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**Legal Education Calendar**

**Writs of Certiorari**
Proposed Amendment to Domestic Relations Form 4A-313 NMRA
Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules and Criminal Forms
Proposed New Children’s Court Form 10-471 NMRA No. 05-8300
In the Matter of the Amendments of Rule 1-007.1 NMRA of the Rules of Civil Procedure For the District Courts

2005-NMCA-002: Hope Community Ditch Association v. New Mexico State Engineer and Pecos Valley Artesian Conservancy District v. Hope Community Ditch Association and New Mexico State Engineer


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The State Bar of New Mexico has changed its Post Office Box number. Please make a note to change our mailing address to:

State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860.

Note: Our physical address, telephone and fax information remains unchanged.
Linea Directa

¡Se Necesita – Abogados Bilingües! El Cuerpo de abogados del Estado de Nuevo México y Univision KLUZ canal 41 le gustaría hospiciar un programa de llamadas para telespectadores de habla hispana. Necesitamos abogados que hablen español para que puedan responder a las extensas llamadas telefónicas referentes a casos legales.

Spanish Call-In

State Bar of New Mexico

Wanted – Bilingual Attorneys! The State Bar of New Mexico and KLUZ Channel 41 would like to host a legal call-in program for Spanish-speaking viewers. Spanish-speaking attorney volunteers are needed to answer telephone inquiries on a wide range of legal issues.

PLEASE CONSIDER SIGNING UP NOW SO YOU CAN CALENDAR YOUR PARTICIPATION
This is a tentative commitment; someone will call you 10 days to 2 weeks in advance of each scheduled date to confirm the date, time and your continued ability to participate.

(Check the box after the DATES and TIMES you want to sign up for)

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
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<tbody>
<tr>
<td>February 25</td>
<td>5:00 – 7:00 p.m.</td>
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<tr>
<td>May 13</td>
<td>5:00 – 7:00 p.m.</td>
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<td>May 27</td>
<td>5:00 – 7:00 p.m.</td>
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<td>(Immigration Only)</td>
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<td>July 20</td>
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<tr>
<td>November 18</td>
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NAME:________________________________ PHONE: ______________________________
I have some questions. Please call me at:________________________________________
I have an attorney associate/friend/acquaintance that might be interested in participating. Call________________________________________________________________________

(Name)        (Telephone Number)

You may use my name as a reference: DO NOT use my name as a reference:

PLEASE RETURN TO: Lizeth Cera-Cruz
Public & Legal Services Department
State Bar of New Mexico
P.O. Box 92860
Albuquerque, NM 87199-2860

OR FAX TO: (505) 797-6074

For further assistance call (505) 797-6068 or e-mail lcera-cruz@nmbar.org
The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:30 p.m. We do not schedule a session in December.

PLEASE CONSIDER SIGNING UP NOW SO YOU CAN CALENDAR YOUR PARTICIPATION. This is a tentative commitment: someone will call you 10 days to 2 weeks in advance of each scheduled date to confirm the date, time and your continued ability to participate.

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(Check the box after the DATES AND TIMES you want to sign up for)

<table>
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<tr>
<th>January 19</th>
<th>5:00 – 7:30 p.m.</th>
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<tr>
<td>February 16</td>
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<td>September 21</td>
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<td>April 20</td>
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<td>October 19</td>
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<td>May 18</td>
<td>5:00 – 7:30 p.m.</td>
<td>November 16</td>
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<td>June 15</td>
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I have an attorney associate/ friend/ acquaintance that might be interested in participating. Call _____________________________

(Name)                                     (Telephone Number)

You may use my name as a reference:        DO NOT use my name as a reference:

PLEASE RETURN TO: Richard Spinello
                 Director, Public & Legal Services Department
                 State Bar of New Mexico
                 P.O. Box 92860
                 Albuquerque, NM 87199-2860

OR FAX TO: 505 797-6074
Course Open to Lawyers for CLE Credit Spring 2005!

Navajo Law and Practice, The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation. Wednesday, 5:00 – 7:00pm (January, 12 to April, 27). 32 General, 2 Ethics and 2 Professionalism Credits. Navajo Nation Bar CLE credit approval pending.

The objectives of this course are to build student and practitioner proficiency in the areas of:

1. The background and context of Navajo Nation law and practice;
2. The institutional structures of Navajo Nation law;
3. Finding the law;
4. Western versus traditional or customary law;
5. The major substantive principles of Navajo Nation law;
6. The major procedural provisions of Navajo Nation law;
7. Ethics and the practice culture;
8. Navajo Nation Code of Judicial Conduct;
9. NNBA Code of Ethics;
10. Navajo Nation Governmental Code;
11. Trial Diplomacy; and
12. Building upon class lessons in the application of principles in a brief based on sample cases and oral argument.

- To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu or Mitzi Vigil: (505) 277-0405, vigil@law.unm.edu
- Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend the course NOT FOR CLE and pay $5.00 per session. For more information about the Access to Justice Network visit http://lawschool.unm.edu/Clinic/pro_bono/index.htm or call Associate Dean Antoinette Sedillo Lopez: 277-5265.
- Non-members may take the course for $30.00 per CLE credit. (1 credit = 50 minutes of class attendance). Non-members may take course NOT FOR CLE and pay $10.00 per session or $100.00 per unlimited sessions.
- Fees are paid in advance and are not refundable.
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- Professionalism Tip -

With respect to my clients:

I will charge only a reasonable attorney’s fee for services rendered.

Meetings

February

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

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

4 Quality of Life Committee, noon, State Bar Center

7 Attorneys Support Group, 5:30 p.m., First Methodist Church

10 Public Law Section Board of Directors, noon, State Bar Center

10 Business Law Section Forms Committee, 2:30 p.m., State Bar Center

State Bar Workshops

February

7 Lawyer Referral for the Elderly Workshop, 10 a.m., San Felipe Pueblo Senior Center, San Felipe Pueblo

8 “Your Life, Your Death, & Preventative Law” Estate Planning Workshop, 6 p.m., Santa Fe Library-La Farge Branch, Santa Fe

16 Lawyer Referral for the Elderly Workshop, 10 a.m., Jemez Pueblo Elderly Program, Jemez Pueblo

22 Lawyer Referral for the Elderly Workshop, 10 a.m., Chavez County J.O.Y Center, Roswell

*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.

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NOTICES

COURT NEWS

NM Supreme Court Notice Regarding Pleadings and Oral Argument

Attorneys are reminded that motions to extend page limits on documents and motions to vacate oral argument rarely are granted by the Court except for exceptional good cause shown. Motions for extension of time to file briefs also are discouraged and rarely will be granted for more than a seven- to 10-day extension of time for good cause shown.

Law Library Retirement Reception

The Supreme Court Law Library will be hosting a reception at 3 p.m., Feb. 8 to honor Kevin M. Lancaster, Associate State Law Librarian, on his retirement after serving 25 years. The reception will be held at the Supreme Court Law Library, 237 Don Gaspar, Santa Fe. Contact Alice Robledo, (505) 827- 4850 for more information.

NM Compilation Commission

Volume 135 of NM Reports and 2004 NM Taxation Handbook Available

Volume 135 of the New Mexico Reports is now available for sale. The cost is $63. The New Mexico Selected Taxation and Revenue Laws and Regulation and CD ROM are also available. The price is $36.75.

To order, send a check to the New Mexico Compilation Commission, PO Box 15549, Santa Fe, NM 87592-5549.

First Judicial District Court Family Law Brownbag Meeting

The First Judicial District Court will host its family law brownbag meeting at noon, Feb. 8 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with the domestic relations judges. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com.

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

The Second Judicial District Court will host its monthly judges’ and managers’ meeting on Feb. 1 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 Feb. 7. Contact Mary Lovato, (505) 841-6778, for more information or to have an item placed on the agenda.

Bernalillo County Metropolitan Court Judges’ Meeting

The Bernalillo County Metropolitan Court Judges have rescheduled their monthly Judges’ Meeting to noon, Feb. 8 in the Judicial/Administrative Conference Room (Room 849) of the Metropolitan Court Building, 401 Lomas NW, Albuquerque. The meeting is open to the public. Contact the Court Administrator’s Office, (505) 841-8105 for more information or if accommodations for individuals with disabilities are needed.

U.S. District Court for the District of New Mexico Notice to Federal Practitioners

The Omnibus Appropriations Act of 2005 included a provision raising the district filing fee by $100, from $150 to $250. The new fee will become effective on Feb. 7.

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 the annual attorney bar dues of $25 shall be suspended for the calendar year 2005. All delinquent dues are still required to 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., Feb. 7 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

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

Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Feb. 2. (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.

Paralegal Division Brownbag CLE’s for Attorneys and Paralegals

There will not be a February meeting of the division’s lunch time CLE program, but check the Bar Bulletin for the schedule of upcoming CLEs. Contact Debi Shoemaker-Scott, (505) 243-1443 with questions, speaker suggestions or to be added to the e-mail list.

Public Law Section Board Meeting

The next Public Law Section board meeting will be held at noon, Feb. 10 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.
Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the ninth annual public lawyer of the year award, which will be presented on Law Day, May 2. Prior recipients include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerny, Jerry Richardson, Peter T. White and Robert M. White. Send nominations by 5 p.m., March 1 to Doug Meiklejohn by e-mail, dmeiklejohn@nmelc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe. The selection committee (comprised of past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

A complete listing of the qualifications for candidates can be found in the Jan. 24 issue of the Bar Bulletin (Vol. 44, No.3).

American Inns of Court Warren E. Burger Writing Competition

The American Inns of Court is inviting judges, lawyers, scholars and other authors to participate in its Warren E. Burger writing competition. Authors need to submit an original, unpublished essay of 10,000 to 25,000 words on a topic of their choice addressing issues of legal excellence, civility, ethics and professionalism. The author of the winning submission will receive a $5,000 prize and the essay will be published in the South Carolina Law Review. Complete rules of the competition can be found on the American Inns of Court Web site www.inssofcourt.org.

National Association of Women Lawyers Upcoming Directory

The National Association of Women Lawyers (NAWL) is preparing to publish the 6th Edition of the National Directory of Women-Owned Law Firms and Women Lawyers. Attorney's interested in being listed in the directory or who would like more information can visit the NAWL Web site at www.nawl.org.

Center for Civic Values Judges Needed

Judges are needed for the regional rounds of the high school mock trial competition in Albuquerque and Las Cruces. Regionals are Feb. 19 and 20. Attorneys interested in participating should register online at www.civicvalues.org/MT_registration.htm.

The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

Mock Trial Coaches Needed

Attorney coaches are needed for the Del Norte High School mock trial team in Albuquerque, the Pojoaque High School team and the Lordsburg High School team. Attorneys interested in participating in this exciting and rewarding program should call (505) 764-9417, extension 13, or send e-mail to mocktrial@civicvalues.org. The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

UNM Law Library Spring Semester Hours

Hours through May 15:
Mon. – Thurs. 8 a.m. to 11 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 11 p.m.

Reference:
Mon. – Thurs. 9 a.m. to 9 p.m.
Fri. 9 a.m. to 5 p.m.
Sat. noon to 4 p.m.
Sun. noon to 4 p.m.

Extended Exam Hours:
Apr. 30 8 a.m. to 10 p.m.
May 1 9 a.m. to 10 p.m.
May 7 8 a.m. to 10 p.m.
May 8 9 a.m. to 10 p.m.
May 14 8 a.m. to 10 p.m.

2005 License and Dues

• The 2005 License and Dues forms were mailed Dec. 6, 2004.
• Without exception, dues and license fees are due on Feb. 1. Members who have not received the form should notify the State Bar, (505) 797-6036, (505) 797-6035.
• For members’ convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
• License and disciplinary fees are mandatory for active attorneys and must be paid to maintain license status (inactive and judges exempt from disciplinary fees).
• Late fees will be assessed if payment is not postmarked by Feb. 1.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week of publication.
February

1-2  Insurance Planning and Strategies for Individuals and Estates, Part 1 & 2
Teleseminar
Center for Legal Education of SBNM
2.4 G
(505) 797-6020
www.nmbar.org

1  Evidentiary Issues at Trial
VR - State Bar Center, Albuquerque
Center for Legal Education of SBNM
5.3 G, 1.0 E
(505) 797-6020
www.nmbar.org

1  How to Help Your Client Survive a Child Custody Evaluation in New Mexico
Albuquerque
National Business Institute
6.7 G, 0.5 E
(715) 835-8525
www.nbi-sems.com

1  Justice in the Jury Room
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

2  Confidentiality of Medical Records
Albuquerque
Lorman Education Services
7.2 G
(715) 833-3940
www.lorman.com

2  Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

3  The Tangled Webs of Impaired Lawyers
Teleconference
TRT, Inc.
2.4 P
(800) 672-6253
www.trtle.com

4  The High Price of Billables
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

7  New Mexico Wage and Hour Regulations and Recent Developments
Albuquerque
National Business Institute
6.7 G, 0.5 E
(715) 835-8525
www.nbi-sems.com

7  What Puts Government Lawyers in a Class by Themselves
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

8  Burden of Representing Financially-challenged Companies
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

8  Reorganization Bankruptcies for Small Businesses in New Mexico
Albuquerque
National Business Institute
6.7 G, 0.5 E
(715) 835-8525
www.nbi-sems.com

8  The Basics of a NM Divorce Case
VR - State Bar Center, Albuquerque
Center for Legal Education of SBNM
5.3 G, 1.0 E
(505) 797-6020
www.nmbar.org

9  Demonstrative Evidence in Your Personal Injury Trial - When, What, Why and How Much?
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

10  Choice of Entity - 2005
ALN - Satellite Broadcast
State Bar Center, Albuquerque
Center for Legal Education of SBNM
4.4 G
(505) 797-6020
www.nmbar.org

10  Constitutional Law
Las Cruces
Paralegal Division of New Mexico
1.0 E
(505) 522-2338

10  Major Issues in Mediation
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

10  Tax Issues In Estate Planning and Probate
Albuquerque
National Business Institute
7.5 G, 0.5 E
(715) 835-8525
www.nbi-sems.com

10  Worker’s Compensation
Roswell
Paralegal Division of New Mexico
1.0 G
(505) 622-6510

14  DaVinci Code of Scientific Evidence
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

15  Employee Benefits Update for 2005
ALN - Satellite Broadcast
State Bar Center, Albuquerque
Center for Legal Education of SBNM
4.4 G
(505) 797-6020

15  Junk Science or Scientific Evidence?
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com
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<td>15</td>
<td>Toil and Trouble: Avoiding Common Pitfalls in the Practice of Law</td>
<td>VR - State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
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<td>2.0</td>
<td>(505) 797-6020</td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>15</td>
<td>Trustees and Beneficiaries - Can They Live in Harmony?</td>
<td>Teleconference, Cannon Financial Institute</td>
<td>1.8</td>
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<td>(800) 775-7654</td>
<td><a href="http://www.cannonfinancial.com">www.cannonfinancial.com</a></td>
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<td>Update on Sales Contracts Under UCC Article 2</td>
<td>Teleseminar, Center for Legal Education of SBNM</td>
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<td>(505) 797-6020</td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>16</td>
<td>Making the Suitable Sale: The NASD Requirements for Variable Annuities</td>
<td>Teleconference, Society of Financial Service Professionals</td>
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<td>(800) 392-6900</td>
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<td>16</td>
<td>They Took My Stuff! How Do I Get it Back?</td>
<td>Teleconference, TRT, Inc.</td>
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<td>(800) 672-6253</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>17</td>
<td>Advanced Estate Planning Practice Update - Winter 2005</td>
<td>ALN - Satellite Broadcast, State Bar Center, Albuquerque Center for Legal Education of SBNM</td>
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<td>(505) 797-6020</td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>(800) 392-6900</td>
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<td>18</td>
<td>Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws</td>
<td>State Bar Center, Albuquerque Project Change Fair Lending Center, Institute of Public Law, National Community Reinvestment Coalition and Center for Legal Education of SBNM</td>
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<td>(505) 797-6020</td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>18</td>
<td>Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy</td>
<td>Teleconference, TRT, Inc.</td>
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<td>(800) 672-6253</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>21</td>
<td>Managing Absent Employees So It Doesn’t Make You Absent-minded</td>
<td>Teleconference, TRT, Inc.</td>
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<td>(800) 672-6253</td>
<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>22</td>
<td>Electronic Discovery Needn’t Be Shocking</td>
<td>Teleconference, TRT, Inc.</td>
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<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>22</td>
<td>Tax Treatment of Contingency Fee Awards After Banaitis v. Commissioner</td>
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**WRITS OF CERTIORARI**

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

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

**EFFECTIVE JANUARY 26, 2005**

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**Certiorari Granted But Not Submitted:**

(Submission = date of oral argument or briefs-only submission)

**ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN NO. 28,670, STATE V. SHAY**

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## WRITS OF CERTIORARI

**As Updated by the Clerk of the New Mexico Supreme Court**

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

**Effective January 26, 2005**

### Certiorari Granted But Not Submitted:

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<td>Sam v. Estate of Sam (COA 23,288)</td>
<td>9/13/04</td>
</tr>
<tr>
<td>28,119</td>
<td>State v. Dominguez (COA 23,286)</td>
<td>9/13/04</td>
</tr>
<tr>
<td>27,409</td>
<td>State v. Rodriguez (COA 22,558)</td>
<td>9/15/04</td>
</tr>
<tr>
<td>28,016</td>
<td>State v. Lopez (COA 23,424)</td>
<td>9/15/04</td>
</tr>
<tr>
<td>28,471</td>
<td>State v. Brown (COA 23,610)</td>
<td>9/15/04</td>
</tr>
<tr>
<td>28,423</td>
<td>Marquez v. Allstate (COA 23,385)</td>
<td>9/15/04</td>
</tr>
<tr>
<td>28,438</td>
<td>Marquez v. Allstate (COA 23,385)</td>
<td>9/15/04</td>
</tr>
<tr>
<td>28,532</td>
<td>Spencer v. Health Force, Inc. (COA 22,702)</td>
<td>10/14/04</td>
</tr>
</tbody>
</table>

### Petition For Writ of Certiorari Denied:

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>28,977</td>
<td>State v. Duran (COA 24,994)</td>
<td>1/6/05</td>
</tr>
<tr>
<td>28,990</td>
<td>State v. Ortiz (COA 25,045)</td>
<td>1/10/05</td>
</tr>
<tr>
<td>28,979</td>
<td>Vinson v. Beninati (COA 24,847)</td>
<td>1/11/05</td>
</tr>
<tr>
<td>28,991</td>
<td>State v. Saiz (COA 24,063)</td>
<td>1/11/05</td>
</tr>
<tr>
<td>29,003</td>
<td>State v. Gonzales (COA 23,881)</td>
<td>1/18/05</td>
</tr>
<tr>
<td>29,001</td>
<td>State v. French (COA 24,976)</td>
<td>1/18/05</td>
</tr>
<tr>
<td>29,000</td>
<td>State v. Chavez (COA 25,036)</td>
<td>1/18/05</td>
</tr>
<tr>
<td>28,999</td>
<td>Vistawall v. Apodaca (COA 25,130)</td>
<td>1/18/05</td>
</tr>
</tbody>
</table>

### Writ of Certiorari Quashed:

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>28,253</td>
<td>Miller v. Brock (COA 24,124)</td>
<td>1/20/05</td>
</tr>
<tr>
<td>28,249</td>
<td>Miller v. Brock (COA 24,125)</td>
<td>1/20/05</td>
</tr>
</tbody>
</table>
PROPOSED AMENDMENT TO DOMESTIC RELATIONS FORM 4A-313 NMRA.
The Supreme Court is considering proposed amendments to Domestic Relations Form 4A-313 NMRA. If you would like to comment on the proposed amendments set forth below, please send your written comments to:

Kathleen J. Gibson, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before February 18, 2005, to be considered by the Court.

4A-313
STATE OF NEW MEXICO
COUNTY OF _______________ JUDICIAL DISTRICT

Petitioner ____________

v. _____________________

No. _____________________

Respondent ____________

PARENTING PLAN
AND CHILD SUPPORT OBLIGATION

We, _____________________ and _____________________, are the parents of the children listed below. We both agree to the terms of this parenting plan.

Child’s name Date of birth Age

[ ] Plan 1. Same plan each week or every two weeks.
[ ] Plan 2. Write your own plan.

1. Residence of our [child] [children]. Our [child resides] [children reside] in New Mexico. Neither of us will move our [child] [children] out of state unless we both agree or a judge allows one of us to do so.

2. Review of plan. We understand that the needs of our [child] [children] will change as they grow older. The plan may also change because of either parent’s employment or other circumstances change. We must be flexible and cooperate in helping our [child] [children] grow and change. We agree to meet [ ] every year or [ ] every ____ years to make sure this plan continues to work well.

CUSTODY OF THE CHILDREN
(Choose either Option A, Joint legal custody, or Option B, Sole legal custody)

[ ] A. Joint legal custody.
We will share joint legal custody of our [child] [children] and will make important decisions about our [child] [children] together. No change regarding an important decision will happen unless we both agree to the change in writing or the court changes it.

Joint custody decisions regarding our [child] [children]
(Use a separate sheet if necessary.)

City and county of residence: _____________________
Religion: _____________________
Recreational Activities: _____________________

[ ] B. Sole custody.
(Complete all 3 blanks.)
_________ (name of parent with sole custody) will have sole legal custody of our [child] [children]. The parent with sole custody will make the important decisions regarding our [child] [children].
_________ (name of other parent) will have visitation with our children as explained in this agreement.

Sole custody is in the best interest of our [child] [children] because:

WHERE OUR CHILDREN SPEND THEIR TIME
(Complete whether you chose joint or sole custody.)

1. Time sharing.
We will share time with the [child] [children] as we agree between ourselves. If we cannot agree, we will share time with the [child] [children] as set forth here.

2. Transfer of the children.
We will transfer the children as follows:

THE USUAL PLAN
(Either complete the blank lines in “Plan 1” or write your own plan in “Plan 2” below.)

[ ] Plan 1. Same plan each week or every two weeks.
(Set out the time that mother or father will have the [child] [children] for that day.)

<table>
<thead>
<tr>
<th>Week 1</th>
<th>Mother’s time</th>
<th>Father’s time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monday</td>
<td></td>
<td></td>
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<tr>
<td>Tuesday</td>
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<td>Wednesday</td>
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<tr>
<td>Sunday</td>
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<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Week 2</th>
<th>Mother’s time</th>
<th>Father’s time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monday</td>
<td></td>
<td></td>
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<tr>
<td>Tuesday</td>
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<td>Saturday</td>
<td></td>
<td></td>
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<tr>
<td>Sunday</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[ ] Plan 2. Write your own plan.
(Write your own plan here or attach a separate sheet or calendar or make additions to Plan 1.)
THE VACATION AND HOLIDAY PLAN

1. **Vacations.** We will each have ____ [days] [weeks] (circle one) of uninterrupted time with the [child] [children] each year. We will give each other at least ____ (days) (weeks) notice of the vacation time. Any dispute will be resolved in the manner agreed to in the “Solving Arguments” section of this parenting plan.

2. **Holidays.** Regardless of the day of the week, the [child] [children] will spend:

<table>
<thead>
<tr>
<th>Holidays:</th>
<th>Even year</th>
<th>Odd year</th>
<th>Times (if split)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mother’s Day</td>
<td>Mother</td>
<td>Mother</td>
<td></td>
</tr>
<tr>
<td>Father’s Day</td>
<td>Father</td>
<td>Father</td>
<td></td>
</tr>
<tr>
<td>Child’s Birthday</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Halloween</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thanksgiving break</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Winter religious holidays</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st 1/2 winter break</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd 1/2 winter break</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Spring Break</td>
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<tr>
<td>July 4th</td>
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<tr>
<td>Other religious holidays</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The Monday of a 3-day weekend is the same as the Sunday schedule unless we agree differently.

3. Write in any other information regarding the plan or the vacation schedule here:

DETAILS ABOUT THE CUSTODY PLAN

1. **Telephone and mail.** The [child] [children] may call each of us and receive letters and packages from each of us. We will not interfere with the [child’s] [children’s] communication with the other parent.

2. **Transportation.** We will share responsibility for getting the [child] [children] to and from each other’s house, day care, school, etc., as follows: (write what you will do here)

3. **Emergencies.** If there is a medical emergency, the parent with the child will try to call the other parent about the emergency. If the other parent cannot be reached, any decision for emergency medical treatment will be made by the available parent in the best interest of the child.

4. **Changes.** We may ask each other for changes to this schedule. The other parent has the right to say “no”. If the other parent says “no”, we will not argue or criticize the other parent’s decision. If we don’t agree, we will follow the “solving arguments” section of this agreement.

CHILD SUPPORT

1. **Child Support Worksheet.** We attach a signed worksheet to this plan. (Complete and sign a child support worksheet prior to completing this section.)

   Child support: __________ pays __________ $________.
   (Choose A or B)
   [ ] A. This amount is the amount shown on the worksheet; or
   [ ] B. We ask the judge to order an amount different from the child support amount in the worksheet because (fill in the reason here)*

   __________________

2. **Health insurance coverage.** [Father] [Mother] agrees to keep the minor [child] [children] covered by health and dental insurance under the policy of insurance available to [father] [mother] from the [father’s] [mother’s] employer or other group health care insurance plan.

3. **Additional expenses to be determined by percentage.** We have not included the following costs on the child support worksheet because we do not have actual dollar figures to include on the worksheet. We will split the following expenses by percentage of the actual cost incurred:

   **Additional expenses**
   (List percent for each that applies to you)
   **Mother pays** | **Father pays**

   - Medical co-payments
   - % %
   - Medical expenses not paid by insurance
   - % %
   - Dental expenses if no insurance or co-payments and deductible
   - % %
   - Dental expenses not paid by insurance
   - % %
   - Counseling expenses for [child] [children]
   - % %
   - Educational expenses or child care expenses, such as camp, not listed on worksheet
   - % %
   - Transportation and communication expenses if child does not live in same city as one parent
   - % %
   - Increase in medical premium
   - % %
   - Increase in dental premium
   - % %
   - Day care, school tuition or additional educational or child care expenses, such as camp, not listed on worksheet
   - % %
   - Increase in counseling expenses
   - % %
   - Other costs not listed on worksheet
   - % %

   * We may ask each other for changes to the child support amount in the worksheet because (fill in the reason here)*
GENERAL AGREEMENTS; HOW WE TREAT OUR CHILDREN

1. We will both actively be responsible for and involved in our [child’s] [children’s] lives.
2. As our [child grows] [children grow] [his] [her] [their] needs will change. We will talk about the changing needs.
3. We will support our [child’s] [children’s] relationship with the other parent and not interfere in it. We will be positive about that relationship.
4. We both have a right to medical and educational information about our [child] [children]. We each may talk with our [child’s] [children’s] doctors and schools. If either of us learns that our [child is] [children are] involved in any other legal proceeding, we agree to notify the other parent.
5. We will consider what our [child wants] [children want] when we make decisions about the [child] [children]. We will never ask our [child] [children] to make decisions that they are not old enough or mature enough to make. We will never ask a child to choose between us.

When I sign here, I am telling the judge that I have read this document and agree with everything in it. I state, upon oath, that this document, and the statements in it, are true and correct as far as I know and believe.

Husband’s signature  Wife’s signature
Address: ______________________  Address: ______________________
Telephone: ______________  Telephone: ______________
STATE OF NEW MEXICO   )
COUNTY OF _____________ ) ss
Acknowledged, signed and sworn to before me this _____ day of _____________, _____ by ______________________, the husband.

Notary public
My commission expires: ______________________.

STATE OF NEW MEXICO   )
COUNTY OF _____________ ) ss
Acknowledged, signed and sworn to before me this _____ day of _____________, _____ by ______________________, the wife.

Notary public
My commission expires: ______________________.

USE NOTES

1. The court may require the use of a different parenting plan. The parties should check with the clerk of the court prior to completing a parenting plan. For a further explanation of this form, see Domestic Relations Form 4A-205 NMRA. The parenting plan will become a part of the judge’s final order when the Final Decree of Dissolution of Marriage, with children, Domestic Relations Form 4A-322, is signed by the judge.

2. The parties should understand the difference between the rights and obligations of joint custodians and a sole custodian. Descriptions of these terms are set out in Section 40-4-9.1 NMSA 1978. See an attorney with questions you may have. Joint legal custody does not necessarily mean that the [child] [children] must spend fifty percent (50%) of the time with each parent.

3. The law prefers joint custody for most children. Many judges will require a hearing before granting sole custody.

4. In developing a parenting plan, consider the needs of younger
children. See a professional specializing in child development for a plan appropriate for your children.

5. See Section 40-4-11.1 NMSA 1978 for the child support worksheet. An interactive version of this worksheet may be found at www.nmcourts.com, click on “Family Law Forms”. See also Domestic Relations Form 4A-205 NMRA for a further explanation of the child support worksheet. The child support worksheet is used to determine the monthly child support obligation.

6. The judge may or may not accept a proposed change from the worksheet amount.

7. See Section 40-4C-4 NMSA 1978 for medical support orders.

8. See Domestic Relations Form 4A-341 NMRA for the Wage Withholding Order. A Wage Withholding Order is required if either party or the children born of this marriage are receiving public assistance. Either party may request the court to enter a Wage Withholding Order. See also Domestic Relations Form 4A-205 NMRA for a further explanation of the Wage Withholding Order.

9. The court will sign a Wage Withholding Order upon request of either party. If child support is not paid in a timely manner, interest will be added to the amount owed at the rate provided by law. See Section 40-4-7.3 NMSA 1978 for accrual of interest on delinquent child and spousal support. The rate is the rate in effect pursuant to Section 56-8-4 NMSA 1978.

10. You need a court order to adjust child support payments.

11. See a professional about tax issues that relate to any children.
PROPOSED AMENDMENTS TO THE MAGISTRATE, METROPOLITAN AND MUNICIPAL COURT RULES AND CRIMINAL FORMS

The Supreme Court is considering the amendment of the Magistrate Court and Metropolitan civil and criminal rules and criminal forms. If you would like to comment on the proposed revisions set forth below, please send your written comments to:

Kathleen J. Gibson, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before February 18, 2005 to be considered by the Court.

Almost identical new rules relating to offers of settlement are proposed as Magistrate Court Rule 2-308 and Metropolitan Court Rule 3-308 NMRA. Rule 2-308 is printed below.

PROPOSED NEW RULE
2-308. Offer of settlement.

A. Offer of settlement. Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until thirty (30) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant’s costs incurred after the making of the offer and shall not be considered the prevailing party for purposes of costs and attorney fees.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

B. Awards not cumulative. In those cases where a claimant would be entitled to double costs under Rule 3-701 NMRA and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party, but not both statutory, Section 56-8-4 NMSA 1978, interest and double costs.

Almost identical amendments to Magistrate Court Rule 6-304, Metropolitan Court Rule 7-304 and Municipal Court Rule 8-304 NMRA. The proposed amendments to Rule 7-304 NMRA are published below.

7-304. Motions.

A. Defenses and objections which may be raised. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.

B. [How made. Motions may be made orally or in writing, unless the court directs they be in writing.

C. Suppression of evidence. In cases within the trial court’s jurisdiction:

(1) a person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence;

(2) a person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

[D. Notice and hearing. No motion shall be heard without a hearing following prior notice to all parties.

C. Motions and other papers. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 7-209 NMRA.

D. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initiated by opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.

E. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The moving party shall request concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;

(2) motion regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion to suppress evidence; or

(5) motion to modify a sentence pursuant to Rule 7-801 NMRA.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion.

F. Response. Unless otherwise specifically provided in these rules, any written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response.

PROPOSED NEW CRIMINAL FORM 9-511
[For use with Magistrate Court Rule 6-506, Metropolitan Court Rule 7-506 and Municipal Court Rule 8-506.]

STATE OF NEW MEXICO
[COUNTY OF ________________]
[CITY OF ____________________]
IN THE __________________ COURT

[STATE OF NEW MEXICO]
[CITY OF ____________________]

v.

WAIVER OF SIX MONTH TRIAL RULE

I understand that I have a right to have the trial in this case begin within one hundred eighty-two (182) days after my arraign-
ment. I understand my signature on this form means I give up my right to have the charges in this case dismissed with prejudice if the trial does not begin within one hundred eighty-two (182) days after my arraignment, as by provided by rule.

I further understand that I am not giving up any right to a speedy trial under either the United States or New Mexico constitutions.

After reading and understanding all of the above, and consulting with counsel, I knowingly and voluntarily give up my right to have the trial in this case begin within the time limits provided by court rule.

___________________________
Signature of defendant

CERTIFICATE OF DEFENSE COUNSEL
(To be completed if the defendant is represented by counsel)
I have explained to the defendant the right to trial within one-hundred eighty-two (182) days and that this right may be waived by the defendant and I am satisfied that the defendant understands the waiver of the right to trial within the time provided by court rule.

____________________________
Defense counsel

APPROVAL OF JUDGE
Permission to waive trial within the time limits provided by court rule is:
[ ] granted under the following conditions ________________ (list any conditions).
[ ] denied.

____________________________
Judge

____________________________
Date

PROPOSED NEW CRIMINAL FORM 9-512
[For use with Magistrate Court Rule 6-506, Metropolitan Court Rule 7-506 and Municipal Court Rule 8-506.]
STATE OF NEW MEXICO
[COUNTY OF _______________]
[CITY OF ________________]
IN THE __________________ COURT
 No. __________

[STATE OF NEW MEXICO]
[CITY OF ________________]
v.

EXTENSION OF TIME FOR COMMENCEMENT OF TRIAL
The court orders the following:
(check and complete applicable alternative)
[ ] The court approves the stipulation of the parties to extend the time for commencement of trial for sixty (60) days.
[ ] The court finds good cause and therefore grants defendant’s motion to extend the time for commencement of trial for thirty (30) days.

Trial must be commenced on or before _________________, _______ (date).

____________________________
Date

Judge

APPROVED:
____________________________
Defendant or counsel

____________________________
Prosecutor

USE NOTE
1. Signature of the prosecutor is not necessary for approval by the court of a motion to extend the time for trial for thirty (30) days.
PROPOSED NEW CHILDREN’S COURT FORM 10-471

The Supreme Court is considering a proposed new Form 10-471 NMRA of the Children’s Court Rules. If you would like to comment on the proposed revisions set forth below, please send your written comments to:

Kathleen J. Gibson, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before February 18, 2005 to be considered by the Court.

10-471
[For use in abuse, neglect and termination of parental rights proceedings]
STATE OF NEW MEXICO
COUNTY OF _______________
JUDICIAL DISTRICT
IN THE CHILDREN’S COURT
No. ___________

We the undersigned, participated in a mediation session today, __________________ (date).

We acknowledge that the purpose of this meeting is to candidly discuss and attempt to resolve outstanding issues in this case. Pursuant to Rule 11-408 NMRA of the Rules of Evidence, any opinions, admissions and comments made during this proceeding are confidential and not subject to discovery, and cannot be used as an admission for any other purpose by any party in any proceeding governing this action, except for new information or abuse and neglect subject to being reported pursuant to the Children’s Code or otherwise provided by the Rules of Evidence.

Signatures:

Mediator ___________________ Children’s Court Attorney ___________________

Respondent ___________________ Respondent’s Attorney ___________________

Social Work Supervisor ___________________ Social Worker ___________________

Guardian ad litem ___________________ CASA ___________________

Other ___________________ Other ___________________
(To be completed by mediator. Choose one.)
___ parties reached complete agreement
___ parties reached a partial agreement
___ no agreement was reached
___ continued
___ reset
___ vacated

1. Form 6559 NTC: Report of Mediation. For use in neglect and abuse proceedings. The children’s court attorney shall file this report with the court and provide a copy to each party to the proceeding.
ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Civil Procedure for the District Courts Committee to adopt amendments of Rule 1-007 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 1-007.1 NMRA of the Rules of Civil Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 1-007.1 NMRA of the Rules of Civil Procedure for the District Courts shall be effective for cases filed on or after March 15, 2005; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 11th day of January, 2005.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

1-007.1 Motions; how presented.

A. Requirement of written motion. All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.

B. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order approved by opposing counsel shall accompany the motion.

C. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;
(2) motion for new trial;
(3) motion for judgment as a matter of law;
(4) motion for summary judgment;
(5) motion for relief from a final judgment, order or proceeding pursuant to Paragraph B of Rule 1-060 NMRA.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the moving party shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 NMRA. A motion for new trial shall comply with Rule 1-059 NMRA.

D. Response. Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. Failure to file a response within the prescribed time period constitutes consent to grant the motion, is a waiver of the notice provisions of Paragraph C of Rule 1-058 NMRA, and the court may enter an appropriate order.

E. Reply brief. Any reply brief shall be filed within fifteen (15) days after service of any written response.

F. Request for hearing. A request for hearing shall be filed at the time an opposed motion is filed. The request for hearing shall be substantially in the form approved by the Supreme Court.
This case is the latest in a series of cases involving appeals from decisions of the State Engineer. See Anthony Water & Sanitation Dist. v. Turney, 2002-NMCA-095, ¶ 3, 132 N.M. 683, 54 P.3d 87 (hereinafter AWSD) (“Issues regarding the procedure to effectively appeal decisions of the State Engineer have appeared regularly on appellate court dockets over the last twenty-one years.”). The unique issues in this case arise from a party’s failed attempt to appeal in one court followed by that party’s attempt to file a cross-appeal or other further pleading in response to another party’s proper appeal in another court. The other party voluntarily dismissed its appeal, and the second court dismissed the first party’s attempted cross-appeal. We affirm because State Engineer appeals must comply with the applicable statute, and neither the original, failed appeal nor the cross-appeal in this case did so. In addition, the attempted cross-appeal was barred by principles of res judicata.

BACKGROUND

Hope Community Ditch Association (Hope) filed applications with the State Engineer to change a point of diversion by drilling supplemental wells on land located partially in Chaves County and partially in Eddy County. Over the objection of Pecos Valley Artesian Conservancy District (PVACD), the State Engineer granted the application with certain restrictions and requirements. The decision was entered on January 16, 2003.

On January 22, 2003, PVACD filed a de novo appeal in the district court of Chaves County (the Chaves case). PVACD served the State Engineer, but did not serve Hope. NMSA 1978, § 72-7-1(B) (1971) states, Appeals to the district court shall be taken by serving a notice of appeal upon the state engineer and all parties interested within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. If an appeal is not timely taken, the action of the state engineer is conclusive. On February 17, 2003, Hope filed its own de novo appeal in the district court of Eddy County (the Eddy case). All parties were properly served in the Eddy case.

The State Engineer moved to dismiss the Chaves case on the ground that an interested party, Hope, was not served with the notice of appeal in a timely fashion. New Mexico appellate courts have “repeatedly held that the district court does not gain jurisdiction over such appeals unless all parties are served within the thirty-day time frame.” AWSD, 2002-NMCA-095, ¶ 3. The Chaves County district court dismissed the Chaves case on May 8, 2003, following a hearing on the matter held on April 22, 2003. No appeal was taken from this decision.

While the Chaves case was proceeding, on March 10, 2003, PVACD filed a responsive pleading in the Eddy case, which included a statement of issues pursuant to Rule 1-074 NMRA, a cross-appeal, a counterclaim against Hope, and a cross-claim against the State Engineer.
In substance, this document sought to raise the same issues that PVACD would have raised in its own appeal in the Chaves case, i.e., that the applications were defective, that the State Engineer’s decision was not supported by substantial evidence and was arbitrary and capricious, and that the State Engineer’s decision was contrary to the applicable water law statutes and judicial decisions. The State Engineer moved to dismiss PVACD’s cross-appeal and other claims. Hope joined in this motion. Hope then moved to dismiss the Eddy case, representing that it no longer wished to pursue the appeal that it had taken. The district court granted both motions. PVACD now appeals.

DISCUSSION

1. Appeals from Decisions of the State Engineer

[6] The theory behind the jurisdictional nature of the requirement of properly serving all parties to a de novo appeal from the State Engineer is that the legislature has, by statute, set forth the steps necessary to transfer the authority over a case from an administrative agency to the judicial branch. See In re Application of Metro. Invs., Inc., 110 N.M. 436, 440, 796 P.2d 1132, 1136 (Ct. App. 1990). “Where the legislature has established statutory steps for perfecting an appeal from an administrative proceeding, compliance with such requirements is jurisdictional.” Id. Cases from both this Court and the Supreme Court have so held. AWD, 2002-NMCA-095, ¶ 3.

[7] In this case, PVACD was aggrieved by the decision of the State Engineer and wanted to appeal. According to Section 72-7-1(B), it was required to serve its notice of appeal on the State Engineer and all interested parties, including the applicant Hope, within thirty days of receipt of the State Engineer’s decision or the decision of the State Engineer would be conclusive. It is undisputed that PVACD did not comply with the jurisdictional requirement of service on Hope within thirty days, either in the Chaves case or the Eddy case. PVACD cites no case in which the jurisdictional requirement of service on interested parties within thirty days was excused. Accordingly, we hold that PVACD, having failed to meet the jurisdictional requirements of its appeal from the decision of the State Engineer, was not entitled to have its appeal issues, challenging the decision of the State Engineer, heard in district court. See § 72-7-1(B)(indicating “conclusive” nature of action of State Engineer).

2. Res Judicata

[8] The form of res judicata known as claim preclusion prevents parties from relitigating claims after those claims have been litigated once. This doctrine applies when the second suit has the following relationship with the first suit: (1) [t]he parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits.

City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 18, 134 N.M. 216, 75 P.3d 816 (internal quotation marks and citation omitted). Although PVACD argues that the parties and causes of action are not the same because the Chaves case was its appeal while the Eddy case is Hope’s appeal, the portion of the Eddy case that was dismissed and about which PVACD is appealing to this Court, is the portion that comprised its cross-appeal and other claims, all of which were the same challenges to the State Engineer’s decision that it would raise in the Chaves case.

[9] PVACD also argues that it did not have a full and fair opportunity to litigate in the Chaves case nor was the decision in that case a final one on the merits because that case was dismissed on “technical procedural failings, prior to the identification or litigation of any substantive issues.” This argument reflects a misunderstanding of the requirements of claim preclusion. So-called technical, procedural failings, if they result in dismissal of a case with prejudice, are sufficient to provide the foundation for claim preclusion.

[10] We have ruled that a dismissal with prejudice is an adjudication on the merits for purposes of res judicata. See, e.g., Reed v. Furr’s Supermarkets, Inc., 2000-NMCA-091, ¶ 35, 129 N.M. 639, 11 P.3d 603. Trajillo v. Acequia de Chamisal, 79 N.M. 39, 439 P.2d 557 (Ct. App. 1968), on which PVACD relies, is not to the contrary. The suit at issue in that case was not dismissed on the merits, and was instead dismissed for lack of standing, and therefore the denomination “with prejudice” in the order was incorrect. Id. at 40, 439 P.2d at 558. On the other hand, a dismissal of an appeal for failure to file a timely notice of appeal results in a dismissal with prejudice. See Executive Sports Club, Inc. v. First Plaza Trust, 1998-NMSC-008, ¶ 11, 125 N.M. 78, 957 P.2d 63. We have applied res judicata to preclude claims made after the same claims were dismissed in an earlier case for failure to timely prosecute. See Carter v. Thurber, 106 N.M. 429, 430, 432, 744 P.2d 557, 558, 560 (Ct. App. 1987). Based on these cases, the dismissal of the Chaves case was a dismissal with prejudice that operated as a final adjudication of the issues that could have been raised in that case and that operates to preclude the same issues being raised in the Eddy case presently before us on appeal.

3. Other Issues

[11] We have considered PVACD’s other issues and find them to be without merit in light of our decision. Specifically, to the extent PVACD contends that it was entitled to file cross-claims and counterclaims because appeals from State Engineer decisions are de novo proceedings governed by the Rules of Civil Procedure, we need not address that contention because even if true, our decision on the preceding issues would preclude the claims under the circumstances of this case. Similarly, we need not address PVACD’s complaint that the trial court did not permit it to file findings and conclusions, nor did it file its own findings and conclusions, because the issues raised below and on appeal are legal issues based on the undisputed facts recited in the background section of this opinion. See In re Adoption of Beggay, 107 N.M. 810, 814, 765 P.2d 1178, 1182 (Ct. App. 1988) (indicating that findings and conclusions are not generally required when ruling on motions).

CONCLUSION

[12] The district court’s orders dismissing the Eddy case are affirmed.

[13] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

RODERICK T. KENNEDY, Judge
OPINION
LYNN PICKARD, JUDGE

{1} Plaintiff sued Defendant, the Santa Ana Golf Club, Inc., a corporation wholly owned by Santa Ana Pueblo, for wrongful discharge and defamation. Defendant filed a motion to dismiss, arguing that the district court lacked subject matter and personal jurisdiction because Defendant was immune from suit under the doctrine of sovereign immunity. The court granted Defendant’s motion. Plaintiff appeals the court’s order granting dismissal. On appeal, Plaintiff argues that Defendant waived sovereign immunity by (1) including a “sue or be sued” clause in its corporate charter, (2) committing itself to adhere to anti-discrimination standards in its employee handbook, (3) participating in New Mexico’s workers’ compensation program, and (4) failing to abide by its own express conditions of how to effectuate a waiver in other contracts. Furthermore, Plaintiff contends that a genuine issue of fact exists concerning whether Defendant waived sovereign immunity, and Plaintiff is therefore entitled to have a jury hear evidence of whether an effective waiver existed in this case. We are not persuaded by Plaintiff’s arguments and affirm the district court’s dismissal.

FACTS AND BACKGROUND

{2} Plaintiff was employed by Defendant for eight years. In the spring of 2002, Plaintiff consulted a physician regarding certain symptoms she was experiencing. The physician advised Plaintiff to be tested for Hepatitis C. Defendant fired her after having been told by Plaintiff that she had been tested for Hepatitis C. The results of the test were negative. Plaintiff alleges that Defendant’s employees falsely told others, including persons not affiliated with Defendant, that Plaintiff was infected with Hepatitis C, a disease commonly known to be sexually transmitted. Plaintiff sued Defendant, claiming that she had been wrongfully terminated by Defendant, as well as defamed by Defendant’s employees. The district court dismissed the case, citing a lack of subject matter jurisdiction based on Defendant’s sovereign immunity. Plaintiff appealed. She argues that Defendant either waived sovereign immunity, or a genuine issue of fact exists as to whether Defendant’s actions effectuated a waiver.

DISCUSSION

{3} We first consider whether sovereign immunity was waived, and then proceed to discuss whether a genuine issue of fact exists in this case.

Sovereign Immunity

{4} We review de novo the legal question of whether an Indian tribe, or an entity under the tribe’s control, possesses sovereign immunity. Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1063 (10th Cir. 1995). We also review de novo an order granting or denying a motion to dismiss for lack of jurisdiction. Barnae v. Barnae, 1997-NMCA-077, ¶¶ 10-11, 123 N.M. 583, 943 P.2d 1036.


{6} Other entities under tribal control are extended the same sovereign immunity as the tribe itself. Parker Drilling Co. v. Metlakatla Indian Cnty., 451 F. Supp. 1127, 1131 (D. Alaska 1978) (holding that the sovereign immunity afforded to tribes extends to their governmental organizations and business entities). Defendant in this case is an entity that enjoys sovereign immunity originating from the Santa Ana Pueblo, which incorporated Defendant under Section 17 of the Indian Reorganization Act. 25 U.S.C. § 477 (1990). Section 17 authorizes tribes to incorporate pursuant to a corporate charter in order to operate as a business entity. Id. Corporations formed under Section 17 enjoy sovereign immunity, but may waive such protection. Parker Drilling Co., 451 F. Supp. at 1131. In this case, although Plaintiff admits that Defendant enjoys sovereign immunity, she argues that Defendant waived its immunity.

{7} There is a strong presumption against waiver of tribal sovereign immunity. Demontiney v. United States ex rel. Bureau of Indian Affairs, 255 F.3d 801, 811 (9th Cir. 2001). Therefore, a waiver of sovereign immunity “cannot be implied but must be unequivocally
expressed.” Santa Clara Pueblo, 436 U.S. at 58 (internal quotation marks and citations omitted). Tribal entities may not be sued absent consent to be sued. Kiowa Tribe of Okla., 523 U.S. at 757. “Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast.” Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F. 2d 1374, 1378 (8th Cir. 1985).

[8] With the above law as our guide, we now turn our attention to each of Plaintiff’s arguments that Defendant waived sovereign immunity.

“Sue or Be Sued” Clause

[9] Plaintiff contends that Defendant waived sovereign immunity by including a “sue or be sued” clause in its corporate charter. Plaintiff cites to Article VIII, § K, of Defendant’s Articles of Incorporation, which provides Defendant with the authority to “sue or be sued in its Corporate name to the extent provided in Article XVI of this Charter.” Plaintiff claims that Defendant has waived sovereign immunity since Article XVI does not contain any language exempting Defendant from a waiver created by Article VIII’s sue or be sued clause. We agree that a waiver created by the sue or be sued clause would be applicable to Defendant if such a waiver existed. However, in this case no waiver was created by the sue or be sued clause because other requirements that were needed to effectuate a waiver pursuant to Article XVI were not met.

[10] The strong weight of authority holds that enactment of a sue or be sued clause, in and of itself, does not constitute an effective waiver of sovereign immunity. Ninigret Dev. Corp. v. Narragansett Indian Wettumuck Hos. Auth., 207 F.3d 21, 30 (1st Cir. 2000). Furthermore, a waiver of sovereign immunity should be strictly construed, with all ambiguous provisions interpreted in favor of the tribe. Cf. County of Oneida, N.Y. v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (applying this rule to treaties and certain non-treaty matters). In this case, the sue or be sued clause was only activated if it met the requirements of Article XVI. Section D of Article XVI mandates that all waivers must be in the form of a resolution, which shall be duly adopted by Defendant’s board of directors. Section D continues:

The resolution shall identify the party or parties for whose benefit the waiver is granted, the transaction or transactions and the claims or classes of claim for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the Corporation may be brought. Any waiver shall be limited to claims arising from the acts or omissions of the Corporation, its Directors, officers, employees or agents, and shall be construed only to effect the property and income of the Corporation.

[11] Here, Plaintiff has offered no proof that a resolution was adopted by Defendant’s board of directors, and since Article VIII’s sue or be sued clause can only be made effective pursuant to the requirements set out in Section D of Article XVI, we conclude that no waiver was created. See Ninigret Dev. Corp., 207 F.3d at 30.

[12] Plaintiff contends that federal law is clear that the simple appearance of a sue or be sued clause in the charters of Section 17 corporations serves as a general waiver of sovereign immunity. We disagree. Our review of the law indicates that a sue or be sued clause will only accomplish a waiver when the clause clearly expresses an intent to waive immunity. Parker Drilling Co., 451 F. Supp. at 1136-37 (holding that the sue or be sued clause in corporate charter served as a waiver because the clause had no restrictions or limitations and was a clear, explicit, and unambiguous waiver); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty., 674 P.2d 1376, 1383 (Ariz. Ct. App. 1983) (holding that tribal corporation waived immunity due to express provision within its charter allowing it to be sued in courts of competent jurisdiction); Martinez v. S. Ute Tribe, 374 P.2d 691, 693-94 (Colo. 1962) (en banc) (same). We conclude that the present case, with its sue or be sued clause, is distinguishable from the cases which found an express waiver. The clause in Defendant’s charter could only be made effective pursuant to the requirements set out in Section D of Article XVI, we conclude that no waiver was created.

[13] Plaintiff further argues that Defendant may have “inadvertently waived” its sovereign immunity by enacting the sue or be sued clause within its charter. Plaintiff cites to C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001), for the proposition that sovereign immunity may be inadvertently waived. We find no support for this theory in C&L Enterprises, Inc., which held that for a tribe to relinquish its immunity, the tribe’s waiver must be “clear.” Id. at 418 (internal quotation marks and citation omitted). Although the Court in C&L Enterprises, Inc. found a waiver of immunity in that case, the Court noted that the waiver—an agreement to submit disputes to arbitration, to be bound by the arbitration award, and to have the award enforced in a court of law—was ambiguous and explicit. Id. at 420. Therefore, we decline to hold that an Indian tribe, or the entities that they control, can inadvertently waive its sovereign immunity under the circumstances of this case.

[14] We find the present case to be analogous to the First Circuit’s decision in Ninigret Development Corp., which found no waiver of immunity where the sue or be sued clause contained a requirement that immunity be waived by contract, but which had no contract waiving immunity. 207 F.3d at 30. Therefore, we hold that the sue or be sued clause in Defendant’s charter did not constitute an express waiver since the requirements were not met to effectuate the waiver.

Commitment to Anti-Discrimination Standards in Employee Handbook

[15] Plaintiff contends that Defendant waived immunity through its employee handbook by affirmatively committing to nondiscrimination based on handicap. Plaintiff further argues that the employee handbook contains procedures for employee discipline, which also constitute a waiver of immunity. Essentially, Plaintiff requests that this Court hold that Defendant’s language contained in its employee handbook should serve as an implied waiver of sovereign immunity.

[16] A waiver of sovereign immunity cannot be implied. Santa Clara Pueblo, 436 U.S. at 58. Furthermore, in questions regarding waivers of sovereign immunity, all issues should be interpreted favorably for the tribe and restrictively against the claimant. S. Unique, Ltd., 674 P.2d at 1381. The general language in the handbook says nothing about lawsuits or courts of law. Therefore, we hold that
Defendant’s employee handbook does not constitute an implied waiver of sovereign immunity.

**Participation in New Mexico’s Workers’ Compensation Program**

{17} Plaintiff urges the Court to hold that Defendant’s voluntary participation in New Mexico’s workers’ compensation program serves as a waiver of immunity. Plaintiff makes this argument without citing to any authority or providing any substantive argument in support of her contention.

{18} A waiver of sovereign immunity cannot be implied. *Santa Clara Pueblo*, 436 U.S. at 58. Thus, we conclude that waivers of sovereign immunity cannot be created by implication through activities such as participation in the state’s workers’ compensation program. *See Webb v. Paragon Casino*, 872 So. 2d 641, 646 (La. Ct. App. 2004) (holding that state did not have jurisdiction over tribe where tribe paid into workers’ compensation program but had not waived sovereign immunity).

**Inconsistent Waivers in Other Business Dealings**

{19} Plaintiff’s final argument that Defendant waived sovereign immunity is that Defendant has, in past business dealings, ignored the procedures to effectuate a waiver as set out in Section D of Article XVI. She argues that a “waiver could be inferred” from Defendant’s past actions. We disagree. A waiver of sovereign immunity may not be inferred. *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993). Furthermore, tribal entities may choose to waive sovereign immunity either generally or with respect to particular transactions. *Chance v. Coquille Indian Tribe*, 963 P.2d 638, 639 (Or. 1998). Thus, we rule that Defendant did not waive sovereign immunity in the present case when it did not follow Article XVI’s procedures to create a waiver in prior business dealings.

**Genuine Issue of Fact as to Waiver of Sovereign Immunity**

{20} Plaintiff contends that, even if we do not find a waiver of sovereign immunity, we should find that all four of her waiver arguments, when combined together, create a genuine issue of fact as to whether a waiver existed. She argues that if we determine that a factual issue exists in this case with regard to whether a waiver was effectuated, we should reverse the district court’s order to dismiss and remand to allow her to argue the issue of waiver in front of a fact-finder.


{22} In this case, considering the facts in the light most favorable to Plaintiff, we do not find a genuine issue of fact exists as to whether a waiver was effectuated. As we have discussed above, the sue or be sued clause did not create a waiver since it did not meet the requirements contained within Article XVI. Plaintiff’s other arguments are based on a finding that waivers can be created either by inference, implication, or inadvertence. Since current precedent stands directly against these contentions, we find no issue of fact to exist as to whether a waiver was created by these means.

{23} Yet, Plaintiff argues that if we combine her four waiver arguments, there is sufficient evidence to create a genuine issue of fact as to whether a waiver existed in this case. We disagree. We find no support for Plaintiff’s contention, and she does not direct us to any, that an express waiver of sovereign immunity can be pieced together through inference and implication, combined with a sue or be sued clause that is not made effective due to unmet requirements. Therefore, we hold that summary judgment was appropriate in this case and that there are no genuine issues of fact as to the existence of a waiver.

**CONCLUSION**

{24} For these reasons, we affirm the district court’s order to dismiss.

{25} **IT IS SO ORDERED.**

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

CElia FOY CASTILLO, Judge
**Certiorari Not Applied For**

From the New Mexico Court of Appeals

**Opinion Number:** 2005-NMCA-004

**Topic Index:**

Appeal and Error: Substantial or Sufficient Evidence; and Timeliness of Appeal

Contracts: Consideration; Modification; and Oral Contract

**OPINION**

**LYNN PICKARD, JUDGE**

{1} Jerry and Lois Hilburn (the Hilburns) executed a continuing guaranty of debts that Western Auto Rentals and Sales, Inc. (WARS) owed to Valley Bank of Commerce (Bank). When WARS defaulted on a $1.4 million loan, Bank negotiated settlements with WARS and the other individuals who had guaranteed the loan. The Hilburns did not participate in the settlement, contending that they were not liable for the debt. Bank sued the Hilburns for breach of contract and damages in the amount of the debt remaining after the settlement. The Hilburns countersued under a number of theories, including that Bank had orally agreed to return the guaranty before WARS incurred the debt. A jury returned a verdict finding that neither party should recover, and Bank appealed. First, we address a procedural matter. We hold that in jury trial cases, where one of the parties files a post-trial motion for judgment as a matter of law, the time to file a notice of appeal does not begin to run until the trial court enters an order denying that motion. Finding Bank’s appeal timely, we address the merits of the appeal. We hold that the jury could have reasonably determined that the Hilburns were released from their guaranty through an oral agreement preceding the disputed indebtedness. On that basis, we affirm the jury verdict.

**FACTS AND PROCEEDINGS**

{2} WARS was a business that rented and sold used cars in Roswell, New Mexico. The principals of the business were Ron Peerson, his wife Elly Peerson, Donald “Pug” Thigpen, and his wife Katherine Collier. Also involved in the business were the Hilburns, who provided $625,000 to assist in starting up WARS’ operations under a deal that was either a purchase of stock or a loan.

{3} In October 1996, the Hilburns executed an Unconditional and Continuing Guaranty that guaranteed debts that WARS owed to Bank. The guaranty applied to “any and all liabilities, obligations or indebtedness of any kind or nature whatsoever, which now exist or may hereafter arise or accrue in any manner” between WARS and Bank. The guaranty agreement also provided that WARS could incur new debts that the Hilburns would guaranty, and it waived the Hilburns’ right to notice of any new debts for which they would be liable. The guaranty agreement also gave Bank the ability to change the terms of the debt, to change or release other guarantors from the agreements, and to release or sell the collateral without affecting the Hilburns’ guaranty. The Peersons, Thigpen, and Collier were also guarantors for the debts of WARS.

{4} In order to provide financing for the cars it was selling, WARS created an entity called Western Auto Finance, L.L.C. (WAF). WAF entered into an agreement with Bank that set up the following arrangement. WAF would enter into an installment contract with a consumer who was purchasing a vehicle from WARS. WAF would then sell the installment contract to Bank for face value. WAF would remain responsible for pursuing the consumer if there was a problem with payment, and WAF had a recourse obligation to pay the balance of the installment contract if the consumer did not. WAF and Bank split the interest on the installment contract. Although the Peersons, Thigpen, and Collier were involved in the operations of WAF, the Hilburns were not involved in the relationship between WAF and Bank.

{5} In November 1996, Jerry Hilburn took out a $200,000 personal loan from Bank. That loan was eventually extended, increased to $275,000, and secured by the assets of three video stores that Jerry Hilburn purported to own. In January 2000, Bank determined that Jerry Hilburn did not actually own the assets that he pledged to secure his personal loan.

{6} Both parties agree that in January 2000, Jerry Hilburn had a phone conversation with Bank’s president, John Burson (Burson). According to Bank, Burson refused Jerry Hilburn’s request to be relieved from the WARS guaranty in return for full payment of his personal note because the two obligations were separate. According to the Hilburns, Burson accepted his offer and agreed to release them from the guaranty in return for full payment of Jerry Hilburn’s personal note. Jerry Hilburn did pay his personal debt in full.
In February 2000, Bank extended WARS a loan for $1,553,000, which the parties refer to as “Note 5342.” Note 5342 consolidated a series of earlier loans to WARS in order to facilitate one monthly payment.

In July 2000, Jerry Hilburn sent a letter to Bank stating:

This is notice pursuant to the unconditional and continuing Guaranty dated October 29, 1996 and all other similar guarantees signed previous or subsequent relative to Western Automobile Rental and Sales, Inc. or any of its successors, that the undersigned elects not to guarantee any new indebtedness of the Borrower, (Western Automobile Rental and Sales, Inc. or its successors) to Valley Bank which may hereafter accrue.

The letter was signed by Jerry Hilburn only.

WARS defaulted on its obligations to Bank in November 2000. WAF also had fallen on hard times, as more and more installment contracts went into default and increased the debt that WAF owed Bank based on the recourse obligation. Bank called a meeting with the guarantors of the WARS debt in January 2001 in order to negotiate a workout agreement. Jerry Hilburn attended the meeting and participated in the discussions that led to Bank’s agreement to reduce the obligations of WAF and WARS by $750,000 in return for a $200,000 payment on the loan. The agreement was made in light of the fact that WARS and WAF were in the process of applying for a government loan to keep the businesses afloat. After the agreement was drafted, Jerry Hilburn refused to sign it. In February 2001, there was a heated phone conversation between Burson and Jerry Hilburn in which Burson told Hilburn that if he did not enter into the workout agreement, Bank would enter a workout agreement with the Peersons, Thigpen, and Collier and sue the Hilburns for the balance of the WARS loan.

Bank entered into an agreement with Thigpen and Collier in March 2001, whereby they would borrow $1,450,000 from Bank, secured by a mortgage on their farm and home, and use that money to pay down the WARS and WAF debts. A new entity, New Western Enterprises, would buy the assets of WARS and WAF and would try to secure the government loan to continue operations. In return, Bank agreed not to pursue WARS, WAF, Thigpen, or Collier for the approximately $750,000 of the balance of the WARS and WAF debts. At trial, Thigpen testified that he had made an oral agreement with Bank that if the Hilburns would be released from the guaranty on the first note if Thigpen and Collier secured their new loan with their farm and home. However, the written agreement between Thigpen and Collier and Bank contained a provision stating that the agreement would not affect “any and all rights of Bank against Ron and Elly Peerson (‘Peerson’) or Jerry and Lois Hilburn (‘Hilburn’) and shall not effect or in any way cause a discharge of Peerson and Hilburn from any liability or obligation to Bank[.]” After the agreement was executed, $627,818.78 of the money that Thigpen and Collier borrowed from Bank was applied to Note 5342, as well as another, separate note. The remainder was used to pay off other debts owed by WARS and WAF.

Bank filed suit against the Hilburns for breach of contract in order to collect the balance due on Note 5342. The Hilburns filed a counterclaim for breach of contract, breach of the covenant of good faith and fair dealing, and a myriad of other claims. After a full trial, the jury returned a verdict stating, “We find neither party should recover.” After the district court denied Bank’s motion for judgment as a matter of law, Bank appealed.

DISCUSSION

1. Timeliness of Appeal.

In their brief, the Hilburns contended that Bank’s appeal should be held to be untimely. Although the Hilburns withdrew this point at oral argument, we proceed to address it because timeliness of the appeal is a mandatory precondition to our jurisdiction. See Rice v. Gonzales, 79 N.M. 377, 378, 444 P.2d 288, 289 (1968) (addressing the timeliness issue despite the fact that neither party raised it). On April 17, 2003, Bank filed a timely motion for judgment as a matter of law under Rule 1-050 NMRA 2004. The district court held a hearing on May 28, 2003, and it entered an order denying Bank’s motion on June 4, 2003. Bank filed a notice of appeal on July 3, 2003.

According to the Hilburns, Bank’s motion for judgment as a matter of law was automatically denied under NMSA 1978, § 39-1-1 (1917), which provides:

Any judgment, or decree, except in cases where trial by jury is necessary, may be rendered by the judge of the district court at any place where he may be in this state, and the district courts, except for jury trials, are declared to be at all times in session for all purposes, including the naturalization of aliens. . . . Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment; provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof.[] (Emphasis added.) If this interpretation were accurate, Bank’s motion would have been deemed denied on May 17, 2003, and Bank’s appeal would be untimely under Rule 12-201(D) NMRA 2004. Rule 12-201(D) reads in pertinent part:

D. Post-trial motions extending the time for appeal. If a party timely files a motion pursuant to Section 39-1-1 NMSA 1978, Rule 1-050(B), 1-052(B)(2), or 1-059 or a motion pursuant to Rule 5-614 based on grounds other than newly discovered evidence, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion or the date of any automatic denial of the motion under that statute or any of those rules, whichever occurs first.

Bank responds that Rule 1-050, which does not include an automatic denial provision, controls the issue. The applicable part of Rule 1-050 reads:

B. Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have
submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than ten (10) days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 1-059 NMRA. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
   (a) allow the judgment to stand;
   (b) order a new trial; or
   (c) direct entry of judgment as a matter of law[

D. Denial of motion for judgment as a matter of law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

{15} The Supreme Court amended Rule 1-050 in 1999 in order to conform the New Mexico rule with the Federal Rule of Civil Procedure, which had been amended primarily to change the familiar terminology of “directed verdict” and “judgment n.o.v.” to the single term “judgment as a matter of law.” See In re the Amendment of Rules 1-050, 1-085, and 1-099 of the Rules of Civil Procedure for District Courts, No. 99-8300 (Aug. 10, 1999); 1 James Wm. Moore, Moore’s Federal Rules Pamphlet § 50.3[1], at 597 (2004). In so doing, the automatic denial provision previously in the rule was deleted. It is not clear to what extent the decision to amend the rules took into account the fact that the federal rules governing post-trial motions generally do not contain an automatic denial provision, whereas the New Mexico rules generally did. Compare Fed. R. Civ. P. 50 (providing no automatic denial of post-trial motions for judgment as a matter of law), with Rule 1-050 NMRA 1998 (providing automatic denial of post-trial motions for judgment as a matter of law prior to the amendment); compare Fed. R. Civ. P. 52 (providing no automatic denial of post-trial motions to amend findings and conclusions), with Rule 1-052(D) NMRA 2004 (providing automatic denial of post-trial motions to amend findings and conclusions); compare Fed. R. Civ. P. 59 (providing no automatic denial of post-trial motions for a new trial or to amend the judgment), with Rule 1-059(D) NMRA 2004 (providing automatic denial of motions for a new trial). The federal rule governing timeliness of appeals also does not contain an automatic denial provision. Fed. R. App. P. 4(a)(4). As one commentator noted, parties in federal court must await an order on a post-trial motion before the time for appeal runs, and this could result in an indefinite waiting period or the need to file a writ of mandamus. David G. Knibb, Federal Court of Appeals Manual § 10.4 (2004). This view is inconsistent with New Mexico’s policy of automatically denying motions in order to help the district courts manage their dockets and to give parties certainty as to the time they have to file for appeal. See Martinez v. Friede, 2004-NMSC-006, ¶¶ 12-13, 135 N.M. 171, 86 P.3d 596.

{16} However, this Court ordinarily construes statutes according to their plain language, unless the result would be absurd or unjust. See Cordova v. Wolfel, 120 N.M. 557, 560, 903 P.2d 1390, 1393 (1995). We also construe rules of procedure in the same manner as statutes. Brewster v. Cooley & Assoc., 116 N.M. 681, 684, 866 P.2d 409, 412 (Ct. App. 1993). This Court does not have the power to change rules of procedure promulgated by the Supreme Court. State v. Garcia, 101 N.M. 232, 235, 680 P.2d 613, 616 (Ct. App. 1984). Thus, despite the incongruous nature of the 1999 amendment, we hold that there is no automatic denial of post-trial motions for judgment as a matter of law under Rule 1-050 alone.

{17} Bank also suggests that there is no conflict between Section 39-1-1 and Rule 1-050 in the present case because Section 39-1-1 does not apply to jury trials. On its face, Section 39-1-1 does not appear to apply to jury trials, and a review of our pertinent cases reveals that we have limited our discussion of the applicability of Section 39-1-1 to non-jury trials.

{18} We hold that Section 39-1-1 only applies to non-jury trials, as its plain language suggests. The case of Montgomery Ward v. Larragoite, 81 N.M. 383, 386, 467 P.2d 399, 402 (1970), does not persuade us to the contrary. In that case, the Supreme Court held that appellate courts have jurisdiction to review a case in which the district court did not rule on a post-jury trial motion for a new trial within 30 days. Id. The Court did not hold that Section 21-9-1, the former codification of Section 39-1-1, applied to the case, but merely that it would have governed in a non-jury case. Id. The controlling rule in Montgomery Ward was Rule 5, NMRA 1953, § 21-2-1(5) (1959), which did contain an automatic denial provision. Montgomery Ward, 81 N.M. at 386, 467 P.2d at 402.

{19} Similarly, our holding in Chavez-Rey v. Miller, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982), did not blur the distinction that Section 39-1-1 makes between jury and non-jury trials. In that case, we held that a motion for judgment as a matter of law following a jury trial was automatically denied under an earlier version of the rules of appellate procedure. Id. at 381, 658 P.2d at 456. Chavez-Rey was decided under Appellate Rule 3(d), the predecessor to Rule 12-201, which did not reference Section 39-1-1 as the current rule does. Chavez-Rey, 99 N.M. at 381, 658 P.2d at 456. Instead, Appellate Rule 3(d), like former Rule 5, stated the time for appeal as the earlier of either 30 days after the filing of the motion or the date of the order granting or denying the motion under Rule 1-050. Chavez-Rey, 99 N.M. at 381, 658 P.2d at 456. We reasoned that this provision achieved the same result in jury and non-jury trials, id., citing scholarly commentary suggesting that the distinction between jury and non-jury trials for automatic denial purposes was obsolete. See Mario E. Occhiaino, Civil Procedure, 12 N.M. L. Rev. 97, 154 n.347 (1982).

{20} As discussed above, the Supreme Court amended the Rules of Appellate Procedure subsequent to Chavez-Rey, replacing the 30-day automatic denial provision with a reference to Section 39-1-1. Although Rule 12-201(D) points us to the earliest date at which either Section 39-1-1 or Rule 1-050 disposes of the motion, Section 39-1-1 does not apply to jury trial cases. Therefore, we
look exclusively to Rule 1-050, which has no automatic denial provision as discussed above. Combining these two rules, we hold that in jury trial cases where one of the parties files a post-trial motion for judgment as a matter of law, the time for filing a notice of appeal does not begin to run until the district court enters an order ruling on the motion. Although this result may seem incongruous in light of New Mexico’s policy to generally provide for automatic denials of motions, we believe that it is up to the Supreme Court to conform Rule 1-050 to the other rules. Because there was no automatic denial of Bank’s motion for judgment as a matter of law, Bank’s notice of appeal, filed within 30 days after the order denying its motion, was timely.

2. The jury could reasonably have found that the Hilburns had made an oral agreement with Bank to be released from their guaranty and cease liability before WARS obtained the debt at issue.

(21) Appellate courts review jury verdicts cautiously in order to safeguard a litigant’s constitutional right to a jury trial. Gonzales v. Sansoy, 102 N.M. 136, 137, 692 P.2d 522, 523 (1984). We resolve all factual issues in the light most favorable to the jury verdict, disregarding inferences to the contrary. Id. In the present case, there were no special interrogatories explaining the basis for the jury’s decision. The Hilburns argue that the jury could have found that they made an oral agreement in January 2000 that released them from any liability for debts incurred after that time, which includes the debts at issue in this case. We agree and affirm on this basis.

(22) At trial, the issue of the oral agreement was raised both as a defense to the breach of contract claim and in the context of the Hilburns’ counterclaim for breach of contract against Bank. The jury was instructed that the Hilburns had the burden of proving “that on January 18, 2000, Jerry Hilburn and Valley Bank agreed that if Jerry Hilburn pre-paid a personal obligation he owed to the bank, Valley Bank would return the Unconditional Guarantee.” It was also instructed that in order to find that Bank had breached a contract to return the guaranty, it must find that there was an oral agreement to release the guaranty in exchange for the Hilburns’ payment of Jerry Hilburn’s personal note in full, that there was consideration for the agreement, and that the Hilburns paid the personal note in full. If the jury found that Bank had agreed to release the guaranty in January 2000, this could be a basis for finding that the Hilburns had no liability for debts incurred thereafter, including Note 5342.

(23) The jury instructions were legally correct. Although the guaranty on its face required all changes to be in writing, oral modifications to a written contract are permissible under certain circumstances even when the contract specifies that modifications must be in writing. Medina v. Sunstate Realty, Inc., 119 N.M. 136, 138-39, 889 P.2d 171, 173-74 (1995) (stating that a district court erred by excluding evidence of oral modification to a written contract specifying that all changes must be in writing); Wendell v. Foley, 92 N.M. 702, 705, 594 P.2d 750, 753 (Ct. App. 1979) (holding that there may be oral modification to a written contract specifying that all changes must be in writing). We also reject Bank’s assertions that the statute of frauds precludes the Hilburns from asserting an oral agreement because the guaranty is covered by the statute of frauds as an agreement to guaranty the debt of another. Oral modifications to a contract governed by the statute of frauds are permissible if one of the parties materially changes its position in reliance on that modification. Diversified Dev. & Inv., Inc. v. Heil, 119 N.M. 290, 300, 889 P.2d 1212, 1222 (1995); Wendell, 92 N.M. at 705, 594 P.2d at 753; accord Restatement (Second) of Contracts § 150 (1981). Jerry Hilburn testified that he paid off the note in reliance on Bank’s promise to return the guaranty. Under these circumstances in which Hilburn changed his position by paying off his personal debt in full, Bank’s agreement to release the Hilburns’ guaranty and subsequent attempts to collect under the guaranty would be the type of fraudulent activity that the statute of frauds is not intended to protect.

(24) Bank argues that there was no consideration for the agreement based on the “pre-existing duty” rule, reasoning that Jerry Hilburn was already obligated to pay the note in full. See Jaynes v. Strong-Thorne Mortuary, Inc., 1998-NMSC-004, ¶ 11, 124 N.M. 613, 954 P.2d 45 (explaining the pre-existing duty rule). We disagree. The record does not indicate that Bank ever formally put the note in default status. Bank did not call the note due. Unlike the letters that were sent when the WARS note went into default, Bank never gave written notice that Jerry Hilburn’s personal note was in default. Because the loan was never formally put into default status, Hilburn had no pre-existing duty to pay it in full. Furthermore, the record indicates that there was adequate consideration to support the oral agreement. At trial, Burson testified that he called Hilburn because Burson believed that Hilburn did not have the right to pledge the collateral that secured Hilburn’s personal note. Hilburn disputed the fact that he could not properly pledge the collateral. Instead of pursuing the disagreement, the Hilburns agreed to pay his personal note in a lump sum in return for termination of the guaranty. The jury could thus have found that Bank agreed to end the Hilburns’ liability under the guaranty because it perceived itself to be in an unsecured position with regard to Hilburn’s note and because it had the opportunity to receive full payment without the disagreement and difficulty of issuing notice that the debt was in default and attempting to work out an agreement with Jerry Hilburn. This agreement to pre-pay the personal note is adequate consideration for the release of the guaranty. See Richards v. Allianz Life Ins. Co. of N. Am., 2003-NMCA-001, ¶ 19, 133 N.M. 229, 62 P.3d 320 (stating that it is the fact of consideration and not the amount that is determinative and restating the rule that ambiguities are construed to support the judgment).

(25) Finally, the jury could have reasonably found that there was an oral agreement under the jury instructions. Although the law requires that an oral modification to a written contract be proved by clear and convincing evidence, Powers v. Miller, 1999-NMCA-080, ¶ 10, 127 N.M. 496, 984 P.2d 177, the jury was not instructed on this heightened standard of proof. Nor was there any request for such an instruction. However, “[e]ven in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies.” In re R.W., 108 N.M. 332, 335, 772 P.2d 366, 369 (Ct. App. 1989). In the present case, both Jerry and Lois Hilburn testified that the phone conversation with Burson established an oral agreement to “return” the guaranty in exchange for full payment of the personal debt. The fact that Jerry Hilburn did completely pay this debt was undisputed, and the jury could have inferred partial performance and reliance on the agreement from this fact. Although Bank suggested that Jerry Hilburn would not have attended the March 2001 settlement negotiation meeting unless he still considered himself to be a guarantor, Hilburn testified that he had been asked to attend as a friend for Thigpen, not as a co-guarantor. The jury was free to disregard or disbelieve the testimony of Bank officials. Ranchers Exploration & Dev. Corp. v. Miles, 102 N.M. 387, 390, 696 P.2d 475, 478 (1985) (“It is up to the jury to weigh the testimony, determine the credibility

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of witnesses, reconcile inconsistent or contradictory evidence, and say where the truth lies.

At oral argument, Bank emphasized that any evidence supporting the oral agreement was undercut by the July 2000 letter, suggesting that it would not make sense for Jerry Hilburn to send a letter limiting his liability under a guaranty if the Hilburns truly believed that the guaranty had been previously cancelled. Hilburn explained the July 2000 letter by stating that a Colorado attorney advised him to draft the letter when a notice cancelling the guaranty “didn’t come in the mail.” When there is conflicting testimony, we do not hold that the jury could not have believed one version of the events unless it conflicts with the laws of nature, the result of a simple mathematical calculation, or some other such unmistakable fact. Larsen v. Bliss, 43 N.M. 265, 269-70, 91 P.2d 811, 814 (1939). Instead, we defer to the fact finder, who is in a better position to “see a shift of the eyes, sweat, a squirm, a tear, a facial expression, or take notice of other signs that may mean the difference between truth and falsehood.” Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct. App. 1988), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, ¶¶ 25-26, 131 N.M. 272, 34 P.3d 1148. The jury in the present case could have believed that Hilburn sent the July 2000 letter because an attorney told him to send it and could have rejected Bank’s suggestion that the letter made no sense if there had been a January oral agreement.

Because an oral agreement to return the guaranty in January 2000 would completely relieve the Hilburns of liability, we need not consider any other of the many issues raised by the parties. This finding alone would support the verdict.

CONCLUSION

The appeal in this case was timely under Rule 12-201. We affirm the jury verdict, holding that the jury could reasonably have found that an oral agreement between the Hilburns and Bank relieved the Hilburns of all liability.

IT IS SO ORDERED.
LYNN PICKARD, Judge

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

CYNTHIA A. FRY, Judge

1} In State v. Stein, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295, we examined the definition of “household member” in the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -16 (1995, prior to 2001 amendment) (CAHMA), and concluded that the crime of “battery against a household member does not encompass battery against one’s own child.” Stein, 1999-NMCA-065, ¶ 19. The victim in Stein, however, was the 13-year-old daughter of the accused. Id. ¶ 4. Today we must decide whether a defendant who has battered his adult son may be convicted of battery against a household member. We conclude that he may on the ground that the exclusion recognized in Stein applies only to the minor children of the perpetrator.

BACKGROUND

2} Following a scuffle with Victim, Defendant was charged with battery against a household member. Victim was the 28-year-old son of Defendant and had been estranged from his father for several years. On Father’s Day, Victim was out driving with his wife and their two children when they encountered Defendant riding his bicycle. Conflicting versions of the events that followed were presented at trial. Victim and his wife both testified that Defendant rode in front of their car and flipped them off. They testified that when Victim asked Defendant if there was something wrong with his finger, Defendant got off his bike, approached the car, swore at Victim in Spanish, choked him, and threw coins at him. They also testified that when Victim got out of the car, Defendant punched Victim twice in the face before Victim retaliated with blows of his own. Defendant, on the other hand, testified that Victim called Defendant a “bum” and a “hobo” and threatened to run over him with his car. According to Defendant, when Victim got out of his car, he struck Defendant, and Defendant fought back only in self-defense. Rejecting Defendant’s version of the events, the district court found Defendant guilty of battery against a household member.

DISCUSSION

Finality

3} Preliminarily, we address whether the district court’s order on trial de novo is a final, appealable order. Originally, Defendant was convicted by a jury in magistrate court of battery against a household member. He was sentenced by the magistrate court to 364 days in jail with all 364 days suspended. Defendant then appealed his conviction to the district court where a trial de novo was held. Following a bench trial, the district court entered an order finding Defendant guilty of battery against a household member and remanding to the magistrate court “for imposition of the original sentence.”

4} As the State correctly notes, when a defendant is convicted in a trial de novo on appeal from magistrate court, the district court is required to impose a sentence prior to remanding the case to the magistrate court for enforcement of the district court’s judgment. NMSA 1978, § 35-13-2(C) (1996). When the district court enters an order of remand to the magistrate court that does not resolve the issue of sentencing, this Court has held that the order is not final and appealable. State v. Cordova, 114 N.M. 22, 23, 833 P.2d 1203, 1204 (Ct. App. 1992); see also State v. Garcia, 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct. App. 1983) (recognizing that a final judgment in a criminal case either adjudicates the defendant guilty and imposes, suspends, or defers sentence or dismisses the charges).

5} Here, the district court did not impose a sentence but remanded to the magistrate court “for imposition of the original sentence.” As the State acknowledges, on remand, the magistrate court will have no discretion to revisit the issue of sentencing, but must simply enter the sentence previously imposed. See State v. Gage, 2002-NMCA-018, ¶ 20, 131 N.M. 581, 40 P.3d 1025 (explaining that the magistrate court has no jurisdiction or authority to exceed the mandate of the district court); see also State v. Celusniak, 2004-NMCA-070, ¶ 9, 135 N.M. 728, 93 P.3d 10 (“On remand, the magistrate court proceeds with the case in keeping with the mandate of the district court.”). Therefore, because the magistrate court will lack authority to make any substantive determination regarding Defendant’s sentence, and will be limited to the purely ministerial act of imposing the original sentence, we conclude that the order on trial de novo is final for purposes of appeal. Cf. State v. Candy L., 2003-NMCA-109, ¶ 6, 134 N.M. 213, 75 P.3d 429 (dismissing appeal as premature where “we are not merely awaiting a ministerial act, but rather a substantive determination” of the child’s restitution plan); State v. Ahasteen, 1998-NMCA-158, ¶ 13, 126 N.M. 238, 968 P.2d 328 (applying the doctrine of practical finality.
to permit appeal from an order of remand).

Preservation

[6] Next we address the issue of preservation raised by the State. According to the State, Defendant failed to preserve his argument that Victim is not a “household member” within the meaning of the CAHMA, and thus cannot raise the issue for the first time on appeal. In particular, the State points out that Defendant did not argue that his “child” or “adult son” cannot be considered a “family member” or “relative” under Section 30-3-11, and did not refer to Stein in the district court. We conclude that the issue of whether Victim meets the statutory definition of “household member” was adequately preserved.

[7] “The New Mexico Rules of Appellate Procedure require a ruling or decision by the district court to be ‘fairly invoked’ in order to preserve a question for review.” State v. Jason F., 1998-NMSC-010, ¶ 9, 125 N.M. 111, 957 P.2d 1145; Rule 12-216(A) NMRA. The primary purposes of the preservation requirement are “(1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.” State v. Gomez, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1. As an appellate court, we bear these dual purposes in mind when we apply the preservation requirement. Gracia v. Bittner, 120 N.M. 191, 195, 900 P.2d 351, 355 (Ct. App. 1995).

[8] During closing argument, the prosecutor recited the essential elements of battery against a household member, including that Victim was a “household member.” The prosecutor then argued that there was evidence to support each element of the offense beyond a reasonable doubt, and that Defendant was the first aggressor. Defense counsel disagreed, arguing that the elements of battery on a household member had not been met, and that Defendant acted in self-defense. Defense counsel’s objection, while broad and nebulous, appears to have alerted the district court to the issue of whether the definition of “household member” was met because it prompted the court to ask the prosecutor for the statutory definition of the term following the defense’s closing argument. In response to the district court’s inquiry, the prosecutor, during rebuttal, recited the applicable statutory definition and argued that the definition was met under the facts of this case. Specifically, she stated that “co-habitation is not necessary” for Victim “to be deemed a household member” and that the definition was met because Defendant “is a parent” of Victim. After reviewing the evidence in chambers, the district court returned on the record to announce its finding that Defendant was guilty of battery against a household member.

[9] Based on the foregoing facts, we conclude that the issue of whether Victim falls within the statutory definition of “household member” was fairly presented below. Despite the ambiguity of defense counsel’s objection, the district court was alerted to the question of whether Victim meets the definition of “household member,” the State had an opportunity to respond and argue evidence relating to the issue, and the district court ruled on the issue by finding evidence to support each element of the offense beyond a reasonable doubt. See Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 540, 893 P.2d 428, 436 (1995) (discussing that although appellants’ “arguments were not a model of clarity, and certainly could have been made with more specificity, they were sufficient to alert the trial court and opposing counsel to the substance of the argument being made”); State v. Griffin, 2002-NMCA-051, ¶ 6, 132 N.M. 195, 46 P.3d 102 (concluding that jury instruction issue was preserved where the district court understood the defendant’s argument and made a well-informed ruling on the question); cf. State v. Woodruff, 1997-NMSC-061, ¶ 21, 124 N.M. 388, 951 P.2d 605 (recognizing that the district court may itself fairly invoke a ruling on an issue).

[10] Although no mention of the Stein case was made below, the issue of whether Victim was a “household member” as defined by the applicable statute, the same question addressed in Stein, appears to have been raised and thus was adequately preserved. See Gomez, 1997-NMSC-006, ¶ 30 (determining that a party’s failure to cite to specific cases in support of a legal principle was not fatal “so long as the party has asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule”). “The rules that govern the preservation of error for appellate review are not an end in themselves, rather they are instruments for doing justice.” Garcia, 119 N.M. at 541, 893 P.2d at 437. Because we conclude that the preservation requirement was met in this case, we need not consider whether to review the issue on appeal for fundamental error. Id.

Standard of Review

[11] Defendant argues that his conviction must be reversed because the evidence at trial cannot support a finding that Victim was a “household member” within the meaning of Section 30-3-11. “Although framed as a challenge to the sufficiency of evidence, Defendant’s argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain a conviction.” State v. Barragan, 2001-NMCA-086, ¶ 24, 131 N.M. 281, 34 P.3d 1157. Thus, underlying issues of statutory interpretation are questions of law reviewed de novo. Id.

Statutory Definition of Household Member and Stein

[12] Under the CAHMA, battery against a household member “consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.” § 30-3-15(A). “Household member” is defined under the CAHMA as:

- a spouse, former spouse or family member, including a relative, parent, present or former step-parent, present or former in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act.

§ 30-3-11.

[13] In Stein, this Court concluded that the definition of “household member” in the CAHMA does not include the “child” of the accused. Stein, 1999-NMCA-065, ¶ 19. Defendant argues that because he was charged with battering his son, his conviction must be
reversed based on this Court’s holding in Stein. Relying on Stein and the omission of the term “child” from the statutory definition of “household member,” Defendant urges us to apply the statute as written. He also argues that words should not be read into the statute and that if the legislature had intended to include minor or adult children in the definition of “household member,” it would have specifically done so. We conclude that Defendant’s reliance on Stein is misplaced and that the holding of that case is limited to the minor children of the accused.

14 Initially, we address Defendant’s argument favoring an application of the plain meaning rule of statutory construction. See State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990). We find Defendant’s argument unavailing because a plain reading of the applicable statute supports a conclusion that the definition of “household member” includes adult children of the accused. See § 30-3-11; State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (explaining that in ascertaining legislative intent we start by looking at the words chosen by the legislature). As we observed in Stein: “On its face, the statutory definition of ‘household member’ would appear to encompass a child of the accused. The definition includes ‘a family member,’ ‘a relative,’ and ‘a person with whom a person has had a continuing personal relationship.’” Stein, 1999-NMCA-065, ¶ 11. We find other indications that the definition of “household member” is to be read broadly. The victim need not cohabit or reside with the defendant in order to be a household member. § 30-3-11. Nor is it necessary for the victim to be related to the defendant; “a continuing personal relationship” is sufficient. Id.; cf. State v. Fike, 2002-NMCA-027, ¶ 19, 131 N.M. 676, 41 P.3d 944 (concluding that a continuing personal relationship was established where both victim and defendant lived together for several weeks before the incidents in question occurred). Thus, under a plain reading of the broadly drawn statute, Victim would certainly meet the statutory definition of “household member” since he is a “family member” and “relative” of Defendant.

15 In Stein, however, this Court looked beyond the plain language of Section 30-3-11 because a closer examination of the statute and its background revealed “that the legislative intent was to exclude children.” Stein, 1999-NMCA-065, ¶¶ 11-17; see State v. Rivera, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (explaining that “we have not relied upon the literal meaning of a statute when such an application would be absurd, unreasonable, or otherwise inappropriate”); Davis, 2003-NMSC-022, ¶ 6. We observed that while the definitions of “household member” in the Harassment and Stalking Act, the Criminal Procedure Act, and the Family Violence Protection Act, specifically include the term “child,” the definition in the CAHMA omits the term. Stein, 1999-NMCA-065, ¶ 14. In all other respects, however, the language in the statutory definitions is identical. Id. ¶ 16; see also State v. Trujillo, 1999-NMCA-003, ¶ 8, 126 N.M. 603, 973 P.2d 855. In addition, an examination of the legislative history of Section 30-3-11 revealed that the definition of “household member” originally included the word “child,” but that the word was later deleted by amendment and never reinserted. Stein, 1999-NMCA-065, ¶¶ 16-17. Concluding that the omission of “child” from Section 30-3-11 was “substantive and purposeful,” id. ¶ 17, this Court determined that the legislature intended to “exclude children” of the accused from the statutory definition. Id. ¶ 11.

16 For several reasons, we conclude that the exclusion recognized in Stein applies only to the minor children of the accused. First, the victim in Stein was the 13-year-old daughter of the defendant. Id. ¶ 4. Second, because the victim was a minor, the contents of the defendant and the resulting holding of this Court were necessarily limited to minor children of the accused. See id. ¶ 10. Third, in speculating why “child” was omitted from the statutory definition of “household member,” this Court identified two reasons: (1) conflict with the child abuse statute, and (2) the limited right of parents to impose corporal punishment on their children. Id. ¶ 19. Both rationales apply only to minor children of the perpetrator.

17 In addition, as the State points out, “child” is defined in the child abuse statute, and elsewhere, as a person under the age of eighteen. NMSA 1978, § 30-6-1(A)(1) (2004) (child abuse statute); NMSA 1978, § 32A-1-4(B) (2003) (Children’s Code). We believe that by omitting the word “child” from the statutory definition of “household member,” the legislature must have intended that only children under the age of eighteen be excluded from the definition. See State ex rel. Human Servs. Dep’t (In re Kira M.), 118 N.M. 563, 569, 883 P.2d 149, 155 (1994) (“We presume the legislature is aware of existing law when it enacts legislation.”); accord State v. Smith, 2004-NMCA-026, ¶ 15, 135 N.M. 162, 85 P.3d 804.

18 Accordingly, today we reaffirm our holding in Stein, clarifying that only minor children of the accused are excluded from the definition of “household member.” Id. ¶ 19. We note that since our decision in Stein, the statutory definition of “household member” has not been changed. The legislature has made only one amendment to the CAHMA, increasing the penalty of battery against an adult child from prosecution under Section 30-3-15, even though the victim is a “family member” or “relative,” while permitting an adult child who has battered a parent to be prosecuted under the statute. See State v. Pearson, 2000-NMCA-102, ¶ 5, 129 N.M. 762, 13 P.3d 980 (“Fundamentally, our role is to effectuate the [l]egislature’s intent as evidenced by the statute’s plain terms and avoid strained or absurd constructions.”).

19 Having determined that only minor children of the accused are excluded from the definition of “household member,” and that the definition of “household member” is otherwise broad in scope, we conclude that Victim, as the adult son of Defendant, is a relative of Defendant and therefore fits within the definition of “family member” and thus a “household member” within the meaning of the statute. See § 30-3-11. If construed otherwise, the statute would have the absurd result of shielding a parent who has committed battery against an adult child from prosecution under Section 30-3-15, even though the victim is a “family member” or “relative,” while permitting an adult child who has battered a parent to be prosecuted under the statute. See State v. Pearson, 2000-NMCA-102, ¶ 5, 129 N.M. 762, 13 P.3d 980 (“Fundamentally, our role is to effectuate the [l]egislature’s intent as evidenced by the statute’s plain terms and avoid strained or absurd constructions.”).

20 Defendant argues that because he was estranged from Victim, there was no “continuing personal relationship,” and thus, the State cannot rely on that portion of the statute that defines “household member” as “a person with whom a person has had a continuing
personal relationship.” See § 30-3-11. However, because we determine that Victim is a “relative” under Section 30-3-11, the State was not required to prove that Defendant had a continuing personal relationship with Victim. Under the statute, “household member” is defined, in part, as a family member, which term may include a person with whom a person has had a continuing personal relationship, or a number of other relationships, such as a relative. See State v. Ruffins, 109 N.M. 668, 671, 789 P.2d 616, 619 (1990) (“The word ‘or’ is given a disjunctive meaning unless the context of the statute demands otherwise.” (internal quotation marks and citation omitted)). Moreover, insofar as Defendant contends that an estranged family member cannot be a “household member” under the CAHMA, we reject this contention as without merit since Section 30-3-11 expressly includes former spouses, step-parents, or in-laws, who may or may not have had a continuing personal relationship with the accused at the time in question.

[21] Finally, Defendant argues that the statutory definition of “household member” must be strictly construed in his favor under the rule of lenity. See State v. Allen, 77 N.M. 433, 434, 423 P.2d 867, 868 (1967). However, the rule of lenity is reserved “for those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.” State v. Rowell, 121 N.M. 111, 116, 908 P.2d 1379, 1384 (1995) (emphasis, internal quotation marks, and citation omitted). Because we find that no such doubt persists after revisiting Stein and applying rules of statutory construction, we reject Defendant’s argument urging us to apply the rule of lenity. We also need not address the State’s arguments concerning the appropriate remedy in the event of reversal, and remand to the district court.

CONCLUSION

[22] Based on the foregoing discussion, we affirm Defendant’s conviction.

[23] IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

JONATHAN B. SUTIN, Judge

(specially concurring).

RODERICK T. KENNEDY, Judge

(specially concurring).

JONATHAN B. SUTIN, JUDGE

(Specially Concurring)


[25] The Crimes Against Household Members Act was enacted in response to the Legislature’s concern about domestic violence. State v. Stein, 1999-NMCA-065, ¶ 2, 127 N.M. 362, 981 P.2d 195. It was aimed at household violence. Id. Stein raised some doubt as to the scope of Section 30-3-11. Furthermore, the term “family member,” without any limitation on how far “family” is intended to extend, and the analogical term “relative,” create a conceivably limitless unit. Section 30-3-11 should be strictly construed in favor of a defendant, particularly given the connotations of domestic and household, and given Stein’s restrictive reading of the statute in regard to children. Nevertheless, even applying strict construction and considering lenity, I concur in the majority opinion.

[26] Guidelines as to the meaning of “family member” are provided by the inclusionary terms that follow it in the statute. There appears to be no evidence regarding a continuing personal relationship between Defendant and Joseph. Section 30-3-11’s restrictive definitional term “family member,” and inclusionary term “relative,” should be the only definitional terms applicable in the present case. Joseph, however estranged, was Defendant’s son and thus came from the immediate family; and, of course, Joseph was a relative. It is reasonable to bring a victim’s adult son within the meaning of “family member.”

[27] I nevertheless want to express my concerns about the statute’s scope. The statute neither requires the battery to have taken place in the home or to have been committed against a person residing in the home. The statute automatically covers any person who batters any relative whatsoever no matter the ages, sexes, emancipation, alienation, estrangement, and other circumstances such as chance meeting. Further, the statute automatically includes any person with whom the victim may have at some distant time in the past had a continuing personal relationship. Despite the word “family” in “family member,” the term “family member” could be interpreted to automatically include any person, whether a relative or not, with whom the victim has had at some time a continuing personal relationship.

[28] Many examples can be recited that would seem to make application of the statute virtually absurd without evidence beyond that of the status of relative. An eighty-year-old grandaunt or granduncle can be convicted of battery or aggravated battery under NMSA 1978, §§ 30-3-15 (2001), -16 (1995), for hitting her or his thirty-five-year-old nephew or niece once or twice removed with no further evidence than the elements of simple battery and proof that the victim was a relative. We must speculate that underlying its enactment of the Crimes Against Household Members Act the Legislature intended to establish a very broad policy that, no matter how dilute,
attenuated, transient, and generally non-discordant the relationship may be, it was very important to society to provide every member of a virtually limitless family unit (except of course minor children) added protection from every other member of that unit.

{29} Once a battery against a household member takes place, the statute makes the relative-actor criminally liable under Section 30-3-15(B), increasing the penalty from the petty misdemeanor of simple battery under NMSA 1978, § 30-3-4 (1963), to a misdemeanor. In this sense, the statute is or approaches a strict liability statute, because once a simple battery is proved, the sole question for the jury is whether the defendant was a relative. See State v. Baca, 114 N.M. 668, 674, 845 P.2d 762, 768 (1992) (referring to crimes “closely approaching” or constituting “near” strict liability crimes); State v. Anderson, 2001-NMCA-027, ¶¶ 26-34, 130 N.M. 295, 24 P.3d 327 (discussing strict liability for aggravation of a crime by the mere possession of an object or instrument that, if used as a weapon, could inflict serious injury). As such, perhaps it can be presumed to have been intended to afford a high level of protection and should be construed in a manner so that such protection is not vitiating. See Baca, 114 N.M. at 674, 845 P.2d at 768.

{30} Unquestionably expanded way beyond what the public normally thinks of as domestic or household violence against household members, the Legislature apparently felt that as a matter of our social welfare there should be no physical squabbling within this virtually limitless family unit. See State v. Rios, 1999-NMCA-069, ¶ 5, 127 N.M. 334, 980 P.2d 1068 (stating the legislative interest in establishing a strict liability crime to presumably be “that the public interest in the matter is so compelling or that the potential for harm is so great, that public interests override individual interests” (internal quotation marks and citation omitted)). I am not so sure, however, that the statute should be read so broadly. See State v. Torres, 2003-NMCA-101, ¶ 12, 134 N.M. 194, 75 P.3d 410 (noting that policy considerations may require the conclusion that “some of the potential victims within the purview of [a strict liability] statute do not require the protection of strict liability”).

{31} Defendant has raised no constitutional issue. Absent a constitutional defect in the statute, I hesitatingly defer to possible legislative intent and concern, notwithstanding my skepticism that the Legislature actually intended Section 30-3-11 to reach an estranged adult son under the circumstances of this case, because it is conceivable that the Legislature intended protection where the victim, even though an adult son, is a product of the nuclear family unit, a unit in which psychological sores and scars and abuse are often in hidden closets, and as to which the Legislature may well have wanted to provide added protection.

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge
(Specially Concurring)

{32} I concur with Judge Sutin’s assessment of the utilitarian conundrum that produces a hair-trigger for imposing “near strict liability” based on no genuinely functional distinction between this victim and any other person. Then too, I utterly concur with Judge Fry that we must take the statute as we find it, and that as we find it here, it is clear and lenity does not apply. Besides, it was the former familial relationship out of which the fight here was born. Much consideration in cases like these also rests with the prosecutor, in whose discretion, following the dictates of justice, restraints the power of obsta principiis in the face of a temptation to upgrade a simple brawl to a charge rooted in a legislative desire to protect families.

RODERICK T. KENNEDY, Judge
OPINION

JAMES J. WECHSLER, CHIEF JUDGE

1. Defendants, Murphy Enterprises, Inc. (Murphy), and Spectacular Attractions, Inc. (Spectacular), the sole shareholder of Murphy, appeal from a jury verdict awarding compensatory and punitive damages to Plaintiff. Defendants acknowledged their own negligence, but argued at trial that others were comparatively negligent. They also argued that punitive damages were not justified. Following a verdict finding Defendants 66% liable for Plaintiff’s actual damages and awarding punitive damages, Defendants attack the punitive damage award, jury instructions, and evidentiary and legal rulings. Because we are not persuaded that any error in this case justifies reversing the jury verdict, we affirm.

Background

2. On September 26, 1998, Vanessa Atler was injured on the Cliff Hanger ride at the New Mexico State Fair when the car in which she was riding flew off and crashed to the ground because of a missing bolt. The Cliff Hanger was owned by Butler Amusements, Inc. (Butler), but Butler had leased the ride to Defendants to use during the 1998 State Fair and agreed to provide “qualified experienced personnel required to operate and maintain the ride.” Joel Roy, who had been working for Butler since July 1998, traveled to New Mexico to operate the Cliff Hanger at the State Fair in September 1998. Roy was accompanied by Julie Worley, and there was evidence at trial that Defendants told Roy the location and hours for the ride, that Roy and Worley were paid by Defendants, and that Roy was in charge of other employees of Defendants who worked on the ride, although Defendants denied that Roy was their employee. In their contract with the State Fair, Defendants agreed to keep the rides in safe operating condition, to hire personnel to operate and maintain the equipment, and to provide a sufficient number of personnel to do so. In addition, the contract required Defendants to comply with the Carnival Ride Insurance Act, NMSA 1978, §§ 57-25-1 to 57-25-6 (1993, as amended through 1996). Section 57-25-3(E) specifically requires that the “owner or operator of the ride shall inspect the ride each day the ride is operated.”

3. In her second amended complaint, Plaintiff named as defendants the State of New Mexico; the New Mexico State Fair; the New Mexico State Fair Commission; Murphy; Dartron Industries, Inc. (Dartron) (the manufacturer of the ride); Butler; Don Becker, Inc. (a safety inspector); Donald W. Becker; Safety Counselling, Inc. (SCI) (a safety inspector); W. Brock Carter (president of SCI); and Spectacular. Plaintiff settled with Butler, Dartron, SCI, Carter, Don Becker, Inc., and Donald Becker. Plaintiff also dismissed her claims against the State of New Mexico and the State Fair. Thus, only Murphy and Spectacular remained as defendants at trial. Defendants admitted they had acted negligently but denied that their negligence was the proximate cause of Vanessa Atler’s injuries and denied that their conduct was reckless or wanton.

4. The jury awarded $371,330.11 in compensatory damages to Vanessa Atler and $28,160 for Dora Atler. The jury found Defendants to be liable to 66% of Plaintiff’s compensatory damages. The jury then awarded punitive damages in the amount of $998,725. The court denied various post-trial motions, and Defendants appealed, raising five issues in their brief in chief: whether the trial court erred (1) in improperly instructing the jury on the standard for punitive damages; (2) in not rejecting, as a matter of law, claims for punitive damages based on the conduct of Roy or managerial employees of Murphy; (3) in failing to offset the damage award by the amount of Plaintiff’s settlement with the other defendants who settled before trial; (4) by refusing to include SCI on the special verdict form allocating fault among all defendants; and (5) by instructing the jury not to consider remedial measures in determining Dartron’s negligence.

The Jury Instruction on Punitive Damages

5. Defendants argue that the trial court erred in instructing the jury on the standard for punitive damages because Instruction 9, based on UJI 13-302B NMRA, was inconsistent with Instruction 31, based on UJI 13-1827 NMRA. Both instructions described two bases
for awarding punitive damages. Instruction 9, the instruction that provided the jury with an overview of the case, informed the jury that this case was a civil action in which Plaintiff sought damages for injuries that she claimed were the result of Defendants’ negligent or reckless/wanton conduct. Instruction 9 informed the jury that it could find Defendants had acted recklessly or wantonly if Plaintiff established either (1) that Roy had acted recklessly or wantonly and “Roy was left or placed in a managerial or supervisory capacity as an employee of Murphy Enterprises at the 1998 New Mexico State Fair,” or (2) that Defendants “demonstrated corporate indifference or a cavalier attitude in the face of serious risks of danger, considering the cumulative conduct of its officers and employees individually or as a whole, (including Joel Roy if you find he was an employee of Murphy).” Similarly, Instruction 31, the standard punitive damages instruction, provided that punitive damages could be awarded against Defendants if (1) the jury found Defendants’ own conduct was reckless or wanton, or (2) the jury found Roy had acted recklessly “in the scope of his employment by Murphy Enterprises, Inc. and Spectacular Attractions, Inc. and had sufficient discretionary or policy-making authority to speak and act for them with regard to the conduct at issue, independently of higher authority.”

Moreover, the objection cannot be made in general terms. It is necessary to inform the trial court of the specific nature of Defendants’ objection is not clear from the record, but it does not appear to have focused on inconsistency between Instruction 9 and Instruction 31. Indeed, although defense counsel stated that he objected to “that,” without further clarification, he then stated, “But other than that, it seems to be consistent with the first one” anyway.

{7} The two instructions were discussed separately. Instruction 31, the punitive damages instruction, was addressed first, and Defendants objected to the section of the instruction that explained that Defendants could be liable for punitive damages based on Roy’s conduct. Specifically, Defendants objected that Plaintiff’s requested instruction assumed Roy was an employee of Murphy. The court then adopted Defendants’ version of the instruction, which required the jury to find that Roy was acting in the scope of his duties and had sufficient policy-making authority to speak or act for Defendants. The court also deleted the words “malicious” and “willful” from the instruction at Plaintiff’s request.

{8} The court proceeded to discuss Instruction 9, the instruction that gave the jury an overview of the case. Defendants first argued that Plaintiff’s requested instruction had too much detail and repeated the specific punitive damages instruction set out in Instruction 31. Next, Defendants argued that in order to find them liable for punitive damages based on Roy’s conduct, Plaintiff’s instruction needed to state that the jury had to find Roy was an employee of Murphy, and the discussion focused on how to clarify the instruction. Defendants agreed to modify the instruction to state that Plaintiff had to prove that Roy was an employee with managerial capacity in order to find Defendants liable for his conduct.

{9} The parties then discussed the standard for punitive damages based on Defendants’ own corporate misconduct, which did not necessarily include the reckless or wanton conduct of Roy. The parties and the court discussed the different definitions for reckless and wanton conduct, and Defendants appear to have objected to the contents of the third paragraph of Plaintiff’s requested instruction. The Court removed the part of those paragraphs stating that Murphy willfully failed to comply with its safety obligations. The precise nature of ‘Defendants’ objection is not clear from the record, but it does not appear to have focused on inconsistency between Instruction 9 and Instruction 31. Indeed, although defense counsel stated that he objected to “that,” without further clarification, he then stated, “But other than that, it seems to be consistent with the first one” anyway.

{10} In their reply brief, Defendants respond to Plaintiff’s lack of preservation arguments, arguing generally that Defendants indicated a conflict between the two instructions. As we have noted, although there was some discussion about the standard for punitive damages, and there was some discussion about which elements Plaintiff had to prove, there was no specific discussion about whether Instruction 9 and Instruction 31 provided inconsistent standards for punitive damages.

{11} As this Court has stated in Gillingham v. Reliable Chevrolet, 1998-NMCA-143, ¶¶ 16-18, 126 N.M. 30, 966 P.2d 197, Rule 1-051(I) NMRA requires that to preserve an error in jury instructions, “objection must be made to any instruction given, whether in UJI or a cavalier attitude in the face of serious risks of danger, considering the cumulative conduct of its officers and employees individually or as a whole, (including Joel Roy if you find he was an employee of Murphy).” Similarly, Instruction 31, the standard punitive damages instruction, provided that punitive damages could be awarded against Defendants if (1) the jury found Defendants’ own conduct was reckless or wanton, or (2) the jury found Roy had acted recklessly “in the scope of his employment by Murphy Enterprises, Inc. and Spectacular Attractions, Inc. and had sufficient discretionary or policy-making authority to speak and act for them with regard to the conduct at issue, independently of higher authority.”

Punitive Damages

{12} Defendants next argue that the trial court erred, as a matter of law, by not rejecting claims for punitive damages based on the conduct of Roy or managerial employees of Murphy. Defendants make three arguments in support of this issue. First, Defendants contend that there was insufficient evidence to find them vicariously liable for punitive damages based on Roy’s conduct because he did not have sufficient discretionary or policy-making authority to speak and act for Murphy. Second, Defendants state there was insufficient evidence to find liability on the basis of the conduct of Murphy’s managerial employees. Third, Defendants argue that the award violated due process.

Substantial Evidence to Support an Award of Punitive Damages

{13} In reviewing a substantial evidence claim, “[t]he question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.” Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-44, ¶ 12, 123 N.M. 329, 940 P.2d 177. “Additionally we will not reweigh the evidence nor substitute our judgment for that of the fact finder.” Id. “Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured.” State v. Smith, 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct. App. 1986).
Defendants agreed to inspect all rides operating at the Fair on a daily basis. Defendants also agreed to keep their Fair, Defendants were granted the exclusive right to operate the midway in 1998, when this accident occurred. Under that contract, Defendants “had full control of it, whatever they did, where it sat, what time they were going to open up, what time they closed.” Butch Butler, the owner of the Cliff Hanger, who had leased the ride to Defendants, testified that he never inspected the Cliff Hanger, that he did not know how much training the operator had, and that Defendants had not told him that he had a responsibility to completely inspect the Cliff Hanger. Defendants’ personnel did not verify the qualifications of operators sent by Butler, but took it for granted that Butler would send qualified people. He also acknowledged that he mostly stayed in his office while at the fair so that no one would see him. His testimony indicated that he did not respect the general manager of the State Fair, and this attitude was reflected in the testimony of one of his ride supervisors, who complained that the general manager “rode around in her golf cart, and made sure everyone obeyed the rules, as far as dress and uniform, da-da, da-da, da-da.”

Reasonableness of Punitive Damage Award

Defendants argue briefly that the punitive damages awarded against them are unreasonable in relation to the reprehensibility of their conduct. Defendants correctly point out that we review the reasonableness of a punitive damage award de novo. Aken v. Plains Elec. Generation & Transmission Coop., Inc., 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662. “Any doubt in the mind of the appellate court concerning the question of what appropriate damages may be in the abstract, or owing to the coldness of the record, should be resolved in favor of the jury verdict.” Id. ¶ 19. In undertaking a de novo review, we consider three criteria:
1) the degree of reprehensibility of the defendant’s misconduct; 2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. ¶ 20 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996)). Defendants’ argument focuses only on the first factor, citing Aken for the principle that the reprehensibility of the conduct is, perhaps, the most important guidepost in the analysis. See Aken, 2002-NMCA-021, ¶ 21. In analyzing the reprehensibility of a defendant’s conduct, our Supreme Court discussed the relevance of whether the defendant had notice of the wrongfulness of his conduct to the constitutionality of a large punitive damage award. Id.

{24} In this case, Defendants failed to comply with the terms of their contract with the New Mexico State Fair and with the Carnival Ride Insurance Act, Sections 57-25-2(E) and 57-25-3(E), which required Defendants to conduct daily inspections of the rides. Because the purpose of such inspections is to prevent the type of harm that occurred in this case, and because the responsibility to conduct such inspections was set forth in the contract and statute, Defendants cannot claim to be surprised by a large award of punitive damages, especially when the result of such a failure was so tragically predictable. In addition, as Plaintiff points out, the punitive damage award was only 3.79 times Defendants’ portion of the award of compensatory damages. As the United States Supreme Court stated in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 424-25 (2003), it has been reluctant to set “concrete constitutional limits” on the ratio between compensatory and punitive damages. However, the Court wrote that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Id. at 425. In this case, the award was within the constitutional parameter indicated by the Supreme Court. We conclude that Defendants’ conduct was sufficiently reprehensible to justify the award of punitive damages and was not excessive.

Plaintiff’s Settlement with Other Defendants

{25} Defendants argue that Plaintiff’s jury award should have been offset by the amount Plaintiff received in settlement with the other defendants who were originally in the case. Defendants argued below, and now on appeal, that under NMSA 1978, § 41-3-4 (1947), a credit for amounts paid by other defendants is improper if the verdict is based on principles of comparative fault. Thus, Defendants’ argument presumes that the verdict was based on principles of joint and several liability and not comparative fault.

{26} Defendants premise their argument that they are entitled to offset the amount of Plaintiff’s settlement with the other defendants from the jury verdict on the assertion that Plaintiff argued at trial that Defendants had a non-delegable duty to insure Vanessa Atler’s safety and were therefore liable for any and all damages suffered. Plaintiff’s argument to the jury, however, that the non-settling Defendants were 100% at fault, is not sufficient to support Defendants’ argument that the case was tried and the jury instructed on a theory of joint and several liability. As Plaintiff argues in her answer brief, all Plaintiff’s claims for joint and several liability were dismissed before trial, and the case was tried on the basis of comparative fault, an argument supported by the record, which shows that the special verdict forms requested by both parties instructed the jury to apportion damages based on principles of comparative fault.

{27} Defendants argue in their brief in chief that Instruction 24, which instructed the jury not to consider evidence that had been introduced of Plaintiff’s settlement with other defendants in determining a damages award against Defendants, was almost identical to the uniform instruction to be used in cases of when a joint tortfeasor has been released. As Plaintiff points out, however, Defendants never made this argument below and thus have not preserved this issue for appeal. See Woolwine, 106 N.M. at 496, 745 P.2d at 721. We also note that, in their reply brief, Defendants have not replied to Plaintiff’s arguments that this issue was not preserved.

{28} Because we do not find support in the record for Defendants’ contention that this case was presented to the jury on a theory of joint and several liability, this case is controlled by Hinger, which holds that there is no right to reduction of a jury award based on out-of-court settlements when the case is tried on a theory of comparative fault. Hinger, 120 N.M. at 447-48, 902 P.2d at 1050-51 (citing NMSA 1978, § 41-3-4 (1947), and Wilson v. Galt, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct. App. 1983)). Accordingly, we affirm the district court’s ruling that Defendants were not entitled to offset from the jury verdict the amount of Plaintiff’s settlement with the other defendants.

The Special Verdict Form

{29} Defendants argue that the trial court erred by refusing to list Defendant SCI on the special verdict form as one of the defendants to whom the jury could allocate fault. It is well settled that if a legal theory is supported by the evidence, a party is entitled to have the jury instructed on that theory. Thompson Drilling, Inc. v. Romig, 105 N.M. 701, 705, 736 P.2d 979, 983 (1987). As this Court has previously stated, we review the trial court’s refusal to include a non-party on a verdict form to determine whether there was sufficient evidence to state a claim for the non-party’s negligence. See Jaramillo v. Kellogg, 1998-NMCA-142, ¶ 5, 126 N.M. 84, 966 P.2d 792. However, whether sufficient evidence exists to support a claim or defense is a question of law. In re Estate of Kimble, 117 N.M. 258, 260, 871 P.2d 22, 24 (Ct. App. 1994); see also State v. Apodaca, 118 N.M. 762, 766, 887 P.2d 756, 760 (1994) (stating that a sufficiency of the evidence review involves a two-step process: viewing the evidence in the light most favorable to the verdict, then making a legal determination of “whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt”) (internal quotation marks and citation omitted).

{30} To prove SCI’s negligence, Defendants would have had to show that SCI had a duty recognized by law, that SCI breached its duty, and that the breach proximately caused Vanessa Atler’s injuries. See Jaramillo, 1998-NMCA-142, ¶ 7. In this case, the trial court refused to include SCI on the special verdict form because there were “causation and proximate causation and independent intervening cause problems with Safety Counseling and having any liability in this case.”
Defendants argue that apportionment of fault is a factual question for the jury to consider, and rely on *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 756, 906 P.2d 742, 747 (Ct. App. 1995), to argue that sufficient evidence of SCI’s negligence existed to send the issue to the jury. Defendants argue that evidence of SCI’s negligence in two areas was presented at trial: that Plaintiff’s experts testified that SCI’s inspection of the Cliff Hanger was inadequate, and that SCI was negligent in not recommending the installation of a safety cable to backup the single point suspension, which would have prevented the accident. Defendants point out that another of Plaintiff’s experts testified that the inspection should have been conducted by safety design engineers and that SCI’s employees were not qualified and conducted the inspections negligently. Defendants argue there was also evidence that SCI only conducted a visual inspection of the bolts instead of using a torque wrench or other tool.

In response, Plaintiff argues that this case can be distinguished from *Yardman*, in which a jockey who was injured when the horse he was riding threw him against a post and track railing sued the race track. *Yardman*, 120 N.M. at 755, 906 P.2d at 746. In *Yardman*, there was evidence that the jockey, who had participated in more than seventy-five races at the track, was negligent in riding at the track because he was aware of the dangerousness of the track conditions. *Id.* at 755-57, 906 P.2d at 746-48. Thus, this Court determined that the jury should have received the requested comparative negligence instruction.

Plaintiff contends that the district court correctly refused to include SCI on the special verdict form in this case because there was no evidence that SCI knew the bolt was loose or missing at the time of its inspection or that SCI’s failure to point out the lack of a safety cable caused the accident. She points out that the last day on which SCI conducted inspections at the State Fair was September 15, 1998 when Don Becker, who was on the special verdict form, took over inspections. The accident in this case did not occur until eleven days later, on September 26, 1998. Plaintiff argues that Defendants concede that there is no evidence of when the bolt became loose and fell out, and thus it cannot be demonstrated that SCI was negligent in not finding the loose or missing bolt. In addition, Plaintiff argues that Don Becker informed Defendants that the Cliff Hanger had no safety cable and that Defendants did not act on the information. Thus, Plaintiff asserts that SCI’s failure to warn Defendants was not the proximate cause of the accident.

We agree with Defendants that issues of negligence and proximate cause are generally questions of fact. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶¶ 6, 8, 134 N.M. 43, 73 P.3d 181. However, as we stated earlier, the question of whether sufficient evidence exists to state a claim for negligence is one of law. In *re Estate of Kimble*, 117 N.M. at 260, 871 P.2d at 24. We first address whether there was evidence that SCI’s failure to recommend the installation of a safety cable constituted negligence that proximately caused Vanessa Atler’s injuries. Under the facts of this case, Defendants’ argument is unpersuasive. Viewing the facts in a light most favorable to upholding the jury verdict, we are compelled to agree with Plaintiff that because Don Becker, who conducted inspections after SCI had completed its inspections, informed a Murphy employee of the absence of a backup safety strap, any negligence on SCI’s part was cured by Becker’s action and thus was not the proximate cause of Vanessa Atler’s injuries.

In addition, we are not persuaded that Defendants met their burden of showing that SCI was negligent in failing to detect the loose bolt or that any negligence proximately caused Vanessa Atler’s injuries. As Plaintiff points out, Defendants did not demonstrate that the bolt was loose at the time that SCI was conducting inspections. Nor do we believe that the testimony of Robert Coil, the owner of Dartron, supports Defendants’ argument. Coil testified that it was “impossible” to determine how long it took for the bolt to work its way out of the ride and speculated that “an opinion might be that it took several days to work its way out.” Viewing this testimony in a light most favorable to upholding the jury verdict, we agree with Plaintiff that this testimony is too speculative to support a claim that any negligence on SCI’s part was a proximate cause of Vanessa Atler’s injuries.

Accordingly, we affirm the trial court’s ruling that there was insufficient evidence of comparative negligence to include SCI on the special verdict form.

### Evidence of Subsequent Remedial Measures

During trial, Defendants sought to introduce evidence that after the accident, the manufacturer of the Cliff Hanger, Dartron, had made changes to the safety manual that instructed operators about conducting a safety check and had modified the ride itself by installing a backup safety strap. Defendants sought to introduce this evidence to demonstrate that some of the fault for Vanessa Atler’s injuries should be attributed to Dartron. The parties acknowledge that some evidence of Dartron’s subsequent remedial measures was initially admitted into evidence. Subsequently, however, the court reconsidered its ruling and then instructed the jury not to consider subsequent remedial measures as evidence of negligence.

The admission or exclusion of evidence is reviewed for abuse of discretion. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999. A trial court abuses its discretion when it applies an incorrect standard. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450. Under Rule 11-407 NMRA, evidence of measures taken after an event “which, if taken previously, would have made the event less likely to occur, . . . is not admissible to prove negligence.” However, in *Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶ 26, 132 N.M. 631, 53 P.3d 398, we stated that the prohibition against evidence of subsequent remedial measures set out in Rule 11-407 does not apply to measures taken by non-defendants, such as Dartron.

Plaintiff does not argue that the court was correct in excluding the evidence. She simply argues that Defendants have not demonstrated that they were prejudiced by the exclusion of evidence of subsequent remedial measures made by Dartron. Plaintiff argues that because evidence of the measures was introduced earlier in trial, the excluded evidence was cumulative, and Defendants have not shown that they were prejudiced by the exclusion. She notes that in closing arguments both she and Defendants agreed that Defendants were negligent, and the jury attributed 30% of the fault to Dartron. Thus, Plaintiff argues that any error does not justify reversal. Defendants argue that the court’s instruction to the jury not to consider evidence of remedial measures, in effect, eradicated any evidence that had been admitted earlier and that they were prejudiced by this complete exclusion. They contend that the exclusion of evidence of remedial measures by Dartron was highly prejudicial because “[i]t provided extremely persuasive corroboration to the opinions of the experts that there was a design defect, and that the accident would not have occurred if it had been designed in accordance with the subsequent repair.” They state that evidence of subsequent remedial measures would have demonstrated how easily Dartron could...
have improved the safety of the Cliff Hanger. Failing to include this evidence, Defendants argue, “undermined the jury’s negligence calculus and apportionment of fault.”

As our Supreme Court wrote in *Kennedy v. Dexter Consolidated Schools*, 2000-NMSC-025, ¶ 26, 129 N.M. 436, 10 P.3d 115 (internal quotation marks and citation omitted), “[i]n civil litigation, error is not grounds for setting aside a verdict unless it is inconsistent with substantial justice or affects the substantial rights of the parties.” Under this standard, we are not persuaded that Defendants were prejudiced by the exclusion of evidence of subsequent remedial measures. Although the jury was instructed not to consider evidence of remedial measures, it heard evidence to support a finding that Dartron was negligent. Gary Thompson, Plaintiff’s expert engineer, testified that the Cliff Hanger was “unsafe to operate as it was built and assembled and allowed to operate at the state fair[.]” Thompson testified that there were problems with the way the bolt was designed and secured. He also testified that he would have set up an inspection requirement and that a backup safety strap would have prevented the car from falling. Robert Coil testified that the Cliff Hanger did not contain a backup safety strap that was used on another Dartron ride, the Star Trooper. Joel Roy testified that Coil told him that Dartron would take full responsibility for the accident, that the ride had been badly designed, and that Roy had not been required to inspect the bolt that had fallen out of the ride. Bradford Mosher, state ride inspector for Florida, testified that had he been inspecting the Cliff Hanger, he would have asked the operator and his supervisor if it should have had a safety cable because in his opinion all rides like the Cliff Hanger, which have single-point suspension, should have that type of backup safety device.

In closing argument, Defendants argued to the jury that they should find Dartron 50% negligent for Vanessa Atler’s injuries. They emphasized that Coil told Roy that the accident was Dartron’s fault. They stressed that Thompson testified that the ride had been badly designed and should have had a safety strap. Although Defendants were not permitted to refer to any changes Dartron made to the Cliff Hanger after the accident, they were permitted to argue in closing that the manual that Roy used to inspect the ride did not require him to look at the bolt that fell out. Defendants argued at length that Dartron used the manual to train Butler, who then gave the manual to Roy. They also told the jury, without objection, that there were two manuals, “the manual that was made afterwards and the manual before,” and that the jury would see that the earlier version included “no provision for inspecting this bolt.” Defendants also pointed out that installation of a backup safety strap was not new technology, but had been used on an earlier ride manufactured by Dartron. Having asked the jury to attribute 50% of the fault to Dartron, Defendants asked them to attribute 25% of the fault to Don Becker, the inspector for the State Fair, and 25% to Defendants and Butler, attributing 15% and 10% to those parties, depending on whom the jury believed employed Roy.

In light of all this evidence presented of Dartron’s fault, we cannot say that Defendants were prejudiced because the trial court instructed the jury not to consider evidence that Dartron had subsequently added a safety cable and rewritten their manual. We therefore hold that Defendants were not prejudiced by the trial court’s instruction to the jury that it should not consider subsequent remedial measures in determining negligence.

**Conclusion**

We hold that the trial court did not err in instructing the jury on the standard for punitive damages and that the award of punitive damages was supported by substantial evidence and did not violate due process. We also hold that the trial court correctly determined Defendants were not entitled to offset Plaintiff’s settlement from the jury award and did not err in omitting SCI from the special verdict form. Finally, we hold that Defendants were not prejudiced when the trial court instructed the jury not to consider evidence of subsequent remedial measures in determining Dartron’s comparative fault. Accordingly, we affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER,
Chief Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge
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9:00 a.m. Welcome and Introductions
9:10 a.m. Expanding Equal Access to Credit Through Civil Rights Laws
• Recent case law
• Expanding the Home Mortgage Disclosure Act
• Model state/local laws
• Risk base pricing
10:00 a.m. Break
10:15 a.m. Consumer Protection Developments
• Servicing standards
• Accelerated foreclosure and the role of sub-servicers
• Roles of GSE’s (Fannie Mae; Freddie Mac)
• Roles of appraisers and brokers
• Forbearance
11:05 a.m. Community Reinvestment Act Overview and Impact
• Modernization and pending legislation
• Regulatory challenges
12:00 p.m. Lunch
1:00 p.m. New Mexico Legislative Update
• Mortgage lending
• Payday lending
1:50 p.m. Building Community Attorney Partnerships to Combat Predatory Lending
2:45 p.m. Break
3:00 p.m. New Mexico Foreclosure Process
3:50 p.m. Closing Remarks
4:00 p.m. Adjourn

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