

State Bar policy provides that a section may support or oppose legislation, provided that the section members are notified in advance and have an opportunity to express their views to the members of the section board. If you are interested in reviewing the proposed legislation, the text may be found online at http://tinyurl.com/6uk5.

Section members who wish to comment on the section’s intent to support the legislation should direct their comments by Jan. 14, 2005 to Linda Ellison, PO Box 3070, Albuquerque, NM 87190, or lle@atkinsonkelsey.com. Any comments, suggestions and objections received will be discussed and the Board of Directors of the Family Law Section will take a final vote regarding endorsement and/or lobbying for the passage of this legislation on Jan. 21, 2005.

Lawyers Assistance Committee
Wanted: Lawyers in Recovery

The Lawyers Assistance Committee is looking for lawyers in recovery, especially in towns outside Albuquerque, who would be willing to participate in 12-Step calls on attorneys with alcohol/drug problems. Lawyers willing to help should call Bill Stratvert at 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 Jan. 12, 2005 and is titled Paralegal-Courthouse Interactions: Conflict-Free Litigation Strategies. The cost is $16 for attorneys and $15 for paralegals, legal assistants and office staff. Each meeting has been approved for 1.0 CLE credits. Registration begins at the door at 11:30 a.m. each month, and the presentation will follow from noon to 1 p.m. For more information contact Debi Shoemaker-Scott at Rothstein Donatelli, (505) 243-1443.

Public Law Section
Board Meeting

The next Public Law Section board meeting will be held at noon, Jan. 13 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

Real Property, Probate and Trust Section
Online Treatise Recommendations Requested

The Real Property, Probate and Trust Section board would like to use its budget surplus to provide online treatises to section members. Contact Chair R. Max Best, max@rmxlaw.com, by Dec. 28 with preferences of treatises that should be provided.

Other News
2005 Children’s Law Institute
Registration Deadline Extended

The annual New Mexico Children’s Law Institute will be held Jan. 12 to 14, 2005, at the Marriott Pyramid North in Albuquerque. The conference, sponsored by the University of New Mexico Institute of Public Law and the New Mexico Court Improvement Project, among others, is intended for judges, attorneys, volunteer advocates, social workers, juvenile probation officers and others who work with children and families. The workshops being offered include a workshop approved for 2.0 professionalism CLE credits as well as one eligible for 1.8 ethics CLE credits. Attorneys can earn a total of 14.4 CLE credits overall. The conference brochure is available online at www.abanet.org/ct/gambrell.html. Questions regarding the awards should be directed to Kathleen Maher (312) 988-5307, maherk@staff.abanet.org.

Other Bars
American Bar Association
2005 Gambrell Professionalism Awards

Nominations are now being accepted for the 15th Annual E. Smythe Gambrell Professionalism Awards, recognizing projects that enhance professionalism among lawyers. Bar associations, law schools, law firms and other not-for-profit law related organizations are eligible for the awards. The ABA Standing Committee on Professionalism, a component of the ABA Center for Professional Responsibility, will present up to three awards of $3,500 each during the 2005 ABA Annual Meeting in Chicago. Award criteria include overall quality, replicability, likelihood of continuation, innovation, success, substantive strength in the area of professionalism, scope and other distinguishing features of the applicant programs. The award is named for E. Smythe Gambrell, who served simultaneously as president of the ABA and the American Bar Foundation from 1955 to 1956. Gambrell founded the Legal Aid Society in Atlanta, where he practiced law from 1922 until his death in 1986. The deadline for entries is March 31, 2005. Entry forms and guidelines are available online at www.abanet.org/ct/gambrell.html. Questions regarding the awards should be directed to Kathleen Maher (312) 988-5307, maherk@staff.abanet.org.

Center for Civic Values
Mock Trial Coach Needed

Attorney coaches are needed for the West Mesa High School and Del Norte High School mock trial teams in Albuquerque and Pojoaque High School in Pojoaque. Attorneys interested in participating in this exciting and rewarding program, should
New Mexico Workers’ Compensation Administration Judicial Appointment

The Director of the New Mexico Workers’ Compensation Administration hereby announces the expiration of the initial one-year term of Workers’ Compensation Judge Helen Stirling. Judge Stirling is eligible to apply for a five-year appointment, pursuant to NMSA 1978, Section 52-5-2 B of the Workers’ Compensation Act. Persons wishing to make information available to the director for the statutory review of the judge’s performance should submit comments in writing on or before Jan. 10, 2005.

Paralyzed Veterans of America Legal Writing Competition

The Paralyzed Veterans of America (PVA) has announced its second annual legal writing competition. The competition is open to all law students and attorneys, and is designed to stimulate discussion on issues that affect today’s veterans. The topic of this year’s competition is “Should a Veteran be Entitled to Retain a Lawyer for Adjudication of Claims before the Department of Veterans Affairs?”

A first prize of $1,250 and a second prize of $750 will be awarded. All submissions must be received no later than March 1, 2005. Winners will be announced during PVA Awareness Week, April 10-16, 2005. For more information on how to enter the competition and the specific rules, please visit the PVA Web site www.pva.org and click on “Legal Writing Competition.”

UNM Law Library Holiday Hours

The Law Library will be closed or operate on limited hours during the following UNM holidays:
Dec. 23 to Jan. 3 Closed
Jan. 4-7 8 a.m. to 5 p.m.
Jan. 8 9 a.m. to 5 p.m.
Jan. 9 Closed

Call the Reference Desk, (505) 277-0935 if you have any questions.

MCLE – mcle@nmbar.org or www.nmmcle.org

12/31/04 Compliance Deadline:
Remember to complete all 2004 MCLE requirements by December 31, 2004. Minimum requirements are 12 general, 1 ethics and 2 professionalism credits.

Avoid Sanctions:
As of January 1, 2005 late compliance sanctions are in effect and 2004 non-compliant attorneys will be required to pay a $100 late compliance fee. As of April 1, 2005 attorneys who continue to be in non-compliance and/or have failed to pay the initial $100 fee will be subject to a second late compliance fee of $250.

Check your credits earned online at www.nmmcle.org.

CRP staff would like to acknowledge and thank the MCLE Board members for contributing their time and expertise to assist in the oversight of the MCLE program and the implementation of the MCLE rules.

2004 MCLE Board
Jan Gilman-Tepper, Chair, Albuquerque
William Brancard, Santa Fe
Andrew Schultz, Albuquerque
William Gralow, Albuquerque
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Stevan Looney, Albuquerque
Dennis Manzanares, Taos
Thomas Spahr, Albuquerque
Paul Briones, BBC liaison & board member, Farmington

LEGAL SPECIALIZATION – ls@nmbar.org

Thank you to the 2004 Board of Legal Specialization for their efforts and support of this New Mexico Supreme Court Program.

2004 Legal Specialization Board
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Daniel Shapiro, Albuquerque
Lisa Torraco, Albuquerque
Sarah V. Weaver, Farmington

Thank you to each of the fourteen (14) Legal Specialization Specialty Committees for their work throughout the year. Each Specialty Committee reviews attorney applications for certification or recertification and provides a recommendation of approval or denial to the Board. The Legal Specialization program could not exist without the volunteer efforts of the Board and Specialty Committees.

For additional information regarding the Legal Specialization program including a list of Board Certified Specialists, go to www.nmbar.org > Other Bars/Legal Groups, use the Court Regulated Programs tab in the Bench and Bar Directory, or call (505) 797-6057.
Dear Pat:

I read the letter of “Alice, Looking to Break Through the Glass Ceiling,” and your response, with great interest (Sept. 30 issue). I graduated from UNM Law School in 1989, have worked continuously in the legal profession since that time, and am a partner and shareholder at Hatch, Allen & Shepherd, PA.

There is a noticeable lack of women shareholders in this state. It has been my experience and observation that this is primarily caused by women devoting themselves to their families. Such devotion in the face of society’s career expectations for professional women is commendable, and to be applauded. I am proud of the New Mexico women attorneys who do not bend to the pressure to be “Super Mom.” They realize that you can’t do it all, and you really don’t want to.

My daughter is now 19 years old, and for 15 of those years I have been practicing law. I tried to do it all, and did a fair job of being both an attorney and mother, but not a great job of either. Of the women attorneys in my class, I can think of only a handful that have persevered in the profession, and managed to raise children at the same time. I have not observed gender discrimination in this firm, or in the legal profession in New Mexico in general. Yes, there are some “dinosaurs” out there who will never truly accept women. They are the exception rather than the rule.

I would encourage “Alice” to continue her professional path, continue to devote herself to her family, and enjoy the rewards that come with that devotion.

Very truly yours,
Kimberly A. Syra

Dear Kimberly:

It appears the “glass ceiling” issue remains alive and well for women in the practice of law. The letter in response to the earlier column on this issue and the author’s anecdote illustrate the tension many women continue to experience – it is often difficult, if not impossible, to be both a good attorney and a good parent.

Perhaps more interesting about the response to Pat’s column about the glass ceiling is that it underscores another possible reason for many women feeling unable to shatter that proverbial ceiling. It seems that some of the more traditional tension or competition between the “stay-at-home” and “working” mothers (remember the 1980’s and 1990’s) has been replaced with a sense of competition between mothers in the workplace and the idea that women trying to balance professional lives with parenting can do an adequate job of both but an excellent job at neither. It seems that although women are expected to continue to work after becoming parents, it is correspondingly expected that they will be less adept at work and less effective as mothers. This is disturbing on many levels.

First, the tension between work and family continues to haunt many working parents. Perhaps as men continue to become more hands-on and involved fathers, businesses and law firms (as well as other professions) will recognize the need for all employees, men and women, to balance their private and professional lives.

1 Pat remains uncertain if the term “glass ceiling” applies to the current discussion. Debate continues regarding whether the “glass ceiling” refers to circumstances beyond women’s control (as distinguished from real or perceived “lifestyle choices”) or refers to limitations on women’s opportunities is a more general sense. For the purposes of this column, Pat uses the term as a metaphor for the overall lingering discrimination or obstacles a woman encounters that a man in similar circumstances has not historically encountered.
Second, there is a continuing competition between women who want their companies to recognize the difficulty inherent in balancing demanding professions with family responsibilities and women who want no accommodations made based upon gender or family needs. For example, a recent article profiled five women who made partner at the law firm of Connell Foley LLP in New Jersey. The women made a point of stating “everyone makes it on their own with no special treatment.” The message was clear – there is no accommodation for women partners who have child rearing responsibilities and the women do not want accommodations or the perception that things were any easier for them. See http://www.cfg-lawfirm.com/news/woman-njljOLD.html.

Finally, the issue may be more hidden that it was in earlier decades. Women, and their employers, want to think that discrimination and the “glass ceiling” are things of the past. As a result, it is more difficult to discuss or address lingering differences in how women are treated. Pat is aware of instances in New Mexico where women associates are billed at lower rates than male associates with equal or less experience. Women associates have complained that male shareholders invite male associates to meet clients, to out of office social functions, and to lunch regularly, but do not extend the same invitations to female associates. Women have reported being an “afterthought” introduction at firm functions or when introductions to clients are made. These may at first appear trivial complaints; but, when billing income, client contact, and the appearance of fitting in socially with the established shareholders affect one’s partnership track, such lingering discrimination can have a disproportionate impact.

A review of publications and studies directed towards law firms emphasizes that gender discrimination and the “glass ceiling” remain important issues. Instead of being complacent with labeling law firms and other employers as “family friendly” or offering a mommy track, or flex time, or part time schedules to women – with a corresponding effect on the partnership track – we should instead recognize the importance of adjusting our professional and cultural expectations to value both professional achievement and parenting. It would increase productivity and efficiency in the workplace if no parent was forced to feel he or she “did a fair job of being both an attorney and a [parent], but not a great job of either.”
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<tr>
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<td>Albuquerque Lorman Education Services 6.0 G, 1.2 E (715) 833-3940 <a href="http://www.lorman.com">www.lorman.com</a></td>
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<td>Albuquerque National Business Institute 7.2 G (715) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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**Programs have various sponsors; contact appropriate sponsor for more information.**

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**Programs have various sponsors; contact appropriate sponsor for more information.**
## Petitions for Writ of Certiorari Filed and Pending:

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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 Fé, NM 87504-0848 • (505) 827-4860

**EFFECTIVE DECEMBER 22, 2004**

**CERTIORARI GRANTED AND SUBMITTED:**

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From the New Mexico Supreme Court

Opinion Number: 2004-NMSC-037

Topic Index:
Constitutional Law: Confrontation
Evidence: Blood/Breath Tests

STATE OF NEW MEXICO, Plaintiff-Petitioner, versus PHILLIP DEDMAN, Defendant-Respondent.
No. 28,261 (filed: Nov. 17, 2004)

ORIGINAL PROCEEDING ON CERTIORARI
GRANT L. FOUTZ, District Judge

PATRICIA MADRID, Assistant Appellate Defender
Attorney General
STEVEN S SUTTLE, Assistant Attorney General
Albuquerque, New Mexico for Petitioner

JOHN BIGELOW, Chief Public Defender
KATHLEEN T. BALDRIDGE, Assistant Appellate Defender
Santa Fe, New Mexico for Respondent

OPINION
PAMELA B. MINZNER, JUSTICE

{1} The State appeals from an unpublished opinion of the Court of Appeals, State v. Dedman, No. 23,476 (N.M. Ct. App. Aug. 8, 2003), affirming an order suppressing evidence of a blood alcohol test in a prosecution for aggravated driving while under the influence of intoxicating drugs (DWI), contrary to NMSA 1978, § 66-8-102(D) (1999, prior to 2003 & 2004 amendments). The Court of Appeals concluded that the State had failed to lay an adequate foundation for admission of the report because it did not offer proof that Defendant’s blood was drawn using the veni-puncture method. Dedman, No. 23,476, slip op. at 6. The State appeals pursuant to NMSA 1978, § 39-3-3(B)(2) (1972) and Rule 12-502 NMRA 2004, contending that whether or not the veni-puncture method of drawing blood was used to obtain the sample did not affect the admissibility of the blood alcohol report and that the unavailability of the nurse who drew the sample to testify at trial did not require the exclusion of the report. We hold that the State’s offer of proof, which included the testimony of the toxicologist who prepared the report and the officer in whose presence the blood was drawn, provided sufficient foundation for admission of the report and that lack of opportunity to cross-examine the nurse who drew the sample did not violate Defendant’s confrontation rights. We therefore reverse and remand.

I

{2} On January 15, 2002, Defendant, while allegedly intoxicated, drove his pick-up truck into a street sign while attempting to elude police officers in McKinley County, New Mexico. After Defendant was placed in custody, he was taken by ambulance to the hospital because he had welts, bruises, and swollen eyes. At the hospital, Officer Anthony Ashley asked Defendant to take a blood alcohol test because he could smell the odor of intoxicating liquor coming from Defendant’s breath. Defendant consented to having his blood drawn, and the test was conducted in the presence of Officer Ashley.

{3} Defendant was charged by criminal information with two counts of aggravated assault upon a peace officer, contrary to NMSA 1978, § 30-22-22 (1971); one count of resisting, evading or obstructing an officer, contrary to NMSA 1978, § 30-22-1 (1981); and one count of aggravated driving while under the influence of intoxicating liquor or drugs, contrary to Section 66-8-102(D). Defendant was convicted of the offense of resisting, evading, or obstructing an officer and the lesser included offense of assault upon a peace officer, contrary to NMSA 1978, § 30-22-21 (1971). Defendant was acquitted on the second count of aggravated assault upon a peace officer. As for the aggravated DWI charge, following the State’s offer of proof, the district court excluded a blood alcohol report as violative of Defendant’s right to confrontation because the nurse who drew the blood samples was unavailable to testify. The district court then recessed Defendant’s trial on this charge and permitted the State to appeal.

{4} The Court of Appeals affirmed the district court on different grounds. In affirming the district court’s suppression of the report, the Court of Appeals noted that, under NMSA 1978, § 66-8-110(A) (1993, prior to 2003 amendment), the results of a blood alcohol test could be introduced into evidence when the test was performed pursuant to the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through1993, prior to 2003 amendment). Dedman, No. 23,476, slip op. at 3. NMSA 1978, § 66-8-107(A) (1993) of the Implied Consent Act requires that blood tests be approved by the Scientific Laboratory Division (SLD) of the Department of Health pursuant to NMSA 1978, § 24-1-22 (1981, prior to 2003 amendment), and Section 24-1-22(A) authorizes SLD to “promulgate . . . methods to test persons believed to be operating a motor vehicle under the influence of . . . alcohol.” See Dedman, No. 23,476, slip op. at 3-4. Under this authority, SLD had promulgated a regulation, Blood and Breath Testing Under the New Mexico Implied Consent Act, 7.33.2.12(A)(1) NMAC, (2001), which required, among other things, that blood samples be “collected by veni-puncture.” Dedman, No. 23,476, slip op. at 3-4. The Court of Appeals concluded that strict compliance with the veni-puncture method was a prerequisite to the admission of the blood alcohol report. Id. at 5-6. In the absence of confirmation that veni-puncture had been utilized, the exclusion of the report was...
proper. *Id.* at 6. The Court of Appeals did not address whether the report’s admission would have violated Defendant’s right to confrontation. *Id.* The Court reasoned that in the absence of evidence that the blood test was conducted in accordance with a statutorily mandated regulation requiring that the blood sample be collected using the “veni-puncture” method, it was not an abuse of discretion to exclude the report. *Id.* at 2, 6. The State petitioned for a writ of certiorari.

{5} On appeal, the State contends that the Court of Appeals erred in affirming the district court’s order. The State argues that the Court of Appeals erred because as a general rule the foundational requirements for admission of such a report are met when the record or document is identified and testimony is offered as to the mode of preparation and storage. The State contends that it satisfied these requirements when Juliana Lucero, a forensic toxicologist employed by the SLD, “testified extensively about the blood kits, their preparation, and the manner in which samples are preserved and tested.” The State suggests that whether or not Defendant’s blood was drawn using the veni-puncture method might have affected the weight to be given the report but did not affect its admissibility. The State contends that the district court erred in excluding the report on Confrontation Clause grounds. The State argues that once a record is determined to be admissible under the hearsay exception for regularly kept records, the Confrontation Clause does not require its exclusion. Defendant asks the Court to quash its writ of certiorari, arguing that the Court of Appeals properly applied the relevant statutes, regulations, and case law; we decline to do so. See generally *State v. Urban*, 2004-NMSC-007, ¶ 10, 135 N.M. 279, 87 P.3d 1061 (“[W]e would encourage parties whenever possible to present those arguments [regarding a request to quash certiorari] in a response to the petition itself, as provided by Rule 12-502(D) [NMRA 2004], rather than in the course of briefing the merits of the appeal.”). We are persuaded the Court of Appeals erred in its application of the relevant statutes, regulations and case law. Cf. *State v. Conn*, 115 N.M. 99, 100, 847 P.2d 744, 745 (1993) (quashing the writ of certiorari in part on the ground current law had not been misstated or misapplied).

{6} The first issue we consider is whether the Court of Appeals erred by affirming the exclusion of the blood alcohol report on the basis that the “collection by veni-puncture” requirement was not met. We consider whether proof of veni-puncture is a prerequisite to the admissibility of blood alcohol reports.

A

{7} “Chemical test legislation generally authorizes the state’s health department, attorney general, or other administrative agency to promulgate methods of chemical testing and analysis.” 3 Richard E. Erwin, *Defense of Drunk Driving Cases*: § 28.02[3], at 28-17 (3d ed. 2003). Courts around the country have differed on whether absent strict compliance with such rules and methods, test results are inadmissible. *Id.* at 28-17 n.15. Some courts have held that failure to introduce evidence that the test was conducted in strict compliance with the promulgated methods makes the results inadmissible. See *Webb v. State*, 378 So. 2d 756, 757 (Ala. Crim. App. 1979); *Caffey v. State*, 862 S.W.2d 293, 294 (Ark. Ct. App. 1993); *State v. Hansen*, 203 N.W.2d 216, 223 (Iowa 1972). Other jurisdictions have held test results were admissible with the lack of compliance going only to the weight of the evidence. See *Thomas v. People*, 895 P.2d 1040, 1041 (Colo. 1995); *State v. Wickern*, 411 N.W.2d 597, 599 (Minn. Ct. App. 1987); *State v. Place*, 513 A.2d 321, 323 (N.H. 1986).

{8} In New Mexico, lack of strict compliance with SLD regulations concerning blood alcohol tests initially was not viewed as making the results inadmissible; rather, the failure to comply was considered “essentially an attack on the weight of the evidence.” *State v. Watkins*, 104 N.M. 561, 564, 724 P.2d 769, 772 (Ct. App. 1987). This approach was based on the recognition that it is for the finder of fact to resolve conflicts in the evidence. See *State v. Lankford*, 92 N.M. 1, 2, 582 P.2d 378, 379 (1978); *State v. Casteneda*, 97 N.M. 670, 678, 642 P.2d 1129, 1137 (Ct. App. 1982) (stating that it is the role of the factfinder to resolve any conflicts in the evidence and to determine the credibility and weight to afford the evidence). As a result, the Court of Appeals held in *Watkins* that in enacting Section 24-1-22, which authorizes the SLD “to promulgate and approve satisfactory techniques or methods to test persons believed to be operating a motor vehicle or a motorboat under the influence of drugs or alcohol,” our Legislature had not intended to create a statutory right or make compliance with SLD regulations mandatory. 104 N.M. at 564, 724 P.2d at 772.

{9} In 1993, however, our Legislature amended the Implied Consent Act and the DWI statutes. See 1993 N.M. Laws, ch. 66 (amending NMSA 1978, §§ 66-8-102, -102.1, -107, & -109 to -112). In particular, the 1993 revision modified Section 66-8-110(A) so that blood alcohol tests “performed pursuant to the Implied Consent Act” may be admitted in DWI prosecutions. Additionally, the Implied Consent Act was amended to provide that tests “approved by the scientific laboratory division of the department of health pursuant to the provisions of Section 24-1-22” be administered at the direction of a law enforcement officer.

{10} Defendant relies on *State v. Gardner*, 1998-NMCA-160, 126 N.M. 125, 967 P.2d 465 and *State v. Onsurez*, 2002-NMCA-082, 132 N.M. 485, 51 P.3d 528, in arguing that these 1993 amendments suggest the Legislature intended that strict compliance with all SLD techniques and methods would be required for the admissibility of blood alcohol test results in criminal prosecutions. Defendant argues that *Gardner* held that, taken together, the DWI statutes, the Implied Consent Act, and administrative regulations indicate strict compliance with regulations governing blood alcohol testing is required and results of tests not performed in accordance with regulations were not admissible. Defendant also contends that, according to *Onsurez*, when a defendant properly preserves an objection regarding the annual certification of a breath intoxilizer machine as per SLD regulations, the prosecution must show, as a prerequisite to admission of a breath test result, that the machine used to conduct the test had been properly certified. Defendant’s reliance on these two cases is misplaced.

{11} In *Gardner*, the Court of Appeals reversed the defendant’s DWI conviction because the district court improperly admitted breath alcohol test results. 1998-NMCA-160, ¶¶ 20, 22. The Court of Appeals concluded that the State had not proved that it followed a regulatory requirement that the defendant be observed for twenty minutes prior to the collection of a breath sample. *Id.* ¶ 9. Thus, the State failed to lay an adequate foundation for admission of the test results. *Id.* ¶ 5. Nevertheless, the *Gardner* opinion was based on the recognition that the purpose of complying with the observation period requirement for breath alcohol tests was to ensure the accuracy of the test. *Id.* ¶ 12. The purpose behind the observation period was to ensure that prior to sample collection the subject would not
engage in any activity, such as regurgitating or introducing a foreign substance into his or her mouth, that would compromise the test results. Id. ¶ 6, 12. We conclude Gardner holds that non-compliance with a regulation that goes to the accuracy of the test makes the results inadmissible. We note that in State v. Montoya, 1999-NMCA-001, ¶ 9, 126 N.M. 562, 972 P.2d 1153, the Court of Appeals gave the same reading to Gardner, saying “we held that, in amending the DWI statutes, the [L]egislature intended that compliance with at least those regulations that went to the accuracy of the test would be a condition precedent to admissibility.”

{12} In Onsurez the Court of Appeals again concluded that the trial court had admitted test results without a proper foundation. 2002-NMCA-082, ¶¶ 12-13. The regulation at issue in Onsurez also went to accuracy. The regulation at issue required that an Intoxilizer 5000 machine used to conduct breath alcohol tests be certified annually, which in turn included annual SLD inspections and weekly calibration checks to ensure that the equipment was working properly. Id. ¶ 13. Certifications of Intoxilizer 5000 Breathalyzer machines relate to the routine function of the equipment in order “to insure that it gives accurate readings.” State v. Ruiz, 120 N.M. 534, 538, 903 P.2d 845, 849 (Ct. App. 1995) (quoted authority omitted).

{13} We conclude the Legislature required compliance with the regulations at issue in both Gardner and Onsurez in order to ensure accurate results. Gardner and Onsurez do not support the view that the Legislature intended that compliance with all SLD regulations would be a prerequisite to admission of blood test results. We agree that if an accuracy-ensuring regulation is not satisfied, the result of the test in question may be deemed unreliable and excluded. See State v. Baker, 355 P.2d 806, 809-10 (Wash. 1960) (en banc). When the purpose of administrative rules is to ensure the accuracy of test results and those foundational requirements are not met, the test results may be excluded. People v. Boughner, 531 N.W.2d 746, 747 (Mich. Ct. App. 1995). We are not convinced, however, that strict compliance with all regulatory requirements is necessary for admissibility. We conclude that the Legislature intended, in enacting the 1993 amendments, to mandate the exclusion of test results whenever proof of compliance with a regulation intended to ensure accuracy is missing. Therefore, in determining whether proof of veni-puncture is a prerequisite to the admissibility of blood alcohol reports, we must examine the purpose behind the veni-puncture requirement.

B

{14} Blood is collected by three principal methods: veni-puncture, skin-puncture, and arterial-puncture. Ruth E. McCall & Cathee M. Tankersley, Phlebotomy Essentials, 204 (3d ed. 2003). Veni-puncture is the term used to describe the method of collecting blood from the vein, and “[i]t is the most common way to collect blood specimens for laboratory testing.” Id. at 242. Because arteries are further below the surface of the skin than veins, the vein is considered “the safest and most convenient site from which to draw blood.” 3 Donald H. Nichols & Flem K. Whited III, Drinking/Driving Litigation § 23-4, at 23-4 (2d ed. 1998).

Therefore, under normal conditions, a blood sample is collected using the veni-puncture method. Id.

{15} Skin-puncture, also called derma or capillary puncture, “involves penetrating the capillary bed in the dermis of the skin . . . in order to collect a blood specimen.” McCall & Tankersley, supra, at 332. The skin-puncture method is usually employed in obtaining blood from infants and children. Id. at 339. This method is usually employed because infants and children have a comparatively small blood volume, and “removing the larger quantities of blood typical of venipuncture or arterial puncture can lead to anemia . . . [or even] cause cardiac arrest.” Id.

{16} Skin-puncture is used on adults when there are no accessible veins, to save veins for other procedures, when the subject has clot-forming tendencies, and “for certain bedside and home-testing procedures such as glucose monitoring.” Id. at 338. When using the skin-puncture method, blood is collected from the finger in adults and from the heel in the case of infants. Id. at 332, 339-46. Skin-puncture only yields small volumes of specimen. Id. at 332, 338.

{17} Arterial puncture is the term that describes the method of drawing blood from an artery. Id. at 402. “Because arterial puncture is technically more difficult to perform and potentially more painful and hazardous to the patient than venipuncture, arterial specimens are not used for routine blood tests.” Id. Instead, arterial punctures are primarily performed in order to obtain blood for evaluation of arterial blood gases, which in turn “is used in the diagnosis and management of respiratory disease to provide valuable information about a patient’s oxygenation, ventilation, and acid-base balance.” Id.

{18} It appears that the choice of one blood collection rather than another depends on the identity of the subject and the purpose of extraction, rather than on specific reliability concerns. If, for instance, the blood is to be extracted from an infant or child, skin puncture would be the preferred method of blood collection. Id. at 339. If, on the other hand, an examination of the subject’s oxygenation levels is sought, the arterial puncture method is employed. Id. at 402. If the subject is an adult, “normal conditions” exist “the sample is drawn from a vein.” Nichols & Whited III, supra, § 23-4, at 23-4.

{19} Accordingly, the SLD regulation that veni-puncture be utilized in the collection of samples for blood alcohol level laboratory testing appears to be based on the recognition that veni-puncture is the safest and most convenient way to draw blood from adults. See id. Regulation 7.33.2.12(A)(1) seeks to ensure that the collection of blood samples be done using “the most common” method. McCall & Tankersley, supra, at 242. Additionally, the regulation attempts to avoid blood collection through methods that may be more difficult for the blood drawer and potentially more painful and hazardous for the patient than veni-puncture. See id. at 402.

{20} Furthermore, veni-puncture is not necessarily a more reliable method than arterial-puncture in all circumstances. See Nichols & Whited III, supra, § 23-4, at 23-3 to 23-4. In comparing venous blood extraction versus arterial blood extraction, variances in blood alcohol level readings may occur as a result of the timing of the collection. Id. During the absorption of alcohol, arterial blood has a higher alcohol concentration level. Id. During elimination, however, venous blood has a higher alcohol concentration, and “[d]uring equilibration, venous and arterial blood alcohol concentrations are the same.” Id. at 23-4. Therefore, the reason for collection through veni-puncture is not a higher probability of accuracy. Instead, veni-puncture is the preferred method for collecting blood alcohol samples from adults because extraction is easier, less hazardous, and less painful when conducted through the vein.

{21} Consequently, we do not believe that the purpose behind the veni-puncture requirement is to ensure the accuracy of the blood test results. Therefore, since the veni-puncture provision in Regulation 7.33.2.12(A)(1) is not one that goes to
the accuracy of the test, we conclude that failure to comply with the regulation does not render the results wholly unreliable and does not justify exclusion. Accordingly, we hold that compliance with the “collection by veni-puncture” requirement is not a prerequisite to the admissibility of blood alcohol reports.

C
{22} For these reasons, we hold that the Court of Appeals erred in affirming the exclusion of the blood alcohol report on the basis that the “collection by veni-puncture” requirement was not met. We note that subsequent to trial and after the Court of Appeals filed its opinion we proposed a change in Criminal Form 9-505 NMRA 2004 on the recommendation of the New Mexico Attorney General and the SLD. See Vol. 43, No. 21, N.M. SBB 15-17. The proposed revised form included a form of certification by the person drawing any blood sample that the sample “was collected using the entire contents of a state scientific laboratory division approved blood collection kit in accordance with scientific laboratory division’s approved instructions.” Id. at 16. By order dated August 19, 2004, we have now approved the form effective for cases filed after November 1, 2004. The use of this form is intended to simplify the foundational requirement the State must satisfy in moving the admission of the results of a blood alcohol test. The new form responds to the Court of Appeals’ holding that the State had not laid an adequate foundation for admission of the blood alcohol report because there was no evidence the drawer had followed the relevant regulations. The new form should facilitate the State’s ability to lay an adequate foundation. We next address the question of whether Defendant’s lack of opportunity to cross-examine the nurse who actually drew the blood sample violated his Confrontation Clause rights.

III
{23} We review questions of admissibility of evidence as an exception to the hearsay rule for abuse of discretion. State v. Johnson, 99 N.M. 682, 687, 662 P.2d 1349, 1354 (1983). However, objections to admissibility based on confrontation grounds are separate from those raised under the hearsay rules. Ruiz, 120 N.M. at 536, 903 P.2d at 847. Questions of admissibility under the Confrontation Clause are questions of law, which we review de novo. Id.

A
{24} The New Mexico Rules of Evidence provide for the admission of “reports . . . of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.” Rule 11-803(H) NMRA 2004. The SLD is a division of the New Mexico Department of Health. Defendant’s blood alcohol report, prepared by SLD, qualifies as a “public record.” SLD employees are not police officers nor are they law enforcement personnel. Therefore, blood alcohol reports such as the one at issue here are prepared in a non-adversarial setting. See State v. Christian, 119 N.M. 776, 782, 895 P.2d 676, 682 (Ct. App. 1995). Because these reports are prepared in such a setting, “the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present.” Id. (quoting United States v. Quezada, 754 F.2d 1190, 1194 (5th Cir. 1985)). This Court has previously noted that the exclusion of public records “is aimed at reports of law enforcement personnel engaged in investigative and prosecutorial activities.” State v. Linam, 93 N.M. 307, 308, 600 P.2d 253, 254 (1979). A blood alcohol report is neither investigative nor prosecutorial. Christian, 119 N.M. at 782, 895 P.2d at 682. SLD-prepared blood alcohol reports follow a routine manner of preparation that guarantees a certain level of comfort as to their trustworthiness. Id. Nothing in the record in this case suggests that the routine was deviated from, nor that the procedures or results were unreliable. We conclude that the report in question was admissible as a public record and do not address its admissibility under other hearsay exceptions.

B
{25} Both the United States Constitution and the New Mexico Constitution provide that “[i]n all criminal prosecutions,” the defendant has a right “to be confronted with the witnesses against him.” U.S. Const. amend. VI; N.M. Const. art. II, § 14 (amended 1994). The right of confrontation requires an independent inquiry that is not satisfied by a determination that evidence is admissible under a hearsay exception. State v. Austin, 104 N.M. 573, 574, 725 P.2d 252, 253 (Ct. App. 1985); State v. Martinez, 99 N.M. 48, 51, 653 P.2d 879, 882 (Ct. App. 1982). When an out-of-court statement is offered against a criminal defendant, the prosecution “must satisfy the constitutional requirements of the sixth and fourteenth amendments, as well as any evidentiary rules.” Austin, 104 N.M. at 575, 725 P.2d at 254.
{26} In Ohio v. Roberts, 448 U.S. 56, 65 (1980), modified, Crawford v. Washington, 124 S. Ct. 1354 (2004), the Supreme Court held that the Confrontation Clause constrains the admission of hearsay in a criminal trial in two ways. The first constraint, the rule of necessity, requires that the prosecution “either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.” Id. The second constraint reflects the Confrontation Clause’s “underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.” Id. Therefore, this second aspect requires that the out-of-court statement offered for admission bear adequate “indicia of reliability.” Id. at 65-66 (quotation marks and quoted authority omitted). In New Mexico, our Court of Appeals has applied Roberts to the hearsay exceptions for business and public records. In Austin, the Court of Appeals held that the defendant’s right of confrontation was violated by the admission of computerized records against the defendant. 104 N.M. at 576, 725 P.2d at 255. In Christian, the Court of Appeals again applied Roberts but this time held the defendant’s right of confrontation was not violated by the admission of blood alcohol reports. 119 N.M. at 782-83, 895 P.2d at 682-83.
{27} Crawford has called into question the continued validity of our analysis in Austin and Christian. In Crawford, the Court examined the history of the Confrontation Clause and concluded that “history supports two inferences about [the Clause’s] meaning.” Id. at 1363. The first inference was that the primary concern that the Confrontation Clause sought to remedy involved the admission of “testimonial hearsay.” Id. at 1365. The second inference was “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, and the defendant had had a previous opportunity for cross-examination.” Id. After its historical analysis, the Court concluded that the Roberts test’s “unpardonable vice . . . [was] its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.” Id. at 1371. Therefore, the Court discarded the Roberts test for determining the admissibility of testimonial hearsay, holding instead that “[w]here testimonial evidence is at issue .

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First, we could determine that the federal Confrontation Clause still requires the application of the Roberts test to non-testimonial hearsay evidence. Crawford notwithstanding. Second, we could determine that the New Mexico Confrontation Clause requires the application of the Roberts test to non-testimonial hearsay evidence.

{32} A close reading of Crawford indicates that Roberts still applies to non-testimonial hearsay evidence, though the Court appears split on whether it should. The Court did not overrule prior case law holding that the Confrontation Clause is concerned with more than testimonial evidence. It stated

In White v. Illinois, 502 U.S. 346, 352-53 (1992), we considered [whether the Confrontation Clause applies “only to testimonial statements”] and rejected [that position]. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today.

Crawford, 124 S. Ct. at 1370. In addition, the Court stated that it has “considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial.” Id. at 1368. Finally, the Court did not overrule Roberts, and it did not reply to the dissent’s assertion that it had done so. Id. at 1374 (Rehnquist, C.J., dissenting).

{33} We think this analysis clarifies the Court’s statement near the end of its opinion that

where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

Crawford, 124 S. Ct. at 1374. In other words, Roberts still applies to non-testimonial hearsay, though the Court may later conclude that the Sixth Amendment is not concerned with non-testimonial hearsay. Other state courts have concluded the same. See State v. Rivera, 844 A.2d 191, 202 (Conn. 2004) (concluding that Roberts remains in place for determining the admissibility of non-testimonial hearsay); State v. Blackstock, 598 S.E.2d 412, 423 n.2 (N.C. Ct. App. 2004) (“Roberts remains good law regarding nontestimonial statements.”).

{34} Crawford notwithstanding, the federal Confrontation Clause requires the application of Roberts to non-testimonial hearsay evidence. If the Supreme Court later overrules Roberts, or rules that the federal Confrontation Clause applies only to testimonial evidence, we can determine at that time whether the New Mexico Confrontation Clause requires the Roberts test or another reliability test. Thus, in this appeal we apply Roberts.

C

{35} We analyze Defendant’s Confrontation Clause claim under the Roberts analysis discussed and applied in Austin and Christian. See Horton v. Allen, 370 F.3d 75, 84-85 (1st Cir. 2004) (applying Roberts and holding that non-testimonial statements made in private to an acquaintance were admissible under the firmly rooted state of mind exception and did not violate the Confrontation Clause); Perkins v. State, No. CR-02-1779, 2004 WL 923506, at *6, (Ala. Crim. App. Apr. 30, 2004) (applying Roberts and concluding that an autopsy report was admissible under the business records exception and, as within a firmly rooted exception, satisfied the Confrontation Clause). As noted above, “[t]he [C]onfrontation [C]lause places two conditions on the admission of hearsay evidence: necessity and reliability.” Christian, 119 N.M. at 782, 895 P.2d at 682; see also Austin, 104 N.M. at 575, 725 P.2d at 254. Necessity requires that the prosecution either produce the declarant or demonstrate the declarant’s unavailability for trial. Christian, 119 N.M. at 782, 895 P.2d at 682. However, this requirement is excused if:

(1) the utility of cross-examination as to the particular records is minimal or remote; (2) the other evidence at trial affords defendant an adequate opportunity to test the reliability of the records; or (3) public policy considerations otherwise excuse the prosecution from producing the out-of-court declarant or showing his or her unavailability.

Id. at 782-83, 895 P.2d at 682-83 (quoting Austin, 104 N.M. at 575-76, 725 P.2d at 254-55); accord Roberts, 448 U.S. at 65 n.7 (“A demonstration of unavailability . . . is not always required,” such as when “the utility of trial confrontation [is] so remote that it [does] not require the prosecution to produce a seemingly available witness.”).

{36} In this case, the utility of cross-examination was remote. Defendant wanted
the opportunity to cross-examine the nurse in order to ascertain whether the veni-puncture method of blood collection was employed. However, we have already determined that whether veni-puncture was used or not did not affect accuracy of the result and therefore is not relevant to the admissibility of the report. Accordingly, the lack of relevance of the desired cross-examination rendered its utility remote. Cf. State v. Owens, 103 N.M. 121, 127, 703 P.2d 898, 904 (Ct. App. 1984) (determining that the utility of cross-examination was remote when the stated purpose was not relevant to guilt).

{37} The second condition to admissibility, under Roberts, requires that the evidence in question bear adequate "indicia of reliability." 448 U.S. at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Id. In this case, the blood alcohol report was admissible under the public records exception to the hearsay rule. This exception is firmly rooted. Roberts, 448 U.S. at 66 n.8 ("Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.") (quotation marks and quoted authority omitted); accord, e.g., United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001) ("The public records exception is a firmly rooted exception to the hearsay rule."). This exception’s reliability is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Christian, 119 N.M. at 779, 895 P.2d at 679 (quoting Fed. R. Evid. 803 advisory committee’s note); accord id. at 782, 895 P.2d at 682 (noting that public records are reliable “because they closely follow a routine manner of preparation, in a non-adversarial setting”); see id. (stating in the context of analyzing the Confrontation Clause that “[p]reviously we discussed the indicia of reliability that justified admitting this report into evidence”). Therefore, the reliability of the report can be inferred.

{38} Nevertheless, we will describe the procedure for blood collection that applied in this case and to cases similarly situated. We do so because government employees perform the procedure pursuant to their lawful responsibilities and duties and generate a report for use at trial, a report that is very probative of a defendant’s guilt or innocence. Under these circumstances, we believe it is a valuable exercise to support the inference of reliability from a firmly rooted hearsay exception with a separate reliability analysis of the procedures actually utilized in preparing the report.

{39} The blood collection was performed using a blood kit provided by the SLD to the local police department. Typically, when blood kits are employed “the procedure for sampling blood is predictable and efficient.” Nichols & Whited III, supra, § 23:7, at 23-6. Blood kits “reduce[e] the possibility of contamination without increasing medical risks, [and thus] provide better legal protection to the accused.” Id. at 23-8. Specifically, blood kits generally contain a collection tube, which eliminates the need to transfer the sample from a syringe to a storage container. Id. at 23-7. Therefore, the blood is never exposed to air, which “greatly reduces the possibility of contamination, evaporation, or oxidation” of the sample. Id. Here, Officer Ashley testified the blood kit contained two collection tubes, and he observed that the drawing of the blood was done using the contents of that kit.

{40} Another advantage of using a standardized blood collection kit is that there is less opportunity for the sample to be contaminated with alcohol antiseptics because the swab employed contains no alcohol or other organic solvent. Id. The record here reflects that an iodine (non-alcohol) swab was used during extraction. Furthermore, blood kits also contribute to an “improved preservation of the chain of custody.” Id. Ordinarily, the kits remain sealed until an officer opens one for use on a particular person. Id. at 23-7 through -8. After the blood is drawn, the drawer then hands the tube containing the sample back to the officer. Id. at 23-8. The officer then places the tube inside the kit, which is then sealed and delivered to the lab. Id. The lab analyst receives the kit, breaks the seal, and initials the kit when the test is performed. Id. “Such routine documentation and protection of the identity of the sample more effectively preserves the chain of custody.” Id.

{41} The record indicates that Officer Ashley received a sealed blood kit, proceeded to break the seals, and opened the kit which was then used to extract Defendant’s blood. The record also reflects that after the blood was drawn, the nurse handed the tubes containing the sample back to Officer Ashley who then placed them back inside the kit. Officer Ashley also testified that he sealed the blood kit, which was taken back to the Gallup Police Department and then sent to the SLD. Lucero testified that Defendant’s blood kit was received via mail, and she was the person that received it. She further testified that the blood kit’s seals were intact, she signed her name as the receiving employee, and she performed the blood alcohol test on Defendant’s blood.

{42} Reliability “is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.” Christian, 119 N.M. at 779, 895 P.2d at 679 (quoting Fed. R. Evid. 803 advisory committee’s note). Lucero testified that her duties as a forensic toxicologist included analyzing blood samples for alcohol level. Therefore, the record indicates that Defendant’s blood alcohol results bore “indicia of reliability” in that they were obtained pursuant to a duty to make an accurate record.

{43} Lucero also stated that blood alcohol analysis was part of the regularly conducted business activity of the SLD. She testified that her particular laboratory received 2,000 blood samples for alcohol level analysis annually, there were four scientists at the lab, and each scientist worked on 500 to 600 samples per year. Lucero’s testimony that her laboratory regularly and routinely performed blood alcohol tests in DWI cases is an additional indication of reliability, because it establishes that Defendant’s blood results were obtained by “systematic checking” and by “regularity and continuity.” Christian, 119 N.M. at 779, 895 P.2d at 679 (quoted authority omitted).

{44} There was no evidence that Defendant’s blood alcohol report was prepared differently than any of the numerous other reports similarly situated or that there was any deviation from the normal practice. Moreover, the opponent of admissibility of a report has the burden to show that the report should be excluded for lack of trustworthiness. Anaya v. N.M. State Pers. Bd., 107 N.M. 622, 627, 762 P.2d 909, 914 (Ct. App. 1988). There is no evidence that the blood alcohol report was untrustworthy, and neither party called into question the reliability of the procedures or the results reported. The witnesses the State provided in its offer of proof had knowledge of the procedure and the manner in which Defendant’s blood analysis was performed and were available for cross-examination as to these matters. The State has demonstrated
the report had particularized guarantees of trustworthiness. The State has satisfied the second condition of the Roberts test.

D

{45} We conclude that Defendant’s right of confrontation provided no basis for exclusion of the blood alcohol report. We also conclude that ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is non-testimonial and satisfies the Roberts test.

IV

{46} For the reasons stated above, we hold that the Court of Appeals erred by affirming the exclusion of the blood alcohol report on the basis that the “collection by venipuncture” requirement was not met and that the trial court erred in excluding the report on Confrontation Clause grounds. We therefore reverse the Court of Appeals and remand this matter to the district court for further proceedings consistent with this opinion.

V

{47} IT IS SO ORDERED.

PAMELA B. MINZNER,
Justice

WE CONCUR:
PETRA JIMENEZ MAES, Chief Justice
PATRICIO M. SERNA, Justice
RICHARD C. BOSSON, Justice
EDWARD L. CHÁVEZ, Justice

Certiﬁorari Denied, No. 28,904, Oct. 25, 2004

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-129

Topic Index:
Government: Education and Schools
Statutes: Interpretation

TAOS MUNICIPAL SCHOOLS CHARTER SCHOOL,
Plaintiff-Appellee/Cross-Appellant,
versus
MICHAEL J. DAVIS, New Mexico State Superintendent
of Public Instruction, in his official capacity,
Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
PEGGY J. NELSON, District Judge

RONALD J. VANAMBERG
ROTH,VANAMBERG, ROGERS, ORTIZ,
FAIRBANKS & YEPA, L.L.P.
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OPINION
LYNN PICKARD, Judge

{1} Taos Municipal Schools Charter School (TCS), which consists of two facilities located ten miles apart, each housing different grades of students, sought classification as two “public schools” so that it could secure additional funds that the State Department of Public Education (the State) offers to small schools. The State decided not to classify TCS as two “public schools,” and TCS filed suit. The district court granted a declaratory judgment stating that TCS is two “public schools,” each of which is entitled to the additional funds. The court also issued an injunction ordering the State to pay TCS the funds to which it would be entitled when its program costs were recalculated. The State appealed this decision. TCS cross-appealed the district court’s decision not to issue a writ of mandamus and its decision not to award pre-judgment interest. Holding that TCS is not two “public schools” for funding purposes, we reverse the district court’s decision. Accordingly, we need not decide the issues that TCS raises on cross-appeal.

FACTS AND PROCEEDINGS

{2} TCS is a charter school that is part of the Taos Municipal School District (the District). In its agreement with the District (the charter), TCS set out its plan for administration and curriculum. The charter consistently refers to TCS as a school, as opposed to multiple schools. TCS has one chief administrator, one governing council, and one curriculum.

{3} As TCS moved toward opening, it encountered difficulty in finding one facility that would provide adequate space for grades kindergarten through eighth. TCS decided to operate in two facilities at two different sites about ten miles apart. The Randall Lane site houses grades kindergarten through fourth. The Arroyo Seco site houses grades five through eighth.

{4} When TCS initially contacted the State to determine the budget, a state employee suggested that the two facilities would be eligible for additional funds because each would be treated as a separate school, with each meeting the criteria for the size adjustment factor in funding calculations. Later, the State informed TCS that the two facilities would not be considered two separate schools and that TCS would not meet the criteria for the adjustment. This resulted in an estimated 25% decrease in TCS’s entire budget. Although TCS initially pursued an estoppel claim based on these two different representations, it does not seek review of the estoppel claim on appeal.

{5} TCS filed suit in the district court seeking a declaratory judgment that TCS was eligible for the size adjustment, a writ of mandamus to force the State to make the adjustment, an injunction to compel the State to pay the school the additional funds from the size adjustment, and pre-judgment interest on those funds. After the parties filed cross-motions for summary judgment and the State filed a motion to dismiss, the district court held a hearing. The district court
decided that TCS was two public schools for purposes of funding calculations, and it issued a declaratory judgment and injunction against the State. It did not award pre-judgment interest.

DISCUSSION

1. Jurisdiction

{6} The State argues for the first time on appeal that the district court had no jurisdiction to hear TCS’s claim for declaratory relief because there was no waiver of sovereign immunity. We review jurisdictional issues de novo. Weddington v. Weddington, 2004-NMCA-034, ¶ 13, 135 N.M. 198, 86 P.3d 623. In this case, however, neither party has thoroughly briefed this issue. Because a decision on this jurisdictional issue is not necessary in light of our ruling on the merits in favor of the State, we will address the merits of the district court’s declaration and leave the complex and interesting issue of jurisdiction to another day.

2. Is TCS Two “Public Schools” for Funding Purposes?

{7} This case requires us to interpret the statutes governing public school funding and charter schools. We review issues of statutory interpretation de novo. Bd. of Comm’rs of Doña Ana County v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 19, 134 N.M. 283, 76 P.3d 36. Our goal is to ascertain legislative intent, which is primarily indicated by the plain language of the statute. Id. When the statute’s language is clear and unambiguous, we give the statute its plain meaning. Id.

a. Charter Schools

{8} The Public School Code, codified at Chapter 22 of our statutes, includes the 1999 Charter Schools Act. NMSA 1978, §§ 22-8B-1 to -15 (1999, as amended through 2003). Charter schools fulfill a variety of goals, including the facilitation of innovative teaching styles, the creation of new opportunities for teachers, and the increased interaction of schools and the communities they serve. Section 22-8B-3. Charter schools are responsible for their own operation and are largely held to the same standards as other public schools. Section 22-8B-4.

{9} Individuals or groups who wish to start a new charter school put together a detailed application including the school’s mission, governing structure, educational plan, and budget. Section 22-8B-8. The local school board has the authority to approve applications for charter schools in its area. Section 22-8B-6(A). After a local school board approves a charter school, the approved application becomes a contract, known as a charter, that contains all the agreements that the board and the charter school have made.

Section 22-8B-9.

b. Public School Funding Formula

{10} The Public School Code addresses funding using two broad categories: operational funding and capital funding. The Public School Finance Act, NMSA 1978, §§ 22-8-1 to -45 (1967, as amended through 2004), governs the operational funding of New Mexico’s public schools. Charter schools receive the funds for their operational costs through the same allocation process as other public schools. See § 22-8B-13.

{11} Generally, public schools must fund capital expenditures from other sources. Section 22-8-41(A) (prohibiting school districts from spending operational funds on building acquisition or construction unless they meet certain criteria). Public schools often finance capital expenditures through bonding. See NMSA 1978, §§ 22-19-2 and -3 (1967). Additional capital funding is governed by the Public School Capital Outlay Act, NMSA 1978, §§ 22-24-1 to -9 (1975, as amended through 2004); see also NMSA 1978, §§ 22-25-1 to -10 (1975, as amended through 2004) (Public School Capital Improvements Act). Schools may also get short term capital financing through the School District Bond Anticipation Notes Act. NMSA 1978, § 22-19B-2 (2002). A charter school must either raise its own money for start-up capital costs or negotiate for funds or facilities with the local school board. Section 22-8B-4(D), (G). The legislature has also created a Charter Schools Stimulus Fund that provides money for start-up costs and building renovation costs. Section 22-8B-14. After a charter school is established, the Public School Capital Outlay Act requires local school boards to take their charter schools’ continuing capital needs into consideration. Section 22-24-5(B)(9)(f).

{12} A key feature of New Mexico’s public school operational funding scheme is the state equalization guarantee distribution, which is a formula through which the State apportions federal and local revenue for schools equitably among the state’s school districts. Section 22-8-25; see also Bd. of Educ. for Carlsbad Mun. Sch. v. State Dep’t of Pub. Educ., 1999-NMCA-156, ¶ 2, 128 N.M. 398, 993 P.2d 112. The Secretary of Public Education, who was known as the State Superintendent of Public Instruction when this litigation commenced, works with local school boards to calculate how many “program units” each school district has using a formula detailed further below. Section 22-8-25(D); see also § 22-8-12.1 (explaining the information that local school boards provide in the process). The legislature assigns a dollar value per program unit. See § 22-8-2(1). The State gives each school district its share of funds based primarily on how many program units it has. Section 22-8-25(D).

{13} The State calculates program units using a formula set out in the statutes. The calculation begins with basic program units, which are tabulated by multiplying student enrollment in each of four age brackets by the cost differential factor for that bracket. Section 22-8-20. To this base figure, the State adds a number of special factors, such as special education program units or bilingual multicultural program units. Section 22-8-21 (special education program units); Section 22-8-22 (bilingual multicultural education program units). The factor at issue in this case is the size adjustment program unit. Section 22-8-23.

{14} In smaller schools, fixed operational costs like curriculum development and administration must be distributed among fewer students. See Lewis D. Solomon, Edison Schools and the Privatization of K-12 Public Education: A Legal and Policy Analysis, 30 Fordham Urb. L.J. 1281, 1299 (2003) (describing economies of scale in school operation). Because the cost differential factor used to calculate basic program units is based on estimated operational costs per student, the size adjustment factor addresses the issue that it is essentially more expensive to educate a child in a small school than in a larger one. It does so by giving additional program units to “approved public school[s]” with small student bodies. Section 22-8-23. For elementary and junior high schools, a school must have fewer than 200 total enrolled, qualified students to be eligible. Id.; § 22-8-2 (definitions).

c. Classification of TCS

{15} Because TCS offers only elementary and junior high grades and its total enrollment at both locations is greater than 200 students, it is only eligible for size adjustment program units if it is classified as two approved public schools. See § 22-8-23. The Public School Finance Act does not define “approved public school” or “public school.” See § 22-8-2. When some words in a statute are not defined, we give them their ordinary meaning unless a different legislative intent is ascertainable. Smith v. Bd. of County Comm’rs, 2004-NMCA-001, ¶ 11, 134 N.M. 737, 82 P.3d 547. “[W]here several sections of a statute are involved, they must be read together so that all parts are given effect.” Id. (internal quotation marks and citation omitted).
“[P]ublic school” is defined in the “General Provisions” section of the Public School Code as that part of a school district that is a single attendance center in which instruction is offered by one or more teachers and is discernible as a building or group of buildings generally recognized as either an elementary, middle, junior high or high school or any combination of those and includes a charter school.]

NMSA 1978, § 22-1-2(L) (2003). TCS argues that its Arroyo Seco and Randall Lane locations are each a “single attendance center,” and thus each is a public school. We disagree that this is the end of the inquiry. The Code does not define the term “single attendance center,” and we find this term to be ambiguous and without a commonly understood meaning. TCS’s multiple assertions that it is two “single attendance center[s]” begs the question. Furthermore, we must also take into consideration the plain language in TCS’s own charter, which repeatedly refers to it as a “school” rather than two schools.

When the meaning of a statute is ambiguous, we “consider the policy implications of the various constructions of the statute.” State v. Rivera, 2004-NMSC-001, ¶ 14, 134 N.M. 768, 82 P.3d 939. In doing so, we examine the history, background, and overall context of the statute. Id. ¶ 12. Our main goal is always to ascertain legislative intent. Id. ¶ 12.

As explained above, the legislature’s intent in providing a size adjustment is to account for the increased per-student operational costs in smaller schools primarily associated with administration and curriculum. In the present case, TCS points to no operational costs that are higher as a result of its decision to locate in two facilities. Because both locations of TCS share one administration and one curriculum, it appears that TCS is not incurring the very costs that provide the rationale for the size adjustment program units.

Instead, TCS indicates that its capital costs are higher, including rent and facility maintenance. As a result, TCS argues, it has been forced to use operational funds for capital expenditures, resulting in operational cutbacks. TCS appears to argue that, because the Public School Finance Act predated the existence of charter schools, the legislature did not think about how charter schools would cover capital costs. However, it appears that the legislature did specifically consider this issue in developing its funding policies. Thus, the legislature provided charter schools with the options of financing their initial capital costs through negotiation with the local school board, application for funds from the Charter Schools Stimulus Fund, or through private fund raising. See §§ 22-8B-4 and -14. TCS availed of itself of $123,000 in start-up funding that was available for capital expenses. We do not agree that there is a legislative void in the area of charter school capital start-up funding that can justify the use of operational funds for other purposes.

We also believe that the legislature did not intend for a charter school to be able to become more than one “public school” without State approval. We find two major sources of support for this notion. First, the State is responsible for ensuring that no more than 15 charter schools start up each year statewide. Section 22-8B-11(B). If a school like TCS can become two public schools without State approval, we are uncertain as to the effect that would have on the growth of charter schools that the legislature apparently intended to control quite carefully. Furthermore, public schools must obtain permission from the State before establishing, closing, or otherwise reconfiguring a school, and there is a requirement that notice of such changes be given in a timely fashion when they are expected to affect the equalization guarantee. 6.30.2.10(F) NMAC (2003). This regulation makes no exception for charter schools, and it lends credence to the State’s argument that TCS needed to go through some process to obtain approval from the State, in addition to obtaining approval from the local school board, before it could become two schools.

Second, the statutes provide for charter school districts, which consist of multiple charter schools. NMSA 1978, §§ 22-8C-1 to -7 (1999) (Charter School District Act). It appears that the district court analogized TCS to a school district in making its decision. However, TCS is not a charter school district; nor has it taken any steps to become one.

TCS argues at length that its non-traditional grade configuration, with grades kindergarten through four at the Randall Lane site and grades five through eight at the Arroyo Seco site, should not determine whether it is one school or two. We agree that grade configuration is not the sole factor in the analysis, especially because charter schools are meant to be innovative and non-traditional. However, our reasons for determining that the State properly classified TCS as one “public school,” set forth above, do not rely on the grade grouping.

TCS also appears to argue that Section 22-8B-13, stating that a charter school will receive “not less than ninety-eight percent of the school-generated program cost,” entitles TCS to 98% of all of its costs. However, this argument avoids the central question. “[P]rogram cost[s]” are defined as the number of program units to which a school district is entitled multiplied by the per unit dollar amount that the legislature assigns. Section 22-8-2(I). A school is only entitled to size adjustment program units if it meets the statutory criteria, and TCS is only entitled to size adjustment program units if it is defined as two schools. A charter school has no right to additional funding if capital expenditures or any other expenditure becomes so great that its actual costs far exceed its “program costs.”

Start-up funding, and particularly start-up capital funding, has been an obstacle that charter schools have faced across the country. Judith Johnson & Alex Medler, The Conceptual and Practical Development of Charter Schools, 11 Stan. L. & Pol’y Rev. 291, 294 (2000). As it stands, our legislature has chosen to make the costs and negotiations associated with new charter school facilities part of the charter schools’ rights and responsibilities. Section 22-8B-4. If this proves to be a difficulty for charter schools, it is for the legislature to address, as it did with the Charter Schools Stimulus Fund. In doing so, the legislature must balance charter schools’ needs against the ever-growing demands of all public schools, which in turn compete for scarce governmental resources against a myriad of other programs. The answer is not to reinterpret the Public School Finance Act in a way that undermines the very decisions and priorities that the legislature clearly established.

In light of our holding that the district court erred in granting declaratory judgment for TCS, we do not need to address the issues related to the injunction. We also do not need to address any of the issues on cross-appeal, including the writ of mandamus and pre-judgment interest.

CONCLUSION

We reverse the district court’s order granting declaratory and injunctive relief to TCS.

IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

CELIA FOY CASTILLO, Judge
OPINION

CYNTHIA A. FRY, Judge

{1} Plaintiff Systems Technology, Inc. (STI) appeals an order requiring STI to participate in an existing arbitration of a dispute with Bryan E. Hall and Stacey L. Knutson-Hall (the Halls). STI and the Halls disagree about whether another party, Arlin Pennington, is also bound by the contract that contains the arbitration clause. The district court referred part of the dispute to arbitration, including the issue of the identity of the parties to the arbitration agreement.

{2} The issues on appeal primarily concern the interpretation of the arbitration agreement. In the course of analyzing these issues, this Court questioned whether the order appealed from is a final order. See Khalsa v. Levinson, 1998-NMCA-110, ¶ 12, 125 N.M. 680, 964 P.2d 844 (explaining that whether an order is final “is a jurisdictional question that an appellate court is required to raise on its own motion”). We instructed the parties to file briefs addressing this concern, but only the Halls filed a brief. Although STI asked for and was granted an extension of time within which to file its brief, our records show that STI never filed a brief.

{3} We conclude the order appealed from is not a final order. We are unable to determine whether the district court intended to certify its order for interlocutory appeal, or to certify it as a final judgment pursuant to Rule 1-054(B)(1) NMRA. Whatever the court’s intention, we conclude that (1) if the court intended to certify the order for interlocutory appeal, STI’s application for leave to file such an appeal was untimely; and (2) if the court intended certification under Rule 1-054(B)(1), it abused its discretion. We therefore dismiss the appeal.

BACKGROUND

{4} This controversy stems from a purchase and sale agreement for the construction of a log cabin home on a parcel of land belonging to the Halls. Litigation began when “Systems Technology Inc., d/b/a Enchanted Log Homes” filed a complaint for foreclosure of a mechanic’s lien on the home. STI’s complaint averred that it had completed construction of the log cabin, and that the Halls refused to pay the balance due under the agreement. STI’s complaint also named M & T Mortgage Corporation (M & T) as a defendant and sought a determination that its lien had priority over M & T’s mortgage on the home.

{5} In response to the complaint, the Halls moved to dismiss the foreclosure action on the ground that STI did not timely request arbitration of the dispute as required by the purchase and sales agreement. The agreement’s arbitration clause provided that “[a]ny controversy or claim arising out [sic] of or related to this contract, or the breach thereof, shall be settled by arbitration” and also that the “[c]laimant must initiate the Demand for Arbitration within fifteen (15) calendar days of the date the dispute arises.”

{6} The district court denied the motion to dismiss, ordered the Halls to answer the complaint, and also directed the Halls to submit an arbitration demand for any counterclaims they intended to pursue against STI. In January 2003, the Halls submitted a demand for arbitration. The demand for arbitration is not part of the record on appeal; however, the parties appear to agree that although STI was the named party that initiated the foreclosure proceeding against the Halls in the district court, the Halls named “Arlin M. Pennington d/b/a Enchanted Log Homes” in their demand for arbitration and statement of counterclaims. There is no order in the record referring the matter to arbitration.

{7} In May 2003, STI filed a motion to stay arbitration. In the motion, STI also sought a determination of who is a proper party to the lawsuit. The Halls’ response to that motion set out their contention that STI is a “shell corporation with insufficient assets to satisfy any judgment the Halls might obtain.” According to the Halls, they sought to arbitrate claims against Pennington because “that is the party with whom the Halls believe they contracted.”

{8} On June 13, 2003, the district court entered the order from which STI has tried to appeal. The order is entitled “Order Denying Plaintiff’s Motion to Stay Arbitration and Compelling Arbitration,” but the body of the order does not say anything about compelling arbitration; it simply states that STI’s motion to stay arbitration should be denied and STI should be added as a respondent to the AAA arbitration involving Hall v. Pennington d/b/a Enchanted Log Homes. The order also contains certification language that we discuss in more detail below.

{9} STI immediately filed a notice of appeal from the order. Seventeen days later, STI filed an application for interlocutory appeal in this Court as an “alternative” to its notice of appeal. We denied the application and STI filed a motion to reconsider, to which it attached an August 13, 2003 letter from the district court to the parties.
indicating that the district court was under the impression its June 13, 2003 order was a final order. Shortly thereafter, this Court assigned this case to the general calendar and the parties filed their briefs.

DISCUSSION

{10} The June 13, 2003 order from which STI appeals contains ambiguous language apparently attempting to permit an immediate appeal. On the one hand, the order states that “this matter involves a controlling question of law as to which there is substantial ground for difference of opinion, [and] that an immediate appeal from this Order may materially advance the ultimate termination of this litigation,” which is the language required to certify an order for interlocutory appeal. NMSA 1978, § 39-3-4(A) (1999). On the other hand, the order also states “there is no just reason for delay of the entry of this Order,” which is the language certifying an order for immediate appeal as of right under Rule 1-054(B)(1).

But see Khalsa, 1998-NMCA-110, ¶ 18 (observing that courts have generally interpreted Rule 1-054(C)(1) (since renumbered as Rule 1-054(B)(1)) “to require both an express determination that there is no just reason for delay and an express direction for entry of judgment” (emphasis added)). We first address the finality of the order in question and we then consider in turn the effect of each type of certification.

Finality of the June 13, 2003 Order

{11} “An order is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.” In re Estate of Griego, 2000-NMCA-022, ¶ 13, 128 N.M. 676, 997 P.2d 150. Here it appears that the hierarchy of liens as between STI and M & T was not referred to arbitration, and therefore it remained for the district court to decide. As the Halls point out in their supplemental brief, this issue cannot be determined until the arbitration has resolved several preliminary matters, including whether there was an agreement between the Halls and STI, and whether STI has a valid mechanics lien.

{12} In addition, the parties’ actions following entry of the June 13, 2003 order suggest that they viewed the order as non-final. For example, on June 13, 2003, the same day as the order denying the motion to stay arbitration, the district court granted the Halls’ motion to extend a discovery deadline and to vacate a trial setting. On June 23, 2003, the Halls filed a motion for summary judgment on Plaintiff’s foreclosure complaint. All of this activity suggests that the district court and the parties believed there were issues that remained for the district court to decide.

{13} Although we do not have the benefit of a supplemental brief from STI, it appears STI would rely on the August 13, 2003 letter from the district judge that STI attached to a pleading filed in this Court. In that letter the district judge stated, “In light of the fact that I believe I ordered the whole case to arbitration when STI was added to the arbitration order, I believe the direct appeal to the Court of Appeals has divested me of jurisdiction to proceed.” This letter is inconsistent with the June 13, 2003 order, which included language consistent with an attempt to certify a non-final order for appeal. In addition, the letter is not in the record filed in this Court. See State v. Reynolds, 111 N.M. 263, 267, 804 P.2d 1082, 1086 (1990) (“Matters outside the record present no issue for review.”). Therefore, because we cannot rely on the August 13, 2003 letter, and because there appear to be substantive issues as yet undecided by the district court, we conclude that the June 13, 2003 order was not final for purposes of appeal. We now turn to a consideration of the district court’s attempts to certify the order for appeal.

STI’s Application for Interlocutory Appeal Was Untimely

{14} When a district court certifies an order for interlocutory appeal, the appealing party must seek permission from the appellate court for leave to file an appeal by filing an application within fifteen days of entry of the order in district court. Rule 12-203(A) NMRA. Assuming the district court intended to certify its order for interlocutory appeal, STI did not file an application for interlocutory appeal in this Court until June 30, 2003, seventeen days after the filing of the district court’s order. “Neither the statute nor rules authorize this court to entertain late applications for interlocutory appeals or extensions of time for filing late applications.” Candelaria v. Middle Rio Grande Conservation Dist., 107 N.M. 579, 581, 761 P.2d 457, 459 (Ct. App. 1988). Moreover, this Court denied STI’s application on July 30. We therefore conclude that STI’s attempt to perfect an interlocutory appeal was unavailing.

The District Court Abused Its Discretion In Certifying the Order Under Rule 1-054(B)(1)

{15} If the district court properly certified its June 13, 2003 order pursuant to Rule 1-054(B)(1), then STI’s notice of appeal filed on the same day was timely. See Rule 12-201 NMRA (stating that notice of appeal must be filed within thirty days of the order appealed from). Rule 1-054(B)(1) provides that “when more than one claim for relief is presented in an action [. . .] the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay.” We review a certification under this rule for abuse of discretion. Khalsa, 1998-NMCA-110, ¶ 20. A court abuses its discretion “when the issues decided by the judgment are intertwined, legally or factually, with the issues not yet resolved, or when resolution of the remaining issues may alter or revise the judgment previously entered.” Id.

{16} Here the issues referred to arbitration—which, according to the Halls, include (1) whether there was an agreement between the Halls and STI, (2) whether STI was properly licensed, (3) whether STI has a valid mechanics lien, (4) the amount of any lien, and (5) whether STI is entitled to foreclose its lien—are intertwined with the issue remaining in the district court, which is the priority of M & T’s mortgage. For example, if the arbitrator concludes that STI has a valid lien subject to foreclosure, then the district court will have to determine, as between STI and M & T, whose lien has priority. Thus, if we were to decide the issues raised in the present appeal, we may well have to consider a second appeal when the arbitration is completed and the district court rules on the pending issue before it. In light of our strong policy disfavoring piecemeal appeals, Valley Improvement Association v. Hartford Accident & Indemnity Co., 116 N.M. 426, 429, 863 P.2d 1047, 1050 (1993), we hold the district court abused its discretion in certifying its June 13, 2003 order under Rule 1-054(B)(1).

CONCLUSION

{17} Having determined that the June 13, 2003 order is not a final, appealable order, we hereby dismiss this appeal.

{18} IT IS SO ORDERED.

CYNTHIA A. FRy, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
IRA ROBINSON, Judge

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Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2004-NMCA-131

STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
ROLAND H. BRANHAM,
Defendant-Appellee.
No. 24,309 (filed: Sept. 30, 2004)

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
JERRY H. RITTER JR., District Judge

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Assistant Appellate Defender
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for Appellee

OPINION

JAMES J. WECHSLER, CHIEF JUDGE

{1} The State of New Mexico appeals the district court’s grant of Defendant’s motion to suppress evidence because Defendant was driving on a road within the Mescalero Apache Indian Reservation and was stopped by a New Mexico state police officer. The State argues that the district court erred in concluding that there was no agreement between the Bureau of Indian Affairs (BIA) and/or the Mescalero Apache Tribe and the New Mexico state police authorizing the state police to patrol the Mescalero Reservation. In the alternative, the State argues that even if there was no agreement authorizing the state police to patrol the Mescalero Reservation, the state police officer who arrested Defendant conducted a citizen’s arrest. Because we conclude that the officer was without authority to enforce Mescalero tribal traffic ordinances and because the State did not preserve its remaining argument, we affirm.

Factual and Procedural History

{2} The facts are not in dispute. On August 31, 2002, New Mexico State Police Officer Gerard Silva was patrolling Highway 70 in the Mescalero Apache Indian Reservation. He observed Defendant driving 45 mph in a 35 mph zone on Mescalero 6, which is not within a state right-of-way and is not maintained by the state. Officer Silva turned on his emergency lights and pursued Defendant, who pulled over a short time later on Highway 244, a state road not located on the Mescalero Reservation. Officer Silva observed Defendant “staggering” and “swaying” as he emerged from his vehicle. The events following the stop resulted in Defendant being charged with DWI, driving with a suspended or revoked license, two counts of resisting, evading, or obstructing an officer, and one count of speeding.

{3} Defendant filed a motion to suppress evidence, arguing that Officer Silva’s initial traffic stop was unlawful because, as a New Mexico state police officer, Officer Silva did not have authority to enforce Mescalero Apache traffic ordinances. At the hearing on the motion, Officer Silva testified that he believed he had “full, unfettered authority” to conduct traffic stops within the reservation. Officer Silva also testified that he patrolled the Mescalero Reservation at the request of the Mescalero tribal police. Officer Silva stated that his captain had been asked by the tribe to have state police officers patrol the reservation in order to augment tribal police, who were shorthanded.

{4} The State also called Chief Morgan Troy Bolen as a witness. Chief Bolen testified that he was a BIA officer and additionally acted as Chief of Police for the Mescalero Tribe. Chief Bolen stated that after he became Chief of Police in 1999, he determined that he did not have a sufficient number of officers to patrol the reservation. He therefore entered into an informal verbal agreement with the New Mexico state police and the Otero County Sheriff’s Office. According to Chief Bolen, the agreement was an “open invitation” to the state and county officers to patrol highways on the Mescalero Reservation. Under the agreement, when a state police officer makes a stop on the reservation, the officer must determine whether the individual is a Native American. If the person is Native American, the individual is cited to tribal court; if not, the individual is cited to state court. Chief Bolen also testified that the tribal council members and tribal courts were aware of, and did not object to, the informal verbal agreement.

{5} On cross-examination, Chief Bolen acknowledged that as a BIA officer he was an employee of the federal government, and, based on 25 U.S.C. §§ 2802, 2803 (1990), the BIA had authority to patrol the reservation. Chief Bolen also acknowledged that he was unaware of any authority authorizing the informal agreement he described. At the conclusion of his testimony, the State argued that Officer Silva had authority to stop Defendant on tribal land because (1) the State has jurisdiction over victimless crimes by non-Indians, (2) there was sufficient evidence of an informal agreement between the state police and the Mescalero Tribe conveying authority to Officer Silva, and (3) the agreement did not infringe on the authority of the tribe. Defendant argued that evidence should be suppressed because neither Congress nor the Mescalero Tribe expressly authorized state police officers to patrol highways on reservation land and because there was no legal authority for the informal agreement.

{6} The district court took the issue under advisement and asked the parties to brief the applicability of 25 U.S.C. § 2804 (2000) and whether it authorized the informal agreement upon which the State relies. Because the State indicated that there might possibly be a written form of the agreement, the district court allowed the State two weeks to produce the agreement in written form. The State never produced the agreement, when a state police officer makes a stop on the reservation, the officer must determine whether the individual is a Native American. If the person is Native American, the individual is cited to tribal court; if not, the individual is cited to state court.
ten agreement and that Officer Silva was not commissioned to enforce ordinances of the Mescalero Tribe. As a result, the district court concluded that Officer Silva “was without authority to stop” Defendant and granted Defendant’s motion to suppress.

**Authority to Enforce Tribal Traffic Ordinances**

{7} The State argues that the district court erred in concluding that there was no agreement between the BIA and/or the Mescalero Tribe and the New Mexico state police authorizing the state police to patrol the reservation. It contends that there was an actual verbal agreement made by Chief Bolen, which was accepted implicitly by the Mescalero Tribe. Because the State never produced a written agreement, the issue in this case is whether a verbal agreement between the BIA and/or the Mescalero tribal police and the New Mexico state police, and a lack of objection to such an agreement on the part of the Mescalero tribal leaders, is legally sufficient to confer upon the New Mexico state police the authority to enforce tribal traffic ordinances on tribal land.

{8} In reviewing the district court’s grant of Defendant’s motion to suppress, “[w]e review the district court’s ruling . . . to determine whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party.” State v. Cline, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785. We review the legal issue of whether the district court correctly determined that a verbal agreement is insufficient to confer authority upon the New Mexico state police under a de novo standard of review. See State v. Nieto, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (observing that application of law to facts is subject to de novo review).

{9} The State does not cite any authority generally giving the New Mexico state police jurisdiction or authority to enforce tribal laws on tribal lands. However, § 2804(a) authorizes the BIA to enter into agreements with state law enforcement personnel for the purpose of aiding in enforcement of federal or tribal law within a reservation. Similarly, the New Mexico Mutual Aid Act authorizes “mutual aid agreements” for law enforcement purposes between state agencies and tribal governments or the BIA. NMSA 1978, § 29-8-3 (1971) (Mutual aid agreements).

{10} Section 2804(a) states in pertinent part:

> The Secretary may enter into an agreement for the use . . . of

the personnel or facilities of a Federal, tribal, State, or other government agency to aid in the enforcement or carrying out in Indian country of a law of either the United States or an Indian tribe that has authorized the Secretary to enforce tribal laws.

We agree with the State that Chief Bolen, as a BIA employee, ostensibly had the authority to enter into an agreement contemplated by § 2804. See 25 U.S.C. § 2803(8) (2000) (stating that the Secretary of Interior may authorize employees of the BIA to “when requested, assist . . . any Federal, tribal, State, or local law enforcement agency in the enforcement or carrying out of [tribal law]”). The question remains as to whether § 2804 authorizes verbal agreements. We do not believe that it does.

{11} Our duty, when interpreting federal statutes, is to give effect to the intent of the legislative body. See v. Cleve, 1999-NMSC-017, ¶ 15, 127 N.M. 240, 980 P.2d 23. In this instance, we endeavor to give effect to the intent of Congress. Great Am. Ins. Co. v. Brown, 86 N.M. 336, 339, 524 P.2d 199, 202 (Ct. App. 1974) (Hendley, J., specially concurring). When doing so, we may find guidance in federal case law interpreting federal statutes. See id. at 340, 524 P.2d at 203 (relying on “principle[s] of federal statutory interpretation” to aid in construing a federal statute which granted the United States exclusive jurisdiction over Indians residing on Indian land).

{12} There is no express language within § 2804, and the State cites to no authority, indicating that Congress intended to grant the BIA authority to enter into verbal or implicit agreements. See N.M. Cattle Growers Ass’n v. United States Fish & Wildlife Serv., 248 F.3d 1277, 1281 (10th Cir. 2001) (stating that an appellate court’s primary task in construing statutes is to determine congressional intent by using traditional tools of statutory interpretation beginning with the plain language of the law); United States v. Hess, 194 F.3d 1164, 1170 (10th Cir. 1999) (stating that when construing a federal statute, a court will “give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive” (internal quotation marks and citation omitted)).

{13} It makes sense that Congress intended agreements entered into under § 2804 be written. Such agreements involve the law enforcement obligations and relationships of federal, state, and tribal governmental entities. We would not expect that Congress would intend that existing obligations and relationships be modified without the formality of a writing for the protection of each of the entities. We also would expect that Congress would intend that issues of jurisdiction be formally set forth because of the effect of jurisdictional boundaries on the rights of citizens subject to the laws of the interested government entities. Cf. Chem. Weapons Working Group, Inc. v. United States Dep’t of the Army, 111 F.3d 1485, 1490 (10th Cir. 1997) (stating that statutes are not to be construed in a manner that would lead to an irrational result). Therefore, because of the parties involved and the subject matter of an agreement under § 2804, we cannot accept the State’s expansive interpretation of the statute without a clearer indication of congressional intent. Cf. DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1388 (10th Cir. 1990) (declining to imply that Congress intended that a statute be applied retroactively when Congress chose to remain silent on that issue).

{14} Moreover, the State’s position is not supported under New Mexico law. The State characterizes the verbal agreement between the New Mexico state police and the Mescalero Tribe as an “implicit agreement.” The Mutual Aid Act states:

> Any state, county or municipal agency having and maintaining peace officers may enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act [29-8-1 NMSA 1978], with respect to law enforcement, provided any such agreement shall be approved by the agency involved and the governor.

Section 29-8-3. Similar to our interpretation of § 2804, we believe that because the Mutual Aid Act addresses governmental agencies and their exercise of law enforcement jurisdiction, the legislature intended that a mutual aid agreement be written. Moreover, by adding the limiting language that mutual aid agreements must be approved by both the agency involved and the governor of the State of New Mexico, we believe that the legislature contemplated a written agreement. Otherwise, there would be too much opportunity for misconstruction. We must be mindful of our duty when interpreting statutes to “find that interpretation which can most fairly be said to be imbedded in the statute in
the sense of being most harmonious with its scheme and with the general purpose of the legislature.” Smith Mach. Corp. v. Hesston, Inc., 102 N.M. 245, 247, 694 P.2d 501, 503 (1985) (internal quotation marks and citation omitted).

{15} The legislature’s intent with regard to the validity of verbal mutual aid agreements can also be discerned from looking to a statute similar to the Mutual Aid Act. See State v. Ogden 118 N.M. 234, 243, 880 P.2d 845, 854 (1994) (stating that “[s]tatutes on the same general subject should be construed by reference to each other, the theory being that the court can discern legislative intent behind an unclear statute by reference to similar statutes where legislative intent is more clear”) (citation omitted). NMSA 1978, § 29-1-11(B) (2002) governs “cross commissioning” of peace officers. The statute states in pertinent part:

The chief of the state police is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff’s department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the chief of the state police and the tribe or pueblo or the appropriate federal official.

Id. It is inconsistent for the legislature to require a written agreement for the issuance of a cross commission under Section 29-1-11 between state law enforcement and Indian tribal police officers and not require a written agreement for mutual aid agreements under Section 29-8-3. Cf. State v. Herrera, 86 N.M. 224, 226, 522 P.2d 76, 78 (1974) (“We will not construe statutes to achieve an absurd result.”).

{16} Officer Silva initially stopped Defendant for speeding on the Mescalero Reservation. Because Officer Silva did not have authority to enforce Mescalero tribal traffic ordinances, the district court did not err in granting Defendant’s motion to suppress.

Unpreserved Issue

{17} The State argues for the first time on appeal that even if there is no agreement authorizing the state police to patrol the Mescalero Reservation, Officer Silva had authority because he was conducting a citizen’s arrest. Because the State did not raise this issue below, it was not preserved and we do not consider it. See State v. Vandenburg, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19 (“To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.” (internal quotation marks and citation omitted)); State v. Javier M., 2001-NMSC-030, ¶ 8, 131 N.M. 1, 33 P.3d 1 (same).

Conclusion

{18} The district court did not err in granting Defendant’s motion to suppress. Accordingly, we affirm the district court’s decision.

{19} IT IS SO ORDERED.

JAMES J. WECHSLER,
Chief Judge

WE CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge
Unfair Practices Act claims against FIE. We reverse the district court’s dismissal of Plaintiffs’ insurance bad faith, Insurance Code, and New Mexico Unfair Practices Act claims against FIE. Plaintiffs appealed.

BACKGROUND

{1} Defendant Farmers Insurance Company of Arizona (FICA) issued an automobile insurance policy to Plaintiffs. Under the facts assumed to be true, Defendant Farmers Insurance Exchange (FIE) directed, handled, administered, and adjusted all claims submitted by FICA’s policy holders. Plaintiffs sued FICA, FIE, Farmers Group, Inc., and branch claims manager, Michael Idehara, for breach of contract, insurance bad faith, breach of fiduciary duties, violation of the Trade Practices and Frauds Act, NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2003), contained in the New Mexico Insurance Code (the Insurance Code), and violation of the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -24 (1967, as amended through 2003) (the UPA). Early in the proceedings, the claims against Farmers Group, Inc. and Idehara were dismissed by stipulation.

{2} Plaintiffs filed a claim for vehicle damage with their insurer, FICA. Dissatisfied with the way the claim was handled, Plaintiffs sued FICA, FIE, Farmers Group, Inc., and branch claims manager, Michael Idehara, for breach of contract, insurance bad faith, breach of fiduciary duties, violation of the Trade Practices and Frauds Act, NMSA 1978, §§ 59A-16-1 to -30 (1984, as amended through 2003), contained in the New Mexico Insurance Code (the Insurance Code), and violation of the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -24 (1967, as amended through 2003) (the UPA). Early in the proceedings, the claims against Farmers Group, Inc. and Idehara were dismissed by stipulation.

DISCUSSION

Mootness and Collateral Estoppel Issues

{3} FIE moved for dismissal of Plaintiffs’ claims against it pursuant to Rule 1-012(B)(6). Although it admittedly adjusted claims submitted by FICA policyholders, FIE argued that it could not be liable to Plaintiffs because it was not a party to Plaintiffs’ insurance contract. Plaintiffs asserted that they needed the opportunity to conduct discovery to determine the details of the relationship between FICA and FIE.

{4} The district court dismissed all of Plaintiffs’ original claims against FIE, but it allowed Plaintiffs to file an amended complaint adding claims against FIE and FICA under theories of joint venture, civil conspiracy, and aiding and abetting. In its order dismissing the original claims, the court stated that “[i]n New Mexico, under Chenoweth, 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976), there can be no claim for bad faith in the absence of a contract between an insured and an insurer.” The court certified its order as final pursuant to Rule 1-054(B) NMRA. In Plaintiffs’ amended complaint, allegations were added concerning the relationship between FICA and FIE, claiming that FIE through “agreements, contracts, pattern and practice between FICA and FIE . . . directs, handles, administers and adjusts insurance claims submitted by policyholders of [FICA]” and that FIE was liable for all misconduct alleged in the complaint under theories of “agency, contracts, agreements, common law and statute.”

{5} Plaintiffs appealed from the order of dismissal. While this appeal was pending, the remaining claims against FIE asserted in the amended complaint, namely, joint venture, civil conspiracy, and aiding and abetting, along with all claims against FICA, were tried to a jury. Although we have no record of what occurred in the district court after Plaintiffs filed this appeal, the parties tell us that the jury returned verdicts in favor of FICA. Plaintiffs have not appealed from the verdicts.

Mootness and Collateral Estoppel Issues

{6} FIE argues that because certain remaining claims against FIE and FICA were tried to a jury with no result adverse to FIE and FICA, Plaintiffs’ appeal is moot and also that Plaintiffs cannot pursue this appeal because various rulings at trial barred their claims under the doctrine of collateral estoppel. Without a record of what occurred in the district court after dismissal of Plaintiffs’ original claims against FIE, we will not attempt to resolve these questions. However, because we reverse the district court’s dismissals of certain of Plaintiffs’ claims against FIE, we will not attempt to resolve these questions. However, because we reverse the district court’s dismissals of certain of Plaintiffs’ claims against FIE, we will not attempt to resolve these questions. However, because we reverse the district court’s dismissals of certain of Plaintiffs’ claims against FIE, we will not attempt to resolve these questions. However, because we reverse the district court’s dismissals of certain of Plaintiffs’ claims against FIE, we will not attempt to resolve these questions.
against whom the doctrine [of collateral estoppel] is used has had a full and fair opportunity to litigate.”

Standard of Review and Treatment as a Rule 1-012(B)(6) Dismissal

{7} FIE’s motion to dismiss relied solely on Rule 1-012(B)(6) and the district court presumably determined that Plaintiffs failed to state a claim upon which relief could be granted without considering facts outside the complaint. There is nothing in the record indicating that the district court relied on exhibits submitted by Plaintiffs in opposition to FIE’s motion to dismiss. We therefore review the district court’s decision under the standard applicable to Rule 1-012(B)(6) dismissals. See Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 114 N.M. 676, 678-79, 845 P.2d 770, 772-73 (1992) (reviewing summary judgment pursuant to the standard of review applicable to Rule 1-012(B)(6) dismissals where the movant “essentially sought, and the court’s order granted, dismissal . . . for failure to state a claim upon which relief could be granted”). Whether the district court properly dismissed the claims against FIE is a question of law, which this Court reviews de novo. Valles v. Silverman, 2004-NMCA-019, ¶ 6, 135 N.M. 91, 84 P.3d 1056.

{8} We accept as true “[a]ll well-pleaded factual allegations” and we resolve all doubts “in favor of the sufficiency of the complaint.” Id. (internal quotation marks and citation omitted). Disregarding Plaintiffs’ exhibits and looking only at Plaintiffs’ allegations, we determine “whether the plaintiff[s] might prevail under any state of facts provable under the claim.” N.M. Life Ins. Guar. Ass’n v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991). In this case, we will consider the allegations in both the original and amended complaints regarding the relationship between FIE and FICA. The allegations in the amended complaint had to do with “the conduct, transaction or occurrence set forth” in the original complaint. Rule 1-015(C) NMRA. They therefore relate back to the date of the original complaint. Id.

Claim Against FIE for Bad Faith

{9} Plaintiffs alleged that FIE through agency, contract, or agreement with FICA “directs, handles, administers and adjusts insurance claims submitted by policyholders of [FICA],” and that FIE and FICA were “obligated to promptly, timely, thoroughly investigate, evaluate and pay and/or indemnify Plaintiffs for their rental vehicle and for the actual cash value of Plaintiffs’ total loss vehicle.” Plaintiffs further contended that FIE and/or FICA “continually refused” to resolve the claim fairly and timely, and thereby breached the duty of good faith and fair dealing.

{10} FIE argues that Chavez v. Chenoweth, 89 N.M. 423, 429, 553 P.2d 703, 709 (Ct. App. 1976), precludes recognition of a claim for bad faith against anyone other than a party to the insurance contract, which in this case was FICA. We disagree. In Chavez, the plaintiff was involved in a car accident with State Farm’s insured. The plaintiff sued State Farm, claiming that, through its agent, it had assured the plaintiff that State Farm would compensate her fully for all her damages. Id. In affirming the district court’s dismissal of the claim, this Court said that “[t]he ‘bad faith dealing’ rule applies between an insurer and insured.” Id. Thus, Chavez addressed only the relationship between an insurer and the insured party suing the insured. The Court in Chavez was not faced with a bad faith claim as is asserted in this case. See Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (“[C]ases are not authority for propositions not considered.”) (internal quotation marks and citation omitted)). Here the issue is whether the bad faith dealing rule applies between an insured and an entity that handles the insurance function of claim determination, a function inherent in the insurance transaction.

{11} An insurance contract is not always treated as an ordinary commercial contract. See Cary v. United of Omaha Life Ins. Co., 68 P.3d 462, 466 (Colo. 2003) (en banc) (“[I]nsurance contracts are not ordinary commercial contracts.”). The relationship between the insured and the insurer is special, and the insurer has a duty of good faith and fair dealing. In Cary the Court, reversing summary judgment in favor of the insurer’s parent company, held that the entity owed a duty of good faith and fair dealing to the insured, even where no privity of contract existed between the two, because the entity “had primary control over benefit determinations, assumed some of the insurer’s risk of loss, undertook many of the obligations and risks of an insurer, and had the power, motive, and opportunity to act unscrupulously in the investigation and servicing of insurance claims.” Id. at 463. We find the rationale of Cary persuasive.

{12} In Cary, an entity that did not issue the insurance policy “fulfilled virtually all of the functions normally performed by an insurance company in processing claims and determining whether to deliver insurance benefits.” Id. at 468. Furthermore, the entity “had a significant financial incentive to delay payment of benefits or coerce [the insured] into a diminished settlement.” Id. The court in Cary held that the entity owed a duty of good faith and fair dealing to the insured, even where no privity of contract existed between the two, because the entity “had primary control over benefit determinations, assumed some of the insurer’s risk of loss, undertook many of the obligations and risks of an insurer, and had the power, motive, and opportunity to act unscrupulously in the investigation and servicing of insurance claims.” 

{13} Although the rationales differ some, other cases have reached a similar result under analogous circumstances. See Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793, 797-98 (10th Cir. 1995) (applying Oklahoma law in reversing summary judgment in favor of an insurance administrator on a bad faith claim where the administrator “undertook many of the obligations and risks of an insurer”), cited with approval in Campbell v. Am. Int’l Group, Inc., 976 P.2d 1102, 1109 (Okla. Civ. App. 1999) (reversing dismissal of bad faith claim against insurer’s parent company where there was evidence that the parent played a significant role in the handling of insureds’ claims); Gatecliff v. Great Republic Life Ins. Co., 821 P.2d 725, 730-31 (Ariz. 1991) (in banc) (reversing summary judgment in favor of parent company that managed claims of subsidiary insurer and determined insureds’ premium and eligibility for benefits on grounds that, even though the parent company was not a party to the contract, it could be liable for bad faith cancellation of benefits); Sparks v. Republic Nat’l Life Ins. Co., 647 P.2d 1127, 1137-38 (Ariz. 1982) (in banc) (holding proper an instruction on joint and several liability as to the entity handling the investigation and payment of claims, and determining joint venturers both owed common duty to act in good faith). Further, a series of cases involving various Farmers entities have indicated that under certain circumstances, a related managerial entity can be liable under the duty of good faith and fair dealing even where no privity of contract existed.

{14} We hold that Plaintiffs allege sufficient facts to pursue a claim against FIE
for breach of the duty of good faith and fair dealing. We do not see any sound reason why New Mexico should not permit pursuit of such a claim where, as is suggested by the pleadings, an entity related to or pursuant to agreement with the insurer issuing the policy has control over and makes the ultimate determination regarding the merits of an insured’s claim. The reasons why courts have recognized the special and unique relationship between insurer and insured include the inherent lack of balance in and adhesive nature of the relationship, Bourgeois, 117 N.M. at 439, 872 P.2d at 857, as well as the quasi-public nature of insurance and the potential for the insurer to unscrupulously exert its unequal bargaining power “at a time when the insured is particularly vulnerable.” Wolf, 50 F.3d at 797. An insured is particularly vulnerable at the point following a loss when the insured makes a claim for the loss. See Cary, 68 P.3d at 467. An entity that controls the claim determination process may have an incentive similar to that of an unscrupulous insurer to delay payment or coerce an insured into a diminished settlement. See id. at 468. The entity acts as an insurer and is therefore bound within the special relationship created through the insurance contract. See id. at 469 (stating that “[t]he application of a strict privity of contract requirement . . . would allow [entities] to act with impunity in the service of their own self-interest, in disregard of the underlying principles upon which the special relationship exception to the privity requirement exists”). An insured’s expectations of good faith handling and ultimate determination of his or her claim for benefits by the insurer extends no less to an entity that both handles and determines the claim than to the insurer issuing the policy. “Absent the prospect of damages for bad faith breach, [the entity performing claims determination] has no incentive to pay in good faith.” Id. at 468.

{15} We conclude that Plaintiffs stated a claim for breach of the duty to act in good faith, and that, under some state of facts, relief might possibly be granted. Because the matter before us is one of first impression, we do not fault the district court in following the usual doctrine of lack of contractual privity. We do not, at the Rule 1-012(B)(6) dismissal stage, venture any guess as to whether Plaintiffs can provide evidence sufficient to survive summary judgment. But it is clear to us that Plaintiffs are entitled to go forward with discovery in an attempt to establish relationships and other circumstances that would permit them to proceed on the merits of their claim of breach of the implied covenant of good faith and fair dealing.

Claim Against FIE for Breach of Contract

{16} At oral argument, Plaintiffs conceded that they have no colorable claim for breach of the insurance contract except under an alter ego theory. FIE contends that Plaintiffs waived any claim of alter ego because they failed to plead the theory in either the original complaint or the amended complaint. We agree. Even the most generous view of Plaintiffs’ allegations compels the conclusion that Plaintiffs did not give FIE notice of a claim of alter ego. See Garcia v. Coffman, 1997-NMCA-092, ¶ 11, 124 N.M. 12, 946 P.2d 216 (“Under our rules of notice pleading, it is sufficient that [the] defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim[.]” (internal quotation marks and citation omitted)).

Claim Against FIE Under the Insurance Code

{17} Plaintiffs contend that the district court erred in dismissing their claim against FIE for violation of the trade practice and frauds portion of the Insurance Code. See §§ 59A-16-1 to -30. We agree. Section 59A-16-20 states:

the following practices with respect to claims, by an insurer or other person, knowingly committed or performed with such frequency as to indicate a general business practice, are defined as unfair and deceptive practices and are prohibited:

. . .

E. not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured’s claims.

Pursuant to Section 59A-16-1, Section 59A-16-20 applies to adjusters as well as insurers. See § 59A-16-1.

{18} Plaintiffs’ original complaint alleged that FIE, as an adjuster, contracted with a company that FIE knew had a reputation for offering “values lower than a fair actual cash value or replacement value of an insured’s total loss vehicle[,]” and that FIE offered a lower than fair value for Plaintiffs’ vehicle. Under the state of facts thus alleged in the complaint, Plaintiffs may be able to show that FIE offered lower than fair settlements with such frequency as to “indicate a general business practice.” § 59A-16-20. Thus, they have stated a claim. See Valles, 2004-NMCA-019, ¶ 18.

Claim Against FIE Under Unfair Practices Act

{19} Plaintiffs also contend that the district court erred in dismissing their claim against FIE for violation of the UPA. See §§ 57-12-1 to -24. We agree. In the original complaint, Plaintiffs alleged:

Defendant [FIE] is a foreign corporation which directs, handles, administers and adjusts all claims submitted by policyholders of [FICA], including [Plaintiffs’] claim. . . . As such, [FIE] is fully liable for any and all errors and misconduct with respect to Plaintiffs’ insurance claim.

. . . Consistent with the terms and conditions of the insurance policy . . . FIE was obligated to . . . indemnify Plaintiffs in an amount of money such that Plaintiffs could purchase a like kind and comparable vehicle in their local marketplace.

. . . [Defendants] offered the sum of $2,100 to resolve Plaintiffs’ total loss claim, representing that this amount of money was sufficient to allow the Plaintiffs to purchase a like kind and comparable vehicle in the local marketplace.

. . . [FIE’s] failure and refusal to promptly provide the correct insurance coverage to Plaintiffs pursuant to Plaintiffs’ insurance contract . . . was willful . . . and failed to provide the insurance coverage contracted for.

Further, Plaintiffs alleged that, at the time of Plaintiffs’ claim, FIE had a contract and an ongoing relationship with a loss valuation company that FIE knew offered “lower than a fair actual cash value or replacement value of an insured’s total loss vehicle.”

{20} Section 57-12-2(D) defines an unfair trade practice as:

a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes . . . :
Thus, a plaintiff must prove four elements in order to establish a violation of the UPA: (1) the defendant made a false statement, (2) the defendant made the statement in connection with the “sale . . . of . . . services” and knew that the statement was false, (3) the defendant made the statement in the regular course of trade or commerce, and (4) the statement was one which “may, tends to, or does[] deceive or mislead any person.” Stevenson v. Louis Dreyfus Corp., 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991) (internal quotation marks and citations omitted).

[21] In this case, the service at issue is the provision of insurance coverage with indemnification after a loss. Assuming the facts as pleaded are true, Plaintiffs could show that the false statement was that $2,100 was “sufficient to allow the Plaintiffs to purchase a . . . comparable vehicle.” In support of the second element, Plaintiffs alleged that FIE knew the statement was false by alleging that FIE knew the valuation company offered lower than fair values to settle the claim, Plaintiffs could certainly have been more clear, and citation omitted). Further, while Plaintiffs could certainly have been more clear, the facts as pleaded put FIE on notice that Plaintiffs were claiming that FIE’s duty to indemnify Plaintiffs for their loss was found in the contract between FIE and FICA. See Valles, 2004-NMCA-019, ¶¶ 18, 24.

CONCLUSION

[23] We reverse the district court’s dismissal of Plaintiffs’ original claims against FIE for breach of the duty of good faith and fair dealing, and for violations of the Insurance Code and the UPA. We remand with instructions to the district court (1) to reinstate those claims, and (2) to consider whether the reinstated claims are now moot or subject to collateral estoppel, provided that FIE renews its arguments below. We affirm the court’s dismissal of the claim for breach of contract.

[24] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

JAMES J. WECHSLER, Chief Judge

CYNTHIA A. FRY, Judge (specially concurring)

CYNTHIA A. FRY, Judge (Specially Concurring)

[25] I concur in the result of the majority opinion. I also agree with the rationale supporting the result, except that portion of the opinion discussing Plaintiffs’ claims against FIE for bad faith. I write separately to explain how I would use a different analysis to reverse the dismissal of Plaintiffs’ bad faith claims.

[26] I have two problems with the majority’s approach. First, because there is already an established legal theory that would permit Plaintiffs to sue FIE for bad faith, the majority has unnecessarily created a new cause of action. Second, the new cause of action is too amorphous, and the majority provides no practical guidance to practitioners and the district courts as to how the new claim is to be pleaded and proved. I briefly address each issue in turn.

[27] Instead of resorting to cases from other jurisdictions that have fashioned a totally new cause of action, we need search no further than the common law legal theory of delegability of performance. See generally E. Allan Farnsworth, Contracts §§ 11.10-11.11 (2d ed. 1990). The Restatement (Second) of Contracts sets out the framework for the cause of action that arises from this theory, where, for example, the insurer has delegated to another entity some of its obligations under the insurance contract. Under those circumstances, the cause of action consists of two elements: (1) the existence of a “delegation agreement” between the insurer and another entity whereby one delegates to the other obligations owed to the insured under the contract of insurance; and (2) evidence that the insured is an intended beneficiary of the delegation agreement. See Restatement (Second) of Contracts § 318 (1981) (outlining the requirements for a delegation agreement); § 302 (defining an intended beneficiary); § 304 (explaining that a promise in a delegation agreement can create a duty in the delegate). If both elements are proven, the insured may assert a bad faith claim against either entity that is party to the delegation agreement. See Jessen, 108 N.M. at 629, 776 P.2d at 1248 (explaining that the duty of good faith is a non-delegable duty).

[28] This brings me to my second point: the new cause of action created by the majority has only vague perimeters. It seems to require that the target entity have some sort of undefined relationship with an insurer and some indefinite ability to control and determine the resolution of the insured’s claim.

Majority Opinion, ¶ 14. The entity may or may not have some financial incentive to act contrary to the insured’s best interests. Id. The majority does not clarify what precisely a plaintiff has to prove about the target entity in order to prevail. The majority has painted a new cause of action with the broadest of brush strokes and left it to litigants and district courts to struggle to define the cause of action while worrying that they might be guessing wrong.

[29] In reversing the dismissal of Plaintiffs’ bad faith claims, I would simply rely on the common law theory of delegability of performance and point the litigants and the district court to the Restatement for clear guidance on the requirements for proving such a claim.

CYNTHIA A. FRY, Judge
OPINION

LYNN PICKARD, JUDGE

{1} Wife appeals the district court’s order dissolving her marriage, dividing property, and awarding child support. Husband cross-appeals. The parties raise numerous arguments, most of which we address in a memorandum opinion accompanying this formal opinion. In this opinion, we address five issues, all related to attorney fees. Wife contends that the district court had jurisdiction to consider whether to award her attorney fees from the couple’s California child custody case. While we agree, we hold that the provision of her California attorney fees is not mandatory, and we further hold that any error in the district court’s view of its jurisdiction can be viewed as harmless under the circumstances of this case. Wife also argues that the district court should have included all of her custody-related attorney fees as part of the New Mexico case. We disagree, again under the circumstances of this case. Additionally, Wife argues that the district court should have ordered Husband to pay all of her New Mexico attorney fees, while on cross-appeal, Husband argues that he should have been permitted to take discovery on Wife’s California attorney fee and that the district court should have credited him for his partial payment of Wife’s attorney fees. We affirm the district court’s decisions on these issues as well.

FACTS AND PROCEEDINGS

{2} Husband and Wife married in California in July 1991. In 1994, they moved to Arizona. In 1999, they relocated to Socorro, New Mexico, where Husband was raised and where his family owns a holding company that owns the First State Bank of Socorro. The relationship deteriorated, and in July 2000, Wife moved to her former home of California while seven months pregnant. Wife alleged that Husband had threatened her and her mother and that she had discovered that Husband had been secretly investing community assets into separately held accounts and ventures.

{3} Wife filed for legal separation in California in July 2000. Husband filed for dissolution of marriage in New Mexico about two weeks later. In September 2000, their child (Child) was born in California. Husband successfully moved to quash all proceedings in California except for the custody case because the California court did not have personal jurisdiction over him. Husband then filed for determination of custody in New Mexico.

{4} The California court entered an order making an initial determination of child custody jurisdiction in California, but allowing Husband to raise inconvenient forum grounds. The California court later granted Husband’s motion to transfer the case to New Mexico on inconvenient forum grounds and ordered the establishment of a travel fund to facilitate Wife’s participation in the litigation. Wife appealed to the California Court of Appeals.

{5} Based on its inconvenient forum decision, the California superior court transferred the case to New Mexico, where the New Mexico district court assumed jurisdiction in all matters and immediately awarded Wife interim child and spousal support. Then, in April 2001, the California Court of Appeals issued an opinion holding that California was the appropriate jurisdiction for the custody case and directing the California superior court to issue an order vacating the transfer of the case to New Mexico. From this point on, two separate cases proceeded, with child custody litigation occurring in California and litigation pertaining to the divorce, property, and support occurring in New Mexico.

{6} The facts pertaining to attorney fees are as follows. Both parties requested attorney fees on multiple occasions. In June 2001, citing the need “to equalize the monies paid to the parties’ New Mexico attorneys for attorney’s fees and costs,” the district court ordered Husband to pay $50,000 to Wife. In October 2001, the court ordered:

Father[‘]s attorney fee loan and Mother[‘]s California attorney fees will need to be taken care of by liquidating assets. Short term (one or two months) this will be done with the Christmas Club Funds as the [court-appointed expert] directs, mid term shall be as determined by the Court at the next scheduled hearing . . . . [1]In the mid term sum will also need to be included funds for ongoing attorney fees and expert witness fees.

In November 2001, the court ordered monthly payments on Wife’s California attorney fees to be made from a fund established to finance litigation-related travel, child visitation, and payment of taxes. It also ordered that money from that fund be used to pay the court-appointed expert. In October 2002, the district court decided that it would not consider California attorney fees as part of the New Mexico case. From the record, it appears that the district court did not use its sanctioning authority to award attorney fees at any time.

{7} The case was originally heard by Judge James Loughren, and when he stepped down from the bench, he continued to hear the case as a special master for Judge Nan Nash. In January 2003, the special master produced a report on attorney fees. The report found that New Mexico attorney fees totaled $173,000 for Husband and $115,600 for Wife. It listed California attorney fees as $150,369 for Husband and $134,700 for Wife, but stated that New Mexico did not
have jurisdiction to consider the California attorney fees. The report labeled each party’s attorney fee as separate debt, making no distinction between California and New Mexico fees.

The report also reviewed the parties’ actions over the course of litigation, concluding that “[n]either party so clearly prevailed, nor acted with clean hands such that either is entitled to extraordinary relief or sanctions as against the other.” The special master found that Husband had paid Wife $34,902.39 pursuant to earlier orders requiring him to pay part of Wife’s attorney fees and that because this was paid in an attempt to equalize fees, Husband was not entitled to reimbursement or credit for this amount. Finally, considering a series of factors discussed in more detail below, the special master recommended that “the parties should each bear their own remaining attorney fees and no further allocation of attorney fees between the parties than what took place during the case is warranted.”

After Husband and Wife litigated every aspect of property, support, and fees, the district court entered an order dissolving the marriage in December 2002. Following an additional two months of litigation over the final division of property, the district court adopted the special master’s reports on property division and attorney fees. The present appeals followed.

**DISCUSSION**

There are three main sources for the district court’s power to award attorney fees to a party in a divorce. First, the district court “may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his [or her] case.” NMSA 1978, § 40-4-7(A) (1997). We have held that “[i]f there is economic disparity between the parties in a domestic relations case, such that one party may be inhibited from preparing or presenting a claim, then the trial and appellate courts should be liberal in exercising their discretion to award attorney fees to discourage any potential judicial oppression.” Bustos v. Gilroy, 106 N.M. 808, 812, 751 P.2d 188, 192 (Ct. App. 1988).

Second, Rule 1-054(E) NMRA instructs parties to make a motion for attorney fees. In the domestic relations area, Rule 1-127 NMRA provides that:

A motion for attorney fees pursuant to Rule 1-054 NMRA shall include an itemization of time expended and an affirmation that the fees claimed are correctly stated and necessary. In awarding fees, the court shall consider relevant factors presented by the parties, including but not limited to:

A. disparity of the parties’ resources, including assets and incomes;
B. prior settlement offers;
C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and
D. success on the merits.

Rules 1-054(E) and -127 appear to implement Section 40-4-7(A) and the cases decided under it. See, e.g., Gilmore v. Gilmore, 106 N.M. 788, 792, 750 P.2d 1114, 1118 (Ct. App. 1988).

The district court may issue sanctions, including attorney fees, when a party files a pleading or motion without information and belief that there is good ground to support it or if it is interposed for delay or otherwise litigates in bad faith. Rule 1-011 NMRA; see State ex rel. State Highway & Transp. Dep’t v. Baca, 120 N.M. 1, 4-5, 896 P.2d 1148, 1151-52 (1995); Rivera v. Brazos Lodge Corp., 111 N.M. 670, 675-76, 808 P.2d 955, 960-61 (1991).

In New Mexico, contrary to Wife’s argument, the courts’ inherent powers are limited to these situations of bad faith, and courts have statutory powers, rather than inherent powers, to award attorney fees in divorce cases. See N.M. Right to Choose/ NARAL v. Johnson, 1999-NMSC-028, ¶¶ 9, 127 N.M. 654, 986 P.2d 450; Seipert v. Johnson, 2003-NMCA-119, ¶¶ 9-10, 134 N.M. 394, 77 P.3d 298.

1. Jurisdiction to Consider California Attorney Fees

Wife argues that the district court should have considered whether to order Husband to pay her California attorney fees. The district court refused to consider the California fees because it did not believe that jurisdiction was proper. We review the legal issue of whether the court had jurisdiction de novo. See Weddington v. Weddington, 2004-NMCA-034, ¶ 13, 135 N.M. 198, 86 P.3d 623 (involving subject matter jurisdiction).

Under California law, a court with proper child custody jurisdiction cannot award attorney fees associated with the custody determination unless it also has personal jurisdiction over the party to be charged with fees. In re Marriage of Malak, 227 Cal. Rptr. 841, 844-45 (Ct. App. 1986). This mirrors the law of New Mexico. See Worland v. Worland, 89 N.M. 291, 296, 551 P.2d 981, 986 (1976). Furthermore, we are not aware of whether specific provisions in California’s statutes might give a California court the power to order an individual over whom it does not have personal jurisdiction to pay attorney fees when said provisions are met. In any case, it appears that these provisions are not applicable in this case. See Cal. Fam. Code § 3427(e) (1999) (providing for attorney fees when it appears to the court that California was clearly an inconvenient forum); Cal. Fam. Code § 3428(c) (1999) (providing for attorney fees when California declines jurisdiction due to the improper conduct of one of the parties).

Thus, the district court was incorrect to conclude that it should not consider California attorney fees on the ground that proper jurisdiction to determine attorney fees in the custody case was in California. With personal jurisdiction over both Wife and Husband and subject matter jurisdiction over the division of their property, the New Mexico court is the proper forum for the issue.

To the extent that Wife argues that the award of her California attorney fees is mandatory under the New Mexico child custody statutes, we disagree. The costs section of the current statute on child custody jurisdiction mandates that attorney fees shall be awarded to the prevailing party unless such an award would be “clearly inappropriate.” NMSA 1978, § 40-10A-312(a) (2001). Moreover, a transitional provision states, “A motion or other request for relief made in a child-custody proceeding . . . is governed by the law in effect at the time the motion or other request was made.” NMSA 1978, § 40-10A-403 (2001). However, although New Mexico now follows the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), NMSA 1978, §§ 40-10A-101 to -403 (2001), the child custody law governing this case is the now-repealed Child Custody Jurisdiction Act (CCJA), NMSA 1978, §§ 40-10-1 to -24 (1981, repealed 2001), as this case was filed in 2000. See N.M. Const. art. IV, § 34 (providing that no legislation may affect a pending case). Thus, Wife’s arguments pertaining to the application of the UCCJEA to this case are not valid. Furthermore, we also reject Wife’s argument that the UC-CJEA suggests legislative intent to require attorney fees be paid to the prevailing
parties in a child custody dispute, and that we should apply this intent to this case. We will not require a result to be accomplished indirectly when the result would be constitutionally impermissible directly. Cf. Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 12, 133 N.M. 661, 68 P.3d 901 (holding that an insurer will not be allowed to do indirectly what it is precluded from doing directly).

17 Wife’s California attorney fees are also not mandatorily assigned to Husband under the CCJA, Section 40-10-8(G) states that when the forum selected by one of the parties in a child custody dispute is clearly inconvenient, the court may make the party who commenced the action pay the other party’s attorney fees. This section gives the district court discretion to award attorney fees, but does not make it mandatory. See Montano v. Los Alamos County, 1996-NMCA-108, ¶ 5, 122 N.M. 454, 926 P.2d 307 (setting out the canon of statutory construction that the term “may” in a statute is permissive, while “shall” is mandatory). In addition, this provision would not apply to Wife’s fees in this case because it only applies to cases in which child custody jurisdiction was decided on inconvenient forum grounds. Here, the California court ultimately decided jurisdiction as a matter of law.

18 Therefore, we hold that the district court had jurisdiction to consider an award of attorney fees for the California litigation under Section 40-4-7(A) and the Rule 1-127 guidelines set forth above. Wife argues in these circumstances, we must remand to the district court for it to exercise the discretion that it apparently believed that it did not have. See Sandoval v. Chrysler Corp., 1998-NMCA-085, ¶ 12, 125 N.M. 292, 960 P.2d 834 (stating that the “failure of the trial judge to exercise his discretion is, in itself, reversible error”). However, there is nothing in the record indicating that the district court would have exercised its discretion to make an award of attorney fees for the California litigation. To the contrary, as will be demonstrated later in this opinion, the district court exercised its discretion, which discretion we uphold, to require the parties to bear their own attorney fees. Nonetheless, as error was committed, we remand on this issue for the district court’s consideration, in the exercise of its reasoned discretion, of whether to award attorney fees to Wife in connection with the California custody matter. However, nothing in this opinion is intended to require the district court to hold a hearing unless it, in its discretion, chooses to consider an award of the California attorney fees.

2. Child Custody Attorney Fee Debt as Community Debt

19 Wife next argues that all of her attorney fee debt arising from the New Mexico custody dispute should have been labeled as community debt. The threshold question of whether an item is community or separate debt is a legal issue that we review de novo. Arnold v. Arnold, 2003-NMCA-114, ¶ 6, 134 N.M. 381, 77 P.3d 285.

20 Community debt is defined as “a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.” NMSA 1978, § 40-3-9(B) (1983). Separate debt does not include all debts incurred while separated, but does include “unreasonable” debt. Section 40-3-9(A). Unreasonable debt is debt that is acquired by one spouse while living apart that does “not contribute to the benefit of both spouses or their dependents.” NMSA 1978, § 40-3-10.1 (1983). Thus, it appears that the district court’s basis for classifying attorney fees as separate debt must have been a determination that both parties’ attorney fees were “unreasonable debt,” although the district court made no such explicit finding.

21 We have held that a wife’s attorney fee debt incurred in a child custody dispute and while she was living apart from her husband was community debt because it benefitted the community’s dependents. Bustos, 106 N.M. at 810-11, 751 P.2d at 190-91. In that case, the attorney fees were due to an out-of-state attorney. Id. at 811, 751 P.2d at 191. There was also a finding that it was in the best interest of the children to reside with the wife, which was the outcome of the work by the attorney whose fees were held to be community debt. Id.

22 The present case differs significantly from Bustos. Here, the child custody dispute actually took place in a different jurisdiction, and it appears that much of the fees were incurred in a dispute over jurisdiction. The district court made no findings with respect to the best interests of Child or the role of the child custody litigation in meeting Child’s needs. Therefore, Wife’s success on the merits of the jurisdictional issue in the California case is not dispositive of the issue before us, nor is the fact that she was awarded primary custody of Child.

23 In addition, the special master made findings, adopted by the district court, that the parties’ total attorney fees approached $600,000, which exceeded the value of the community estate, much of which was unnecessary and was due to conduct of which the court disapproved. In addition, provision was made, early in the case, for tens of thousands of dollars to be paid to Wife for her attorney fees. Under these circumstances, we believe that the district court could reasonably have ruled that the remainder of Wife’s attorney fees, while stipulated to be reasonable in amount for the work done, was unreasonably incurred and therefore would not be considered community debt. See Gonzales v. Lopez, 2002-NMCA-086, ¶ 27, 132 N.M. 558, 52 P.3d 418 (indicating that appellate court will not second guess district court’s weighing of evidence).

3. Husband’s Discovery on Wife’s California Attorney Fees

24 Husband argues that the trial court erred in failing to afford him an opportunity to engage in discovery related to Wife’s California attorney fees. Given that the district court had decided that it could not hear the matter of Wife’s California attorney fees, the ruling was appropriate. Husband alleges that he wanted to engage in discovery for the purpose of requesting an award of fees from Wife. However, we are upholding the district court’s decisions on attorney fees, and Husband has not raised an issue alleging error in the failure to award him fees. Moreover, based on the ruling we are upholding, it is clear that no amount of discovery would lead the district court to shift Husband’s attorney fees, that were already disproportional to Wife’s in the California litigation, to Wife.

4. Wife’s New Mexico Attorney Fees

25 Wife argues that the district court should have awarded her attorney fees in its discretionary capacity because of the economic disparity between the parties, because she was successful on the merits of the child custody jurisdictional issue, because the final property division gave her more than her initial settlement offer, and because Husband used community funds to pay his attorney fees. The trial court’s decision on whether to award attorney fees under its Rule 1-127 or Section 40-4-7(A) authority is reviewed for an abuse of discretion. Bustos, 106 N.M. at 812, 751 P.2d at 192. “An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.” Sims v. Sims, 1996-NMCA-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. “When there exist reasons both supporting and detracting from a trial court
decision, there is no abuse of discretion." 

{26} Reviewing the Rule 1-127 factors, the considerations in Section 40-4-7(A), and the district court’s findings, we hold that the trial court did not abuse its discretion in deciding not to award any additional fees. With regard to economic disparity, although there was some evidence of economic disparity, substantial evidence, when considering all of the appropriate factors, supported the district court’s denial of additional fees. Wife was imputed with income of $5,000 per month, and received a total estate of $320,491. This was significantly less than Husband’s estate, and this factor weighed in Wife’s favor.

{27} However, we review the district court’s decision bearing in mind all of the factors it was required to consider. See _Fitzsimmons v. Fitzsimmons_, 104 N.M. 420, 429, 722 P.2d 671, 680 (Ct. App. 1986) (“While it would appear that husband’s income was more than twice that of the wife, financial disparity in terms of wages is only one factor which the court may consider.”).

The special master’s report states that any economic disparity did not prevent either side from making its case. The voluminous record bears this out, indicating that Wife made frequent motions to the court, fully briefed responses to all of Husband’s motions, and made regular appearances before the court. We disagree that the failure to award attorney fees left Wife an unfair choice between capitulating to Husband’s “superior economic resources” or incurring tremendous legal debt. The record indicates that Husband did not file a disproportionate share of the motions or raise a disproportionate share of the issues in the case.

{28} With regard to the other factors, the record supports the district court findings. Wife and Husband each made a series of settlement offers, none of which was accepted, such that this factor did not weigh heavily for either party. Both parties expended vast sums in litigating the case. Although Wife indicates that Husband paid his attorney fees from community funds, it also appears that some of her attorney fees were paid with community funds. Finally, as is evident from the appeal and cross-appeal, the district court correctly found that neither party had been completely successful on the merits.

5. Husband’s Partial Payment of Wife’s New Mexico Attorney Fees

{29} In June 2001, the district court ordered Husband to pay Wife $50,000 to equalize the costs of litigation. Wife received $34,902.39 from Husband to this end. On cross-appeal, Husband argues that the district court should have reimbursed him for his contribution to Wife’s attorney fees because Wife made unreasonable demands and forced him to litigate them, because Wife refused reasonable settlement offers, because there was no economic disparity to support the award, and because Wife was unsuccessful on the merits. Again reviewing for abuse of discretion, we disagree.

{30} We begin by noting that the district court did not make this award pursuant to any of its attorney fee-related powers. When it made the June award of money for Wife’s attorney fees, the district court based it on the principle that attorney debt acquired during marriage is community property unless there is evidence to the contrary and that the court had the authority to provide for community funds to be used to satisfy such debt. The district court expressly stated that it was not looking at the attorney fees “as anything other than debt.” It then stated that when viewing New Mexico attorney fee debt, Wife was “already $50,000 down,” meaning that Husband had spent about $10,000 while Husband had spent $60,000, and that the only way to equalize that debt was to award Wife $50,000. It also restated that the court was not considering factors like the reasonableness of the attorney fees in that allocation. Finally, the court asked the parties to draw up an interim order dividing income and bills.

{31} The district court had the authority to make this allocation as part of its power to make an interim order allocating community expenses. Rule 1-122 NMRA. Rule 1-122(A) states that community expenses “shall be equally divided between the parties.” We hold that the district court did not abuse its discretion by allocating the community debt in this fashion, which equalized the community debt of attorney fees.

{32} Furthermore, we affirm the district court’s decision not to credit Husband later for the amount he paid to Wife pursuant to this order. “In apportioning a husband and wife’s assets and liabilities, the trial court must attempt to perform an allocation that is fair under all the circumstances.” _Fernandez v. Fernandez_, 111 N.M. 442, 444, 806 P.2d 582, 584 (Ct. App. 1991). The district court had attempted to equalize the allocation of debt in a manner that was fair at the time, and it was not an abuse of discretion to leave that ruling undisturbed.

{33} The other issues raised by this case will be decided in a memorandum opinion.

CONCLUSION

{34} We affirm the district court’s determinations regarding attorney fees, but remand to allow it to reconsider its decision regarding the California litigation should it choose to do so. We order that the parties shall bear their own attorney fees on appeal.

{35} IT IS SO ORDERED.

LYNN PICKARD, Judge

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