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Proposed Revisions To the Rules of Criminal
Procedure for the District Courts

2005-NMSC-004: State v. Antonio Graham

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Walter A. Edens, Jr.
2005 Annual Meeting - Back to the Basics:
Building Blocks to a Better Practice
Thursday - Saturday, September 22-24, 2005
Ruidoso Convention Center - Ruidoso, NM

Thursday, September 22

5 – 6:30 p.m. Registration/Welcoming Reception

5 – 6:30 p.m. President’s Reception

Friday, September 23

7 a.m. – Noon Registration/Exhibits Open

7 – 10 p.m. Dinner and Entertainment at the Flying J Ranch

7 – 8 a.m. Continental Breakfast

8 – 10 a.m. Plenary: Seven Keys to Maintaining a Safe and Successful Practice (Professionalism)

Dustin A. Cole, President and Master Practice Advisor
Attorneys Master Class

10 – 10:30 a.m. Break

10:30 a.m. – Noon CLE Session One

Senior Lawyers Division
Appellate Practice
Commercial Litigation

Noon – 1:30 p.m. Awards Luncheon

1:30 – 5 p.m. Registration/Exhibits

1:30 – 3 p.m. CLE Session Two

Trial Practice
Employment & Labor Law
Family Law
Solo & Small Firm Practitioners
Paralegal Division

3 – 3:30 p.m. Break

3:30 – 5 p.m. CLE Session Three

Alternative Dispute Resolution
Committee
Health Law
Law Office Management
Committee

Saturday, September 24

7 a.m. – Noon Registration/Exhibits

7 – 8 a.m. UNM School of Law Alumni Breakfast

7 – 8 a.m. Plenary: Ethics Rock!

Jack Marshall and ProEthics, Ltd.

10 – 10:30 a.m. Break

10:30 a.m. – 12:15 p.m. CLE Session Four

Business Law
Quality of Life Committee
Elder Law

12: 15 – 1:30 p.m. Awards Luncheon

2 – 4:45 p.m. Video Replay (optional add-on)

2 – 5 p.m. Golf Tournament at The Links at Sierra Blanca

6 – 10 p.m. Reception, Dinner and Entertainment at Alto Country Club

NOTE: All events will be held at the Ruidoso Convention Center unless otherwise noted.

7.5 General, 1.8 Ethics and 2.4 Professionalism CLE Credits - Plus optional add-on General Credits TBA (Video Replay)

Schedule is subject to change without notice
2005 Annual Meeting - Back to the Basics: Building Blocks to a Better Practice
Thursday - Saturday, September 22-24, 2005
Ruidoso Convention Center - Ruidoso, NM

Name __________________________________________________________ NM Bar No. ______________________
Name for Badge (if different than above) ________________________________________________________________
Address ____________________________________________________________________________________________
City __________________________ State __________ Zip ______________
Phone __________________ Fax __________________ Email __________________
Guest 1 ____________________________________________________________________________________________
Guest 2 ____________________________________________________________________________________________

EARLY REGISTRATION FEE (Must be postmarked by September 1) _________________________________________________________________________________________
Includes CLE tuition, materials, continental breakfasts, breaks, luncheons and receptions.

☐ Standard ________________________________________ $295 __ __ __________
☐ Paralegal ___________________________ __________ $275 __ __ __________
☐ Guest (includes all of the above except CLE tuition and materials) __________ $60 __ __ __________
☐ Add $10 to registration fee if postmarked after September 1. __________________________ $10 __ __ __________

SEPARATELY TICKETED EVENTS __________________________________________________________________________
☐ Awards Luncheon, Friday, Sept. 23 (Non-registered attendee) __________________________ $15 __ __ __________
☐ Dinner & Entertainment, Friday, Sept. 23 ______________________________________________ $35 __ __ __________
☐ Child Dinner (12 & Under), Friday, Sept. 23 ___________________________ ______________ $15 __ __ __________
☐ UNM School of Law Alumni Breakfast, Saturday, Sept. 24 (7-8 a.m.) __________ $10 __ __ __________
☐ Awards Luncheon, Saturday, Sept. 24 (Non-registered attendee) __________________ $15 __ __ __________
☐ Golf Tournament (9-hole), Saturday, Sept. 24 (2-5 p.m.) ____________________________ $65 __ __ __________
The Links at Sierra Blanca (Handicap ________) _________________________________________________
☐ Dinner & Entertainment, Saturday, Sept. 24 ___________________________ ______________ $35 __ __ __________
☐ Child Dinner (12 & Under), Saturday, Sept. 24 ___________________________ ______________ $15 __ __ __________

Total _____________________________________________________________________________________________

PAYMENT OPTIONS ___________________________________________________________________________________
☐ Enclosed is my check in the amount of $ __________________________ (Make Checks Payable to: State Bar of NM)
☐ VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. _____________________________________________ Exp. Date __________
Signature __________________________________________________________________________________________

Internet: www.nmbar.org ____________________________________________ Mail: SBNM, P.O. Box 92860,
                Albuquerque, NM 87199-2860
Phone: (505) 797-6036; Monday - Friday, 9 a.m. - 4 p.m. __________
        (Please have credit card information ready).
Fax: (505) 797-6019; Open 24 Hours _____________________________
      (Please include credit card information.)

Cancellations & Refunds: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior
to the program of interest. A refund, less a $50 processing charge will be issued.
Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program.
MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file
for MCLE credit in other states. A separate MCLE filing fee may be required.

Hotel information is available on the State Bar Web Site at www.nmbar.org
or the February 28th Bar Bulletin.

CENTER FOR
LEGAL
EDUCATION
SEMINAR REGISTRATION FORM
CLE PROGRAMS

APRIL

21
Financial Strategies For Landowners:
Advanced Seminar on Conservation
Easements, Tax and Estate Planning
Thursday, April 21, 2005 • 8:30 a.m.
National Park Headquarters, 1100 Old Santa Fe Trail
(directly across from entrance to Camino Del Monte Sol)
Santa Fe, New Mexico • 3.3 General CLE Credits

Co-Sponsor: Tax Law Section
Presenter: Stephen J. Small, Attorney at Law
This workshop will provide a detailed description of the tax law of con-
servation easements. In particular, it will describe the steps involved for
landowners in placing a conservation easement on their land. It will
cover the income, estate and property tax benefits available to eas-
ment donors. It will also describe related estate planning tools such as testamentary gifts, post-mortem easements and gifts of
remainder interest. It will also address some ethical concerns related to
appropriate easement appraisals and ensuring the public benefit of
conservation easements.

☐ Standard and Non-Attorney $99  ☐ Tax Section Member $89

22
Recreating Yourself in the Practice of Law:
Professional and Ethical Considerations
Friday, April 22, 2005 • 10 a.m. - 3 p.m. (Lunch Provided)
State Bar Center, Albuquerque • 1.2 Ethics,
2.0 Professionalism CLE Credits

Co-Sponsor: UNM School of Law Office of Career and Student Services
Presenters: John Feldman, Esq., Hindi Greenburg, Esq., Daniel J. O’Brien,
Esq., Brian Colon, Esq., Hon. Lynn Pickard, Bonnie Stepleton, Esq.
According to the first-ever, 10-year study of new lawyers, more than a
third of them changed jobs within their first three years of practice. This
half-day seminar will focus upon ways to find career satisfaction and in-
spiration in work life, while also managing the stress of legal practice.
The first session will feature Hindi Greenburg, president of Lawyers in
Transition. Greenburg has been dubbed “The Ann Landers for lawyers”
and is considered among the leading national experts on the topics of
attorney career satisfaction and options. She is a 1974 top graduate of
the University of California, Hastings College of the Law, a former clerk
for a thirteen judge Superior Court in Northern California and a busi-
ness litigator at a prestigious national law firm. For the past 20 years,
she has been a frequent speaker for bar associations and law schools
throughout the U.S. and Canada. She is the author of the best selling
The Lawyer’s Career Change Handbook (HarperCollins), now in its second
edition. Attendees will receive a complimentary copy of this publica-
tion. Greenburg’s professionalism presentation on stress management
will be supplemented by a professionalism panel composed of former
winners of the State Bar of New Mexico’s respected Quality of Life and
Young Lawyer of the Year Awards. In the context of quality of life issues,
this panel will discuss the attributes of a good law firm and other legal
practice areas. Also included will be an ethics component on client and
lawyer relations as presented by the director and assistant director of
the UNM School of Law Office of Career and Student Services.

☐ Standard Price $99

FOUR WAYS TO REGISTER

PHONE: (505) 797-6029, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE,
then Educational Programs
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________
NM Bar # __________________________
Street ____________________________
City/State/Zip _______________________
Phone __________________________ Fax __________________________

Program Title _______________________
Program Date _______________________
Program Location ___________________
Program Cost _______________________
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ __________________
Make check payable to: CLE of the NM State Bar Foundation
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # __________________________
Exp. Date __________________________
Authorized Signature __________________________
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### Meetings

**April**

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<td>Taxation Law Section Board of Directors, noon, via teleconference</td>
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<td>11</td>
<td>Public Legal Education Committee, noon, State Bar Center</td>
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<td>12</td>
<td>Lawyers Professional Liability Committee, noon, State Bar Center</td>
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<td>14</td>
<td>Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe</td>
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<td>14</td>
<td>Business Law Section Forms Committee, 2:30 p.m., State Bar Center</td>
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<tr>
<td>14</td>
<td>Business Law Section Board of Directors, 4 p.m., State Bar Center</td>
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<tr>
<td>15</td>
<td>Family Law Section Board of Directors, 9 a.m., via teleconference</td>
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### State Bar Workshops

**April**

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<td>11</td>
<td>Lawyer Referral for the Elderly Workshop, 10 a.m., Laguna Rainbow, Laguna Pueblo</td>
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<td>12</td>
<td>Lawyer Referral for the Elderly Workshop, 10:15 a.m., Bonnie Dallas Senior Center, Farmington</td>
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<td>13</td>
<td>Lawyer Referral for the Elderly Workshop, 10:30 a.m., Aztec Senior Center, Aztec</td>
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<td>14</td>
<td>Estate Planning &amp; Probate Workshop, 6 p.m., Raton Convention Center, Raton</td>
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<td>18</td>
<td>Consumer Debt/Bankruptcy* &amp; Family Law Workshop, 6 p.m., Roswell Chamber of Commerce, Roswell</td>
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*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 SBM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court Judicial Performance Evaluation Commission Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., April 21 and 22 at the Third Judicial District Court, 201 W. Picacho, Suite A, Las Cruces. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

NM Board of Legal Specialization Comments Solicited

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

Appellate Practice
Nancy L. Simmons
Family Law
Gretchen M. Walther

Statewide Alimony Pilot Project Available Online

The following documents are now available on the State Bar of New Mexico Web site, www.nmbar.org: The Pilot Project Alimony Guidelines and Commentary, Alimony Survey and the Final Report of 1994 Child Support Guidelines Review Commission. This information can also be linked to through the New Mexico Supreme Court Library Web site, www.fscll.org. These alimony guidelines are to be used for settlement purposes only and should not be cited as authority in court proceedings; there should be an initial review of the statutory factors to determine whether an award of alimony is appropriate and, only after it has been determined that alimony is appropriate, should the alimony guidelines be considered; the Commentaries to the Alimony Guidelines and the Final Report of the 1994 Child Support Guidelines Review Commission should be consulted as guides to usage; and some cases will not be appropriate for guidelines. Attorneys are encouraged to provide alimony surveys in each case involving alimony that is resolved by stipulated agreement or decision of the court.

NM Court of Appeals Notice Regarding Appointment of Counsel in Indigent Criminal Cases

The Appellate Division of the Public Defender Department is currently experiencing a serious backlog of work. The backlog has resulted in increasingly slow production and a concomitant increase in requests for continuances. The backlog is adversely affecting the work of the Court of Appeals. Therefore, upon the application of a party or upon the Court’s own motion, the New Mexico Court of Appeals will order appointment of private attorneys to represent indigent criminal defendants on appeal in cases before the Court of Appeals. The assignment of counsel may be made from a panel of attorneys maintained by the Court. The appointment will remain effective throughout all states of a proceeding in the Court, including the filing of a petition for writ of certiorari to the New Mexico Supreme Court, if requested to do so by the client. No reimbursement of compensation will be paid to the appointed attorney. Such representation may fulfill an attorney’s aspiration for pro bono publico legal services set forth in Rule 16-601 of the Rules of Professional Conduct. Attorneys interested in being on the Court’s panel should send a letter to Patricia C. Rivera Wallace, Chief Appellate Court Clerk, New Mexico Court of Appeals, PO Box 2004, Santa Fe, NM 87502.

First Judicial District Court Family Law Brownbag Meeting

The First Judicial Court will host its family law brownbag meeting at noon, April 12 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with the Family Court Services. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@ruhinkatzlaw.com. Provide $1, your name and bar number and receive 1.0 general MCLE credit (pending approval).

Second Judicial District Court Attorney Address Changes

Attorney names and addresses are entered into the Second Judicial District Court’s computerized case management system based on the Computer Automation Identification Number (CAID) issued by the State Bar of New Mexico. When submitting documents for filing to the court please use your CAID complete name and address to ensure notices and correspondence are sent to the correct attorney and address.

It is imperative that all parties’ counsel notify the court if they have a change of address. If attorneys have had an address change and have not notified the court, they are asked to do so at their earliest convenience.

 Destruction of Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the court in the criminal cases filed for years 1981 to 1985 included, but not limited to, cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes, and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after April 22.

Fax Filing

Following are the procedures for fax filing with the Second Judicial District Court:

• Each pleading received by facsimile must have a cover sheet with the following information:
  Name of the sender
The voice and facsimile telephone numbers of the sender
An identification of the case
The docket number and the number
of pages transmitted
• All pleadings received by facsimile have
a ten page limit, excluding the cover
sheet
• All facsimiles must contain transmittal
information (i.e. date and time)
• All facsimiles filing shall be received on
the primary fax number: 841-6705. If
this number is out of service, facsimiles
will be received at (505) 841-7446.
These are the courts’ only facsimile
filing numbers.
Missing information or facsimiles received
on fax machines other than the two numbers
listed above will result in the facsimile being
refused for filing.

Swearing-In Ceremony
Clay Campbell will be formally sworn
in as a Second Judicial District Court
Judge, Division XII, at 4 p.m., April 21 in
Judge William Lang’s Courtroom, #338,
of the Bernalillo County Courthouse, 400
Lomas Blvd. NW. A reception will follow
the swearing-in ceremony at La Posada de
Albuquerque.

Withdrawal as Counsel
The Second Judicial District Court
requests that all counsel involved in cases
follow local rules pertaining to withdrawal
as counsel.

Pursuant to Local Rule 2-117 (Counsel
of record; appearance; withdrawal):
C. Withdrawal of Counsel.
“All withdrawals in all cases shall be by
court order upon motion and shall not be
granted ex parte. In addition to the grounds
for withdrawal, motions to withdraw shall
set forth the dates and times of any hearings
set, and the dates of any relevant Supreme
Court deadlines (e.g., in criminal cases, the
date the six-month rule expires). In addi-
tion, unless the court otherwise orders for
good cause, motions to withdraw shall:
(1.) be accompanied by an entry of
appearance by substitute counsel or
the client as a party pro se in which such
substitute counsel or party pro se certifies
that he or she is ready and able to proceed
without delay; or,
(2.) set forth in the motion the
client’s last known address and telephone
numbers including work number, and
acknowledge that the client has twenty
(20) days in which to obtain counsel or be
deemed appearing pro se.”

Fifth Judicial
District Court
Announcement of Vacancy
A vacancy on the Fifth Judicial District
Court exists as of April 1 upon the swearing
in of The Honorable William P. Lynch to the
Federal Magistrate Court. The chair of the
Fifth Judicial District Nominating Commission
solicits applications for this position from
lawyers who meet the statutory qualifications
in Article VI, Section 14 of the New Mexico Statutes Annotated
1978. Applications may be obtained from
the Judicial Selection Web site: http://
lawschool.unm.edu/judsel/index.htm, or e-
mailed/faxed/mailed to you by calling Reva
Chapman, (505) 277-4700. The deadline
for applications has been set for 5 p.m., April
13. Applications received after that date are
not considered.

Bernalillo County
Metropolitan Court
Judges’ Meeting
The Bernalillo County Metropolitan Court
districts will conduct their monthly judges’ meeting at noon, April 12 in the
Courtroom 960 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 accom-
modations for individuals with disabilities
are needed.

Rio Arriba County
Magistrate Court
Gov. Bill Richardson announced the
appointment of Thomas Rodella to serve
as magistrate judge for the County of Rio
Arriba March 31. Rodella is a native of Rio
Arriba County and received a degree in
criminal justice from Northern New Mexico
Community College. He graduated cum
laude from the University of New Mexico
with a bachelor’s degree in psychology. He
served with the New Mexico State Police
as a sergeant and criminal agent. Rodella
replaces Judge Tony Martinez, who recently
retired from the bench. He stands for elec-
tion in 2006.

Paralegal Division
Brownbag CLE
Bring a lunch and join the Paralegal
Division for their monthly CLE from noon
to 1 p.m., April 13 at the State Bar Center.
Registration begins at 11:30 a.m. and the
cost is $16 for attorneys and $15 for para-
legals, legal assistants and secretaries.
The topic for this month’s CLE is “Internet Legal
Research: Find it Fast in 2005,” presented
by Ronald Wheeler, the UNM Law School
librarian. For more information, contact
Debi Shoemaker-Scott, (505) 243-1443.

State Bar News
Bankruptcy Law Section
Brownbag Meeting
The Bankruptcy Law Section will hold a
brownbag meeting at noon, April 15 on the
10th floor of U.S. Bankruptcy Court. The
topic will be federal and state taxes presented
by Assistant Attorney General Jim Jacobsen,
Assistant U.S. Attorney Manny Lucero and
IRS representatives from Phoenix. R.S.V.P.
to Alfred Sanchez, (505) 242-1979 by April
13 for materials.

Sixth Annual Golf Outing
The State Bar Bankruptcy Law Section
will host the sixth annual golf outing at
12:30 p.m., May 6 at Four Hills Country
Club, Albuquerque. The cost of $65 in-
cludes: a round of golf and cart and hors
d’oeuvres. A cash bar will also be available.
Non-golfing section members are en-
couraged to attend the reception following
the tournament at 5 p.m., also at the Four
Hills Country Club, 911 Four Hills Rd.
SE, Albuquerque. For more information
or to register, contact Gerald Velarde,
(505) 248-1828 or jerryvelarde@hotmail.
com. Reservations must be made by May
2. Participants must provide their own golf
clubs.

Pro Hac Vice
The New Mexico Supreme Court has
established a new rule for practice by non-
admitted Lawyers before state courts (Pro
Hac Vice). The new Rule 24-106 NMRA,
is effective for cases filed on or after Jan. 20,
2005. Attorneys authorized to practice law
before the highest court of record in any
state or territory wishing to enter an appear-
ance, either in person or on court papers, in
a New Mexico civil case should consult the
new rule. This rule requires non-admitted
lawyers to file a registration certificate with
the State Bar of New Mexico, file an affidavit
with the court and pay a nonrefundable fee
of $250. Fees collected under this rule will
be used to support legal services for the poor.
For more information on the rule, a copy
of the registration certificate and sample
affidavit, go to www.nmbar.org. For ques-
tions about compliance with the rule, please
contact Richard Spinello, Esq., Director of
Public and Legal Services, State Bar of New
Technology Utilization Committee

WORD Up! Workshop
Increase your Microsoft Word skill with a free, one-hour workshop, "WORD Up!" from 5 to 6 p.m., April 21 at the State Bar Center, Albuquerque. Learn about organizing files, improving documents, using format, mail merge, symbols and shortcut keys. Paralegals, attorneys and support staff are all invited to attend this free event presented by the State Bar Technology Utilization Committee. The class is limited to 20 attendees. Reservations should be made to Mary Patrick, CLE Program Coordinator, (505) 797-6059. CLE credit will not be provided.

Young Lawyers Division Luncheon Presentation
The Young Lawyers Division of the State Bar of New Mexico is sponsoring a luncheon presentation at noon, April 27 at the Bernalillo County Metropolitan Court’s Ceremonial Courtroom. The topic of the event is Depositions: The How, the When and the Why. John Samore and Greg Chase will be the event’s speakers. Space is limited. Lunch will be provided to those who R.S.V.P. by April 22 to Roman Romero, (505) 345-9616 or by e-mail, romanromerolaw@yahoo.com.

Other BARS

Albuquerque Bar Association
Bench and Bar Reception
The Albuquerque Bar Association will host a Bench and Bar Reception to honor newly appointed judges from 5 to 7:30 p.m., April 20 at the Albuquerque Museum. This free event includes admittance to the El Alma de España (The Soul of Spain) exhibit. El Alma de España is a tribute to the 300th anniversary of the founding of the City of Albuquerque by the Spanish. Paintings from The Prado in Madrid and the Bellas Artes in Valencia will join other works lent by prestigious American institutions. This exhibition is devoted solely to Spanish Masters and consists of nearly 100 works, both paintings and sculpture, and highlights the range of art produced in Spain during the late 16th to early 19th centuries. This will be a wonderful venue to honor this year’s new judges.

Other News

NM Guardianship Association
Guardianship and Conservatorship Forum
The New Mexico Guardianship Association will be hosting a Guardianship and Conservatorship Forum from 1:30 to 5 p.m., April 29 at the Le Baron motel, 2120 Menaul NE, Albuquerque. The featured speaker for the forum is Peter Santini, National Guardianship Association president. There is no charge for the event and the public is welcome. Call (505) 883-4630 or e-mail sbennett@swcp.com to R.S.V.P. or for more information.

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:
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.
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<td>Burden of Representing Financially-challenged Companies</td>
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G = General  E = Ethics  P = Professionalism  VR = Video Replay

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29 24th Annual Update on New Mexico Tort Law
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**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**Effective April 6, 2005**

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

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## WRITS OF CERTIORARI

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

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

**Effective April 6, 2005**

### CERTIORARI GRANTED AND SUBMITTED:

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<td>28,369</td>
<td>State v. Beltron (COA 24,234) 3/31/05</td>
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RULES/ORDERS
From the New Mexico Supreme Court

NO. 05-8300-08
IN THE MATTER OF THE ADOPTION OF NEW RULE 24-107 NMRA OF THE RULES GOVERNING THE NEW MEXICO BAR

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Board of Bar Commissioners to adopt new Rule 24-107 NMRA of the Rules Governing the New Mexico Bar concerning lawyer limited liability entities, 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 new Rule 24-107 NMRA of the Rules Governing the New Mexico Bar hereby is ADOPTED;

IT IS FURTHER ORDERED that new Rule 24-107 NMRA of the Rules Governing the New Mexico Bar shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the adoption of the above-referenced new rule by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 28th day of March, 2005.

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

24-107. Lawyer limited liability entities.

A. Authorized entities. A lawyer may practice law as a shareholder, member, owner, partner or employee of any limited liability entity, including but not limited to a domestic or foreign limited liability company, professional corporation or limited liability partnership, provided that the statutory law governing the limited liability entity:

(1) does not expressly prohibit the practice of law in such entity form; and

(2) expressly provides that nothing in the statute shall be construed to immunize a lawyer from liability or prospectively limit a lawyer’s liability for the consequences of the lawyer’s own acts or omissions.

B. Retroactive effect. This rule shall be given retroactive effect.

[Approved, effective March 28, 2005.]

NO. 05-8300
IN THE MATTER OF THE AMENDMENTS OF RULES 18-201, 18-203, 18-301, AND 18-302 NMRA OF THE MINIMUM CONTINUING LEGAL EDUCATION RULES

ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation by the Minimum Continuing Legal Education Board to adopt amendments of Rules 18-201, 18-203, 18-301, and 18-302 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Petra Jimenez Maes, Justice Patricio M. Serna, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 18-201, 18-203, 18-301, and 18-302 NMRA of the Minimum Continuing Legal Education Rules hereby are ADOPTED;

IT IS FURTHER ORDERED that the amendments of Rules 18-201, 18-203, 18-301, and 302 NMRA of the Minimum Continuing Legal Education Rules shall be effective January 1, 2006;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of Rules 18-201, 18-203, 18-301, and 18-302 NMRA of the Minimum Continuing Legal Education Rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 24th day of March, 2005.

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

18-201. Minimum educational requirements. [Effective January 1, 2006.]

A. Hours required. Every active licensed member of the state bar shall complete twelve (12) hours of continuing legal education during each year as provided by these rules. One hour of continuing legal education is equivalent to sixty (60) minutes of instruction.

B. Legal substantive credits. Ten (10) of the required twelve (12) hours may include related legal subjects or subjects which relate to the individual attorney’s practice of law. The hours shall be defined as general credits.

C. Legal ethics credits. At least one (1) hour of the twelve (12) hours shall be devoted to legal ethics or code of professional responsibility subjects.

D. Professionalism credits. One hour of the twelve (12) hours of continuing education shall be devoted to the subject of professionalism.

E. Carry-over. Any member may carry up to twelve (12) hours of credits earned in one (1) compliance year over to the next compliance year only. One (1) ethics credit may be carried-
over as part of the twelve (12) hours of credits. One (1) professionalism credit may be carried over as part of the twelve (12) hours of credits. While excess ethics credits can be converted to be used toward the substantive (general) requirement, excess professionalism credits cannot be converted. Self-study credit hours cannot be carried over.

F. Judges. Judges, retired judges who are active licensed members of the state bar, domestic violence special commissioners and domestic relations hearing officers shall be required to complete the same number of hours of continuing legal education as other active licensed bar members but may satisfy such requirement by attending judicial education programs:

(1) provided by the Judicial Continuing Education Committee;
(2) approved by the Minimum Continuing Legal Education Board;
(3) provided by the Judicial Education Center; or
(4) approved by the Administrative Office of the Courts pursuant to the Rules Governing Judicial Education.

Annual training for metropolitan, district and appellate court judges, domestic violence special commissioners and domestic relations hearing officers shall include appropriate training in understanding domestic violence, as determined by the Judicial Continuing Education Committee.

G. Initial compliance year. For members admitted on or after January 1, 1990 the initial compliance year shall be the first full compliance year following the date of admission.

H. Compliance year. For all active members not mentioned in Paragraph E of this rule, the compliance year shall end December 31 of each year.

18-203. Accreditation; course approval. [Effective January 1, 2006.]

A. Accreditation. The board shall:
(1) accredit institutions that have a history of providing quality continuing legal education;
(2) approve individual programs of continuing legal education. The content of the instruction provided may include, but not be limited to, live seminars, participation in education activities involving the use of computer-based resources, audiotapes and videotapes; and
(3) periodically review accredited institutions.

B. Accredited institutions and program provider requirements. Accredited institutions and program providers shall:
(1) assure that each program addresses the ethical or code of professional responsibility and professionalism implications where appropriate; provided, however, that only those portions of a program specifically approved or specified as granting ethics and professionalism credit shall be used to fulfill the attorneys’ ethics and professionalism requirements;
(2) assure that the course has significant intellectual or practical content and that its primary objective is to increase the participant’s professional competence as an attorney;
(3) assure that the curriculum offered relates to legal subjects or subjects which relate to the individual attorney’s practice of law, including professional conduct, legal ethics, and professionalism or law office management;
(4) assure that presenters for all programs are qualified by practical or academic experience to teach the subject to be covered. Legal subjects should normally be taught by attorneys;
(5) assure that thorough, high quality, current, readable, carefully prepared written materials are distributed to all participants at or before the time the course is offered; and
(6) assure that a level of activity is noted on the promotional materials following the guidelines listed below:
(a) Advanced. An advanced continuing legal education course should be designed for the practitioner who specializes in the subject matter of the course;
(b) Intermediate. An intermediate course is designed for the practitioner experienced in the subject matter, but not necessarily an expert. A survey course in which there have been recent, substantial changes will be deemed intermediate. In an intermediate course, some segment may be low intermediate or basic and others high or advanced. In those instances, the course taken as a whole will be considered intermediate;
(c) Basic. A basic course is designed for the practitioner with no experience or limited experience in the area of law with which the course deals. A survey course will be considered basic unless there are recent, significant changes in the law.

C. Announcement of approval. Providers shall announce, as to a program that has been given approval, that: “This course has been approved by the New Mexico Minimum Continuing Legal Education Board for _____ hours of credit”.

D. Self-study credit. Self-study credit may be given for viewing videotapes or listening to audiotapes or participating in educational activities involving the use of computer-based resources, provided:
(1) board approval is received prior to viewing, listening or participating;
(2) the self-study course is from an accredited provider and was produced within five (5) years from the date of viewing, listening or participating; or
(3) the self-study course is from an approved program and was produced within five (5) years from the date of viewing, listening or participating.

Absent prior board approval in exceptional circumstances, no more than four (4) hours of credit may be given during one compliance year for self-study activities and the individual seeking self-study credit must not have received self-study credit for the same activity in a prior compliance year. Self-study credits may be applied only to the continuing legal education requirements for the year in which they are earned, and may not be carried over to subsequent year requirements or backward to prior year requirements.

E. Publications. Credit for one hour may be earned for each sixty (60) minutes spent authoring or co-authoring written material which is actually published in a legal periodical, journal, book or treatise which is approved by the administrator or the board, subject to the following requirements:
(1) it substantially contributes to the legal education or competency of the attorney and other attorneys; and
(2) it is not done in the ordinary course of the attorney’s practice of law or the performance of regular employment.

Credit is given in the year the work is accepted for publication, or in which publication actually occurs.

F. Live program credit. Live program credit can also be attained for time spent viewing videotapes and listening to
for preparation time and presentation time, including credit for approved as provided for in these rules. Discussion among participants and provided this live program is audiotapes at an organized open enrollment program provided question-and-answer periods and video or instruction time, which may include lecture, panel discussion, on one (1) hour of credit for each sixty (60) minutes of actual instruction time, which may include lecture, panel discussion, question-and-answer periods and video or film presentation.

H. Hours earned. Credit for approved programs shall be based on one (1) hour of credit for each sixty (60) minutes of actual instruction time, which may include lecture, panel discussion, question-and-answer periods and video or film presentation.

I. Provider attendance lists. Pursuant to practices and procedures to be adopted by the board, all continuing legal education providers must, as a condition of accreditation or program approval, agree to provide the board a list of all New Mexico attorneys and judges who attended the continuing legal education program and the number of hours claimed by each participant. Such list shall be provided within thirty (30) days of the program being held.

J. Other reporting procedures. An attorney wishing to obtain approval for a program, for which the provider has not sought accreditation or has not properly reported attendees, shall comply with the practices and procedures established by the board.

18-301. Compliance. [Effective January 1, 2006.]

A. Reporting. The board shall prepare an annual report statement for each licensed active member of the state bar for the previous compliance year which shall be provided to each member no later than the last day of February of each year. This report shall include reference to hours earned during the compliance year that have been reported by active members and the providers and any carryover hours from the previous compliance year. The annual report statement shall indicate whether the active member has completed credit requirements for the compliance year or whether the active member has a deficiency in credits. Any active member may notify the board of any errors or omission on their annual report statement.

B. Second notification of deficiency to active members. On or about April 1 of each year, the board shall prepare a letter for each active member of the state bar who continues to have a deficiency in credits for the previous compliance year. The letter will indicate that the active member has until April 30 to complete the necessary credit requirements for compliance.

C. Notification of deficiency. The board shall annually compile and certify to the Supreme Court a list of those members of the state bar who prior to May 1 have failed to comply with the requirements of these rules. Whenever the board shall certify to the Supreme Court that any member of the state bar has failed or refused to comply with the provisions of these rules, the clerk of the Supreme Court shall issue a citation to such member requiring the member to show cause before the court, within fifteen (15) days after service of such citation, why the member should not be suspended from the right to practice in the courts of this state. Service may be by personal service or by first class mail postage prepaid. Compliance with the provision of these rules on or before the return day of such citation shall be deemed sufficient showing of cause and shall serve to discharge the citation.

D. Sanctions. In addition to any disciplinary action taken by the Supreme Court pursuant to Paragraph C of this rule, each active member who fails to comply with the provisions of these rules is subject to monetary sanctions as follows:

1. Each active member who fails to complete the annual minimum educational requirements by December 31 of each year shall pay a fee of one hundred dollars ($100.00). The fee shall be assessed in the annual report statement provided to each member pursuant to Paragraph A of this rule, and shall be paid no later than March 31.

2. Each active member who, as of April 1, either continues to have a deficiency in credits for the previous compliance year or fails to pay the fee assessed pursuant to Subparagraph (1) of this paragraph shall pay an additional fee of two hundred and fifty dollars ($250.00). That fee shall be paid no later than April 30.

3. The board shall include in the certifications to the Supreme Court, pursuant to Paragraph C of this rule, any member who has failed to pay any assessed fees prior to May 1.

4. The board shall not waive any fees unless the member can prove that the member was in compliance with the minimum educational requirements prior to the applicable deadline.

18-302. Review and appeal. [Effective January 1, 2006.]

A. Review by board. An attorney, judge or provider who is aggrieved by a decision of the board and who is unable to resolve the disagreement informally may petition the board to review the decision. The petition must be in writing and filed with the board within thirty (30) days from the date the decision was mailed to the petitioner. The petition must state briefly the facts supporting the petitioner’s claim and may be accompanied by supporting evidence or documentation. The board may, in its discretion, request that the petitioner appear before the board.

B. Decision. The board shall review the petition and shall notify the petitioner of its final decision. The decision shall be based on a review of the petition and the records of the board.

C. Appeal. An attorney, judge or provider may petition the Supreme Court for modification or reversal of the decision of the board. The petition must be filed with the Court within thirty (30) days after the date of mailing of the final decision by the board and must be accompanied by a certificate of service on the board. Unless otherwise directed by the Court, within thirty (30) days after service of the petition, the board shall file with the Court a response to the petition and shall deliver the record considered by the board in this matter.
The Supreme Court is considering proposed revisions to the Rules of Criminal Procedure for the District Courts. 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 April 29, 2005, to be considered by the Court.

5-103. Service and filing of pleadings and other papers.

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one relating to discovery required to be served upon a party, unless the court otherwise orders, every order not entered in open court, every paper in these rules, every order required by its terms to be served, shall be served upon each of the parties.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney’s or party’s last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

C. Definitions. As used in this rule:

- “delivery of a copy” means:
  - (a) handing it to the attorney or to the party;
  - (b) sending a copy by facsimile or electronic transmission when permitted by Rule 5-103.1 NMRA or Rule 5-103.2 NMRA;
  - (c) leaving it at the attorney’s or party’s office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or
  - (d) if the attorney’s or party’s office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

- “depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney; and

- “mailing a copy” means sending a copy by first class mail with proper postage.

5-103.1 Service and filing of pleadings and other papers by facsimile.

A. Facsimile copies permitted to be filed. Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. “Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 5-103.1 NMRA or 5-103.2 NMRA of these rules. A paper filed by electronic means in compliance with Rule 5-103.1 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

B. Facsimile service by court of notices, orders or writs. Facsimile service may be used by the court for issuance of any notice, order or writ or receipt of an affidavit. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.
C. Paper size and quality. No facsimile document shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 5-118 of these rules.

D. Filing pleadings or papers [faxed directly to the court] by facsimile. A pleading or paper may be [faxed directly to the court] filed with the court by facsimile transmission if:

(1) a fee is not required to file the pleading or paper;
(2) only one copy of the pleading or paper is required to be filed;
(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and
(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. Facsimile copy filed by an intermediary agent. Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. Time of filing. If facsimile transmission of a pleading or paper faxed is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness the time and date affixed on the cover page by the court’s facsimile machine will be determinative.

G. [Transmission] Service by facsimile. [A notice, order, writ, pleading or paper may be faxed to] Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission [who] if the party or attorney has:

(1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;
(2) a letterhead with a facsimile telephone number; or
(3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. [Proof of service by facsimile. Proof of facsimile service must include:

(1) a statement that the pleading or paper was transmitted by facsimile transmission and that the transmission was reported as complete and without error;
(2) the time, date and sending and receiving facsimile machine telephone numbers; and
(3) the name of the person who made the facsimile transmission.

I. Demand for original. A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation of perjury.

J. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

5-103.2. Electronic service and filing of pleadings and other papers.

A. Definitions. As used in these rules:

(1) “electronic transmission” means the transfer of data from computer to computer other than by facsimile transmission; and
(2) “document” includes the electronic representation of pleadings and other papers.

B. [Registration for electronic service. The clerk of the Supreme Court shall maintain a register of attorneys who agree to accept documents by electronic transmission. The register shall include the attorney’s name and preferred electronic mail address.]

Service by electronic transmission. Any document required to be served by Paragraph A of Rule 5-103 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 5-103 NMRA designated by the party to be served.

C. Service by electronic transmission by the court. The court may [send] serve any document by electronic [transmission] service to an attorney [registered] or party pursuant to Paragraph B of this rule and to any other person who has agreed to receive documents by electronic transmission.

D. Filing by electronic transmission. Documents may be filed with the court by electronic transmission in accordance with this rule and any technical specifications for electronic transmission:

(1) in any court that has adopted technical specifications for electronic transmission;
(2) if a fee is not required or if payment is made at the time of filing.

E. Single transmission. Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. [Service by electronic transmission. Service pursuant to Rule 1-005 of these rules may be made by electronic transmission on any attorney who has registered pursuant to Paragraph B of this rule and on any other person who has agreed to service in this manner.]

G. Time of filing. For purposes of filing by electronic transmission, a “day” begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court’s computer will be determinative.

H. G. Demand for original. A party shall have the right to inspect and copy any document that has been filed or served by electronic transmission if the document has a statement signed under oath or affirmation of perjury.

I. Proof of service by electronic transmission. Proof of
service by electronic transmission shall be made to the court by a certificate of an attorney or affidavit of a non-attorney and shall include:

(1) the name of the person who sent the document;
(2) the time, date and electronic address of the sender;
(3) the electronic address of the recipient;
(4) a statement that the document was served by electronic transmission and that the transmission was successful.

H. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by electronic transmission.

5-503. Depositions; statements.

A. Statements. Any person, other than the defendant, with information which is subject to discovery shall give a statement. If upon request of a party, a person other than the defendant refuses to give a statement, the party may obtain the statement of the person by serving a written “notice of statement” upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon the person to be examined and upon each party.

(No amendments are proposed for Paragraphs B and C.)

D. Time and place of deposition. Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

* * *

(No amendments are proposed for Paragraphs E, F, G, H, I and J.)
Following a jury trial, Defendant Antonio Graham was convicted of, among other charges, child abuse, contrary to NMSA 1978, § 30-6-1 (2001). On appeal, the Court of Appeals affirmed Defendant’s other convictions but reversed his conviction of child abuse on the basis of insufficient evidence. State v. Graham, 2003-NMCA-127, ¶ 3, 134 N.M. 613, 81 P.3d 556. This Court granted the State’s petition for writ of certiorari to the Court of Appeals and we now reverse.

I. Facts

Defendant lived at the residence of his girlfriend, Amanda Kelly, with their two children, ages one and three. On September 1, 2000, police sought to execute an arrest warrant for Defendant at Kelly’s house. Police officers apprehended Defendant outside the house in a truck. With the consent of the owner of the truck, the officers found crack cocaine in a search of the truck. At that point, Kelly stepped out of the house and asked what was happening. The officers smelled a strong odor of burnt marijuana emanating from the house. They obtained a search warrant for the house. Inside, the officers found additional crack cocaine, several plastic bags with marijuana, a marijuana pipe, and a hanging scale in a dresser drawer in the master bedroom. The officers also noticed rolling papers and marijuana residue, including seeds and stems, on top of a different dresser. Additionally, the officers found a marijuana roach on the living-room floor in front of the sofa and a marijuana bud in a crib in the master bedroom. The officers also recovered a plastic sandwich bag with a small amount of marijuana just inside the front door on a table next to a fish tank. The officers saw two infants in the house and noticed that they were in diapers. The house was dirty and untidy, with soiled clothes on the floor throughout the house and unwashed dishes with old food on them. Along with various drug charges, the State charged Defendant with child abuse.

At trial, Officer Lee Wilder testified that the bud is the most desirable part of the marijuana plant that people generally smoke. It is the part of the plant containing a high concentration of tetrahydrocannabinols. Officer Dusty Collins explained that marijuana dries in buds that are broken up and put in bowls or cigarettes to smoke. The bud found in the crib was in one solid piece with the stem.

Kelly testified that she was unaware of the marijuana on the floor of the living room and in the crib. She stated that if the children had ingested the marijuana she believed that they would have become sick. Kelly testified that Defendant told her that the presence of marijuana on the living room floor and in the baby’s crib was his fault and that he was sorry. In response to a question about whether drugs were more important to Defendant than his children, Kelly recited Defendant’s statement that his only thoughts were about drinking, smoking dope, selling drugs, and running the streets.

Two witnesses testified that they were inside Kelly’s house immediately before Defendant’s arrest on September 1, 2000. These witnesses testified that while they were in the living room they saw Kelly’s two children running around the house and playing. Officer Collins testified that the marijuana in the living room was accessible to the children. In addition, a photograph of the bud inside the crib was admitted as an exhibit.

II. Standard of Review

The test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We have explained that this test involves two separate parts. State v. Coffin, 1999-NMSC-038, ¶ 73, 128 N.M. 192, 991 P.2d 477; State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994). First, “[a] reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permiss-
sible inferences therefrom in favor of the verdict.” *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319. Second, an appellate court “determines 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.” *Sanders*, 117 N.M. at 456, 872 P.2d at 874 (emphases added).

[7] In setting out the standard for reviewing sufficiency of the evidence, the Court of Appeals stated that “the evidence and inferences drawn from that evidence must be sufficiently compelling so that a hypothetical reasonable factfinder could have reached ‘a subjective state of near certitude of the guilt of the accused.’” *Graham*, 2003-NMCA-127, ¶ 12 (quoted authority omitted). It is indeed true that the standard of beyond a reasonable doubt has been described as “a subjective state of near certitude of the guilt of the accused.” *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

The Legislature’s decision to criminalize the conduct described by the statute reflects a compelling public interest in protecting defenseless children. *Lujan*, 103 N.M. at 671, 712 P.2d at 17; accord *Santillanes* v. *State*, 115 N.M. 215, 219, 849 P.2d 358, 362 (1993). “[C]hildren, who are often times defenseless, are in need of greater protection than adults.” *State v. Lucero*, 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct. App. 1975). However, in designating the crime as, at a minimum, a third degree felony, Section 30-6-1(E), the Legislature did not intend to criminalize conduct creating “a mere possibility, however remote, that harm may result” to a child. *Ungarten*, 115 N.M. at 609, 856 P.2d at 571; accord *State v. Cuco*, 92 N.M. 320, 321, 587 P.2d 973, 974 (Ct. App. 1978) (rejecting the argument “that because of its negligence requirement the statute covers any and all harm that might befall the child”), overruled on other grounds by *Santillanes*, 115 N.M. at 225 & n.7, 849 P.2d at 368 & n.7. “There must be ‘a reasonable probability or possibility that the child will be endangered.’” *State v. McGruder*, 1997-NMSC-023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (quoting *Ungarten*, 115 N.M. at 609, 856 P.2d at 571) (quotation marks omitted).

[10] In reviewing the evidence relevant to the charge of child abuse, the Court of Appeals stated that there was “no direct evidence that the two children were ever close to the drugs that were found and no direct or circumstantial evidence that the presence of the drugs posed a direct and imminent threat of danger to them.” *Graham*, 2003-NMCA-127, ¶ 26. We first note that direct evidence is not required. *State v. Bell*, 90 N.M. 134, 137, 560 P.2d 925, 928 (1977). We also disagree with this assessment of the evidence. With respect to proximity, two witnesses testified that, while in the living room, they observed the children running around the house immediately before the arrest and search. Officer Collins testified that the marijuana on the floor in front of the sofa was accessible to the children. In addition, a whole marijuana bud was found in a crib, a piece of furniture that functions as a sleeping area for an infant. We believe that this evidence supports a reasonable inference that the children were in the immediate vicinity of the marijuana, that it was accessible to them, and that there was a reasonable possibility that children that would come in contact with the controlled substance. See *State v. Romero*, 79 N.M. 522, 524, 445 P.2d 587, 589 (Ct. App. 1968) (“An inference is merely a logical deduction from facts and evidence.”) (quoting *State v. Jones*, 39 N.M. 395, 401, 48 P.2d 403, 406 (1935)). The Court of Appeals indicated that there was no evidence that the crib was used for either child. *Graham*, 2003-NMCA-127, ¶ 21. However, the State introduced a photograph depicting the contents and state of the crib at the time of the incident. Two police officers testified that the crib was in the master bedroom and that the bed in the crib was found underneath a teddy bear. This evidence, as well as the inherent purpose of this piece of furniture and the ages of the children,
supports a reasonable inference that the crib was being used as a sleeping area for at least one of the children. From the testimony that the officers did not see the bud until they picked up the teddy bear, and from the absence of any evidence suggesting that the marijuana had just been put in the crib, a reasonable inference could also be drawn that the bud had been in the crib while the child slept.

{11} With respect to the danger to the children, the Court of Appeals discounted the testimony of Kelly. Noting that no objection had been made to Kelly’s testimony, the Court nonetheless determined that Kelly’s testimony was inadmissible and “that inadmissible testimony to which no objection is made has only such probative value as its rational persuasive power.” Graham, 2003-NMCA-127, ¶ 21. Irrespective of its admissibility, we believe that the Court of Appeals applied an incorrect standard in reviewing Kelly’s testimony. For the proposition that it could weigh Kelly’s testimony, the Court of Appeals relied on State v. Vigil, 97 N.M. 749, 752, 643 P.2d 618, 621 (Ct. App. 1982). We believe the Court of Appeals’ reliance on Vigil is misplaced. In Vigil, the testimony at issue was hearsay, and it was admissible, despite the existence of an objection by the defendant, because, as a probation revocation, the proceeding was not governed by the Rules of Evidence. Id. at 750-51, 643 P.2d at 619-20. The question on appeal was whether hearsay alone could establish a probation violation. Id. at 751, 643 P.2d at 620. Under these circumstances, the Court assessed the rational persuasive power of the testimony. Id. at 752, 643 P.2d at 621. This evaluation of the weight of testimony has similarly been restricted to hearsay serving as the sole evidence supporting a verdict in other cases. See State v. Romero, 67 N.M. 82, 86, 352 P.2d 781, 783 (1960) (noting that “hearsay, admitted without objection, is to be considered along with other evidence in determining whether there is substantial evidence to sustain a verdict on appeal”). Outside this limited context, and for non-hearsay such as Kelly’s testimony, we follow the rule that [w]e do not . . . substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony. Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions.

Sanders, 117 N.M. at 457, 872 P.2d at 875 (citation omitted).

{12} In addition to Kelly’s testimony, Officer Wilder testified that the bud is the part of the marijuana plant containing the highest concentration of tetrahydrocannabinols. We also note that the Legislature has designated marijuana as a Schedule I controlled substance under NMSA 1978, § 30-31-6(C)(10) (1978), together with LSD, heroin, and numerous other drugs. Moreover, the Legislature has increased the penalties available for distributing controlled substances, specifically including marijuana, to minors as opposed to adults, NMSA 1978, § 30-31-21 (1987), and has increased penalties for distributing controlled substances in the vicinity of minors by creating drug-free school zones, NMSA 1978, § 30-31-22(C) (1990). From these statutes, the Legislature has indicated its determination that marijuana is a dangerous substance, particularly for minors. It is also common knowledge that the same amount of an intoxicant can have a more profound impact on infants and toddlers than on adults or even older children. The Court of Appeals, as an example of the inadequacy of the record in the present case, cited to a case in which an expert testified about the extremely large quantity of marijuana necessary for a lethal dose. Graham, 2003-NMCA-127, ¶ 24. However, Section 30-6-1(D)(1) proscribes conduct that may endanger the health, as well as the life, of a child. It was thus unnecessary for the State to show that the amount of marijuana accessible to the children could have been fatal. Given the illegality of the substance and the Legislature’s determination that the substance is particularly dangerous to minors, we believe it was within the jurors’ experience to decide whether the amount of accessible marijuana endangered the health of a three-year-old child and a one-year-old child.

{13} Contrary to the applicable standard of review, it appears that the Court of Appeals parsed the testimony and viewed the verdict only in light of the probative value of individual pieces of evidence. The Court of Appeals stated that “Kelly’s testimony takes on significance far beyond what it should,” Graham, 2003-NMCA-127, ¶ 26, that “[t]he rational persuasive power of . . . Kelly’s testimony is minimal,” id. ¶ 21, that “[w]e do not know if the children had access to the marijuana or their proximity to the drugs or drug users,” id. ¶ 25, and that “[w]e do not know where the children were in relation to the others in the house, or whether the ‘roach’ that was found resulted from this or earlier smoking.” Id. This divide-and-conquer approach is not contemplated in appellate review for sufficiency of the evidence. Cf. United States v. Arvizu, 534 U.S. 266, 274 (2002) (noting that a totality of the circumstances review for reasonable suspicion supporting an investigative stop is inconsistent with a “divide-and-conquer analysis” that looks at individual facts in isolation). We view the evidence as a whole and indulge all reasonable inferences in favor of the jury’s verdict. “An appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” Sutphin, 107 N.M. at 130-31, 753 P.2d at 1318-19. Appellate courts “faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” Jackson, 443 U.S. at 326. We do not search for inferences supporting a contrary verdict or re-weigh the evidence because this type of analysis would substitute an appellate court’s judgment for that of the jury.

{14} From the evidence in the record, a rational jury could draw reasonable inferences that the marijuana was accessible to the children, that there was a reasonable possibility that the children would come in contact with the marijuana, and that there was a reasonable possibility of danger to the very young children from ingesting the marijuana. In conjunction with this evidence, the jury heard testimony that Defendant trafficked in crack cocaine in close proximity to the children and that Defendant kept a substantial quantity of crack cocaine and marijuana in various places around the house. Defendant also admitted to being responsible for leaving the marijuana in places that the jury could infer were easily accessible to the children. Viewing all of the evidence in the record in a light most favorable to the verdict, we determine that a rational jury could find each element of child abuse, including a reasonable possibility of danger to the health of the children, beyond a reasonable doubt.

IV. Conclusion

{15} We conclude that Defendant’s conviction of child abuse is supported by sufficient evidence in the record. We reverse the Court
of Appeals and affirm the conviction.

{16} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice (specially concurring)
RICHARD C. BOSSON, Chief Justice (dissenting)
PAMELA B. MINZNER, Justice (dissenting)

EDWARD L. CHÁVEZ, JUSTICE

(Specially Concurring)

{17} I concur with the opinion authored by Justice Serna. I write separately to address some of the concerns raised in the dissenting opinion.

{18} In order to prove the offense of child abuse under Section 30-6-1(C)(1), the State must prove beyond a reasonable doubt that Defendant knowingly, intentionally or negligently, and without justifiable cause, permitted a child to be placed in a situation that may endanger the child’s life or health. NMSA 1978, § 30-6-1(D) (2001). In child abuse cases, we have held that the Legislature intended the phrase “may endanger” to constitute “a reasonable probability or possibility” that the child will be endangered. State v. Ungarten, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993). In this case the jury was instructed that the State had the burden of proving beyond a reasonable doubt that Defendant caused a child or children to be placed in a situation which endangered their life or health. UJI 14-604 NMRA 2005.

{19} In my opinion, although this is a close case, the evidence was sufficient to support the conviction. I do not agree with the dissent that by sustaining this conviction we make bad parenting a crime. This is not simply a case of bad parenting or a “mistake” as characterized by the dissent. In this case two children, ages one and three, were running around the house while adults smoked marijuana rolled in cigar paper. A marijuana cigarette bud was left on the floor where the children were playing. An open bag with marijuana residue was left sitting on a table. Marijuana seeds and stems were left on a dresser in the room where the baby crib was located. In the baby crib was a marijuana bud, which, according to expert testimony, is the most potent part of the marijuana plant. The case would have been much stronger had a witness testified that the children were chewing the marijuana left within their reach and had a toxicologist testified regarding the toxicity of marijuana. However, in this case the law does not require such direct evidence. See State v. McGruder, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150. Given the jury’s reasonable inference in this case that the marijuana bud, a particularly potent and illegal substance, could harm a child if ingested, I believe the evidence of marijuana left in the baby’s crib and the areas where the children were playing is sufficient to support a finding of a reasonable probability or possibility that the children would be endangered.

{20} I am also not persuaded by the concern expressed in the dissent that the Court’s holding criminalizes leaving household products accessible to children. Each of the products to which the dissent refers is legal. I do not read Justice Serna’s opinion as prohibiting legitimate acts. Additionally, toxic household products have child resistant caps. The Defendant in this case left the marijuana accessible to children without taking any steps whatsoever to eliminate or minimize the risk that the children would ingest the marijuana. A reasonable fact finder could find that such an act constitutes child abuse as defined by the Legislature.

{21} Finally, the dissent relies on State v. Trujillo as support for the proposition that a child must be directly in harm’s way to support a conviction of child abuse. Much like the dissent in this case, Trujillo seems to require proof of actual injury beyond all doubt. In Trujillo the Court of Appeals reversed a jury finding of child abuse, holding there was insufficient evidence that a child who witnessed the beating of her mother faced a “substantial risk” to her emotional or physical health. 2002-NMCA-100, ¶¶ 20-21, 132 N.M. 649, 53 P.3d 909. In that case, the drunken father came home late one night, and, as the children slept, he began to beat his wife. The beating was loud enough to awaken the couple’s eight-year-old child, who went to the room to see what was happening. The child testified that she saw her dad beating her mother as the mother asked him to stop. When the child appeared at the door the father stopped beating the child’s mother and said to the child, “Get your little f—ing ass back to bed because I don’t want to have you see me kill your mother.” Id. ¶ 5. The Court of Appeals held there was insufficient evidence for a jury to find a “reasonable probability or possibility” that the daughter’s emotional health was endangered, id. ¶ 20, despite testimony from the child and the mother that the child was scared and saddened by what she witnessed, and that for some time the child lived in fear that she would be “taken away,” or that her father would injure her or kill her mother, to the extent that she missed many days of school. Id. ¶¶ 11-12. The dissent in this case underscores the lack of evidence of direct, physical harm to the child in Trujillo, emphasizing that “the father ordered his child to leave the room just so she would not be in the direct line of his anger.” ¶ 31. In my opinion, requiring this type of evidence to sustain a jury finding of child abuse goes well beyond requiring the prosecution to prove each element of a crime beyond a reasonable doubt.

{22} Justice is a community project in which individuals participate directly when serving on a jury. While it is certainly appropriate in some cases to reverse a jury conviction based on insufficient evidence, this is not the case. The jury was instructed in such a way that what may be a vague and overbroad statute—requiring only a showing that a child was negligently placed in a situation that may have endangered the child—in fact required a showing that the child was placed in a situation which endangered the child’s life. For the reasons previously stated, I believe a reasonable jury could find the defendant guilty based on the direct and circumstantial evidence
presented to the jury and the reasonable inferences that could be drawn from such evidence.

{23} If our interpretation of legislative intent is incorrect as it relates to child abuse, let us err on the side of the safety of children. If the Legislature did not intend for the child abuse definition to reach the circumstance in which illegal drugs are placed within reach of children, the Legislature should revise the definition and tighten up what may be a vague and overbroad statute.

{24} For the foregoing reasons, I concur in affirming Defendant’s conviction for child abuse.

EDWARD L. CHÁVEZ, Justice

RICHARD C. BOSSON, CHIEF JUSTICE

(Dissenting)

{25} I do not believe the State provided sufficient evidence at trial that the children were actually in danger of ingesting marijuana, and therefore I respectfully dissent. To establish a claim of child abuse, the State must demonstrate that the defendant caused the children “to be placed in a situation which endangered [their] life or health.” UJI 14-604 NMRA 2005. The State must first show that marijuana is a potentially dangerous substance, and then that the children were actually in danger from it.

{26} Because most of the trial focused on the other charges arising from Defendant’s drug dealing, the one count dealing with child abuse received little attention at trial from either side. The State presented only one theory for the charge in its opening statement: that Defendant committed child abuse by leaving the marijuana in areas accessible to children. State v. Graham, 2003-NMCA-127, ¶ 19, 134 N.M. 613, 81 P.3d 556. But it has never been a crime, before now, to leave a potentially toxic chemical in an area where there is only a mere possibility, however remote, that a child might come in contact with it. This cannot be what the legislature had in mind when it made criminal child abuse a third degree felony. Otherwise, we risk criminalizing huge territories of benign, though perhaps careless, conduct which up to now has been the province of the abuse and neglect statutes or the law of civil negligence. See NMSA 1978, § 30-6-1 (2004). We risk making a criminal act out of merely being a bad parent.

{27} I agree with our Court of Appeals that the State presented an anemic case in support of the child abuse charge. Despite the testimony of a police officer formally trained in the identification and handling of marijuana, and a forensic chemist from the state crime lab, the State failed to elicit any expert testimony describing the toxicity of the two small pieces of marijuana or directly linking such a small amount to its potential effects upon small children. Presumably, the State could have done so without undue inconvenience, and the jury would have had the kind of evidence it deserved to make an informed decision.

{28} However, this satisfies only half the State’s burden. Beyond proving the degree of risk to the child’s health from marijuana generally, the State had to prove proximity: that a child was actually placed in a direct, physical line to that danger. The danger to this particular child must be more than merely theoretical. Although the law does not require that a child suffer actual injury, it does require that the hazard be greater than a “mere possibility.” State v. Ungarten, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993). The risk of harm has to be substantial; the legislature did not intend to criminalize every harm that might possibly come a child’s way. State v. Massengill, 2003-NMCA-024, ¶¶ 43-47, 133 N.M. 263, 62 P.3d 354. Our courts have previously lent such a reasonable interpretation to the child abuse statute, and I believe we should do so here. “In making this offense a third degree felony, the legislature intended to address conduct with potentially serious consequences to the life or health of a child. The coupling in the statute of the word ‘health’ with the word ‘life’ suggests to us that the legislature intended to address situations in which children are exposed to a substantial risk to their health.” State v. Trujillo, 2002-NMCA-100, ¶ 21, 132 N.M. 649, 53 P.3d 909.

{29} With this caution in mind, I would point out what is self-evident about modern households. They contain a wide assortment of commonly used agents, potentially toxic to children, such as detergents, paint products, cleansers and bleaches, insecticides, herbicides, and even alcoholic beverages and cigarettes. Most of the time, these toxic agents are not under lock and key. Sensibly, as a society we place a considerable degree of trust and discretion in parents; we trust them to undertake reasonable precautions to keep these toxic agents away from children. We do not make a criminal act out of merely making a mistake; after all, none of us is a perfect parent.

{30} In interpreting the child abuse statute, our courts have recognized the distinction between imminent danger and danger which is more remote. For example, we have upheld child abuse convictions when the violent behavior of adults places children physically proximate to that violence and directly in harm’s way. See State v. McGruder, 1997-NMSC-023, ¶ 38, 123 N.M. 302, 940 P.2d 150 (upholding child abuse conviction despite the lack of any physical harm when defendant aimed a gun at a woman and threatened to kill her while her daughter was standing behind her); Ungarten, 115 N.M. at 609-10, 856 P.2d at 571-72 (upholding child abuse conviction when defendant’s knife thrusts at a child’s parent came close to the child). In these cases, the evidence demonstrated that children were physically close to an inherently dangerous situation.

{31} On the other hand, our courts have reversed child abuse convictions when a child may be in the general area of a potentially dangerous situation, but the child is not placed directly in harm’s way. For example, in State v. Roybal, 115 N.M. 27, 29, 846 P.2d 333, 335 (Ct. App. 1992), a father sold illegal drugs, itself a dangerous proposition, while his daughter waited in the car about ten to fifteen feet away. On appeal from a conviction for child abuse, the court reversed, finding insufficient evidence that the child’s mere presence in the car put her sufficiently at risk to constitute criminal child abuse. Id. at 34, 846 P.2d at 340. Similarly, in Trujillo, 2002-NMCA-100, ¶ 7, a father was convicted of child abuse after his daughter witnessed the father’s attack upon her mother from

1 Even with the presumed toxicity of marijuana, and fully recognizing its illegality, the State nonetheless had the burden of producing evidence of proximity.
the bedroom doorway out of the direct line of danger. Oddly, the father ordered his child to leave the room just so she would not be in the direct line of his anger. Id. ¶ 5. Again, the court reversed, finding that any risk of danger was physically remote. Id. ¶ 19.2

Defendant’s case is similar to both Trujillo and Roybal. Even though Defendant introduced a potentially dangerous, illegal substance into the house, Defendant has already been convicted of possession and trafficking. With respect to the separate offense of child abuse, the State failed to demonstrate that either child was ever close enough to the marijuana to be seriously at risk.3 At trial, the State presented no evidence that these children were ever in the crib with the marijuana bud or even in the same bedroom. In fact, there was very little evidence linking either piece of marijuana to the physical location of the children. The only indication from the record regarding the children’s whereabouts is that they were running around the house, not in the bedroom with the crib, at approximately 5:30 p.m., shortly before Defendant’s arrest. When the house was secured and officers awaited a search warrant, the children were most likely outside the house with their mother. For all we know, Defendant placed the marijuana bud in the crib earlier in the day, and we have no idea if the children were ever actually in the crib at the same time as the contraband.

Importantly, there was no evidence that the children were ever left unsupervised by their mother. In fact, to make one of these children physically proximate to the marijuana in the crib, an adult would have to pick up the child, place the child in the crib, and then leave the child unsupervised in the crib with the marijuana bud. But the mother, not Defendant, was the parent in the house with her children, and there is no evidence that she would likely have been so careless. This does not absolve Defendant of blame or otherwise excuse his reprehensible behavior toward these children. But it does absolve Defendant of guilt under this particular child abuse statute, because the evidence does not prove the elements of the crime established by our legislature.

More significantly, I fear the implications of this opinion with respect to what the legislature has defined as criminal child abuse. If we are going to convict based on nothing more than speculation as to what might have happened if certain events had occurred in the future, then there are almost no limits to what a jury might conclude is child abuse. But juries do not define crimes; the legislature does. And our legislature required evidence of “endangerment,” which, under our existing case law, means something more than “what might have been.”

Under its broad reading of the statute, the majority is effectively allowing the jury to usurp the role of the legislature in determining what constitutes child abuse. I cannot agree to such a standard-less, open-ended reading, especially of a criminal statute. I especially fear the due process implications to which we give rise with such an unprecedented reading of our child abuse law. Accordingly, with respect, I am compelled to dissent.

RICHARD C. BOSSON,
Chief Justice

I CONCUR.
PAMELA B. MINZNER, Justice

2 The special concurrence implies a certain dissatisfaction with the Court of Appeals opinion in Trujillo. Yet Trujillo was and is the law of this State. This Court had the opportunity to review it on certiorari, yet declined, to do so. The present majority opinion makes no change in Trujillo.

3 As the majority opinion correctly states, Defendant took full responsibility for the presence of the marijuana in the house and its location. However, Defendant never conceded its proximity to the children, nor was there any other direct evidence of its actual proximity to the children in terms of place and time.
OPINION
RODERICK T. KENNEDY, JUDGE

{1} Petitioner Darryl Lewis filed an appeal with the district court seeking review of an administrative action of the City of Santa Fe (the City), by which Wal-Mart Stores, Inc., (Wal-Mart) was authorized to develop a gasoline filling station on one of its existing properties. The district court dismissed the appeal on grounds that it constituted an impermissible collateral attack on a preexisting judgment. We granted Petitioner’s petition for writ of certiorari. We reverse and remand for further proceedings.

BACKGROUND

{2} Wal-Mart operates a Sam’s Club store in Santa Fe. In February 2001, Wal-Mart sought permission from the City to increase the intensity of use at that location by erecting an unmanned gasoline filling station in the parking lot to serve its members. After gathering information from a variety of sources, the City’s Planning Commission denied the application. Wal-Mart then appealed to the City Council. The City Council reviewed the recommendations of the Planning Commission, conducted a public hearing, and denied Wal-Mart’s appeal in October 2001.

{3} Dissatisfied with the City’s decision, Wal-Mart appealed to the district court. Shortly thereafter, the City and Wal-Mart reached a settlement of the suit in which the City agreed to approve the gasoline filling station, subject to certain conditions. In an executive session without a public hearing and without public comment, the City Council then voted to approve the settlement agreement and the proposed development on February 27, 2002. Petitioner filed a timely appeal with the district court alleging in part that while the development was approved after a public hearing at which he spoke against it, “[t]here was no public meeting” and “[n]o public comment was allowed” when the City subsequently approved the development on February 27, 2002, although “there was no significant change in the application.” Petitioner therefore alleged in his appeal that the City’s approval of the development was arbitrary, capricious, not in accordance with law, and not supported by substantial evidence.

{4} After Petitioner filed the foregoing appeal, the district court entered a stipulated order of dismissal in Wal-Mart’s appeal on March 18, 2002. It recites that the City and Wal-Mart have resolved and settled Wal-Mart’s appeal pursuant to a settlement agreement and then orders, “that this matter be, and hereby is, dismissed pursuant and subject to the terms and provisions of the [Settlement] Agreement.”

{5} Shortly after the stipulated dismissal was entered, Wal-Mart intervened in Petitioner’s administrative appeal to the district court. Wal-Mart then filed a motion to strike Petitioner’s appeal, and the City then filed a similar motion to dismiss. After a hearing, the district court granted the motions and dismissed Petitioner’s appeal on the specific, limited ground that Petitioner’s appeal constituted an impermissible collateral attack on the order of March 18, 2002. Petitioner timely filed a petition for writ of certiorari with this Court, seeking review of the district court’s ruling.

STANDARD OF REVIEW

{6} This Court reviews district court decisions in administrative appeals under an administrative standard of review. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-065, ¶¶ 15-16, 133 N.M. 97, 61 P.3d 806. Generally speaking, we “conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal.” Id. ¶ 16. In this case, we apply the latter portion of this standard, insofar as we are called upon to review the district court’s dismissal of the appeal. “A decision to grant summary judgment on preclusion principles is reviewed under a de novo standard.” Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 76, 134 N.M. 77, 73 P.3d 215.

DISCUSSION

Preclusive Effect of the Stipulated Dismissal and Settlement Agreement

{7} The order of dismissal that we review here is premised on the district court’s determination that Petitioner’s administrative appeal should be characterized as an impermissible collateral attack on the March 18, 2002, order. This is the exclusive subject of our review. See Vill. of Angel Fire v. Wheeler, 2003-NMCA-041, ¶ 9, 133 N.M. 421, 63 P.3d 524 (observing that in the context of administrative appeals, it is generally inappropriate for this Court to rule on issues that the district court has not passed upon).
[8] Petitioner’s pleadings, including the notice of administrative appeal and the statement of appellate issues, make clear that Petitioner seeks to challenge the City’s official decision on February 27, 2002, to approve the development of a filling station at the Sam’s Club location. This constitutes a statutorily authorized, direct attack on a land use decision by the City under Section 31-2-9. See also § 3-19-8; § 3-21-9; § 39-3-1.1 (providing for an appeal to the district court by any person in interest dissatisfied with an order or determination of a planning commission after review of the order or determination by the governing body of the municipality). Although the City, Wal-Mart, and the dissent assert that Petitioner was required to intervene in the litigation between them in order to protect his right to challenge the development, they cite no New Mexico authority to support this position, and we decline any invitation to create such authority here. We fail to see how Petitioner’s statutory right to seek review of the City’s land use decision should be defeated by the subsequent execution of a private settlement agreement and the entry of a stipulated order of dismissal.

The Dismissal Based Upon the Settlement Agreement Is Not an Order Entitled to Preclusive Effect
[9] The City and Wal-Mart contend that Petitioner’s appeal should be regarded as an impermissible collateral attack on the order of the district court by which Wal-Mart’s lawsuit against the City was dismissed because the order specifically references the settlement, and because the settlement contains the terms of the very development agreement that Petitioner seeks to overturn. We are unpersuaded for several reasons.

[10] First, we do not regard Petitioner’s administrative appeal as a collateral attack. A collateral attack is “an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking” the judgment. *Lucas v. Ruckman*, 59 N.M. 504, 509, 287 P.2d 68, 72 (1955) (internal quotation marks and citation omitted), *overruled on other grounds by Kalosha v. Novick*, 84 N.M. 502, 504, 505 P.2d 845, 847 (1973). In this case, all that is at issue is a stipulated order of dismissal. Petitioner’s appeal from the development decision of the City Council does not in any way seek to “avoid, defeat, or evade” the stipulated order of dismissal. Instead, it seeks review of the substantive acts undertaken by the City making a zoning decision to secure the dismissal.

[11] The City and Wal-Mart urge that Petitioner’s appeal represents a collateral attack on the settlement between them, insofar as Petitioner seeks a reversal of the development agreement contained therein. The jurisprudence pertaining to collateral attacks pertains to judgments and other adjudications. See, e.g., *Hanretty v. Middle Rio Grande Conservancy Dist.*, 82 N.M. 275, 276, 480 P.2d 165, 166 (1970) (holding that a party could not collaterally attack a default judgment obtained against him in a foreclosure action); *City of Socorro v. Cook*, 24 N.M. 202, 212, 173 P. 682, 685 (1918) (holding that a judgment as to the title in a prior litigation was not subject to collateral attack); *Dugan v. Montoya*, 24 N.M. 102, 115, 173 P. 118, 122 (1918) (observing that judgments evidenced by patents are immune from collateral attack); *VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶¶ 17-21, 130 N.M. 287, 24 P.3d 319 (applying the bar against collateral attacks in regard to a municipal authority’s final zoning decision); *Sanders v. Estate of Sanders*, 122 N.M. 468, 469, 927 P.2d 23, 24 (Ct. App. 1996) (holding that an attempt to set aside a divorce decree constituted an impermissible collateral attack); *Royal Int’l Optical Co. v. Tex. State Optical Co.*, 92 N.M. 237, 241, 586 P.2d 318, 322 (Ct. App. 1978) (holding that a judgment establishing a party’s exclusive right to use a trade name was not subject to collateral attack). It has no application to contractual relationships. It is well established in this state that even judgments and settlements entered between the consent of the litigants essentially represent contractual agreements. See *Owen v. Burn Const. Co.*, 90 N.M. 297, 299, 563 P.2d 318, 322 (1977) (observing that “a stipulated judgment is not considered to be a judicial determination; rather it is a contract between the parties”) (internal quotation marks and citation omitted); *Pope v. The Gap, Inc.*, 1998-NMCA-103, ¶ 18, 125 N.M. 376, 961 P.2d 1283 (holding that a consent judgment is essentially a contract).

[12] Had the stipulated dismissal meaningfully incorporated the settlement, Petitioner’s appeal might have constituted an indirect attack on the district court’s order. See, e.g., *Sanders*, 122 N.M. at 469, 927 P.2d at 24 (addressing an attempt “to set aside a property settlement agreement that was merged into a divorce decree”). However, the district court’s order merely references the settlement agreement. Nothing in the order suggests that the district court independently evaluated the validity of the settlement agreement or passed upon the propriety of the City’s development decision. *Cf. State ex rel. Martinez v. Kerr-McGee Corp.*, 120 N.M. 118, 122, 898 P.2d 1256, 1260 (Ct. App. 1995) (observing that it would be “unfair to presume prior determination of an issue from the mere fact of settlement when the contrary may more likely be true”). We regard this seemingly technical distinction as something of substantive import.

[13] As an approval of no more than a stipulation to dismiss because of a settlement agreement, the district court order does not represent an adjudication of rights that is entitled to preclusive effect. *Cf. Sanchez v. Saylor*, 2000-NMCA-099, ¶¶ 24-25, 129 N.M. 742, 13 P.3d 960 (holding that a bankruptcy court’s approval of sale did not bar a subsequent action for conversion; because the matter under consideration was not actually litigated in the bankruptcy proceedings, the action for conversion did not constitute an impermissible collateral attack on a federal judgment). In other words, the nature of Wal-Mart’s suit was to appeal the City’s zoning decision against it. The subsequent stipulated order of dismissal did not determine the rights of the parties with regard to the substance of that underlying dispute.

[14] Finally, even if we were to assume that the stipulated dismissal meaningfully incorporated the settlement agreement, such that Petitioner’s appeal represented a collateral attack on an adjudication, our authorities indicate that Petitioner’s action still would not be barred. Our review of the published case law has revealed that in the past, judgments entered by the consent of the parties and upon stipulations have only been regarded as immune from collateral attack by the parties themselves, or those in privity with them. See *Mayers v. Olson*, 100 N.M. 745, 748, 676 P.2d 822, 825 (1984) (“Properly authorized and acknowledged consent judgments and judgments rendered on stipulations are conclusive of all claims determined therein and may not be collaterally attacked by the parties thereto.”); *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 700, 875 P.2d 1128, 1131 (Ct. App. 1994) (observing that a judgment entered by consent pursuant to a settlement “is not subject to collateral attack by a party or a person in privity, and it bars a second suit on the same claim or cause of action”) (internal quotation marks and citation omitted).

[15] Accordingly, to the extent that Petitioner’s administrative appeal could be characterized as a collateral attack on the stipulated dismissal and settlement, the propriety or impropriety of the attack would turn upon Petitioner’s status as a party to the litigation or a person in privity with a party. It is undisputed that Petitioner was not a party to the litigation between the City and Wal-Mart. “A person in privity with another is a person so identified in interest with another that he represents the same legal right.” *Bentz v. Peterson*, 107 N.M. 597, 600, 762 P.2d 259, 262 (Ct. App. 1988). Generally speaking, governmental agencies are only said to be in privity with private
individuals to the extent that the entity “acts on behalf of an individual claimant and seeks individual relief.” *Rex, Inc. v. Manufactured Hous. Comm.*, 119 N.M. 500, 509, 892 P.2d 947, 956 (1995). In this case, the City’s involvement in the prior litigation with Wal-Mart could not be characterized as action on behalf of any individual. Had the City stood by its initial decisions to reject Wal-Mart’s development plan, it might have been “identified in interest” with Petitioner, who has consistently registered opposition to the proposed development. However, in the brief course of the litigation with Wal-Mart, the City reversed its position. This position had resulted from full administrative consideration by its Planning Council. When Wal-Mart appealed, the City Council also gave it due consideration before it denied Wal-Mart’s appeal. By settling the case and opting to permit Wal-Mart to move forward with the development in order to obtain a rapid resolution on terms that it came to find acceptable, the City made another zoning decision without this full process. Because the City could not be said to have acted on Petitioner’s behalf, and because Petitioner’s interests have proven demonstrably dissimilar from the City’s, we conclude that Petitioner was not in privity with the City.

{16} We reiterate that Petitioner had the statutory right to appeal a zoning decision pursuant to Section 3-19-8, which states: “Any person in interest dissatisfied with an order or determination of the planning commission, after review of the order or determination by the governing body of the municipality, may commence an appeal in the district court pursuant to the provisions of Section 39-3-1.1.” By reversing its course, the City determined an issue, and Petitioner had the right to appeal its decision.

{17} In summary therefore, we conclude that the district court erred in ruling that Petitioner’s administrative appeal constitutes an impermissible collateral attack on the stipulated order of dismissal.

**Alternative Bases for Affirmance Also Fail**

{18} The City and Wal-Mart urge this Court to consider alternative bases for affirmance. First, we address their contention that the challenged action is essentially legislative in nature rather than quasi-judicial, such that it should not be subject to administrative review. As the preceding analysis suggests, we reject this characterization. Although the approval of a settlement agreement is superficially at issue, Petitioner’s challenge is directed at the underlying decision to permit the proposed development to proceed. Both the minutes of the February 27, 2002, City Council meeting and the settlement agreement clearly reflect that a development decision pertaining to the Sam’s Club property was made. Such site-specific development determinations are properly classified as quasi-judicial in nature. *See W. Old Town Neighborhood Ass’n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529 (holding that a zoning decision pertaining to a specific property is not a legislative act, but is rather quasi-judicial in nature). The fact that the City’s quasi-judicial development decision is embedded in a settlement agreement does not immunize it from review.

{19} The City and Wal-Mart further contend that Petitioner lacks standing to pursue an administrative appeal. However, the district court did not dismiss on this basis, nor did it pass upon the matter. As a result, the question of standing is not properly before us. *See Mitchell v. City of Santa Fe*, 99 N.M. 505, 507-08, 660 P.2d 595, 597-98 (1983).

{20} Finally, the City and Wal-Mart argue that Petitioner should be prevented from proceeding with an administrative appeal under Rule 1-074 NMRA because the record is inadequate, and because they will be prevented from marshalling and presenting pertinent evidence. However, we are aware of no authority for the proposition that an appeal should be denied altogether because one of the parties regards the procedures to be unduly limiting. In any event, should it prove helpful, the district court is at liberty to remand for the purpose of creating a record that is adequate for review. *See Martinez v. N.M. Tax. & Rev. Dep’t*, 117 N.M. 588, 589, 874 P.2d 796, 797 (Ct. App. 1994), *Littlefield v. State ex rel. Tax. & Rev. Dep’t.*, 114 N.M. 390, 394, 839 P.2d 134, 138 (Ct. App. 1992). In this regard, we note two germane points. First, the district court’s review of the City’s decision pursuant to statute is governed in its scope by Section 39-3-1.1, which plainly delineates the factors a district court may properly consider in such an appeal. *See Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 15, 126 N.M. 753, 975 P.2d 366 (“The procedure for district court review of zoning decisions under both Section 3-21-9 and Section 3-19-8 . . . now follow [Section 39-3-1.1] for obtaining court review of an agency’s decision.”). Second, if the record is insufficient to consider these factors, (i.e., whether the municipality acted fraudulently, arbitrarily or capriciously, without substantial evidence, or in accordance with the law) it could well be related to the City’s decision to handle discussion of the settlement agreement in an executive session. In such a case, the district court, as we mentioned above, can remand for creation of an adequate record.

**Advisory Issues**

{21} Petitioner invites this Court to issue rulings on a number of additional questions, including: (1) whether the record on appeal should include the record of all proceedings pertaining to the proposed gasoline filling station; (2) whether Petitioner’s due process rights were violated; (3) whether the City engaged in impermissible contract zoning; and (4) whether the City’s decision was arbitrary, capricious, unsupported by substantial evidence, not in accordance with law, or beyond the scope of its authority. We decline the invitation to rule on these issues, on grounds that the district court did not pass upon any of them. *See Ramirez v. City of Santa Fe*, 115 N.M. 417, 418-19, 852 P.2d 690, 691-92 (1994) (rejecting to address a number of issues presented in a zoning case, on grounds that the district court had not passed upon them, and on grounds that the courts do not issue advisory opinions).

{22} Likewise, we do not consider this case to have much to do with the price of gas in Santa Fe. As Councilor Martinez stated when the City Council voted, “[t]he misconception is that anybody can buy gas [at Sam’s Club], but they won’t be able to if they don’t . . . belong to Sam’s Club.”

**CONCLUSION**

{23} For the foregoing reasons, we conclude that the district court erred in determining that Petitioner’s administrative appeal constitutes an impermissible collateral attack on a prior judgment. We therefore reverse and remand for further proceedings.

{24} *IT IS SO ORDERED.*

RODERICK T. KENNEDY, Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

IRA ROBINSON, Judge (dissenting)
I would affirm the decision of the district court dismissing Petitioner’s administrative appeal on the ground that it constituted an impermissible collateral attack on the stipulated order of dismissal in the previous case involving only the City and Wal-Mart. That previous case was dismissed in recognition of a settlement agreement reached between the City and Wal-Mart, which resolved and settled the issues in Wal-Mart’s appeal. The majority says that the stipulated judgment is just a private contractual agreement such that the appeal is not a collateral attack upon an adjudication. I disagree. Furthermore, the majority admits that if “the stipulated dismissal [had] meaningfully incorporated the settlement, Petitioner’s appeal might have constituted an indirect attack on the district court’s order.” The judgment or order of dismissal recited that the litigation was terminated “pursuant and subject to the terms and provisions of the Settlement Agreement.” The court waited three weeks after the City Council voted on February 24, 2002, to approve the settlement agreement. I am satisfied that there is little or no difference between the language in this judgment or order and those which “adopt” or “incorporate” a settlement agreement.

The majority defines a collateral attack as “an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect.” Lucas, 59 N.M. at 509, 287 P.2d at 72 (internal quotation marks and citation omitted). The majority then contends that Petitioner’s appeal from the development decision of the City Council does not in any way seek to “avoid, defeat, or evade” that dismissal. Id. I say, of course it does. That is precisely what Petitioner seeks to do. Furthermore, Petitioner certainly seeks to deny the “force and effect” of this dismissal pursuant to the settlement agreement. Id. That makes it an impermissible collateral attack.

If Petitioner cared about this situation, he should have intervened in the previous case when Wal-Mart appealed it to the district court in Santa Fe. He was aware of it, but did nothing until he filed a second case—an administrative appeal—rather than join in the Wal-Mart/City appeal in district court. Callaway v. Ryan, 67 N.M. 283, 287, 354 P.2d 999, 1002 (1960) (stating piecemeal litigation is not favored by the courts and is the function of the trial court to rule on such matters initially); see also M&G Engines v. Mroch, 631 P.2d 1177, 1178 (Colo. Ct. App. 1981) (stating that separate action by third party was impermissible challenge to the disposition of a prior action where the third party had had an opportunity to intervene).

Petitioner filed his administrative appeal with knowledge of the previous case and before the previous case had been dismissed. Rather than seeking to intervene, he filed an entirely separate action in which he was objecting to the manner in which in the prior action was eventually settled. I do not assert that he was required to intervene. I say that he could have intervened.

While I realize that under Section 3-19-8 “[a]ny person in interest dissatisfied with an order or determination of the planning commission . . . may commence an appeal,” that is only part of what happened here. Petitioner is not just filing an appeal of a planning commission or City Council ruling. He is attacking another judgment of another court in another case. That is what makes it a collateral attack and the court was correct in dismissing it as improper and impermissible.

The matter was appealed in the previous lawsuit by Wal-Mart, the City, as a party to the lawsuit, had the right to reach a settlement. It should not be any different than any other lawsuit. Public policy favors enforcement of settlement agreements. Bd. of Educ. v. N.M. State Dep’t of Pub. Educ., 1999-NMCA-156, ¶ 14, 128 N.M. 398, 993 P.2d 112; Gonzales v. Atnip, 102 N.M. 194, 195, 692 P.2d 1343, 1344 (Ct. App. 1984).

I reject Petitioner’s contention that Wal-Mart requested rezoning. Article 14-3.5(A)(1) of the Santa Fe Land Development Code defines a “rezoning” as an “amendment to the zoning map.” Santa Fe, N.M., Land Development Code art. 14, § 3.5(A)(1). Wal-Mart did not request an “amendment to the zoning map.” Id. A gasoline station is a lawful use under the zoning that Wal-Mart already had. Nor does Article 14-3.5(D), § 3.5(A)(1) of the Santa Fe Land Development Code have any relevance as Petitioner suggests. That article deals with the possible rescission of a zoning map change (or “rezoning”) if the property owner has failed to take certain steps to develop the property, such as development plan approval, applying for building permits, etc., within two years of the rezoning. Id. Wal-Mart requested an amendment to their existing development plan—not a zoning change—at their Sam’s Club location to allow gas pumps.

Petitioner also assumes, without explanation or citation to legal authority, that this Court can or should scrutinize the City Council’s reasons for approving the settlement agreement. In particular, Petitioner argues that “the Councilor’s only concerns were the price of gasoline.” The City Council could reasonably have concluded that there is a community good to be achieved by breaking the monopoly on inflated gasoline prices in Santa Fe, which has kept Santa Fe gasoline prices considerably higher than those in Albuquerque and other cities for a long time.

The majority seems overly impressed with the fact that only Wal-Mart’s Sam’s Club members will be able to take advantage of lower gas prices at Sam’s Club gas pumps. The reality is that there are lots of Sam’s Club members in Santa Fe. That is the reason some people claimed to be concerned with an increase in traffic.

At present, all those Sam’s Club members shop for gas at high-priced Santa Fe stations. It is unreasonable to believe that once Sam’s Club lowers gas prices, the other stations will keep their prices high and not reduce them to be competitive. I am convinced that the City Council already figured out that this is the way to end unrealistically high gas prices in Santa Fe.

The majority states that “[w]e do not consider this case to have much to do with the price of gas in Santa Fe.” I think that is exactly what it is all about.

The people of Santa Fe are entitled to the relief that the City Council proposes to give them.

I respectfully dissent.

IRA ROBINSON, Judge

IRA ROBINSON, Judge

(Dissenting)
{1} This is a post-dissolution of marriage case in which Walter Edens (Husband) appeals the trial court’s order denying his motion to set aside the alimony provisions of the marital settlement agreement (MSA) that was incorporated into a final decree of divorce. Husband also appeals the trial court’s reconsideration of its initial denial of attorney fees and costs to Nancy Edens (Wife). Wife cross-appeals the trial court’s initial refusal to award her attorney fees and costs. We affirm the trial court’s decision refusing to set aside the lump sum alimony provision of the MSA incorporated into the divorce decree. We further hold that the trial court lost jurisdiction to reconsider its denial of an award for attorney fees and costs in this case because Husband had already filed a notice of appeal at the time Wife’s motions to reconsider were filed in the trial court. As a result of this determination, we hold the trial court’s order on Wife’s motions for reconsideration is void. Because the trial court’s initial order denying Wife’s request for fees and costs was entered without the trial court first considering argument, and because the court did not make findings of fact and conclusions of law on the issue, we remand to the trial court to revisit the issue.

BACKGROUND

{2} After approximately twenty-eight years of marriage, Wife filed a petition for dissolution of marriage and the parties filed the MSA. On the same day, the trial court approved and filed the final decree of dissolution of marriage, which incorporated the MSA.

{3} Although Husband and Wife proceeded pro se in the divorce proceedings, in the months leading up to entry of the final decree both Husband and Wife were advised by independent counsel. The parties conferred in January 2001 and resolved issues concerning, among other things, division of their community and separate property and liabilities. They then agreed to obtain the assistance of a mediator experienced in family law to resolve the issue of alimony.

{4} At the time of mediation, the parties acknowledged there was a disparity in their incomes. Husband historically earned an income considerably larger than Wife’s income. Husband worked as a sales engineer for the last eleven years of the marriage. Wife worked approximately half-time as a physical therapist during the last ten years of the marriage. During the years immediately preceding the divorce, Husband was earning approximately $180,000-$240,000 per year, while Wife was earning less than $30,000 per year.

{5} At the first mediation session, the parties discussed the concept of mediation, signed a mediation contract, and exchanged general financial information. Husband informed Wife that he planned to leave his job and move to Colorado to build a home. He planned to seek work in Colorado in the fall of 2001. Wife informed Husband that she earned between $1200 and $1500 per month, but the parties did not discuss whether this was net or gross income. Wife also stated that she would be unable to work full-time due to a medical condition that Husband was aware of, but that she was looking to increase her work hours to thirty-two hours per week. During this session and the following two mediation sessions, Husband did not dispute Wife’s neck and arm pain stemming from her medical condition, and he did not question her inability to work full-time. The mediator asked the parties to prepare budgets to be used at the next mediation session.

{6} During the second mediation session, Wife informed Husband that she thought she could increase her income to $2000 per month by working thirty-two hours per week. Again, there was no discussion of whether this was gross or net income. Wife in fact received a pay raise of $1.00 per hour that first appeared in her late March 2001 paycheck, but she apparently did not report this during mediation. Husband stated that he expected to earn approximately $137,000-$165,000 per year when he began to work again in Colorado. If he did not meet his expectations, his fall-back position was to earn somewhere between $70,000 and $100,000 per year. The mediator discussed alimony but did not advise the parties how they should treat the issue. He explained that numerous factors are considered when a court makes an alimony determination and suggested that the parties seek legal advice concerning this issue. The mediator also suggested that Husband seek advice from an accountant. Husband proposed a lump sum alimony award during this session, but the parties did not agree on any specific terms. Wife proposed that Husband pay her $1500 per month in alimony; Husband did not respond to this offer at the second session.

{7} At the third and final mediation session, Wife reported that her employer agreed to increase her work hours gradually to thirty-two hours per week and that she would be earning $34,725 per year by August 2001. The parties focused on reaching an amount to be paid to Wife as alimony. Husband had consulted with an accountant and his attorney about the issue of alimony. Ultimately, at Husband’s suggestion, the parties agreed to a nonmodifiable lump sum alimony amount to be paid at $2000 per month for the first six months after
divorce and then $1,500 per month thereafter until Wife turned sixty-two.

(8) Based on the agreement reached between Husband and Wife during mediation, the mediator drafted the MSA and final decree of divorce. The documents went through three drafts, and the parties reviewed, revised, and executed them during the approximately three months after the final mediation session. The MSA contained not only the alimony provisions, which set forth the terms of a nonmodifiable lump sum alimony payment, but also the property settlement and liability issues that the parties had agreed to prior to mediation. The trial court incorporated the MSA into the final decree of divorce as a final judgment.

(9) One year after the stipulated final divorce decree documents were filed in the trial court, Husband filed a motion to set aside the final judgment and alimony provisions of the MSA pursuant to Rule 1-060(B) NMRA. Husband argued that the provisions of the MSA concerning alimony should be set aside “on the grounds of misrepresentation, mistake, that it is no longer equitable that the judgment should have prospective application and/or because the contract provisions for alimony as written are so inequitable that it is unconscionable to enforce the decree incorporating the [MSA].” Husband maintained that Wife misrepresented her potential income, earning capacity, budget, and medical condition during mediation, and that the alimony provisions of the MSA should be set aside because the lump sum alimony agreement was based on Wife’s misrepresentations. Husband further argued that the MSA was ambiguous and inequitable and should be set aside based on those grounds.

(10) When Husband filed his motion, the financial circumstances of the parties had changed to some extent. At the time of the mediation sessions and before the entry of the final decree, Husband projected that he would be earning between $70,000 and $165,000 per year. But after the divorce and his move to Colorado, he had actually earned between $56,000 and $64,000 annually. Since the divorce, Wife had earned between $33,000 and $42,000 per year.

(11) After a trial on the merits during July 2003, the trial court filed its findings of fact and conclusions of law denying Husband’s motion to set aside the alimony provisions of the MSA incorporated into the final divorce decree. In that same order, without hearing argument on the issue, the trial court also denied Wife’s request for an award of attorney fees and costs incurred in defending against Husband’s motion; it ordered each party to bear his or her own fees and costs.

(12) Husband filed a notice of appeal on September 10, 2003, from the trial court’s order denying his motion to set aside the MSA alimony provision in the final judgment. On September 11, 2003, Wife filed a motion to reconsider the denial of attorney fees and a motion to reconsider the denial of her application for costs. Husband moved to strike the motions to reconsider for lack of jurisdiction because his notice of appeal was filed prior to Wife’s motions. On September 19, 2003, Wife filed a notice of cross-appeal pertaining to the initial denial of the attorney fees and costs. After a hearing and briefing on Husband’s motion to strike, the trial court entered an order reserving its right to rule on the motions for reconsideration of attorney fees and costs if the court found it had jurisdiction. The trial court then filed a memorandum order granting Wife’s motions for reconsideration and awarding Wife a portion of the fees and costs she requested. Husband filed a second notice of appeal from that order, and we consolidated that appeal with his earlier appeal on the issue of setting aside the alimony provisions of the MSA.

DISCUSSION

The Trial Court Correctly Denied Husband’s Motion Under Rule 1-060(B)

(13) We generally review the trial court’s ruling under Rule 1-060(B) for an abuse of discretion “except in those instances where the issue is one of pure law.” Martinez v. Friede, 2004-NMSC-006, ¶ 19, 135 N.M. 171, 86 P.3d 596. Here the trial court was concerned with factual issues, such as whether Wife had misrepresented facts during the mediation, so we will review for abuse of discretion the trial court’s decision refusing to set aside the MSA. To reverse the trial court under an abuse-of-discretion standard, “it must be shown that the court’s ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable.” Meiboom v. Watson, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (internal quotation marks and citation omitted) (omission in original); see also Talley v. Talley, 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct. App. 1993) (“When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion.”). “Where the court’s discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence.” Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted).

(14) Husband moved to set aside the final judgment and the alimony provisions of the MSA under Rule 1-060(B)(1), (3), (5), and (6). Under the provisions of Rule 1-060(B) upon which Husband relies, a court may relive a party from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

Rule 1-060(B).

(15) Before analyzing Husband’s arguments under Rule 1-060(B), we first review the pertinent provisions of the MSA. The MSA provided that “Husband shall pay support and maintenance to Wife . . . [the sum of Two Hundred Twenty Thousand Five Hundred and No/100 Dollars ($220,500.00) to be paid to [Wife] until paid in full or until [Wife’s] death, whichever occurs first.” The MSA further stated that Husband shall pay Wife $2,000 per month for the first six months and then pay $1,500 per month until the obligation is paid in full or until Wife’s death. The alimony provision provided that “[p]ayments stop should [Wife] die before July 2013, but are
otherwise nonmodifiable by the parties and the Court.” (Emphasis added.) In addition, the alimony provision stated that “[t]he alimony as set forth constitutes deductible, lump sum alimony paid in installments pursuant to Sections 40-4-7(B)(1) and 40-4-7(B)(2)(b) NMSA 1995.”

Rule 1-060(A)

{16} Husband argues that the MSA was ambiguous and should have been set aside under Rule 1-060(A), which permits a court to correct clerical mistakes in judgments, or under Rule 1-060(B)(1). This argument has no merit. See generally Mark V, Inc. v. Melliekas, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993) (discussing how a court determines whether an agreement is ambiguous). The MSA is clear that the lump sum alimony is nonmodifiable. Husband suggested an agreement for nonmodifiable lump sum alimony, and Husband understood that Wife could not move to modify the nonmodifiable amount of alimony. This was entirely consistent with Husband’s desire that Wife not be able to seek more alimony if Husband’s income increased. The MSA itself and the intentions of the parties support the trial court’s conclusion that the alimony provision of the MSA is not ambiguous.

Rule 1-060(B)(3)

{17} Relief under Rule 1-060(B)(3) is available where the trial court determines that misconduct of the opposing party substantially impeded the movant’s full and fair preparation of its case. Rios v. Danuser Machine Co., 110 N.M. 87, 93, 792 P.2d 419, 425 (Ct. App. 1990). There was substantial evidence presented to the trial court to support its conclusion that Husband was not impeded in the preparation and presentation of his case.

{18} It is undisputed that Husband had no job at the time the MSA was executed and that the alimony award was based on his previous salary and his hope of projected similar future earnings, and on Wife’s predicted income. Husband attested that during mediation between January and June 2001, when the MSA was finally signed, he did not know Wife’s hourly wage or work hours. Husband contends that he relied on Wife’s misrepresentations made during mediation that she earned between $1200 and $1500 per month and that she could not support herself on this income. Husband further claims that his attorney advised him to make a lump sum award based on Wife’s medical condition, which he claims he later learned was exaggerated, and her inaccurate statements about her income.

{19} The evidence reveals that Wife projected she could make approximately $2000 per month working thirty-two hours per week. Then, at the third and final mediation session, Wife reported a projected yearly income of at least $34,725 beginning August 2001. Husband denies being present to hear Wife state this estimated figure, but the mediator testified that Husband was present when Wife made the statement.

{20} The evidence supports the determination that Husband did not rely on Wife’s representations regarding her earning capacity or her medical condition when he agreed on the lump sum alimony provision, and that Wife’s income and budget were not substantial considerations for him. Husband’s counsel testified that Husband arrived at a lump sum, nonmodifiable calculation based on his own concept of reasonableness, and that he did not make a mistake in relying on Wife’s representations about her income or budget. Husband wanted to make sure Wife was comfortable, and he wanted to protect his future earnings from a motion for an upward modification by Wife if he made substantially more money in the future or if she declined in health. There was also testimony that Husband wanted to avoid litigation fees and that he sought to reach an agreement quickly because he planned to move to Colorado in order to get on with his life. Husband obtained the advice of both an attorney and an accountant, and he knew that budget and income were only some of the factors a court considers when it determines a lump sum award. Yet he proposed to pay Wife nonmodifiable lump sum alimony anyway because he thought it would best serve his needs and protect his future earnings.

{21} Therefore, while Husband contends that Wife misrepresented her earning potential, the evidence establishes that each party trusted the other to predict future earning potential. As it turned out, Wife may have underestimated her future income, while Husband overestimated his. These inaccurate predictions do not amount to fraud or misrepresentation. There was no showing that Wife knowingly misrepresented what her income would be. While Husband contends that he thought the parties were discussing gross income, Husband has not shown that Wife made representations during mediation about whether her income was gross or net income. While she did not report her $1.00 per hour raise, this failure on Wife’s part was harmless considering that she did report during the final mediation session that she expected to earn at least $34,725 per year. With respect to Wife’s medical condition, testimony established that Husband chose not to delve into Wife’s medical records or question Wife’s medical condition even though these records were available for his inspection.

{22} In short, the record indicates that Husband made a free and conscious choice when he suggested lump sum alimony. Husband and Wife were entitled to enter into a voluntary settlement agreement. “If equitable, a stipulated agreement should not be vacated merely because an award may have been unwise or unfortunate in light of subsequent events.” Harkins v. Harkins, 101 N.M. 296, 297, 681 P.2d 722, 723 (1984). “Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate.” Benavidez v. Benavidez, 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (internal quotation marks and citation omitted). Further, “Rule 60(b) cannot be used to relieve a party from the duty to take legal steps to protect his interests.” Id. Husband took a calculated risk that turned out badly for him, but this fact provides no basis for relief under Rule 1-060(B)(3).

Rule 1-060(B)(5)

{23} Husband argues that the alimony provision should be set aside under Rule 1-060(B)(5) because, in light of the parties’ changed circumstances, it is no longer equitable that the provision be given prospective application. This argument is without merit. Husband’s voluntary unemployment and life choices that have changed his ability to pay the alimony do not justify a modification in support. See generally Henderson v. Lekvold, 95 N.M. 288, 292, 621 P.2d 505, 509 (1980) (holding that in a child support case where a parent’s “salary has increased and the increased burden on his finances is the result of an obligation he incurred voluntarily, it was an abuse of discretion for the trial court to reduce his child support obligations to such an extent” (emphasis omitted)); Barnes v. Shoemaker, 117 N.M. 59, 67, 868 P.2d 1284, 1292 (Ct. App. 1993) (concluding that “when a judgment is founded on a prediction that takes into ac-

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count various contingencies, equity does not require modification of the judgment simply because events did not evolve in accordance with the prediction’); Wolcott v. Wolcott, 105 N.M. 608, 609-10, 735 P.2d 326, 327-28 (Ct. App. 1987) (holding that the trial court did not abuse its discretion when it decided to continue the wife’s alimony after the husband’s voluntary change of employment). The law favors finality and “[t]he public policy of this state discourages repeated attempts to reopen support decrees.” Cherpelis v. Cherpelis, 1996-NMCA-037, ¶ 20, 121 N.M. 500, 914 P.2d 637. Husband’s miscalculation of his future income is not a basis to set aside the alimony provision under Rule 1-060(B)(5). See Benavides, 99 N.M. at 539, 660 P.2d at 1021.

Rule 1-060(B)(6)

24 Husband argues that the trial court should have set aside the alimony provisions of the divorce decree under Rule 1-060(B)(6) because the provision was unconscionable and violated the Thirteenth Amendment’s prohibition against involuntary servitude. We are not persuaded. The evidence in this case does not establish the existence of exceptional circumstances contemplated by the rule. “Rule 1-060(B)(6) is designed to apply only to exceptional circumstances, which, in the sound discretion of the trial judge, require an exercise of a reservoir of equitable power to assure that justice is done.” Stein v. Alpine Sports, Inc., 1998-NMSC-040, ¶ 17, 126 N.M. 258, 968 P.2d 769 (internal quotation marks and citations omitted); see also Wahrle v. Robison, 92 N.M. 485, 487, 590 P.2d 633, 635 (1979) (stating that “[a]n individual must establish the existence of exceptional circumstances to obtain relief under Rule 60(b)(6)” and that one “cannot claim relief under Rule 60(b)(1) and (3) and also claim relief under subsection (6)”).

25 First, the MSA was not unconscionable. Husband and Wife mutually agreed on the terms of the MSA, and it was Husband who suggested the nonmodifiable lump sum alimony provision after consultation with an attorney and an accountant. Second, enforcement of the voluntary MSA does not amount to involuntary servitude that violates the Thirteenth Amendment to the United States Constitution. Husband freely entered into the terms of the MSA, and he has not been made a “slave” to Wife. “Alimony . . . is support for one spouse by another as a substitute for the statutory right to marital support during coverture.” Brister v. Brister, 92 N.M. 711, 715, 594 P.2d 1167, 1171 (1979). Alimony “is not intended as a penalty against a husband.” Id.

The Trial Court Properly Denied Husband’s Motion for Summary Judgment

26 Husband contends the trial court should have granted his motion for summary judgment, which argued that (1) the trial court should exercise its inherent or continuing jurisdiction to modify or terminate the MSA’s alimony provision pursuant to Section 40-4-7(F), and (2) the MSA’s provision for nonmodifiable alimony was unenforceable pursuant to NMSA 1978, § 40-2-8 (1907). We do not agree.

27 At issue is the interpretation of statutes, which is a question of law subject to de novo review. Cooper v. Chevron U.S.A., Inc., 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. Looking first at Section 40-4-7(F), we conclude the statute does not apply to the type of nonmodifiable lump sum alimony agreement in this case. It applies to periodic payments. Section 40-4-7(B)(2)(a) plainly limits the support awards subject to modification. It states that a trial court may “modify and change any order in respect to spousal support awarded pursuant to the provisions of Subparagraph (a), (b) or (c) of Paragraph (1) of this subsection whenever the circumstances render such change proper[.]” § 40-4-7(B)(2)(a). The referenced sections permit awards of rehabilitative spousal support, § 40-4-7(B)(1)(a), transitional support, § 40-4-7(B)(1)(b), and support for an indefinite duration, § 40-4-7(B)(1)(c). But the statute’s provision permitting modification does not apply to lump sum awards under § 40-4-7(B)(1)(d) (“a single sum to be paid in one or more installments that specifies definite amounts, subject only to the death of the receiving spouse”) and § 40-4-7(B)(1)(e) (“a single sum to be paid in one or more installments that specifies definite amounts, not subject to any contingencies, including the death of the receiving spouse”). Thus, when Section 40-4-7(F) refers to a court’s continuing jurisdiction “over proceedings involving periodic spousal support payments” it is referencing the support payment provisions in Sections 40-4-7(B)(1)(a), (b), and (c).

28 Turning next to Section 40-2-8, Husband subjects the statute to a strained reading. That statute provides:

A husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children during their separation.

§ 40-2-8 (emphasis added). Focusing on the emphasized language, Husband reads this to mean that spouses are prohibited from entering into agreements providing for post-divorce support. This interpretation is unreasonable. Section 40-2-8 governs how spouses may alter by contract their legal relationship during marriage; here, by contrast, the parties entered into an agreement applicable to their relationship after dissolution of their marriage. Section 40-2-8 has nothing to do with the MSA.

The Trial Court Properly Denied Husband’s Motion for Protective Order

29 Husband contends the trial court erred in granting a protective order denying him the right to discover and/or establish Wife’s infidelity. He maintains Wife’s infidelity was relevant to whether it was equitable to terminate or modify the alimony judgment and whether Wife was a credible witness. Again, this argument has no merit. A trial court has discretion to limit discovery. See Hartman v. Texaco Inc., 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979. The trial court did not abuse its discretion in this case. Proof of Wife’s alleged extramarital affair was immaterial and irrelevant to the trial court’s consideration of Husband’s motion to set aside the alimony provision of the MSA. The trial court was not determining the amount of alimony; that had already been decided and agreed upon by the parties in the MSA. The trial court was considering whether the MSA should be set aside under Rule 1-060(B), and the allegations of an affair were irrelevant to that determination.

The Trial Court Did Not Have Jurisdiction to Grant Wife’s Motions for Reconsideration of Attorney Fees and Costs

30 Husband maintains that the trial court’s November 13, 2003, order awarding attorney fees and costs to Wife is void and must be vacated because the trial court lost jurisdiction to hear Wife’s motions for reconsideration on attorney fees and costs once Husband filed a notice of appeal in this Court. We agree.

31 The day after Husband filed his notice of appeal from the trial court’s denial of his Rule 1-060(B) motion, Wife filed motions asking the court to reconsider its previous denial of Wife’s motions for attorney fees and costs. Approximately two months later, the trial court
filed an order granting Wife’s motions for reconsideration, finding that under *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 824 P.2d 1033 (1992), the court “retains jurisdiction to address the issues of fees and costs (collateral matters) even after the notice of appeal is filed.” The trial court found that it had erred when it denied Wife’s fees and costs without any findings and conclusions to justify its ruling. Therefore, the court decided it must reconsider its ruling and awarded Wife a portion of the fees and costs she requested.

A pending appeal divests a trial court of jurisdiction to take further action that would affect the judgment on appeal. *Kelly Inn*, 113 N.M. at 241, 824 P.2d at 1043; see *Luboyeski v. Hill*, 117 N.M. 380, 382, 872 P.2d 353, 355 (1994) (holding that notice of appeal divested trial court of jurisdiction to grant pending motion to amend complaint). This case does not fall within the *Kelly Inn* exception to this rule, where a trial court retains jurisdiction to consider unresolved matters collateral to the underlying controversy. Here, the decision appealed from fully disposed of the Rule 1-060(B) motion and the issue of attorney fees and costs. In addition, the trial court’s decision contains decertal language consistent with a final, appealable order. *See Khalsa v. Levinson*, 1998-NMCA-110, ¶ 17, 125 N.M. 680, 964 P.2d 844 (“In a dissolution proceeding, there is no final order unless and until an order is entered that contains decertal language and resolves all the matters raised in the initial petition.”). The trial court specifically denied attorney fees and costs when it ordered that each party bear his or her own fees and costs. There was no issue left open on this matter to decide. Because the trial court lost jurisdiction over this case when Husband filed his initial notice of appeal, its subsequent order granting Wife’s motions for reconsideration and awarding attorney fees and costs to Wife is void.

**Wife’s Cross-Appeal Concerning Attorney Fees and Costs**

Because we conclude the trial court’s order awarding Wife attorney fees and costs is void, we now consider Wife’s cross-appeal challenging the trial court’s initial order of August 28, 2003, refusing to award her attorney fees and costs. Wife argues she was entitled to an award of attorney fees and costs, and she notes that the trial court denied the requested award without a hearing and without entering findings of fact and conclusions of law on the issue. We agree that the trial court abused its discretion by ruling on Wife’s motion for fees and costs without considering the argument of counsel on the issue and without entering findings and conclusions. *See Monsanto v. Monsanto*, 119 N.M. 678, 680-82, 894 P.2d 1034, 1036-38 (Ct. App. 1995) (explaining that a grant or denial of an award of attorney fees in a domestic relations case must be supported by substantial evidence and the trial court is required to enter findings of fact and conclusions of law on the issue). The trial court must assess a number of considerations, including the parties’ economic disparity. *Id.*; *see also Gomez v. Gomez*, 119 N.M. 755, 759, 895 P.2d 277, 281 (Ct. App. 1995) (listing factors to be considered in determining whether to award attorney fees). Therefore, the initial denial of fees and costs is reversed, and the matter is remanded to the trial court to make findings in support of its decision on Wife’s request for an award of fees and costs for Wife.

**CONCLUSION**

For the foregoing reasons, we affirm the trial court’s order refusing to set aside the alimony provision of the parties’ MSA incorporated into the final decree of divorce. We reverse the trial court’s November 13, 2003, order awarding attorney fees and costs to Wife as void for lack of jurisdiction. Finally, we reverse the trial court’s initial decision to deny attorney fees and costs and remand for entry of findings and conclusions on that issue.

**IT IS SO ORDERED.**

CYNTHIA A. FRY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

CELIA FOY CASTILLO, Judge
State Bar of New Mexico

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Bar Bulletin - April 11, 2005 - Volume 44, No. 14
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This seminar will be very fast paced and loaded with information on the latest cases important to a civil practice. Our goal is to summarize and analyze an entire year of appellate decisions in a lively one-day package. The past year was filled with significant New Mexico appellate decisions, important changes in the Uniform Jury Instructions, and major amendments to the Federal Rules. Don’t miss this great opportunity to cover the waterfront of those decisions important to your practice.

**PROGRAM SCHEDULE**

8:30 a.m. Registration/Check-in

9:00 a.m. Developments in Tort Claims Against the Government

Lori Bencoe, Esq.

9:30 a.m. Protecting the Client’s Assets: Special Needs Trust

Susan Tomita, Esq.

10:15 a.m. Legislative Update

David Duhigg, Esq. & Peter Mallery, Esq.

10:35 a.m. Break

10:45 a.m. Claims Under Wrongful Death Act: Tactics and Strategy

David Jaramillo, Esq.

11:30 a.m. Protecting Your Claim: Statutes of Limitation

Loralee Hunt, Esq.

12:00 noon Quick Lunch (Provided)

12:30 p.m. Worker’s Compensation Round-up

Robert L. Scott, Esq.

1:00 p.m. Important New Development in Insurance

Maureen Sanders, Esq.

1:55 p.m. All You Should Know About Pending Appellate Cases

Kathleen J. Love, Esq.

2:20 p.m. Break

2:30 p.m. Major Developments in Uniform Jury Instructions

Hon. Linda Vanzi

3:00 p.m. Federal Court Decisions and the Federal Rules Amendments

Jane Gagne, Esq.

3:30 p.m. Issues of Agency: Knowing When Liability is Vicarious

David J. Stout, Esq.

4:00 p.m. And the Kitchen Sink: Other Significant Cases

Daymon Ely, Esq.

4:30 p.m. Adjourn

David J. Stout, Program Chair
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“Ask-A-Lawyer” Call-In
Saturday, May 7, 2005

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- ○ Las Cruces  9:00 am to 1:00 pm

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- ○ Elder Law
- ○ Employment/Labor Law
- ○ Estate Planning
- ○ Family Law
- ○ Insurance Law
- ○ Landlord/Tenant
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Bar Bulletin - April 11, 2005 - Volume 44, No. 14
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Recreating Yourself in the Practice of Law: Professional and Ethical Considerations

Friday, April 22, 2005 • 10 a.m. - 3 p.m.
State Bar Center, Albuquerque
1.2 Ethics & 2.0 Professionalism CLE Credits

Co-Sponsor: UNM School of Law Office of Career and Student Services


According to the first-ever, 10-year study of new lawyers, more than a third of them changed jobs within their first three years of practice. This half-day seminar will focus upon ways to find career satisfaction and inspiration in work life while also managing the stress of legal practice. The first session will feature Hindi Greenberg, president of Lawyers in Transition. Greenberg has been dubbed “The Ann Landers for lawyers” and is considered among the leading national experts on the topics of attorney career satisfaction and options. She is a 1974 top graduate of the University of California, Hastings College of the Law, a former clerk for a thirteen judge Superior Court in Northern California and a business litigator at a prestigious national law firm. For the past 20 years, she has been a frequent speaker for bar associations and law schools throughout the U.S. and Canada. She is the author of The Lawyer’s Career Change Handbook (HarperCollins), now in its second edition. Attendees will receive a complimentary copy of this publication. Greenburg’s professionalism presentation on stress management will be supplemented by a professionalism panel composed of former winners of the State Bar of New Mexico’s respected Quality of Life and Young Lawyer of the Year Awards. In the context of quality of life issues, this panel will discuss the attributes of a good law firm and other legal practice areas. Also included will be an ethics component on client and lawyer relations as presented by the director and assistant director of the UNM School of Law Office of Career and Student Services.

Schedule of Events
10:00 a.m. Stress Management and the Practice of Law (Professionalism)
10:40 a.m. Career Satisfaction Issues and Legal Practice (non-credit)
Noon Lunch (provided at the State Bar Center)
1:00 p.m. Quality of Life Panel Discussion (Professionalism)
2:00 p.m. Client and Lawyer Relations (Ethics)
3:00 p.m. Adjourn

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2005 Update: Tax Considerations In Estate Planning

Friday, April 29, 2005
8:30 a.m. - 4:45 p.m.
State Bar Center, Albuquerque
8.1 General CLE Credits


Join the Laflin Law Firm as they present this popular annual update on current tax issues and advanced planning techniques. Extensive tax materials will be provided to include over 400 pages of text with the overall program geared primarily for the attorney who is experienced with estate planning and taxation.

Schedule of Events

8:00 a.m. Registration
8:30 a.m. Current Developments - John D. Laflin, Esq.
9:30 a.m. Family Limited Partnerships and Limited Liability Companies - Daniel E. Pick, Esq.
10:15 a.m. Break
10:30 a.m. Selected “Real Life” Issues with Retirement Plans and IRA Distributions - John E. Heer, Esq.
11:30 a.m. Circular 230 Daniel E. Pick, Esq.
12:15 p.m. Lunch (provided at State Bar Center)
1:15 p.m. New Mexico Trust Law: Tax and Asset Protection Considerations - Evan S. Hobbs, Esq.
3:00 p.m. Break
3:15 p.m. HIPAA and Estate Planning - John E. Heer, Esq.
3:30 p.m. Miscellaneous Topics; Final Regulation on Alternative Valuation
4:45 p.m. Adjourn

REGISTRATION - 2005 UPDATE: TAX CONSIDERATIONS IN ESTATE PLANNING
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