Why Is This Dentist Smiling?

Because he doesn’t have to worry about health insurance

When Dan Sanchez, DDS started his career in dentistry at a clinic in northern New Mexico, he joined the New Mexico Health Insurance Alliance. A few years later, when he started his own practice, he offered his employees the same health insurance.

Today, as part of the Insure New Mexico! initiative, the New Mexico Health Insurance Alliance will be able to offer him the same coverage and benefits at lower rates.

The New Mexico Health Insurance Alliance Offers:

- New, LOWER rates for all plans
- PPO, HMO & indemnity plans with benefits such as maternity, mental health and prescriptions
- Available for groups as small as 1-2
- No medical screening
- Only 50% of eligible employees need enroll
- No employer contribution required

Plus, the Alliance has information on other Insure New Mexico! plans for businesses and individuals, including the New Mexico Medical Insurance Pool (NMMIP), the New Mexico State Coverage Insurance (NMSCI), and the Small Employer Insurance Pool (SEIP).

Give Yourself Something to Smile About

Call us today at 1-800-204-4700 or visit our website at www.nmhia.com. Protect yourself. Protect your future.

With health insurance that meets your needs.
CNA has more than 44 years of experience insuring attorneys in the private practice of law, and is now the nation’s largest provider of professional liability coverage for attorneys.

With that expertise, CNA understands that helping their clients better manage risk factors upfront is as important as providing reliable, comprehensive coverage against liability claims.

An important part of that commitment to risk management is CNA’s outstanding risk management seminar program.

As the exclusive broker for the CNA program for New Mexico attorneys, Health Agencies of the West, Inc. is proud to present the CNA seminar, "Smart Practice, Not Malpractice", in Albuquerque on Thursday, September 22, 2005 from 9 am to 12:15 pm at the Hyatt Regency Albuquerque.

This informative and entertaining seminar will provide you with:

- Techniques to help avoid costly malpractice claims
- Management tools to help improve efficiency and productivity
- 3.3 hours of Ethics MCLE credit
- Up to a 7.5% discount on CNA’s professional liability premium for the next three years

Mail orders to Health Agencies of the West, Inc., 500 N. State College, # 880, Orange, CA 92868. Phone orders call: (714) 769-3000 Fax orders to: (714) 769-3010
Order online at: www.healthagencies.com
(make checks payable to Health Agencies or pay with credit card online)

A full refund will be provided for any cancellations made more than 24 hours prior to the seminar.
A credit toward a future CNA seminar will be provided for any cancellations made within 24 hours prior to the seminar.
Chapter 13 and BAPCPA: Making It Work
Friday, October 7, 2005
8 a.m. - 4:30 p.m.
State Bar Center, Albuquerque
7.8 General CLE Credits

Co-Sponsor: Bankruptcy Law Section

This conference is geared to chapter 13 practitioners who already have an understanding of the foundations of chapter 13. It is intended to provide a more practical look at chapter 13 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) and somewhat less theoretical. The program should be a good follow-up session from the August 5-6, 2005 CLE “Old Dogs, New Tricks.” The focused small-group discussions will be based upon a hypothetical available on the Web site for the chapter 13 trustee at www.ch13nm.com.

☐ Standard and Non-Attorney $189
☐ Government and Paralegal $179
☐ Bankruptcy Law Section Member $169

Public Health Emergencies
also available via LIVE WEBCAST
Friday, October 14, 2005
8 a.m. - 4:25 p.m.
State Bar Center, Albuquerque
4.5 General, 1.2 Ethics and
2.0 Professionalism CLE Credits

Co-Sponsors: Health Law Section of SBNM and ABA Health Law Section

What do legal and medical professionals need to know about the various aspects of public health emergencies? This regional seminar will focus upon federal, state, and local issues related to emergency preparedness and public health emergencies. The day will conclude with a look at both ethical and professional legal considerations.

☐ Standard and Non-Attorney $179
☐ Government and Paralegal $169
☐ Health Law Section Member $159

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ____________________________________________
NM Bar # ________________________________
Street ___________________________________________
City/State/Zip __________________________________
Phone __________________ Fax ____________________
E-mail __________________________________________

Program Title __________________________________
Program Date __________________________________
Program Location _________________________________
Program Cost ________________________________

☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ ______________
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # ________________________________
Exp. Date _________________________________
Authorized Signature __________________________
Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:

I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications.

Meetings

September

12 Taxation Law Section Board of Directors, noon, via teleconference
15 Health Law Section Board of Directors, 7:30 a.m., State Bar Center
16 Board of Editors, noon, State Bar Center
21 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
22 Board of Bar Commissioners Meeting, TBD, Ruidoso Convention Center
23 State Bar Annual Meeting, noon, Ruidoso Convention Center
23 Senior Lawyers Division Board of Directors and Annual Meeting, noon, Ruidoso Convention Center
24 Young Lawyers Division Board of Directors and Annual Meeting, 10 a.m., Ruidoso Convention Center

State Bar Workshops

September

14 Family Law Workshop, 6 p.m., State Bar Center
21 Lawyer Referral for the Elderly Workshop, 10 a.m., City of Santa Rosa Senior Center, Santa Rosa
28 Family Law Workshop, 5:30 p.m., Branigan Library (Terrace Gallery), Las Cruces
28 Consumer Debt/Bankruptcy Workshop*, 6 p.m. State Bar Center
29 Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library (Terrace Gallery), Las Cruces

October

19 Lawyer Referral for the Elderly Workshop, 10 a.m., Moriarty Senior Center, Moriarty

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

**Court News**

**NM Supreme Court Judicial Performance Evaluation Commission**

**Upcoming Meeting**

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., Sept. 15 and 16 at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

**Proposed Revisions to the Children’s Court Rules**

The Supreme Court is considering the adoption of proposed revisions to the Children’s Court Rules. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 16 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 29 (Vol. 44, No. 34) Bar Bulletin.

**First Judicial District Court**

**Criminal Bench and Bar Brownbag**

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, Sept. 20 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

**Destruction of Exhibits: Criminal, Civil, Children’s Court, Domestic and Probate Cases**

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic and probate cases for years 1970 to 1987, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Oct. 28. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will not be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

**Destruction of Tapes: Criminal, Civil, Children’s Court, Domestic and Probate Cases**

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy tapes filed with the court in criminal, civil, children’s court, domestic and probate cases for years 1974 to 1988, including 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) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 28.

**Judicial Vacancy**

A vacancy on the First Judicial District Court will exist as of Sept. 23 due to the resignation of Judge Carol Vigil. The chair of the First Judicial District Court Nominating Commission now solicits nominations and applications for these positions 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, or mailed by contacting Reva Chapman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Sept. 16. Applications received after that time will not be considered. The Commission will meet on Oct. 17, and, if the number of applications warrant, Oct. 18.

**Swearing-In Ceremony**

Judge Kenneth H. Martinez will be formally sworn in as a Second Judicial District Court Judge, Division XXIV, at 4:30 p.m., Sept. 15 in Chief Judge William F. Lang’s courtroom, No. 338, of the Bernalillo County Courthouse, 400 Lomas Blvd. NW. A reception will follow the swearing-in ceremony at La Posada de Albuquerque.

**Ninth Judicial District Court**

**Designation of Civil and Adult Criminal Divisions**

Pursuant to an administrative order filed Aug. 24, the Ninth District Court, Curry and Roosevelt County have established the following divisions. Division I and Division II are hereby designated the adult criminal divisions; Division III is hereby designated the civil division and shall preside over the drug court when established; and Division IV is hereby designated as the family division, as described in separate notice.

In order to equally distribute the caseload among the four divisions, case assignments may be made to a division other than which would normally be assigned to that division. All cases now pending or hereinafter filed and not retained by the assigned judge due to familiarity with the case shall be transferred to the appropriate division. Parties who have not previously exercised their right to excuse will have 10 days from Sept. 12 to excuse the judge pursuant to Rule 1-088.1 NMRA.

**Designation of Family Court Division**

Judge Robert S. Orlik took the oath of office Aug. 19 and will fill the Ninth Judicial District Court Division IV family court position effective Aug. 22. The Family Court Division will consist of all juvenile delinquent (JR), abuse and neglect (JQ), domestic
Service on Local Civil Rules Committee
Honorable Richard L. Puglisi, chair, Local Civil Rules Committee, District of New Mexico, would like to solicit interest of Federal Bar members to serve on the Local Civil Rules Committee. All interested Federal Bar members in good standing should respond by Sept. 30 to Matthew J. Dykman, Clerk of Court, U.S. District Court, Pete V. Domenici Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, or by e-mail, civilrules@nmcourt.fed.us.

U.S. Bankruptcy Court Chapter 13 Brownbag on BAPCPA
The office of the chapter 13 trustee will hold weekly brownbag sessions covering the NACTT’s consumer bankruptcy practice under BAPCPA. Attendees should bring lunch and a copy of the Bankruptcy Code with BAPCPA changes highlighted. Weekly sessions will be held on Mondays at noon on the tenth floor training room, U.S. Bankruptcy Court, Albuquerque. Presenters on the DVD include Judge Keith Lundin, Judge Ray Mullins, Judge William Brown, Judge Tom Waldron, Chapter 13 Trustee Henry Hildebrand and Attorney Richardo Kilpatrick. Topics covered will include: notice – getting information where it goes; case filing issues – “getting in”; automatic stay/refilling issues; attorney responsibilities – DRAs; chapter 13 – the “new” chapter 13; exemptions; court and clerk responsibilities; discharge and dischargeability; and reaffirmation. Call Kelley Skehen, (505) 243-1335 ext. 3013 for additional information.

Free Court Clerk’s Workshop
The clerk’s office of the U.S. Bankruptcy Court for the District of New Mexico is presenting a free workshop, “In with the New, Out with the Old: What Every Practitioner Needs to Know About the Court’s Rules, Forms, and Procedures Under the New Bankruptcy Law,” from 1:30 to 5 p.m., Oct. 6 in the Betty Bigbee Memorial Auditorium at the State Bar Center, 5121 Masthead St. NE, Albuquerque.

The workshop will cover changes to forms, rules, and procedures. Handouts will be provided. Attorneys and all law office staff members are encouraged to attend. Further information will follow in subsequent editions of the Bar Bulletin and will also be on the court’s website, www.nmcourt.fed.us/web/BCDOCS/bcindex.html.

STATE BAR NEWS
Board of Bar Commissioners Appointments to New Mexico Legal Aid (NMLA) Board
The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid (NMLA) Board at its next meeting on Sept. 22. Two of the appointments are for two-year terms to end December 2007 and one appointment is for a one-year term to end December 2006. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by Sept. 9 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-5001, for more information.

Commercial Litigation Section
Board Meeting in Ruidoso
The next board meeting of the Commercial Litigation Section will be held at 10:30 a.m., Sept. 24 at the State Bar Annual Meeting at the Ruidoso Convention Center. RSVP to membership@nmbar.org and contact Chair Stephen Lauer, slauer@cmtisantafe.com or (505) 982-4611, to place an item on the agenda.

Economics of Law Practice Survey
As a service to members, the State Bar of New Mexico is conducting an attorney compensation survey. Members are asked to complete and return the survey by Sept. 23. A comprehensive picture of the compensation ranges and structures by firm size, years in practice, geographical area and type of practice will be of great interest and assistance to all New Mexico practitioners, as well as any lawyer interested in a New Mexico law practice. The survey instrument is completely confidential; however, participation is critical to insure the thoroughness and accuracy of this study. The survey is being conducted by Research & Polling, Inc. in Albuquerque. Upon completion of the survey, the results will be published on the State Bar Web site, www.nmbar.org, so that the entire membership may have access. Notices will also be published in the Bar Bulletin when the survey results are available.
Family Law Section
Annual Meeting

The Family Law Section will hold its annual membership meeting from 7 to 8 a.m., Sept. 24 in conjunction with the State Bar Annual Meeting at the Ruidoso Convention Center. Breakfast will be provided to section members free of charge. RSVP by Sept. 15 to the State Bar, membership@nmbar.org, and contact Chair Linda Ellison, lle@atkinsonkelsey.com, to place an item on the agenda. Section members are also encouraged to attend the family law update CLE presented by John Feder and Tom Montoya from 10:30 a.m. to noon, Sept. 23.

Paralegal Division
Brownbag CLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Sept. 14 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Get the Facts: Witness Interview Techniques,” presented by Jeanne Adams, paralegal and private investigator. For more information, contact Cheryl Passalaqua, (505) 890-6089, or Amy Paul, (505) 883-8181.

Senior Lawyers Division
Annual Meeting

The Senior Lawyers Division will hold its annual membership meeting at noon, Sept. 23 in conjunction with the State Bar Annual Meeting at the Ruidoso Convention Center. The meeting will be held in the same room as the division’s CLE program, “The Dysfunctional Client: Opportunity to Help or Hazard” presented by Judge Ted Baca, Susan Bennett and Mary Ann Green. The CLE program begins at 10:30 a.m. Contact Chair Turner Branch, tbranch@branchlawfirm.com or (505) 243-3501 to place an item on the agenda.

Young Lawyers Division
2005 Election Notice

The Young Lawyers Division of the State Bar is governed by a board of directors whose members are elected by the active, in-state members of the division to staggered, two-year terms. All members of the State Bar of New Mexico who have practiced law in any state for five years or less and those State Bar members who are under the age of thirty-six are members of the division.

In accordance with the bylaws, nominations may be made in the form of a petition signed by at least 10 members of the division. Specific residence requirements apply for region director positions (see the nominating petition on page 10). The deadline for submission of nominating petitions to the State Bar office is Oct. 10.

Positions to be elected:
2006-2007 Director-at-large, Position 1
Currently held by Briana Zamora
2006-2007 Director-at-large, Position 3
Currently vacant
2005-2006 Director-at-large, Position 4
Currently held by Roxanna Chacon
2006-2007 Director-at-large, Position 5
Currently held by Erika Anderson
2006-2007 Region 1 Director
Currently held by Robert Tedrow
(11th Judicial District)
2006-2007 Region 3 Director
Currently held by Matthew Chandler
(5th and 9th Judicial Districts)

Timeline:
Deadline for submission of nominating petitions Oct. 10
Ballots to be mailed (if contested) Nov. 1
Deadline for receipt of ballots Nov. 22

Annual Meeting
The Young Lawyers Division will hold its annual membership meeting from 10 a.m. to noon, Sept. 24 at the State Bar Annual Meeting at the Ruidoso Convention Center. Contact Chair Roxanna Chacon, lgmc@zianet.com or (505) 234-9311, to place an item on the agenda.

Other Bars
ABA/YLD

FEMA Aid
The American Bar Association/Young Lawyers Division has an agreement with FEMA in which the ABA/YLD has agreed to mobilize lawyers to organize the provision of free civil legal services to low-income disaster victims. The primary assistance that is provided is the establishment of a FEMA disaster legal services hotline that disaster victims can call. Most often, these calls are “coverage” issues regarding insurance policies; however, a number of legal issues can arise as a result of a disaster.

In response to Hurricane Katrina, the ABA/YLD has been asked provide disaster legal services to residents in Louisiana and Mississippi, with Alabama soon to follow. In addition, the ABA is seeking financial and legal assistance for the many victims of Hurricane Katrina. Many members of the State Bar of New Mexico have inquired about providing assistance to those individuals living in the states affected by Hurricane Katrina. The ABA/YLD offers two suggestions: 1. The ABA/YLD will be in need of attorneys licensed in the affected states to respond to calls regarding legal issues taken by the FEMA disaster legal service hotline. Attorneys who would like to add their names to the list of volunteers should send contact information to Mo Chavez, mo@chavezlaw.com or call the State Bar, (505) 797-6000, 2. Disaster victims are in desperate need of financial assistance and the ABA/YLD strongly urges each member of the State Bar to generously contribute to the American Red Cross. Members of the ABA/YLD plan on giving at a minimum the financial equivalent of one hour of their billable rates, and they strongly urge members of the State Bar to do the same. Donations may also be made to the Salvation Army and contributions to both can be made online or by phone. Salvation Army: www.salvationaryusa.org or (800) SAL-ARMY; Red Cross: www.redcross.org or (800) 435-7669.

Hispanic National Bar Association
30th Annual Convention

Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

NM Black Lawyers Association
Civil Rights CLE

The New Mexico Black Lawyers Association and the Hispanic National Bar Association will present the CLE program, “Civil Rights Litigation: Sec. 1983, Employment Discrimination, Special Ethical Issues,” Sept. 30 at the State Bar Center. The cost is $120 and attendees will earn a total of 8.0 CLE credits, including 1.0 ethics and 2.0 professionalism. Mail payment and registration to: NMBLA, PO Box 695, Albuquerque, NM 87103-0695. Registration information includes name, bar number, firm/organization,
address and phone number. Contact NMBLA President Ray Hamilton, (505) 450-1032, for further information.

Retirement Dinner
The New Mexico Black Lawyers Association will host a retirement dinner at 6:30 p.m., Sept. 30 at the Albuquerque Petroleum Club honoring Judge Tommy E. Jewel. Banquet tickets cost $75 and may be obtained by contacting Hannah Best, HannahBBest@aol.com or (505) 247-2727.

NM Defense Lawyers Association
Annual Meeting Notice
The New Mexico Defense Lawyers Association is proud to announce that the organization’s 2005 Outstanding Civil Defense Lawyer of the Year Award will be given to Charlie Pharris. The award will be presented at the 2005 Annual Meeting on Oct. 27 at the Hyatt Regency in Albuquerque. The featured presenters will be Professor Jim McElhaney and a panel of local judges. Call Rhonda Dahl, (505) 250-3091, for more information.

NM Lesbian and Gay Lawyers Association
Potluck with New Mexico Lesbian and Gay Doctors Organization
The New Mexico Lesbian and Gay Lawyers Association will host a potluck social event with New Mexico’s lesbian and gay doctors organization. The event will be held at 6 p.m., Sept. 17. For more information or to RSVP, contact Mike Hely, mikhely@yahoo.com.

NM Women’s Bar Association
Monthly Networking Luncheon
The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., Sept. 14 at Conrad’s in the La Posada Hotel, Albuquerque. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 to $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should RSVP to Rendie R. Moore, womensbarnm_admnasst@msn.com by Sept. 12.

UNM School of Law
CLE on Disaster Preparedness and Recovery
The UNM School of Law and the ABA Section of State and Local Government Law will co-sponsor a CLE on Disaster Preparedness and Recovery. The program will consist of a video viewing of “Are You Ready? What Lawyers Need to Know About Emergency Preparedness and Disaster Recovery,” followed by discussion. The program will be held on from 5-7 p.m., Sept. 19 at the UNM School of Law. A $15 registration fee will be charged for attorneys requesting the 2.2 general CLE credits (includes pizza). Law students and others not requiring CLE credit may attend free of charge. Adjunct Professor Anita Miller co-chaired this project for the ABA, and will introduce the video. She will be joined by Public Safety Director Nick Bakas, who will lead discussion following the video. Materials, including FEMA forms will be provided. To register or for more information, contact Gloria Gomez, gomez@law.unm.edu or Antoinette Sedillo Lopez, (505) 277-5265.

Law Library
Fall Hours
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.

Other News
Center for Civic Values
Joseph J. Mullins Memorial Scholarship
The Center for Civic Values board and staff note with great sorrow the death on Aug. 18 of their friend and colleague Joseph J. Mullins. Joe was a remarkable man and a brilliant lawyer, whose generous spirit and ready humor touched all of those around him. The CCCV is honored to have served with him, grateful to have known him and deeply saddened by his passing.

The board and staff extend heartfelt thanks to the Mullins family for naming CCCV as one of the organizations to receive contributions in his memory. The CCCV has already received several donations, to which the organization will add CCCV’s $5,000 gift to create the Joseph J. Mullins Memorial Scholarship. All donations to the Memorial will be considered restricted funds, with the principal to be permanently preserved and only the earnings (up to 5% of the total fund) available to award a scholarship to a University of New Mexico School of Law student.

To join the CCCV as the organization builds a lasting program to honor Joe, send tax-deductible gifts to: CCCV, PO Box 2184, Albuquerque, NM 87103-2184.

Christian Attorneys Legal Aid Training
Training for this developing area of law, for which New Mexico is a leader, will be held from 9 a.m. to 3 p.m., Oct. 15 at the Albuquerque Rescue Mission. Parking for the mission is located off 3rd Street and attendees should enter between Coal and Iron SW. Free lunch, good fellowship and CLE credit will be provided. Contact Jim Roach, (505) 243-4419 or Bill L’Esperance, (505) 266-8482.

Children’s Law Center
UNM Institute of Public Law
Delinquency Training
September 22-23
“New Landscapes in Delinquency Prosecution and Defense” will take place Sept. 22-23, 2005 at the Hilton Albuquerque. With funding support from the NM Juvenile Justice Advisory Committee, this two-day training program is being offered without charge to state and tribal judges, prosecutors and public defenders, including private attorneys with public defender contracts. Other private defense counsel are welcome to attend for a $100 registration fee, including conference materials, CLE credit and a working lunch on Friday. The deadline for registration is Sept. 16.

Learn from national speakers and local experts on such issues as adolescent development, juvenile involvement in gangs, juvenile sex offenders, dispositional planning, and special education and immigration law as they affect juvenile justice. Dr. Abigail Baird, professor of psychological and brain sciences at Dartmouth, will open the conference speaking on “The Teen Brain – A Picture of Adolescent Decision-Making.”

For more information, contact the Corinne Wolfe Children’s Law Center, Institute of Public Law, UNM School of Law, (505) 277-1050 or visit its Web site, http://ipl.unm.edu/childlaw. The program has been endorsed by the NM Public Defender Department, the NM District Attorneys Association, the Children, Youth and Families Department, the Children’s Law Section of the State Bar and the NM Criminal Defense Lawyers Association.
**Nomination Petition**

**For Young Lawyer Division Election**

Any division member practicing in New Mexico may nominate candidates for the positions of: Director-At-Large, Position 1; Director-At-Large, Position 3; Director-At-Large, Position 4; Director-At-Large, Position 5; Region 1 Director; or Region 3 Director. Region directors may be nominated only by division members in their region.

We, the undersigned members of the Young Lawyers Division in good standing, nominate

_________________________________________________ of _________________________, New Mexico, for the position of

_________________________________________________, Young Lawyers Division Board of Directors.

Date Submitted:___________________________

Please include your address next to your name

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LEGAL EDUCATION

SEPTEMBER

12 Arbitrator Training
Albuquerque
Construction Dispute Resolution Services
14.4 G, 1.2 E, 2.4 P
(505) 466-7011
www.mediate.com/cdrsnm

12 Managing Absent Employees So It Doesn’t Make You Absent-minded
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

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

VR - State Bar Center, Albuquerque
Center for Legal Education of NMSBF
10.3 G, 1.2 E
(505) 797-6020
www.nmbar.org

14 2005 Professionalism: Lawyers Concerned for Lawyers
VR - State Bar Center, Albuquerque
Center for Legal Education of NMSBF
2.0 P
(505) 797-6020
www.nmbar.org

14 Adoption in New Mexico
Roswell
Paralegal Division of NM
1.0 G
(505) 622-6510

14 Get the Facts: Witness Interview Techniques
Albuquerque
Paralegal Division of NM
1.0 G
(505) 890-6089

15 Advanced Judgment Enforcement
Albuquerque
Lorman Education Services
6.6 G, .6 E
(715)833-3940
www.lorman.com

Teleseminar
Center for Legal Education of NMSBF
2.4 G
(505) 797-6020
www.nmbar.org

15 Responding to Allegations of Sexual or Racial Harassment
Albuquerque
Sterling Education Services
8.0 G
(715) 855-0495
www.sterlingeducation.com

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

16 Junk Science or Scientific Evidence?
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

17 Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy
Teleconference
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## WRITS OF CERTIORARI

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

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

**Effective September 9, 2005**

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

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(Parties preparing briefs)

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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE SEPTEMBER 9, 2005

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NO. 29,344  State v. Hughey  (COA 24,732)  8/26/05
NO. 29,373  State v. Martinez  (COA 25,376)  8/26/05
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NO. 29,317  State v. Fielder  (COA 24,190)  9/1/05
NO. 29,319  Gomez v. Tapia  (12-501)  9/1/05

CERTIORARI GRANTED AND SUBMITTED TO THE COURT

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

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NO. 28,068  State v. Gallegos  (COA 22,888)  2/3/04
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NO. 29,404  Granado v. Janecka  (12-501)  9/1/05
NO. 29,417  State v. Fielder  (COA 24,190)  9/1/05
NO. 29,419  Gomez v. Tapia  (12-501)  9/1/05

WRIT OF CERTIORARI QUASHED:

NO. 29,110  State v. Lackey  (COA 24,355)  8/30/05
NO. 28,908  Prince v. State  (COA 23,657)  9/2/05
IN THE MATTER OF THE AMENDMENT OF RULE 23-112
NMRA OF THE SUPREME COURT GENERAL RULES

ORDER

WHEREAS, this matter came on for consideration upon the Court’s own recommendation to amend Rule 23-112 NMRA of the Supreme Court General Rules governing citations for pleadings and other papers filed in the courts of this state to modify reference to the 18th edition of The Bluebook: A Uniform System of Citation (2005), and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rule 23-112 NMRA of the Supreme Court General Rules hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments to Rule 23-112 NMRA of the Supreme Court General Rules shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments to Rule 23-112 NMRA by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 15th day of August, 2005.

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

23-112. Citations for pleadings and other papers.

A. Applicability. This rule governs the form of citations included in pleadings and papers filed in the courts of this state.

B. State appellate court citations. For opinions of the New Mexico Supreme Court and New Mexico Court of Appeals, the following is an example of the form of citation: State v. Ray, 2003-NMSC-001, 122 N.M. 23 or State v. Ray, 2003-NMSC-001, 122 N.M. 23, 976 P.2d 54. Use of the vendor neutral citation with citation to both reporters is permitted, but is not required. For opinions not yet published in the reporter system, the vendor neutral citation may be followed by citation to the Bar Bulletin, use the following form of citation: State v. Ray, 2003-NMSC-001, Vol. 26, No. 53, SBB 23. For citations for opinions issued prior to January 1, 1996, follow citation rules in The Bluebook: A Uniform System of Citation (18th Ed. 2005).

C. Subsequent history. Effective October, 2003, subsequent history, when cited, shall include the vendor neutral citation for certiorari information, as assigned by the Supreme Court, e.g., State v. Ray, 2003-NMCA-001, {reporter citation}, cert. granted, 2004-NMCERT-003, {reporter citation}. When a vendor neutral citation number is not available, the Supreme Court docket number shall be substituted for the vendor neutral citation, e.g., State v. Ray, 2003-NMCA-001, {reporter citation}, cert. granted, Sup. Ct. No. 28,714, {reporter citation}.

D. Pinpoint citations. If a pinpoint citation is used:

(1) for opinions issued after 1996 that have a paragraph number, the paragraph number shall be used after the vendor neutral citation, e.g., State v. Ray, 2003-NMSC-001, ¶ 2, {reporter citation};

(2) for opinions issued prior to 1997 or if paragraph numbering is unavailable, the applicable page number of the New Mexico Reports and Pacific Reporter print publication shall be used;

A short citation form may be used if it clearly identifies a case that has been cited within the same general textual discussion, e.g., Ray, 2003-NMSC-001, ¶ 2.

E. Citation to New Mexico statutes. Citations to section numbers of the New Mexico statutes shall be to the chapter, article and section of the NMSA 1978. The form shall be as follows: “NMSA 1978, § ____ (year)” or “NMSA 1978, Section 34-1-1 (1972)”. It is unnecessary to include a citation to compilation references such as “Cum. Supp.” or “Repl. Pamp.”, rather reference shall be made to the date of enactment or amendment, as applicable. This date is the date in the “History Note” following each statute relied upon in the pleading or paper.

F. Citation to court rules and uniform jury instructions. Rules, uniform jury instructions and forms promulgated or approved by the Supreme Court shall be cited to the New Mexico Rules Annotated version by set and rule number. For example: “Rule 1-001 NMRA” or “UJI ____ NMRA”. You may also use the citation form approved by the Supreme Court and published in the NMRA. For example, Rule 4A-100 NMRA provides that rules published in set number 4A of the NMRA may be cited as “Domestic Relations Form 4A- ____”. If the rule has been amended since the date the proceedings were filed, it may be necessary to refer to the year of the version of the rule relied upon in the pleading or paper. In such cases the year of the NMRA is added after “NMRA”.

G. Administrative code. If a pleading or paper cites a state agency rule or regulation, the New Mexico Administrative Code shall be cited using Title, Chapter, Part and Subpart, e.g., “1.15.2.1 NMAC”. It may also be necessary to use a year after “NMAC” to identify the year of the rule applicable to the pending case;

H. Bluebook citations. Except as provided in Paragraphs A through F of this rule, the form of citations as set forth in The Bluebook: A Uniform System of Citation (18th Ed. 2005) shall be used for all citation reference for all pleadings and other papers filed in all courts in this state.

[Approved, effective June 4, 2004; August 15, 2005.]
Certiorari Granted, No. 29,336, August 12, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-106

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

LESLEY KERBY,
Defendant-Appellant.

No. 24,350 (filed June 20, 2005)

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
THOMAS J. HYNES, District Judge

PATRICIA A. MADRID
Attorney General
Santa Fe, New Mexico

M. ANNE KELLY
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

VICTOR A. TITUS
TITUS & MURPHY LAW FIRM
Farmington, New Mexico
for Appellant

OPINION
A. JOSEPH ALARID, JUDGE

{1} Defendant, Leslie Kerby, appeals from the judgment and sentence of the district court convicting him of three counts of criminal sexual contact of a minor. We reverse, holding that the district court improperly admitted evidence of prior bad acts.

BACKGROUND

{2} On March 28, 2002, Defendant was charged in a criminal information with thirteen counts of criminal contact with a minor. Each count alleged that “on or about between December 1986 and December 1987,” Defendant [did] unlawfully and intentionally touch or apply force to the intimate parts of [Victim] or unlawfully and intentionally caused [Victim] to touch [D]efendant’s intimate parts and [Victim] was a child under thirteen (13) years of age, contrary to NMSA 1978, § 30-09-13(A)(1) (a 3rd degree felony).

{3} Defendant’s case was tried before a jury on April 16-17, 2003. In its case in chief, the State called three witnesses: Sandy Williams, Defendant’s former wife and the mother of Victim; Victim; and Henry Katz, Williams’ former husband and the father of Victim.

{4} Williams testified that she had known Defendant since junior high school. She and her two daughters moved into a house trailer located on an orchard owned by Defendant’s family. They lived in the trailer with Defendant for several months. In late June 1986, Williams and Defendant married. Victim, who was born on June 22, 1980, had just turned six years old. About a month after Williams and Defendant married, Victim told Williams that Defendant had “tickled” her. From Victim’s sad, upset demeanor and her gestures toward the lower part of her body, Williams understood Victim to be telling her that Defendant had touched her inappropriately. Williams confronted Defendant, who denied the accusation. About a month later, Victim once again reported to Williams that Defendant had touched her. Defendant again denied Victim’s accusation. In the fall of 1986, the family moved into a newly constructed house located on the orchard property. One night Victim came into Williams’ bedroom to tell her that Defendant had come into Victim’s room and touched her. Williams and Defendant discussed the incident the next morning. Defendant apologized and promised that this wouldn’t happen anymore. A pattern of complaints by Victim and confrontations between Williams and Defendant, followed by apologies by Defendant, continued through 1987. Williams recalled confronting Defendant thirteen to fifteen times. Williams moved out with the children in the summer of 1988. Williams and Defendant were divorced in May 1989. In February 2002, Williams contacted the police about the incidents of inappropriate touching.

{5} Williams conceded that although Defendant would apologize when she confronted him, he never flatly admitted touching Victim inappropriately. Williams also conceded that she never observed Defendant touching her daughters inappropriately.

{6} Victim was the second witness called by the State. She was twenty-two years old at the time of the trial. She recalled that Defendant touched her two times while the family was living in the trailer. She testified that the first time Defendant touched her was directly on her vulva. The other touchings consisted of Defendant rubbing her buttocks over her clothes. Victim recalled that even though she was a child at the time, she recognized that it was not a fatherly touch. Victim clearly recalled four instances of buttock rubbing and had what she described as mental “clips” of other incidents.

{7} Henry Katz was the third, and final, witness called by the State in its case in chief. Katz recalled that in 1989 he had angrily confronted Defendant about Defendant’s abuse of Victim as reported to him by Williams. Katz recalled that Defendant was silent at first, but then said he was sorry and that he had spoken to an elder at church who told Defendant he was forgiven.

{8} Following the close of the State’s case in chief, the district court dismissed nine of the thirteen counts in view of Victim’s testimony that she had a clear memory of only four of the incidents. The district court allowed the State to amend the complaint to allege that the touchings occurred between June 1, 1986, and December 31, 1987.

{9} Defendant’s case in chief consisted of
one witness: Defendant’s eighty- year-old mother, Evelyn Kerby. Mrs. Kerby testified that she never observed Defendant engage in any inappropriate conduct toward Victim. Mrs. Kerby testified that when she asked Defendant about the accusations of improper touching, Defendant responded that all he had done was pat Victim goodnight. Mrs. Kerby testified that she patted her own children on the bottom and did not think that it was a crime.

{10} The State called three rebuttal witnesses. Williams testified that there was a small compartment near the fireplace in the master bedroom. Williams recalled that on several occasions when she walked into the bedroom, she saw Defendant coming out of the compartment. She could not understand why he would be in the compartment since they did not store anything in it.

{11} Williams was aware that Defendant had been having Victim bathe when Williams was out of the house. Williams considered this out of the normal routine and instructed Victim to lock the bathroom door and undress in the bathroom.

{12} On one occasion, Williams’ fourteen-year-old sister, who was visiting, got up to go to the bathroom. Defendant went into the master bedroom. Williams followed Defendant into the bedroom, where she observed Defendant in the compartment. Later, Williams inspected the compartment and discovered a small hole drilled through a two-by-four inside the compartment. As a test, Williams had one of her daughters stand in the bathtub. Through the peep hole, Williams could see her daughter in the bathtub. Williams plugged the peep hole with toothpaste. After Williams discovered the peep hole, “it all came together.” When Williams confronted Defendant, accusing him of peeping at Victim, Defendant acted angry and frustrated and said that he was sorry and that it would not happen again.

{13} On cross-examination, Williams conceded that she had never actually caught Defendant spying on Victim.

{14} The State also called Dick Otero in rebuttal. Otero testified as an expert on carpentry and residential contracting. Otero testified that he had examined the compartment and bathroom in April 2003. He testified that a mirrored medicine cabinet in the bathroom was installed upside down. When the medicine cabinet was removed, Otero observed a second, slightly higher set of pre-existing screw-holes in the bathroom wall. With the cabinet turned right side up, the mounting holes in the back of the chest pre-drilled by the manufacturer matched the second, higher set of screw-holes in the bathroom wall. Moreover, with the medicine chest mounted right side up using the second set of screw holes, a small, crudely punched hole in a metal lip on the bottom of the medicine chest overlapped a small opening cut into the wall of the bathroom, allowing a person in the compartment to observe the inside of the bathroom.

{15} The State’s final rebuttal witness was Detective Lisa Haws. Detective Haws testified that she had examined the compartment and the bathroom of Defendant’s home in April 2003. Haws confirmed that it was possible to see into the bathroom from the compartment.

{16} The district court submitted four counts of criminal sexual contact with a minor to the jury. The jury acquitted Defendant of one count (the alleged touching of Victim’s vulva) and convicted Defendant on the remaining three counts.

DISCUSSION

 Sufficiency of the Evidence

{17} The crucial issue in this case was the unlawfulness of the alleged touchings. The jury was instructed as follows:

In addition to the other elements of Criminal Sexual Contact of a Minor, as charged in Counts 1 through 4, the state must prove beyond a reasonable doubt that the act was unlawful.

For the act to have been unlawful it must have been done with the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Victim]. Criminal Sexual Contact does not include a touching for purposes of reasonable medical treatment, nonabusive parental or custodial care or a lawful search.

Defendant argues that the evidence was insufficient to establish anything more than an innocent patting of a child’s bottom.

{18} The standard of review for sufficiency-of-the-evidence claims in criminal cases is well established:

[We] review the record, marshaling all evidence favorable to [the] trial court’s findings. If evidence is in conflict, or credibility is at issue, we accept any interpretation of the evidence that supports the trial court’s findings, provided that such a view of the evidence is not inherently improbable. We determine whether the evidence supports any conceivable set of rational deductions and inferences that logically leads to the finding in question. We must be satisfied that the evidence was sufficient to establish the facts essential to conviction with the level of certainty required by the applicable burden of proof. To support a conviction under a beyond a reasonable doubt standard, 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.

State v. Wynn, 2001-NMCA-020, ¶ 5, 130 N.M. 381, 24 P.3d 816 (internal citations and quotation marks omitted).

{19} We agree with the State that Defendant’s convictions are supported by substantial evidence of unlawfulness. Victim testified that the touchings were not fatherly pattings. Williams testified that the touchings left Victim upset and sad. Williams testified that when she confronted Defendant, he apologized. In common usage, an apology is understood to mean both an expression of regret and an implicit admission of guilt or fault. Evidence that Defendant apologized when confronted with accusations of improper sexual contact with Victim was probative of Defendant’s awareness that his conduct toward Victim was improper. Katz testified that when he confronted Defendant about molesting Victim, Defendant said that he had been forgiven. A jury could have inferred from Defendant’s desire for forgiveness for his treatment of Victim that Defendant was conscious that he had acted improperly toward Victim. Lastly, the peephole evidence strongly suggested that Defendant had a voyeuristic interest in Victim.

 Improper Admission of Peephole Evidence

{20} Defendant argues that the peephole evidence was improperly admitted. We agree.

{21} Prior to trial, the district court ruled that the peephole evidence would not be admissible unless the State first established that Defendant had used the peephole to observe Victim as she bathed. The district court further ruled that “[i]f the Defendant presents evidence in which touching of the
alleged victim is admitted but indicates that it was not being done for sexual gratification, then the door will be opened regarding evidence of the Defendant touching of other pubescent girls for the purpose of sexual gratification.” On April 15, 2003, Defendant filed a motion asking the district court to reconsider its ruling on the admission of the peephole evidence. Defendant reviewed cases construing Rule 11-404(B) NMRA. Defendant argued that it was the State’s burden to establish that he acted unlawfully and that he could not open the door to propensity evidence merely by contesting the State’s claim that his touching of Victim was unlawful.

{22} Prior to putting on its rebuttal evidence, the State argued that it should be allowed to rebut Mrs. Kerby’s testimony suggesting that Defendant had innocently patted Victim’s bottom. The State argued that the jury should hear evidence from other alleged victims recounting Defendant’s improper behavior toward them. The district court and counsel engaged in an extended discussion of case law addressing the use of evidence of other acts pursuant to Rule 11-404(B). The district court refused to allow the State to introduce the evidence of Defendant’s behavior toward other alleged victims. The State then argued that Defendant had opened the door to evidence concerning the peephole. The district court ruled that the State could put on evidence of the peephole. As previously noted, the State called three witnesses, who testified in considerable detail about the peephole.

{23} We begin our analysis with Rule 11-404(A), which precludes the admission of evidence of a person’s character or a trait of character to prove “action in conformity therewith on a particular occasion.” This type of evidence is commonly referred to as “propensity evidence.” E.g., State v. Lamure, 115 N.M. 61, 69, 846 P.2d 1070, 1078 (Ct. App. 1992) (Hartz, J., specially concurring).

{24} The first sentence of Rule 11-404(A) restates Rule 11-404(A)’s proscription of propensity evidence. In applying the second sentence of Rule 11-404(B), it is essential to recognize that the prohibition against propensity evidence set out in Rule 11-404(A) and in the first sentence of Rule 11-404(B) remains operative even when evidence of other acts is being admitted to show “motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” The second sentence of Rule 11-404(B) is not a list of issues excepted from Rule 11-404’s general proscription against propensity evidence; rather, issues such as “motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake” are merely examples of issues as to which evidence of other acts can be relevant without reliance upon an impermissible inference of “the character of a person in order to show action in conformity therewith.” Rule 11-404(B).

{25} Under Rule 11-404(B), the proponent of evidence of other acts must identify the particular consequential fact upon which the proffered evidence bears and must explain how the proffered evidence makes the consequential fact “more probable or less probable,” Rule 11-401 NMRA, in a way that does not depend upon an inference of a propensity for criminal behavior. State v. Jones, 120 N.M. 185, 187, 899 P.2d 1139, 1141 (Ct. App. 1995). Even when it is shown that evidence of other acts has a legitimate alternative use that does not depend upon an inference of propensity, the proponent must establish that under Rule 11-403 NMRA, the probative value of the evidence used for a legitimate, non-propensity purpose outweighs any unfair prejudice to the defendant. State v. Ruiz, 2001-NMCA-097, ¶ 15, 131 N.M. 241, 34 P.3d 630. In the case of evidence of other uncharged bad acts, unfair prejudice refers to the risk that the jury, notwithstanding limiting instructions, see Rule 11-105 NMRA, nevertheless will draw unfavorable inferences about the defendant’s propensity for criminal conduct from evidence of non-charged bad acts, 1 Kenneth S. Broun, et al., McCormick on Evidence § 190, at 672 (John W. Strong et al. eds., 5th ed. 1999) (observing that “the fact that there is an accepted logical basis for the evidence other than the forbidden one of showing a propensity for criminality does not preclude the jury from relying on a defendant’s apparent propensity toward criminal behavior”); Old Chief v. United States, 519 U.S. 172, 180-81 (1997) (discussing “unfair prejudice” in the context of Fed. Rule Evid. 404(b); observing that it is improper to generalize a defendant’s uncharged bad act into bad character and to infer that bad character raises the odds that the defendant did the later bad act now charged). Evidence of uncharged bad acts also may unfairly prejudice a defendant by emotionally predisposing the jury against the defendant. Margaret C. Livnah, Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415, 44 Clev. St. L. Rev. 169, 181-82 (1996).

{26} Prior to the adoption of the Rules of Evidence, we upheld the admission of evidence of uncharged sexual conduct toward the prosecuting witness under the common-law “lewd and lascivious disposition” exception to the rule against character evidence. E.g., State v. Minns, 80 N.M. 269, 272, 454 P.2d 355, 358 (Ct. App. 1969). Subsequently, in State v. Scott, a case decided after the adoption of Rule 11-404(B), we relied upon Minns as support for the proposition that evidence of prior similar acts toward the victim, “if not too remote, is admissible as showing a lewd and lascivious disposition . . . toward the prosecuting witness and as corroborating evidence.” 113 N.M. 525, 528, 828 P.2d 958, 961 (Ct. App. 1991) (quoting Minns, 80 N.M. at 272, 454 P.2d at 358). In State v. Landers, 115 N.M. 514, 519, 853 P.2d 1270, 1275 (Ct. App. 1992), this Court considered and rejected the argument that the exception for evidence of a lewd and lascivious disposition toward the prosecuting witness was inconsistent with Rule 11-404(B). We held that the trial court did not abuse its discretion in admitting evidence of incidents of uncharged sex misconduct that “corroborated the victim’s testimony and placed the charged acts in context.” Id. at 520, 853 P.2d at 1276. Unfortunately, we did not critically examine how the evidence of uncharged acts would have tended to corroborate the victim’s testimony or place the charged acts in context other than through an inference of the defendant’s propensity for improper sexual conduct towards the victim. In State v. Sandate, 119 N.M. 235, 242-43, 889 P.2d 843, 850-51 (Ct. App. 1994), the defendant urged this Court to reconsider Landers. We declined to reach the issue because the evidence in question was inadmissible on other grounds. We noted in passing that “[t]he rationale underlying Landers may very well require reconsideration.” Id. at 243, 889 P.2d at 851 (citing State v. Williams, 117 N.M. 551, 561-62, 874 P.2d 12, 22-23 (1994) (Montgomery, C.J., specially concurring)). Our most recent reported decision relying on the Landers exception is State v. Casaus, 1996-NMCA-031, ¶ 25, 121 N.M. 481, 913 P.2d 669. Although our Supreme Court has noted the exception for prior sexual conduct with the prosecuting witness, Williams, 117 N.M. at 558-59, 874 P.2d at 19-20; to our knowledge, our Supreme Court has not applied this exception in a case decided after the adoption of Rule 11-404.

{27} A leading commentator has described
the relationship between Federal Rule of Evidence 404(b) (and its state counterparts) and the use of uncharged misconduct evidence in prosecutions for sex crimes:

The overwhelming majority of the cases recognizing the special exceptions [for evidence of uncharged sexual misconduct] antedate the Federal Rules. Several commentators assert that it is questionable whether the special exceptions survived the adoption of the rules. To say that the exceptions’ survival is questionable is probably an understatement. It is exceedingly difficult to reconcile the exceptions [for evidence of uncharged sexual misconduct] with the clear language of Rule 404(b). The exception seems at odds with the prohibition in the first sentence of Rule 404(b).


We find it exceedingly difficult to reconcile the Landers exception for evidence of a lewd and lascivious disposition toward the prosecuting witness with Rule 11-404. In the related context of evidence of uncharged sexual misconduct with victims other than the prosecuting witness, we have acknowledged that “the lewd disposition exception is nothing more than a euphemism for the character evidence which Federal Rule of Evidence 404(b) and its state counterparts are designed to exclude.” State v. Lucero, 114 N.M. 489, 492-93, 840 P.2d 1255, 1258-59 (Ct. App. 1992). Nothing in the express language of Rule 11-404 mandates the perpetuation of a common-law exception to the general proscription of propensity evidence; to the contrary, the lewd and lascivious disposition exception appears to flatly contradict the general proscription of propensity evidence found in Rule 11-404(A) and repeated in the first sentence of Rule 11-404(B). See Lucero, 114 N.M. at 492-93, 840 P.2d at 1258-59 (rejecting lewd-and-lascivious-disposition exception for evidence of uncharged conduct with other victims). In the present case, the peephole was relevant to the issue of sexual gratification precisely because it allowed the jury to infer that sexual attraction to young female children was a trait of Defendant’s character: Defendant spied on Victim for sexual gratification and therefore it is more likely that when he touched her, it was also for sexual gratification.

29 Logical consistency requires that we extend Lucero to the admission of evidence of uncharged misconduct with the prosecuting witness. We agree with the late Chief Justice Montgomery that the Landers exception is “indefensible.” Williams, 117 N.M. at 562, 874 P.2d at 23 (characterizing the distinction recognized in Landers as “indefensible” and its approach as an “anomaly”). “While we may sympathize with the State’s desire to improve its position, and while we recognize the potential difficulty in prosecuting such cases involving sex crimes against children, it is equally true that the appropriate solution is [not] to wink at the dictates of Rule 11-404(B).” Ruiz, 2001-NMCA-097, ¶ 19 (quoting Lucero, 114 N.M. at 494, 840 P.2d at 1260). We hereby disavow Landers and its progeny’s “indefensible” distinction between evidence of a lewd and lascivious disposition toward the prosecuting witness and evidence of a lewd and lascivious disposition toward other victims. See First Fin. Trust Co. v. Scott, 1996-NMSC-065, ¶¶ 16-17, 122 N.M. 572, 929 P.2d 263 (abrogating doctrine of intrastate forum non conveniens; observing that stare decisis does not preclude an appellate court from overruling “improvident precedent, even recent precedent”). In either case, the exception is nothing more than a euphemism for the propensity evidence that Rule 11-404 was designed to exclude.

30 Adoption of a sex-crimes-against-children exception to Rule 11-404 is best carried out in the process of rule-making. The decision to adopt an exception to Rule 11-404 will require an extensive examination of legislative facts, see Lee v. Martinez, 2004-NMSC-027, ¶ 13, 136 N.M. 166, 96 P.3d 291 (remanding consolidated cases for evidentiary hearing on whether to repeal Rule 11-707 NMRA; observing that decision to repeal a rule of evidence involves consideration of legislative, as opposed to adjudicative, facts), including studies investigating whether prior sexual misconduct with children is a reliable predictor of subsequent sexual misconduct, Sara Sun Beale, Prior Similar Acts in Prosecutions for Rape & Child Sex Abuse, 4 Crim. L.F. 307, 319-21 (1993) (acknowledging that there may be a valid scientific basis for narrowly-tailored exceptions for some forms of child sex abuse justifying the admission of evidence of other bad acts in prosecutions for sex crimes against children).

31 The State also argues that Defendant “opened the door” to the peephole evidence by offering evidence through Mrs. Kerby suggesting that his touching of Victim was lawful. We disagree.

32 Defendant had a right to require the State to prove every element of its case, including the unlawfulness of the touchings, beyond a reasonable doubt. UJls 14-101, 14-132, 14-5061 NMRA. Defendant also had a right to call witnesses to testify in his defense. See Washington v. Texas, 388 U.S. 14, 18-19 (1967) (holding that due process guarantees a criminal defendant the right to present the testimony of defense witnesses). The State’s approach to opening the door would require Defendant to elect between enforcing Rule 11-404’s proscription of propensity evidence and exercising his right to contest the elements of the State’s case. Nothing in Rule 11-404 expressly conditions the exclusion of propensity evidence upon an accused’s concession that his conduct was unlawful. The drafters of Rule 11-404 carefully prescribed the circumstances under which evidence of an accused’s character is admissible in rebuttal. Rule 11-404(A)(1) (authorizing admission of rebuttal evidence of an accused’s character to rebut “evidence of a pertinent trait of character offered by an accused”). We are reluctant to engraft amorphous “opening the door” concepts onto Rule 11-404 when the Rule itself specifically provides a framework for the admission of rebuttal evidence of character. We are satisfied from our review of the transcript that Mrs. Kerby’s testimony did not constitute evidence of a pertinent, favorable trait of
Defendant’s character. Defendant did not forfeit the protection of Rule 11-404 by putting on evidence refuting the State’s claim that the touchings were unlawful.

{33} Lastly, we must consider whether the admission of the peephole evidence was harmless. Rule 5-113(A) NMRA. Error in the exclusion or admission of evidence in a criminal trial is not harmless “if there is a reasonable possibility that the excluded evidence might have affected the jury’s verdict.” State v. Balerdama, 2004-NMSC-008, ¶ 41, 135 N.M. 329, 88 P.3d 845. We are persuaded that the peephole evidence very likely substantially contributed to the jury’s guilty verdicts. Defendant’s state of mind was the crucial issue in the case. Without the peephole evidence, Defendant could have argued with some degree of plausibility that Victim and Williams had simply misunderstood conduct that had occurred years before. However, with the introduction of the peephole evidence, Defendant’s behavior in patting Victim becomes much more sinister. We believe that the jury very likely reasoned from the peephole evidence that Defendant was sexually aroused when he secretly spied on Victim and that he was similarly aroused when he patted her. Moreover, evidence that Defendant, who continued to live in the house after Williams and the children moved out, inverted the medicine chest to obscure the peephole would have suggested to the jury Defendant’s consciousness of wrongdoing in spying on Victim and other girls.

{34} We reverse Defendant’s convictions based on the erroneous admission of the peephole evidence. Because Defendant’s convictions were supported by substantial evidence, we remand for retrial. State v. Rosaire, 1996-NMCA-115, ¶ 20, 123 N.M. 250, 939 P.2d 597 (observing that retrial is not barred by double jeopardy if the evidence admitted at the first trial, including any wrongly admitted evidence, was sufficient to support the defendant’s conviction).

{35} Defendant has also challenged the peephole evidence on the ground that it was obtained by warrantless entries into Defendant’s residence in violation of the Fourth Amendment. Our determination that the peephole evidence is inadmissible renders moot this claim of error.

Statute of Limitations

{36} New Mexico law provides the following:

No person shall be prosecuted, tried or punished in any court of this state unless the indictment is found or information or complaint is filed therefor within the time as provided:

. . .

B. for a third or fourth degree felony, within five years from the time the crime was committed.[]

NMSA 1978, § 30-1-8(B) (1963, as amended through 1997). As noted above, Defendant was acquitted of the charge of touching Victim’s unclothed genital area. The three charges that Defendant faces on remand are for criminal sexual contact of a minor in the third degree, a third degree felony. NMSA 1978, § 30-9-13(C) (1975). These crimes are subject to the five-year limitations period of Section 30-1-8.

{37} In 1987, the Legislature enacted a tolling provision applicable to sex offenses against children:

The applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.

NMSA 1978, § 30-1-9.1 (1987). Section 30-1-9.1 applies only to crimes committed after its effective date. 1987 N.M. Laws, ch. 117, § 2. The State acknowledges that the tolling provision does not apply to any of the alleged touchings that occurred prior to June 19, 1987, the effective date1 of the tolling provision; accordingly, the statute of limitations expired no later than June 18, 1992, as to any alleged touchings occurring prior to June 19, 1987. As to any touchings occurring on or after June 19, 1987, the five-year limitations period would have been tolled by Section 30-1-8.1 until June 22, 1998, Victim’s eighteenth birthday. As to these touchings, there is no limitations problem as the criminal information in this case was filed on March 28, 2002, well within five years of June 22, 1998. Because Defendant did not pursue a statute of limitations defense at trial, the State’s evidence and the jury instructions did not distinguish between pre-June 19, 1987, touchings, which are time-barred, and post-June 19, 1987, touchings, which are still subject to prosecution.

{38} A plea of not guilty puts in issue the defendant’s character. Defendant did not forfeit the protection of Rule 11-404 by putting on evidence refuting the State’s claim that the touchings were unlawful.

{39} Other than pleading not guilty, Defendant did nothing to raise the bar of the statute of limitations in the district court. Neither defense counsel, the prosecutor, nor the district court appears to have recognized that the State was prohibited by Section 30-1-8 from prosecuting Defendant for touchings that occurred prior to June 19, 1987. Defendant argues that the statute of limitations is a jurisdictional issue in a criminal case that can be raised for the first time on appeal. The State, analogizing from civil cases, responds that the statute of limitations in a criminal case is merely an affirmative defense that can be forfeited by the defendant’s failure to assert it in a timely manner.

{40} We have not discovered a reported New Mexico case deciding whether in a criminal case the bar of the statute of limitations is a jurisdictional limit on the very right of the State to bring a criminal prosecution. A review of opinions from other jurisdictions reveals a substantial divergence of opinion as to the nature of a statute of limitations defense. See generally State v. Timoteo, 952 P.2d 865, 876-78 (Haw. 1997) (Ramil, J., dissenting) (noting three distinct approaches to waiver of a criminal statute of limitations). According to a leading treatise:

Three different views are to be found as to the effect of the running of the applicable statute of limitations in a criminal case. One is that once the time has run the court is without jurisdiction to try the offense, which means the defendant need not raise the issue in a pretrial motion and is entitled to relief notwithstanding his otherwise valid plea of guilty or his raising of the issue for the first time on appeal. The second is that this is a matter of affirmative defense
which may be waived by either the defendant’s failure to raise it in a pretrial motion or the defendant’s entry of a guilty plea. The third variation is that the statute of limitations is waivable, but that only an intentional relinquishment of the right will suffice.

4 Wayne R. LaFave et al., Criminal Procedure § 18.5(a) at 722-23 (2d ed. 1999) (footnotes omitted).

{41} In view of our determination that Defendant’s convictions must be reversed on evidentiary grounds, we need not decide whether the statute of limitations is jurisdictional. Since the case is to be retried, we perceive no compelling reason for denying Defendant the opportunity to assert Section 30-1-8 on remand. Cf. Kucel v. N.M. Med. Review Comm’n, 2000-NMCA-026, ¶ 18, 128 N.M. 691, 997 P.2d 823 (declining to apply law of the case doctrine; expressing preference for applying “the law of the land—the law as the Legislature wrote it and intended it” as opposed to perpetuating manifest error). On remand Defendant may request that the jury be instructed as to the State’s burden of establishing beyond a reasonable doubt that each touching occurred on or after June 19, 1987.

**Speedy Trial**

{42} Defendant was arrested on March 10, 2002, and a criminal information was filed on March 28, 2002. Defendant’s right to a speedy trial attached upon his arrest. State v. Manzanares, 1996-NMSC-028, ¶ 8, 121 N.M. 798, 918 P.2d 714 (observing that the right to a speedy trial attaches when the defendant is formally charged or when he is arrested and held to answer a criminal charge). Defendant’s trial began on April 15, 2003.

{43} Unless the length of delay is “presumptively prejudicial,” there is no need to engage in a full-blown analysis of the speedy trial issue. State v. LeFebre, 2001-NMCA-009, ¶ 9, 130 N.M. 130, 19 P.3d 825. Whether the length of the delay is presumptively prejudicial depends upon the relative complexity of the case. Id. We recognize three general categories of complexity: simple, intermediate and complex. LeFebre, 2001-NMCA-009, ¶¶ 10-12. Our Supreme Court has observed that nine months is presumptively prejudicial in a simple case; twelve months is presumptively prejudicial in an intermediate case; and, fifteen months is presumptively prejudicial in a complex case. Salandre v. State, 111 N.M. 422, 428, 806 P.2d 562, 568 (1991).

{44} In the present case, the district court found that Defendant’s case was a complex case, and therefore that the thirteen-month delay was not presumptively prejudicial. Although we give considerable deference to a district court’s determination of the complexity of a case, that deference “is not without limits.” LeFebre, 2001-NMCA-009, ¶ 10. We cannot accept the district court’s conclusion that this was a complex case, representing the highest level of complexity for speedy trial purposes. There were no scientific or medical issues in the case. The State’s only expert testified about the relatively mundane issue of the installation of the medicine chest and its relationship to the peephole. The State’s case largely depended on the credibility of Williams and Victim as judged by their demeanor in front of the jury. We hold that Defendant’s case was of no more than intermediate complexity. Therefore, a thirteen-month delay in the present case is presumptively prejudicial. On remand, the district court should proceed to evaluate Defendant’s speedy trial claim under the four factors of Barker v. Wingo, 407 U.S. 514 (1972).

**Jury Instruction on Unlawfulness**

{45} As previously noted, the jury was given the following instruction:

In addition to the other elements of Criminal Sexual Contact of a Minor, as charged in Counts 1 through 4, the state must prove beyond a reasonable doubt that the act was unlawful.

For the act to have been unlawful it must have been done with the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Victim]. Criminal Sexual Contact does not include a touching for purposes of reasonable medical treatment, nonabusive parental or custodial care or a lawful search.

{46} Defendant argues that the phrase “intrude upon the bodily integrity . . . of [Victim]” was confusing and allowed the jury to convict Defendant based upon “a non-sexual event.” The State argues that Defendant waived this claim of error. As the State points out, the district court reviewed this instruction in the presence of the prosecutor and defense counsel. The district court specifically asked whether counsel agreed to the inclusion of the language “intrude upon the bodily integrity or personal safety of [Victim].” Both the prosecutor and defense counsel responded, “Yes, your Honor.” We agree with the State that Defendant waived this claim of error.

**CONCLUSION**

{47} We vacate the judgment and sentence of the district court and remand for proceedings consistent with this opinion.

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

A. JOSEPH ALARID, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

CELIA FOY CASTILLO, Judge
OPINION

JONATHAN B. SUTIN, Judge

1. Defendant Phillip Garvin, a homeless man, was in line at a local soup kitchen when a man he did not know, who identified himself as Jimmy or Santiago, asked Defendant if he wanted to earn money doing yard work, an offer that Defendant accepted. The man asked Defendant if he had identification, if he would cash a check for him, and if he wanted to get something to eat. Defendant accompanied the man to a bank where the man wrote a check to Defendant in the amount of $315. Defendant signed the back of the check, walked to the bank. A detective testified that Defendant tried to give the cash to the bank. Recognizing that knowledge and specific intent to injure, deceive, or cheat is

2. Defendant tried to give the cash to the man in the bank, but he would not take the money until they got outside. The man drove to a fast food restaurant with Defendant, and gave Defendant $20 to get something for them both to eat. The man said, “[W]e’ll kill two birds with one stone, and I’ll go get gas, and I’ll be right back.” The man never returned. Defendant suspected something was wrong, and he called the police and reported what had occurred. After a police investigation, Defendant was arrested and charged with forgery.

3. At trial, the State proved that the check belonged to a person named Sami Haddad, whose name was printed on the check. Haddad’s checkbook had been stolen. The signature on the check purported to be that of Haddad, but it was not his signature. A videotape showed the transaction at the bank. A detective testified that Defendant had told him that he glanced at the check and was scared and freaked out at the time the check was cashed.

4. Defendant asserts there was insufficient evidence to convict and that prosecutorial misconduct deprived him of a fair trial. We reverse and remand for a new trial.

DISCUSSION

I. Sufficiency of the Evidence

A. Standard of Review

5. Substantial evidence required to support a criminal conviction is such evidence that would be acceptable to a reasonable mind as adequate to support the conclusion. State v. Sparks, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985). In analyzing the sufficiency of the evidence, we inquire whether substantial evidence exists, either direct or circumstantial, “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). In doing so, we view the evidence in the light most favorable to the verdict, resolving all conflicts in the evidence and indulging all permissible inferences to be drawn from it in favor of upholding the verdict. State v. Woodward, 121 N.M. 1, 11, 908 P.2d 231, 241 (1995). This Court does not weigh the evidence, nor can we substitute our judgment for that of the jury so long as there is sufficient evidence to support the verdict. State v. Lankford, 92 N.M. 1, 2, 582 P.2d 378, 379 (1978). Nor do we substitute our judgment for that of the fact finder concerning the credibility of witnesses or the weight to be given their testimony. State v. Riggis, 114 N.M. 358, 362-63, 838 P.2d 975, 979-80 (1992). In a case involving circumstantial evidence, “reasonable doubt is not precluded unless [the] circumstantial evidence viewed in the light most favorable to the State gives rise to an equally reasonable inference of innocence.” State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

B. The Law of Forgery

6. Defendant was charged with one count of forgery by violating NMSA 1978, § 30-16-10 (1963), which reads:

Forger consists of:
A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or
B. knowingly issuing or transferring a forged writing with intent to injure or defraud.

Whoever commits forgery is guilty of a third degree felony. See also State v. Ruffins, 109 N.M. 668, 670, 789 P.2d 616, 618 (1990) (stating that under New Mexico law, a forgery is completed when a defendant “possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; or (3) passes an interest in a forged writing”). In the present case, the jury was instructed that for it to find Defendant guilty of forgery, the State must prove that “[D]efendant gave or delivered to Bank of the Rio Grande a check knowing it to have a false signature intending to injure, deceive or cheat Bank of the Rio Grande or another[].”

C. Sufficient Evidence for Conviction

7. Defendant contends the State failed to prove beyond a reasonable doubt that he knew the signature on the check was false and that he cashed the check with the specific intent to injure, deceive, or cheat the bank. Recognizing that knowledge and
intent can be established by circumstantial evidence, Defendant argues that the evidence did not rise to the level of certainty required by the burden of proof imposed on the State. See State v. Wyn, 2001-NMCA-020, ¶ 5, 7, 130 N.M. 381, 24 P.3d 816. [8] In Wyn, the defendant was charged with the specific-intent crime of aggravated battery. Id. ¶ 4. The State presented only circumstantial evidence of intent in its attempt to prove that the defendant, in smashing a window with his fist, intended to harm his ex-wife by causing the glass to cut her. Id. ¶¶ 7-11. The evidence was uncontradicted that the defendant never threatened the victim; thus, the only evidence to support intent was the victim’s location near the window at the time the defendant smashed it. Id. ¶ 11. We determined that we could not disregard the uncontradicted evidence, and the evidence left was insufficient to permit a fact finder to conclude “that the inference of intent was sufficiently compelling to establish intent to harm beyond a reasonable doubt.” Id.

[9] Defendant argues that he was found guilty simply because he cashed the check. According to Defendant, the fact that he “glanced” at the check, and the fact that he was scared at one point, did not permit an inference that he knew the check was forged or that he intended to injure or deceive the bank. Defendant argues that there was no evidence that he noticed the name on the check, and even if he did, there was still no evidence that he knew the man who signed the check was not Sami Haddad because he was not even sure of the man’s name, since “people often go by nicknames.” Defendant further argues that it can be inferred that he did not know the check was forged from the uncontradicted evidence that he used his own name and license information in cashing the check, and he called the police when he suspected something was wrong. The most that can be gleaned from the facts, Defendant asserts, is that he lacked good judgment.

[10] Looking at the evidence in the light most favorable to the verdict, resolving all conflicts in the evidence and indulging all permissible inferences to be drawn from the verdict in favor of upholding it, we hold there was substantial evidence to support a verdict of guilty and that a rational jury could have found that Defendant committed the crime of forgery. Compare State v. Hermosillo, 88 N.M. 424, 425-26, 540 P.2d 1313, 1314-15 (Ct. App. 1975) (concluding that there was not substantial evidence to support the defendant’s conviction for forgery because there was no evidence of knowledge where the only evidence was that the defendant was present in a car with the forger when the forger cashed the checks at a bank drive-up window), with State v. Martinez, 85 N.M. 198, 200, 510 P.2d 916, 918 (Ct. App. 1973) (concluding that there was substantial evidence to support conviction for forgery where, when asked by the bank teller if the woman who wrote the check was the check owner, he said that she was and he signed the checks with her). [11] Defendant knew the man as Jimmy or Santiago, but the signature on the check did not show either of these names. Rather, the signature showed Sami Haddad. Defendant “glanced” at the check. The jury could reasonably infer that Defendant knew the check had a false signature.

II. Prosecutorial Misconduct

[12] Defendant argues that the State resorted to numerous improper tactics which deprived him of his constitutional right to a fair trial. Defendant cites six such instances of alleged prosecutorial misconduct. Defendant also urges us to apply the doctrines of fundamental and cumulative error. See State v. Duffy, 1998-NMSC-014, ¶ 47, 126 N.M. 132, 967 P.2d 807 (discussing fundamental error and cumulative error).

A. Standard of Review

[13] When an issue of prosecutorial misconduct is preserved by a timely objection at trial, we will not disturb the trial court’s ruling on the issue absent an abuse of discretion. State v. Frujillo, 2002-NMSC-005, ¶ 49, 131 N.M. 709, 42 P.3d 814. When an issue has not been properly preserved at trial, we have discretion to review the claim on appeal for fundamental error. Id. ¶ 52; see Rule 12-216(B)(2) NMRA. Our Supreme Court has held that prosecutorial misconduct amounts to fundamental error when it is “so egregious and had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” State v. Allen, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citation omitted).

“The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand.” State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993) (internal quotation marks and citation omitted). However, “[a]n isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one.” Allen, 2000-NMSC-002, ¶ 95 (internal quotation marks and citation omitted).

[14] Under the doctrine of cumulative error, “[w]e must reverse a conviction when the cumulative impact of errors [that] occurred at trial was so prejudicial that the defendant was deprived of a fair trial.” State v. Ashley, 1997-NMSC-049, ¶ 21, 124 N.M. 1, 946 P.2d 205 (internal quotation marks and citation omitted). In New Mexico, the doctrine of cumulative error is strictly applied. State v. Martin, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984). It cannot be applied when “the record as a whole demonstrates that a defendant received a fair trial.” Id. With the foregoing in mind, we examine each of Defendant’s claims to determine whether they individually or collectively deprived Defendant of his right to a fair trial.

1. The Prosecutor’s Misstatement of the Law

[15] The particular instance of claimed prosecutorial misconduct that we find most egregious is the prosecutor’s misstatement of the law in this case. During closing argument, the prosecutor made the following argument.

So the issue is, did he know it was a false signature? Not his signature, the signature on the front of the check where it says Sami Haddad. Did he know that was the wrong signature? . . .

So did he know? Here’s what he knew, according to his story; that 10, 15 minutes, some short time before they go to the bank, he’s in line at the soup kitchen, somebody comes up to him he doesn’t know, hasn’t seen him before, “Want to make some money, $75 or $100, for yard work?”

And this person, this stranger, when they get in the car, asked him for his I.D. He gives it to him. . . .

This stranger then writes this check out to the defendant and signs the name Sami Haddad. Sami Haddad is the owner of the check. That’s what’s preprinted by the bank.

The defendant takes this check and cashes it, but what does he know when he cashes it? He knows the man’s name is Jimmy or Santiago, not Sami Haddad. Despite that fact, de-
spite the fact that he had known this man 10 or 15 minutes, he gets a check for $315 before he ever does any yard work, he goes into the bank and cashes a check that was signed by the person who gave him another name.

Did he know? You bet he did. He had a duty to know. What did he tell you? What did he tell the officer? He told him, “I glanced at it. I was scared. I was freaked out.”

. . . .

Did he know? How could he not have? He has a duty to. If you’re involved in a crime, and you’re freaked out and scared, you have a duty to do more than glance at a check.

(Emphasis added.)

Defendant did not object or otherwise preserve a claim of error.

{16} In general, where there is overwhelming evidence of a defendant’s guilt, we will not find fundamental error even though a prosecutor has incorrectly stated the law. See Duffy, 1998-NMSC-014, ¶ 59. Three cases in which we have discussed the proper remedy when the prosecutor misstates the law are instructive. In State v. Gonzales, 105 N.M. 238, 239-41, 731 P.2d 381, 382-84 (Ct. App. 1986), the State appealed from the trial court’s grant of a new trial on the basis of alleged prosecutorial misconduct that included, among other instances, a misstatement of the law. Thus, this case was reviewed under the abuse of discretion standard, not the fundamental error standard. Nonetheless, we applied the overwhelming-evidence test, holding that the trial court did not abuse its discretion in granting the new trial where the “prosecutor made a legally incorrect statement of the law” and “[t]he evidence of guilt [was] not overwhelming.” Id. at 242, 731 P.2d at 385 (internal quotation marks omitted).

{17} In Duffy, our Supreme Court held that an alleged improper statement of the law by the prosecutor was not a misleading misstatement of the law, and even if it had been, the evidence of the defendant’s guilt was so overwhelming that the error did not rise to the level of fundamental error, nor was there cumulative error. 1998-NMSC-014, ¶¶ 53, 59, 60. Duffy involved a robbery resulting in the death of the victim where there were many eye witnesses. Id. ¶¶ 2, 3. There the prosecutor had stated that the jury could convict the defendant on both second degree murder and felony murder.

Id. ¶ 52. While the court recognized that “[c]ounsel may not misstate the law,” id. ¶ 53 (internal quotation marks and citation omitted), the Supreme Court reasoned that “any improprieties on the part of the prosecution are outweighed by the overwhelming evidence” of the defendant’s guilt. Id. ¶ 59. Further, the Court concluded that since it had found no error, it could not find cumulative error. Id. ¶ 60.

{18} The only New Mexico case which has found that the cumulative impact of a prosecutor’s misstatement of the law, in addition to other misconduct, amounted to fundamental error is State v. Diaz, 100 N.M. 210, 215, 668 P.2d 326, 331 (Ct. App. 1983). In that case, the prosecutor misstated the law by stating that “in order to establish the intoxication defense[,] the defendant would have to produce expert testimony.” Id. at 214, 668 P.2d at 330. Further, the prosecutor argued that a verdict of not guilty would send a message to the community encouraging similar crimes. Id. We reasoned that the prosecutor, by this comment, was “telling the jury in effect to disregard the defense [of intoxication] even if they [found] it meritorious.” Id. We stated that “[s]pecific intent [was] an essential element of the crimes” in issue and found that the prosecutor’s comment misstated the law. Id. We concluded that the cumulative impact of the comment, in addition to the State’s improper reference to the authority of the prosecutor and improper comments on the character of the defendant, amounted to fundamental error. Id. at 215, 668 P.2d at 331.

{19} In the case at hand, we believe that the prosecutor’s comments were incorrect statements of the law and that they fell closer to the statements in Diaz than to those in Duffy or Gonzales. According to the forgery statute, the appropriate mens rea is that the defendant have actual knowledge that the document is a forgery. § 30-16-10(B); see State v. Baca, 1997-NMSC-018, ¶¶ 15-17, 123 N.M. 124, 934 P.2d 1053 (analyzing whether there was sufficient evidence of knowledge in a forgery prosecution and concluding that the jury could infer that the defendant “actually knew the checks were forged when he negotiated them”). The statute does not criminalize a negligent state of mind, in which a defendant should know or has a duty to investigate whether the signer of the check is actually the owner of the check. Nor does the statute criminalize even a reckless state of mind, where a defendant acts in careless disregard of whether the signer of the check is its owner, by, for example, not refusing to cash a check despite some confusion about the signer’s actual name.

{20} We believe that the State’s arguments that Defendant “had a duty to know” that the check was forged and that he “ha[d] a duty to do more than glance [at the check]” lowered the State’s burden of proof as to the essential element of the mens rea of Defendant. This misstatement of the law becomes even more prejudicial to Defendant where this is the only issue contested by Defendant and where, as here, the evidence that Defendant knew that the check was forged is not overwhelming. The only evidence of Defendant’s knowledge was that he was told the man’s name was Jimmy or Santiago, he glanced at the check, and he felt scared. While earlier in this opinion we held that there was substantial evidence of guilt based on this evidence, we do not believe the evidence was overwhelming.

In light of the prosecutor’s misstatement of the essential element of Defendant’s state of mind, we cannot be sure that the jury actually found that Defendant knew the check was forged. The jury may have concluded that Defendant should have known the check was forged. We believe that there is a “reasonable probability that the conviction was swayed by the misconduct.” Duffy, 1998-NMSC-014, ¶ 59. This misstatement of the law is similar to that in Diaz, in which we concluded that there was cumulative error in part based on the prosecutor’s misstatement of the essential element of intent. Diaz, 100 N.M. at 215, 668 P.2d at 331.

{21} We believed that the misstatements likely had such a persuasive effect as to cause the jury to convict the defendant based on a less than criminal state of mind. See Allen, 2000-NMSC-002, ¶ 95 (stating that we will only find fundamental error where the conduct is “so egregious and had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial” (internal quotation marks and citation omitted)). We turn to the other claims of prosecutorial misconduct to determine whether the other instances of alleged misconduct were actually misconduct and whether the cumulative effect of this conduct deprived Defendant of a fair trial.

2. The Prosecutor’s Comments on Defendant’s Right Not to Testify

{22} During the State’s closing arguments, the prosecutor told the jury, “[Y]ou’re not getting the whole story. There’s more to the
story than he’s told the police.” Defendant immediately objected and the court sustained the objection on the basis that it violated Defendant’s Fifth Amendment right to silence. Defendant stated, “Is there any way we can cure that, Your Honor?” The court responded, “[W]e’ll proceed along.” On appeal, Defendant argues that the State improperly commented on Defendant’s right not to testify both inside and outside of court, and that because no curative step was taken, the prejudice from the remark remained unremedied.

[23] In State v. Foster, we stated that there are “three independent underpinnings” for the “rule forbidding a prosecutor from commenting on a defendant’s silence.” 1998-NMCA-163, ¶ 9, 126 N.M. 177, 967 P.2d 852. The first is the “constitutional privilege against self-incrimination,” which “prohibits the prosecutor from commenting on a defendant’s failure to testify at trial.” Id. ¶¶ 9, 10. The second is due process, stemming from Miranda v. Arizona, 384 U.S. 436 (1966), which forbids a prosecutor from commenting on a defendant’s silence after receiving Miranda warnings in an attempt to incriminate the defendant. Foster, 1998-NMCA-163, ¶¶ 9, 11, 14. The third is the Rules of Evidence, particularly Rules 11-402 and -403 NMRA, which forbid the use of irrelevant evidence or relevant evidence when the probative value of the evidence is substantially outweighed by its prejudicial value. Foster, 1998-NMCA-163, ¶¶ 9, 12.

[24] In this case, the State was permitted to argue that Defendant did not give the whole story to the police. See id. ¶ 14. Defendant did not invoke his right to silence after receiving his Miranda warnings. Because Defendant did not invoke his right to remain silent while being questioned by the police, the State did not impermissibly comment on his silence with respect to his communications with the police. As we stated in Foster, “[t]he Miranda warnings do not imply that the arrestee’s half-truths will carry no penalty.” Id.

[25] We are more concerned about the prosecutor’s comment to the jury that “you’re not getting the whole story.” This comment may have been interpreted by the jury as implying that if Defendant were innocent, he would have testified at trial and told the “whole story.” To the extent that the jury may have interpreted the comment this way, it was an impermissible comment on Defendant’s right not to testify. State v. Miller, 76 N.M. 62, 70, 412 P.2d 240, 245 (1966) (holding that, under the Fifth Amendment, a prosecutor may not comment on a defendant’s silence as evidence of guilt); see also State v. La Madrid, 1997-NMCA-057, ¶ 9-10, 123 N.M. 463, 943 P.2d 110 (finding no impermissible comment on the defendant’s failure to testify).

[26] While the court did sustain Defendant’s objection, the court did not take any steps to remedy this error. While this error alone may have been harmless, we will still look at the effect that this error may have had when combined with the other errors in our cumulative error analysis.

3. Mischaracterization of the Stipulated Facts

[27] During its rebuttal argument, the State made the following argument, and, again, Defendant did not object:

   Did [Defendant] intend to cheat or deceive Bank of the Rio Grande? . . . It comes back to the stipulations by the parties in State’s Exhibit No. 1. Did he sign his name on the back of the check? Yes. Did he look at the front of the check? Yes. Is it plainly evident from the front of the check . . . whose check it was? Did he know who the individual giving him the check was? Yes.

(Emphasis added.)

[28] Defendant asserts that the State misstated the stipulated facts. We agree. Defendant stipulated that he signed the back of the check; however, he did not stipulate that he looked at the front of the check. The only evidence about Defendant looking at the check was not in the stipulated facts but, rather, was presented by Detective Craig Buckingham, who, after refreshing his recollection with a written report, testified that Defendant told him that he glanced at the check, without specifying whether Defendant said he looked at the front or the back of the check. Further, there was no stipulation that Defendant knew “who the individual giving him the check was.” However, because Defendant did not object to these mischaracterizations of stipulated facts, the question becomes whether this error amounted to fundamental error, that is, whether it was so egregious and prejudicial as to deprive Defendant of a fair trial, or whether it was an isolated and minor imperfection. See Allen, 2000-NMSC-002, ¶ 95.

[29] We do not believe that the prosecutor’s misstatements, by themselves, prejudiced Defendant enough to deprive him of a fair trial. The jury was read the actual stipulations, though it is unclear whether the jury received them as an exhibit. While the jury may have believed that Defendant stipulated to and agreed that he looked at the front of the check and knew that Jimmy or Santiago was not Mr. Haddad, we are not convinced that this error alone “had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” Id. (internal quotation marks and citation omitted). However a prosecutor has a duty not to misstate the facts, and even if the prosecutor simply by accident failed to clarify that the only stipulated fact of those mentioned was that Defendant signed the back of the check, such a careless mistake can be an ingredient in a cumulative error analysis. Thus, we reserve this instance of misconduct as one to consider among the other instances of claimed prosecutorial misconduct that may add up to cumulative error depriving Defendant of a fair trial. See Duffy, 1998-NMCA-014, ¶ 47 (“[U]nder the doctrine of cumulative error, a series of lesser prosecutorial improprieties may amount to reversible error.”).

4. Prejudicial Comments During Voir Dire

[30] Defendant asserts that the prosecutor’s questions during voir dire about potential jurors’ sympathy for the homeless led to the implication that the homeless have “more tendency” to commit crimes. The following exchange between the prosecutor and a potential juror took place during voir dire:

   [Q:] How many people feel sorry for the homeless? Go ahead and raise your hand. . . .

   Does it make a difference, or will it make a difference to you if [D]efendant is homeless or was homeless at the time or at least down and out on his luck and having to get food from a shelter, or a soup kitchen . . . ?

   Does that matter to anybody?

   . . .

   [A:] . . . I just feel terrible about people who are in that situation.

   . . .

   [Q:] Do you think it’s okay for a person to commit a crime if he’s down and out on his luck?

   [A:] If you’re down that far, you have more tendency, I believe.
Defense counsel objected to this line of questioning as inflammatory. The court instructed the prosecutor to “wrap it up” by asking the juror if he was going to have any feelings of sympathy for Defendant. Defendant argues that this line of questioning was aimed at improperly appealing to the passions and prejudices of the jury. See Ashley, 1997-NMSC-049, ¶ 15.

{31} We disagree. Given the facts of this case, it was not improper for the prosecutor to explore the biases of the jury panel with regard to the homeless. The prosecutor’s question appears to have been an attempt to determine whether any of the potential jurors would have refused to convict a person simply because he or she is homeless, even though the State may prove beyond a reasonable doubt that the person committed a crime. The question did not call for the juror’s answer or any speculation on whether homeless people are more likely to commit a crime. Thus, we hold there was no misconduct here, especially because once the juror’s statement was given, the court required the State to ask an appropriate question and move away from the question of whether those who are homeless are predisposed to committing crimes.

5. Alleged Improper Argument by Prosecutor During Opening Statement

{32} Defendant next asserts that the State presented arguments during its opening statement by implying that if Defendant had been innocent, he would have asked more questions about the check before agreeing to cash it. The prosecutor said the following during opening statement:

[1] This guy that [D]efendant has known for ten minutes . . . asked [D]efendant for his I.D. . . . and writes a check out to [Defendant] and asks him to go inside the bank and cash it. And [Defendant] doesn’t ask him why; he doesn’t inquire as to who he’s cashing it for . . . .

Even were these statements considered closer to argument than to factual recitation, we do not believe that the statements were consequential in the least. Defense counsel objected and the court instructed the prosecutor to limit her opening statement to what the State anticipated the evidence would show. “An opening statement is intended to serve as a preview of the evidence to be admitted by one or both of the parties.” State v. Gilbert, 99 N.M. 316, 319, 657 P.2d 1165, 1168 (1982). Even had the comments by the prosecutor been in the gray area between facts and argument, in our view no misconduct occurred based on these statements.

6. Prosecutor Allegedly Eliciting Inadmissible Statements on Direct Examination

{33} Prior to the trial, Defendant moved to have any mention of the burglary of Mr. Haddad’s home excluded from evidence. The State noted that it did not intend to produce any evidence along that line. The State’s principal witness, Detective Buckingham, was present during this exchange. During the State’s direct examination of Detective Buckingham, the following dialogue ensued:

Q: Did you come to investigate an occurrence from September 18, 2002?
A: Yes, I did.
Q: Tell us what happened.
A: I was assigned a report taken by the initial responding deputy in reference to a burglary that happened out on Carver Road.

{34} At this point, Defendant objected. The court instructed the jury to disregard the last answer from the witness. Defendant argues on appeal that, under State v. Ruiz, 2003-NMCA-069, ¶ 11, 133 N.M. 717, 68 P.3d 957, we should conclude that this reference to inadmissible evidence warrants reversal.

{35} We disagree with Defendant. In Ruiz, we held that where the prosecutor purposely elicited testimony regarding a defendant’s prior conviction and where there was a “reasonable probability that the improperly admitted evidence could have induced the jury’s verdict,” we were required to reverse. Id. ¶¶ 9-11. We explicitly acknowledged that “if inadvertent admission of evidence of prior crimes is error, the prompt sustaining of an objection and an admonition to disregard the witness’s answer cures any prejudicial effect of the inadmissible testimony.” Id. ¶ 6.

{36} In this case, unlike in Ruiz, it is not clear that the State intended to elicit the reference to the burglary investigation.
OPINION
LYNN PICKARD, JUDGE

{1} Defendant appeals his convictions of third degree criminal sexual penetration (CSP III), aggravated battery, and false imprisonment. He does not challenge a fourth conviction of larceny. His briefs raised the following three double jeopardy issues: (1) that his conviction at a second trial of CSP III, after he was tried for CSP II at a first trial that resulted in neither a verdict nor any inquiry into the degree of CSP on which the jury was hung, compels a discharge on all levels of CSP; (2) that his conviction of false imprisonment as well as CSP, which necessarily involves the confinement of a victim, compels a discharge on the false imprisonment count; and (3) that the prosecutor’s conduct in the first trial during jury deliberations, in obtaining instruction on CSP III and in subsequent supplemental closing argument, was sufficiently egregious conduct to require a discharge on all counts under State v. Breit, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

{2} We agree with Defendant that his double jeopardy rights were violated by the State’s prosecution of Defendant at the second trial for CSP II because there was no manifest necessity for a mistrial on that charge during the first trial. However, the remedy for the violation is a retrial on that count with the highest exposure being to CSP III. Further, we hold that the prosecutor’s conduct did not rise to a level compelling a dismissal under Breit. Therefore, there is no double jeopardy bar to further trials. However, we believe that the double jeopardy error of submitting CSP II to the jury during the second trial tainted all of the convictions resulting from that trial, and therefore the proper remedy is to reverse the three convictions and remand for a third trial. Finally, we hold that false imprisonment, while a lesser included offense of CSP II, is not a lesser included offense of CSP III because the crimes have different elements.

FACTS AND BACKGROUND

{3} Victim made a 911 call to the police department and reported that she had just been raped inside her home. Victim stated that she had been unable to see the perpetrator’s face throughout the incident. Furthermore, she reported that the perpetrator was armed with a knife during the incident. When the police arrived to interview Victim, Victim realized that her television and VCR were missing from her living room. After the police searched the area, the police noticed a trail of footprints leading from Victim’s house to Defendant’s house. After receiving consent to enter Defendant’s home, the police found a VCR and television with serial numbers that matched those that they had received from Victim. Defendant was arrested for theft of Victim’s property.

{4} Subsequently, Defendant admitted that he had had sexual intercourse with Victim on the night in question, although Defendant stated that the intercourse was consensual. Furthermore, Defendant stated that Victim had agreed to lend him her television and VCR. Further investigation by the police led them to discover clothes in Defendant’s home that matched those described by Victim as the type worn by the perpetrator. However, even after conducting a thorough search of the area, the police were unable to locate the knife Victim had described as being used by the perpetrator. Although the knife was not found, Defendant was eventually indicted for criminal sexual penetration of Victim while armed with a deadly weapon (CSP II).

{5} Defendant was charged with four counts: Count 1 charged aggravated burglary, Count 2 charged CSP II, Count 3 charged false imprisonment, and Count 4 charged larceny. At the first trial, after the State and Defendant had presented their cases, the four counts were submitted to a jury and, after several hours of deliberation, the jury sent a written question to the court. Specifically, the jury’s question dealt with Count 2, which charged Defendant with CSP II. The jury asked the following question:

“If we think there was not a knife, must we acquit on Count 2, item two?”

The court, after discussing the jury’s question with both parties, responded to the inquiry by directing the jury to “please read instruction No. 7 in its entirety.” Instruction 7 was the elements instruction for CSP II, and item two of it required the jury to find that Defendant was armed with and used a deadly weapon.

{6} Shortly thereafter, the State moved the court to supplement the jury instructions by adding an instruction for criminal sexual penetration without the use of a deadly weapon, CSP III, as a lesser included offense of Count 2. After hearing arguments from both the State and Defendant, the court granted the State’s request to allow
CSP III as a lesser included offense of Count 2 over Defendant’s strong objection. While the court allowed the jury to continue deliberating on the other counts, the court asked the jury not to deliberate any further on Count 2 until receiving further instructions from the court. Defendant then requested that the court allow both parties to briefly provide additional closing arguments to the jury concerning the charge of CSP III. The court granted Defendant’s request. The jury was then called back into the courtroom, where the court instructed the jury on the charge of CSP III. The court then informed the jurors that, to Count 2, they were to first consider the charge of CSP II and, if they had a reasonable doubt as to that charge, they were to begin deliberating the CSP III charge.

{7} Upon completion of the court’s oral instructions to the jury, the court allowed both the State and Defendant to make closing arguments concerning the supplemental jury instructions. In its supplemental closing argument, the State made the following statement:

We looked at your questions and tried to define what you were thinking in the jury room, and we came up with two possible answers. Clearly, you were concerned about the element that said Defendant was armed and used a deadly weapon, and the Defendant used a knife. We don’t think you had a problem with the rest of it, which talks about what the definition of a deadly weapon is. One possibility we thought of was that you were concerned about what “[j]used a knife[”] meant. Another possible concern we thought you had was what happens if you don’t think there was any knife at all.

Defendant did not object to this argument.

{8} After closing arguments, the jury deliberations reconvened. Shortly afterwards, the jury foreperson informed the court that the jury had reached a verdict on the count of larceny, but that it was unable to reach a decision on the other counts. The jury was then called in. The foreperson of the jury announced that as to the charge of larceny, the jury had found Defendant guilty. After both parties declined the court’s offer to poll the jury as to the larceny charge, the following dialogue occurred between the court and the jury foreperson:

THE COURT: Very well. The Court having inspected the verdict forms as to Counts 1, 2, and 3, and taken the information from the jury that they cannot reach a decision, the Court then declares a mistrial as to Counts 1, 2 and 3.

JUROR COOGLER: We have that piece of paper in there. Could I refer to it?

THE COURT: If you need it. If you don’t recall the numerical decision now, then you may get the note, or the bailiff may get it for you.

JUROR COOGLER: Okay, Your Honor, on the aggravated burglary, which I believe is the first one, two felt that he was guilty and 10 felt that he was not guilty. On the second one, which was the criminal sexual penetration, nine felt that he was guilty and three felt that he was not guilty. On the false imprisonment, 10 felt he was guilty, and two felt he was not guilty.

The court then excused the jury.

{9} Thereafter, Defendant was retried on charges of aggravated burglary, false imprisonment, CSP II, and CSP III. His second trial ended in convictions for CSP III, aggravated burglary, and false imprisonment. Defendant appeals these convictions, claiming that his conviction of CSP III must be set aside because the first trial ended in an implied acquittal of CSP II and his right to be free from double jeopardy bars successive prosecutions of all degrees of the offense following an acquittal of any degree. Relying on the same authority and our recent decision in State v. Garcia, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, we rule that Defendant’s double jeopardy rights were violated when he was tried for CSP II at a second trial. However, we further hold that the proper remedy is to order a retrial, at which the highest degree that Defendant can be tried for is CSP III.

{10} Defendant argues that his conviction of CSP III must be set aside because the first trial ended in an implied acquittal of CSP II, and the double jeopardy clauses of both the state and federal constitutions bar successive prosecutions following an acquittal. Although we agree with Defendant’s contention that his double jeopardy rights were violated when the State prosecuted him a second time for CSP II, we conclude that the proper remedy for such a violation is not to bar all successive prosecutions, but to order a retrial on the CSP count with the highest degree of exposure being to CSP III. We review double jeopardy claims de novo. State v. Segura, 2002-NMCA-044, ¶ 7, 132 N.M. 114, 45 P.3d 54.

{11} Defendant relies on State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), overruled on other grounds by State v. Wardlow, 95 N.M. 585, 588, 624 P.2d 527, 530 (1981), and Rule 5-611(D) NMRA to support his argument that his conviction of CSP III must be set aside because the first trial ended in an implied acquittal of CSP II and his right to be free from double jeopardy bars successive prosecutions of all degrees of the offense following an acquittal of any degree. Relying on the same authority and our recent decision in State v. Garcia, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, we rule that Defendant’s double jeopardy rights were violated when he was tried for CSP II at a second trial. However, we further hold that the proper remedy is to order a retrial, at which the highest degree that Defendant can be tried for is CSP III.

{12} In Castrillo, charges of first and second degree murder and voluntary manslaughter were submitted to the jury in the defendant’s first trial. 90 N.M. at 610, 566 P.2d at 1148. However, the jury was unable to reach a verdict. Id. The court declared a mistrial without inquiring into which of the specific included offenses the jury had either agreed or disagreed upon. Id. at 613, 566 P.2d at 1151. The defendant was retried and found guilty of second degree murder. Id. at 610, 566 P.2d at 1148. On appeal, the defendant argued that his prosecution in the second trial was a violation of his right to be free from double jeopardy. Id. Although our Supreme Court noted that a manifest necessity to declare a mistrial was shown since the jury was hung between acquittal and at least one of the offenses included within the murder charge, the Court stated that the record was “silent upon which, if any, of the specific included offenses ... the jury had reached an impasse.” Id. at 613, 566 P.2d at 1151. Thus, based on double jeopardy grounds, the Court dismissed all offenses on which the record was unclear. Id. The
Court stated:

[T]he record is not clear as to which of the included offenses the jury was considering at the time of its discharge. Without inquiry by the trial court into the jury’s deliberations on the greater, included offenses, no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached. Jeopardy did not attach to the offense of voluntary manslaughter which was the least of the included offenses. Had the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.

Id. at 613-14, 566 P.2d at 1151-52. In effect, failing to ascertain a deadlock as to each level of the charge that the jury is deliberating requires dismissal of all but the least of the lesser included charges submitted to the jury.

{13} In Garcia, the issue before us was whether the district court committed error when it inquired into the jury deliberations as to the greater offense, but did not continue its inquiry into the jury’s deliberations of the lesser included offenses. 2005-NMCA-042, ¶ 10. In that case, the defendant was charged with a count of first degree murder, and the jury was instructed on second degree murder and voluntary manslaughter as lesser offenses within the same count. Id. ¶ 2. When the jury informed the court that it could not reach agreement as to the murder count, the court declared a mistrial. Id. ¶ 20. However, after the court declared a mistrial, the court inquired as to the jury’s deliberations regarding the charge of first degree murder. Id. The jury’s foreperson stated that the jury had been unable to reach a unanimous agreement as to that charge. Id. The court then concluded its inquiry without inquiring into the jury’s deliberations on the lesser offenses included within the count of murder. Id.

{14} After analyzing Castrillo and its progeny, we concluded that nothing in Castrillo required a district court to continue its inquiry into the jury’s deliberations regarding lesser offenses when the court has determined, through its inquiry, that the jury was unable to reach agreement as to a greater offense. Garcia, 2005-NMCA-042, ¶ 17. In Garcia, we noted that our holding was consistent with Rule 5-611(D), which requires that:

If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed.

2005-NMCS-042, ¶¶ 25-27. Thus, in Garcia, we determined that the district court did not err in the manner in which it inquired as to the jury’s deliberations, and we concluded that the defendant’s retrial and subsequent conviction of first degree murder did not violate his double jeopardy rights because there was a manifest necessity to declare a mistrial at that level of the charge. Id. ¶ 29.

{15} In the present case, contrary to Rule 5-611(D) and our Supreme Court’s holding in Castrillo, the district court did not inquire into the jury’s deliberations beginning with the greater offense of CSP II. Here, under Count 2, the jury received instructions for charges of CSP II and CSP III. However, when the district court inquired as to the jury’s deliberations, it simply requested that the foreperson of the jury provide the court with the numerical split of the jury as to guilty and not guilty. The court did not inquire as to each degree included in Count 2, beginning with the highest degree, which in this case would have been CSP II. Without inquiry by the trial court into the jury’s deliberations on the greater offense, there was no manifest necessity to declare a mistrial as to that offense and therefore jeopardy attached to that offense. See Castrillo, 90 N.M. at 613-14, 566 P.2d at 1151-53. Therefore, we conclude that Defendant’s double jeopardy rights were violated when he was prosecuted at the second trial for CSP II.

{16} Although we have determined that Defendant should not have been prosecuted at the second trial for CSP II, we do not agree with Defendant that it would be a violation of his double jeopardy rights to order a retrial where thehighest exposure Defendant would face would be for CSP III. In Castrillo, the Court held that a dismissal on double jeopardy grounds is required for such offenses where the record is silent upon which of the specific offenses the jury had agreed and upon which the jury had reached an impasse. Id. In that case, the Court did not dismiss the lower offense because the Court noted that “[h]ad the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.” Id. at 614, 566 P.2d at 1152. The same holds true for the present case. Here, the record is clear that the jury reached an impasse regarding the CSP III charge because, as in Castrillo, “[h]ad the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.” Id. Thus, we hold that there was a manifest necessity to declare a mistrial as to the CSP III charge, and therefore no double jeopardy attached to that offense, and Defendant can be retried on that charge without violating his double jeopardy rights.

{17} Furthermore, we find no merit in the State’s argument that Defendant’s double jeopardy rights were not violated because Defendant was only convicted of CSP III at his second trial, and therefore he suffered no prejudice due to his second prosecution for CSP II. The United States Supreme Court expressly rejected this contention in Price v. Georgia, 398 U.S. 323 (1970):

The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.

Id. at 331 (footnote omitted).

{18} Defendant contends that this language means that he must be discharged on all degrees of CSP. We disagree. In the very next paragraph of Price, the Supreme Court indicated that the possibility of retrial on the lesser offense, which would not be prohibited by double jeopardy principles, was a matter for state law. Id. at 332. Our Supreme Court has determined in Castrillo that retrial on the
lesser offense in these circumstances is permissible. 90 N.M. at 614, 566 P.2d at 1152. A so-called “implied acquittal” of a greater charge either when a defendant is actually convicted of a lesser charge or when the jury is hung as to a lesser charge does not operate to prohibit conviction on that lesser charge. See id. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73, which involved a prosecution for first degree murder after a prosecution at which second degree murder was the highest offense submitted to the jury, is not to the contrary.

2. The prosecutor’s conduct in this case did not rise to the level of Breit, and therefore there is no double jeopardy bar to further trials.

{19} Defendant argues that the prosecutor’s conduct in this case was so outrageous as to rise to the magnitude contemplated in Breit, 1996-NMSC-067, and therefore double jeopardy bars the re-prosecution of Defendant on any offenses arising out of the indictment for which he was not found guilty at the first trial. Specifically, Defendant contends that the State caused a mistrial at the first trial by (1) improperly seeking to have the court instruct the jury on the CSP III charge, which was not supported by the evidence; (2) seeking the instruction after the jury began deliberations; and (3) injecting itself into the jury deliberation process during closing arguments regarding the CSP III charge.

{20} In Breit, the Court held:

[When a defendant moves for a mistrial, retrial, or reversal because of prosecutorial misconduct: Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.]

1996-NMSC-067, ¶ 32. The Court went on to state that an isolated instance of misconduct will rarely be so prejudicial as to cause a mistrial. Id. ¶ 33. Furthermore, the Court held that the term “willful disregard” connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal. Id. ¶ 34.

{21} In the present case, the result of the prosecutor’s actions was a mistrial, but we cannot say that the prosecutor was acting in willful disregard of a mistrial, retrial, or reversal. First, the case on which Defendant relies for the proposition that the jury should not have been instructed on a lesser included offense for the first time during deliberations, State v. Villa, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017, was not decided until a full year and a half after the first trial in this case. Second, it appeared that the prosecutor was not fomenting a mistrial as much as trying to obtain a conviction of some degree of CSP and thus end the proceedings during the first trial.

{22} Defendant rests much of his argument concerning prosecutorial impropriety on the prosecutor’s statement we previously quoted in paragraph 7 in which the prosecutor specifically addressed the jurors about his suppositions as to their thinking underlying their question to the court about the knife. Defendant contends that this statement by the prosecutor indicates a level of misconduct so unfairly prejudicial to Defendant that, pursuant to Breit, Defendant’s convictions should be reversed and the State should be barred from retrying Defendant. We disagree.

{23} Although we agree with Defendant that it was improper for the prosecutor in this case to inject himself into the jury’s deliberations through his closing argument, we conclude that this lone instance does not rise to the level of misconduct articulated in Breit. See 1996-NMSC-067, ¶¶ 32-36. Nor do we believe that seeking the lesser offense instruction after hearing of the jury’s concern rises to the level of misconduct articulated in Breit. See id.

We do note that this type of behavior is considered error in at least one federal circuit, see United States v. Yarborough, 400 F.3d 17, 19-22 (D.C. Cir. 2005), a holding with which New Mexico courts would likely agree in light of Villa. But see State v. Wall, 94 N.M. 169, 171, 608 P.2d 145, 148 (1980) (permitting supplemental instruction on accessory liability), overruled on other grounds by State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993). However, such behavior appears to be accepted in at least one jurisdiction that seeks more jury involvement in the trial process. See Yarborough, 400 F.3d at 21-22. In any event, because the question before us is whether that conduct was sufficiently egregious to invoke the extreme remedy of barring further prosecution, we need not decide the question of the propriety of the prosecutor’s conduct in this case.

{24} The Court in Breit noted that the prosecutorial misconduct in that case led to a “trial out of control.” 1996-NMSC-067, ¶ 41 (internal quotation marks and citation omitted). The Court also went on to indicate that the prosecutor’s misconduct in that case began “[b]arely into his opening statement” and continued through to closing. Id. ¶¶ 41-43 (internal quotation marks and citation omitted). Furthermore, the Court stated that the prosecution in that case used “unfair, unethical[,] and constitutionally impermissible trial tactics” in order to secure a conviction at any cost. Id. ¶ 85.

{25} The prosecutorial misconduct described in Breit is a far cry from the improper language used in one instance by the prosecutor in this case. We conclude that our Supreme Court’s decision in Breit was not intended to bar retrials based on the slightest prosecutorial misconduct. The Court in Breit stated, and we agree, that “[r]aising the bar of double jeopardy should be an exceedingly uncommon remedy.” Id. ¶ 35. Finally, because of the evidence that the police found no knife, the instruction on CSP III was supported by the evidence. See State v. Fish, 102 N.M. 775, 778-79, 701 P.2d 374, 377-78 (Ct. App. 1975) (holding that where no knife was ever found and the victim was not cut, a jury could reject the victim’s testimony about a knife and convict of CSP III). Therefore, under the facts of this case, we conclude that the prosecutor’s conduct was not such improper conduct to bar the State from retrying Defendant.

3. The nature and impact of the double jeopardy violation was such that it infected all of the convictions obtained at the second trial, and therefore we reverse all three convictions and remand for a new trial.

{26} As indicated above, Price and Castrillo require a reversal of the CSP III conviction and allow for the possibility of retrial on that count. The State contends that it should be only the CSP charge, if any, that is required to be retried. Defendant, on the other hand, contends that retrial on any charge is barred, but if retrial is allowed, it should be on all charges.
Apart from the *Breit* rationale, which we have already rejected, Defendant does not cite any specific authority for the proposition that he is entitled to be discharged on all counts arising from a trial in which a higher degree of one count was submitted to the jury erroneously under double jeopardy principles. He does cite the language from *Green v. United States*, 355 U.S. 184, 187-88 (1957), which was persuasive to the Court in *Breit*, 1996-NMSC-067, ¶ 9:

> “The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

*Id.* (quoting *Green*, 355 U.S. at 187-88). But while we believe that this language counsels us to apply a lenient standard of harmless error to the double jeopardy error we hold to be present in this case, we do not believe that it requires Defendant’s discharge on all counts. *See State v. Lopez*, 99 N.M. 791, 794-95, 664 P.2d 989, 992-93 (Ct. App. 1982) (holding that fourth trial after properly declared mistrials in earlier trials did not violate double jeopardy). We also believe that Defendant, by his appeal, either has waived any non-*Breit* plea of former jeopardy or has acted to continue the jeopardy. *See Green*, 355 U.S. at 189.

(27) Nonetheless, we believe that the circumstances of this case counsel that the double jeopardy error of trying Defendant a second time for CSP II, when he should not have faced trial on that charge, spilled over to and infected not only the conviction of CSP III, but also the convictions of aggravated burglary and false imprisonment. We recognize that the jury was instructed at both trials for aggravated burglary that it could find Defendant guilty if he either was or became armed with a knife or committed a battery inside and that the knife did not form any part of the elements of false imprisonment. But the factual basis of all of the charges was bound up with the presence of the knife, which in turn appeared to be a critical part of the jury’s deliberations. The presence or absence of a knife was the lynch pin distinguishing CSP II from CSP III. The knife was central in two of the three alternative ways of committing aggravated burglary. Finally, the knife was part of the means used to commit the false imprisonment. We do not know what the result would have been during the second trial had Defendant not been tried for CSP II, committed with a knife. As the United States Supreme Court said in *Price*, the jury’s debate could have been entirely different without the presence of the contaminating higher offense. 398 U.S. at 331.

(28) Our own cases, discussing the concept of harmless error in the evidentiary context, are to a like effect. *Clark v. State*, 112 N.M. 485, 816 P.2d 1107 (1991), is a pertinent example. After establishing that error in the admission of evidence cannot be deemed harmless if there is a reasonable possibility that it contributed to the conviction, the Court turned to an analysis of each charge. *Id.* at 487-88, 816 P.2d at 1109-10. And, in analyzing each charge, the Court took into account any possibility that the jury could have used the erroneously admitted evidence, either substantively or for impeachment. *Id.* at 488, 816 P.2d at 1110. The Court was concerned that the improper evidence would cause the jury to look at the defendant in an unfavorable light, thus inducing the verdict against him. *Id.*

(29) We believe that it is appropriate to evaluate the effect of the CSP II charge on the remaining charges because of the importance of the double jeopardy principle as outlined in *Green*, 355 U.S. at 187-88. The prohibition of retrial on a greater offense when there is no inquiry as to whether a mistrial was necessary on that greater offense was established in *Castrillo* almost 30 years ago, and we are still finding prosecutors violating defendants’ *Castrillo* rights, such as occurred in this case. As is the case with prosecutorial comment on a defendant’s silence, where we apply a rule of automatic reversal regardless of objection as a prophylactic measure, *see State v. Hennessy*, 114 N.M. 283, 285-86, 837 P.2d 1366, 1368-69 (Ct. App. 1992), overruled on other grounds by *Lucero*, 116 N.M. at 453, 863 P.2d at 1074, we must be alert to the prejudicial effect that an improper additional charge might have on the jury’s conviction on the remaining charges. If we cannot determine the effect, retrial on the remaining charges is necessary. Thus, we reverse the CSP III, aggravated burglary, and false imprisonment convictions and remand them for a new trial.

4. CSP III and false imprisonment are separate offenses upon which a defendant may be separately convicted and sentenced.

(30) Defendant claims that his double jeopardy rights were also violated by his conviction and sentence for both CSP III and false imprisonment based on the same facts. He relies on *State v. Pisco*, 119 N.M. 252, 259, 261-62, 889 P.2d 860, 867, 869-70 (Ct. App. 1994), and *State v. Corneau*, 109 N.M. 81, 87-88, 781 P.2d 1159, 1165-66 (Ct. App. 1989). However, those cases involved CSP II in the commission of a felony where the felony was the restraining of the victim that could occur during any CSP. *Pisco*, 119 N.M. at 259-60, 889 P.2d at 867-68; *Corneau*, 109 N.M. at 85-87, 781 P.2d at 1163-65. The State properly argues, relying on *Swafford v. State*, 112 N.M. 3, 14, 810 P.2d 1223, 1234 (1991), that reviewing the elements of these crimes is the proper test to determine if double jeopardy is violated by separate convictions and sentences. So doing, it can be seen that the commission of a felony is an element of CSP II committed in the commission of a felony whereas the elements of CSP III and false imprisonment are distinct. CSP III requires sexual conduct perpetrated through force or coercion, whereas false imprisonment does not require sexual conduct and requires knowledge that the perpetrator has no authority to restrain or confine the victim. *See NMSA 1978, § 30-4-3 (1963); NMSA 1978, § 30-9-11(A), (E) (2003).* The difference in elements, according to *Swafford*, gives rise to a presumption that the legislature intended separate punishments. 112 N.M. at 14, 810 P.2d at 1234.

(31) We next look at the social evils sought to be prevented, construing them narrowly, as well as the quantum of punishment for each offense. *Id.* at 14-15, 810 P.2d at 1234-35. The CSP statute is designed to prevent unwanted sexual violence while the false imprisonment statute is designed to prevent unlawful restraint of any sort. *See id.* at 15, 810 P.2d at 1235 (discussing the difference between the elements of CSP and incest). In addition, CSP III is a third degree felony punishable by three years of imprisonment while false imprisonment is a fourth degree felony punishable by one and one-half years.
of imprisonment. See § 30-4-3; § 30-9-11(D)(5); NMSA 1978, § 31-18-15(A)(7), (8) (2003). If there is a CSP that is committed during the commission of a separate false imprisonment, the crime may be punished as CSP II, which is a second degree felony punishable by nine years of imprisonment. See § 30-9-11; § 31-18-15(A)(4). Under these circumstances, we believe that the legislature likely intended CSP III and false imprisonment to be separately punished by four and one-half years of imprisonment in appropriate cases within the prosecutor’s discretion.

{32} Defendant argues, however, that the Swafford analysis is not correctly applied to his offenses in the above manner because this Court has already decided, in State v. Crain, 1997-NMCA-101, ¶¶ 15-22, 124 N.M. 84, 946 P.2d 1095, that the legislature did not intend separate punishment for every offense of restraint that is necessarily included as a factual matter within every offense of CSP. We do not agree that Crain went so far.

{33} Crain concerned a defendant who was convicted of two counts of CSP II (one with personal injury and one in the commission of a felony) and of the separate charge of kidnapping. Id. ¶ 15. The kidnapping itself was the very felony involved in the CSP II, based on one factual episode that did not involve restraint apart from that necessary to the CSP. Id. ¶¶ 15, 17. We first analyzed the two CSP offenses and found that they had different elements. Id. ¶ 19. We therefore presumed different offenses. Id. However, we noted that both methods of committing CSP II were simply ways of increasing the degree of seriousness of a CSP III offense, and therefore we held that both charges of CSP II could not stand. Id. ¶ 20. In deciding which type of CSP II to let stand, because there was no separate kidnapping, we held that the legislature did not intend to permit either CSP II (in the commission of a felony) or the separate second degree felony of kidnapping whenever there is evidence of the third degree felony of CSP III. Id. ¶ 21. This reasoning is inapplicable in this case because of the difference in the degrees of the crimes at issue. In other words, it was the seriousness of the offenses of CSP II and kidnapping, both second degree felonies involving nine-year sentences, that motivated our belief in Crain as to what the legislature intended. Accordingly, we disagree with Defendant that Crain requires a holding that Defendant’s double jeopardy rights were violated here.

CONCLUSION

{34} We reverse Defendant’s convictions of CSP III, aggravated burglary, and false imprisonment and remand them for a new trial.

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

WE CONCUR:
CElia FOy CASTILLO, Judge
RODERICK T. KENNEDY, Judge
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ASSOCIATE TRIAL ATTORNEY
8th Judicial District
(Taos County)
The Eighth Judicial District Attorney’s Office is accepting applications for the position of Associate Trial Attorney (ATA) in the Taos Office. This position will have primary responsibility for DWI and misdemeanor prosecutions. The ATA may also handle some juvenile and felony cases under supervision. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Donald Gallegos, District Attorney, 920 Salazar Road, Suite A, Taos, NM 87571. Position open until selection made.

STAFF ATTORNEY
New Mexico Legal Aid (NMLA) a poverty law program in Santa Fe, NM seeks attorney to provide advice, brief service, and representation in domestic relations proceedings focusing on domestic violence to low income persons. Work: handling general poverty law cases, utilizing a computerized case management system, handling telephone intake, participating in community education and outreach to domestic violence victims and providers, participating in recruitment of pro bono attorneys. Qualifications: Dedication and commitment to serving the needs of domestic violence victims and persons living in poverty, excellent research, writing and interviewing skills. Priority given to Spanish speaker. New Mexico bar license required. Reliable transportation required. Send letter of intent, resume, two references and writing sample to: Margret Carde, 602 Salazar Road, Suite A, Taos, NM 87571. Position open until selection made.

OFFICE OF THE STATE ENGINEER/INTERSTATE STREAM COMMISSION
State of New Mexico
The New Mexico State Engineers Office/Interstate Stream Commission is seeking an attorney – Advanced Level to represent the OSE/ISC in federal & state court litigation & at administrative hearings, water right adjudications & natural resources issues. Work Experience/Education Requirements (minimum qualifications): REQUIRED - Licensure as an attorney by the Supreme Court of New Mexico. Must be a member in good standing of State Bar & eligible to obtain New Mexico attorney General Commission. Experience in the practice of law in the area of administrative hearings matters, water right adjudications & natural resources totaling 4 years. The position is located in Santa Fe. Salary range is $43,064 to $76,556. Please refer to job order #70636 when applying. Applications are being accepted by the Department of Labor from August 22, 2005 to September 16, 2005. Please send an additional copy of your resume, bar card & a writing sample to: J. Schleicher at the OSE/ISC, P.O. Box 25012, Santa Fe, NM 87504-2501. Office of the State Engineer is an Equal Opportunity Employer.

LITIGATION ASSOCIATE
The Rodey Law Firm is accepting resumes for an associate attorney for the firm’s Santa Fe office. Applicants must have 4-6 years litigation experience, and strong research and writing skills. New Mexico practitioner with strong academic background preferred. Firm offers outstanding benefit package. Salary commensurate with experience. Please forward resume, references, law school transcript and writing sample to: Deborah E. Mann, P.O. Box 1888, Albuquerque, NM 87103-1888. All inquiries kept confidential.

40 BAR BULLETIN - SEPTEMBER 12, 2005 - VOLUME 44, NO. 36
Executive Director, New Mexico Legal Aid (NMLA)
Organization: NMLA is a statewide organization dedicated to the provision of civil legal services to low-income and elderly New Mexicans. The population served by NMLA includes rural and urban low-income people, such as Native Americans, migrant workers, homeless individuals, abused or battered people, farmers, the elderly and those whose case or concern affects their most basic survival needs. Over 40% of New Mexico is Hispanic, and about 10% is Native American. Duties and Responsibilities: The Executive Director of NMLA is the chief operating executive and has overall responsibility for operation of the program, including general administration of the program and its fiscal affairs, securing and maintaining funding levels sufficient to meet program needs, employment of staff, which is unionized, and working with the organized Bar. The Executive Director is appointed by and accountable to the Board of Directors. The Executive Director is responsible for: Directing the overall operations of the program in compliance with relevant laws, Board policies, requirements of funding sources, LSC regulations, and the mission of NMLA; Developing, recommending and implementing policies relating to the administrative and substantive tasks of the program; Directing and overseeing the financial affairs of NMLA, including helping to secure funds and maintain funding levels sufficient to meet program needs; Recruiting and employing qualified personnel, ensuring proper training and evaluating performances; Establishing and maintaining constructive and supportive relationships with external groups and organizations, including oversight of the program's public relations activities; and planning effective strategies on a statewide basis. Qualifications: Legal Services and senior management experience preferred. The Executive Director should be an effective and articulate leader with a proven track record and a commitment to Justice for our clients, the poor. Location Current Executive office: Albuquerque, New Mexico. NMLA has 11 offices throughout the State. Compensation: $75,000 proposed in current Budget, with generous benefits package. Applications: Applications desired by September 30, 2005, but applications will be accepted until the position is filled. Position available immediately, with preference to start no later than January 1, 2006. Please send cover letter and resume with references to NMLA Executive Director Search Committee, 300 N. Downtown Mall, Las Cruces, NM 88001 or e-mail to: gloriam@nmlegalaid.org. For further information on NMLA's history and background, please contact Gloria Molinar at 505-541-4815 or gloriam@nmlegalaid.org. NMLA is an equal opportunity employer; women, minorities and disabled persons encouraged to apply.

Associate Attorney
Scheuer, Yost & Patterson, P.C. is seeking an associate with experience in a variety of transactional matters preferably including real estate, estate planning and tax matters. Applicant should possess excellent research and writing skills and sound business judgement. Good benefits and growth potential. Please submit resume, writing sample and cover letter to Hiring Partner, P.O. Drawer 9570, Santa Fe, NM 87504.

Real Property & General Litigation

Lawyer A Position
The New Mexico Public Regulation Commission is accepting applications for the position of Associate General Counsel (Lawyer A). The Office of General Counsel ("OGC") advises the Commission on administrative law matters and on cases pending before the Commission, which involve, among other things, regulation of utilities, telecommunications carriers, and transportation carriers. The OGC also assists the Commission in rulemakings and defends Commission decisions in the New Mexico Supreme Court and in other state and federal courts. The position requires a hard-working attorney with superior writing and speaking skills who works well with others. Minimum qualifications: two or more years of experience in working at or advising a state agency, or in the practice of public utility or administrative law, or the equivalent; license to practice law in New Mexico. Salary $43,064 – $76,556 per year (with benefits). Background in regulatory law, engineering, economics, accounting or technical discipline preferred. Interested persons must submit a resume and writing sample to both the Department of Labor and to the New Mexico Public Regulation Commission, Human Resource Bureau, 1120 Paseo de Peralta, Room 536, Santa Fe, NM 87501. Interviewees must submit three references including two references from current or former supervisors. Applicants must register with the New Mexico Department of Labor, 301 W. De Vargas, Santa Fe, NM 87501, by no later than September 23, 2005 (reference DOL #NM71481). For additional information, call DOL at (505) 827-7434. The State of NM is an EOE.

Associate Attorney
Seeking attorneys with a minimum of 2 and a maximum of 5 years experience (litigation experience helpful) to work in a busy law firm, focusing in civil defense litigation, and general civil practice. We offer a very competitive salary and attractive benefits package. Please fax your resume to Stanley N. Hatch at (505) 341-3434 or mail to P.O. Box 94750, Albuquerque, NM 87199-4750.

Associate Attorney
Sturges, Houston & Sexton, P.C., seeks a motivated associate attorney with 3-5 years civil litigation experience and strong research and writing skills. Excellent professional opportunity, working environment and benefits. Please forward résumé and writing sample to ksenton@sturgeshouston.com or Managing Shareholder, P.O. Box 36210, Albuquerque, NM 87176.

Lawyer A Position
The New Mexico Public Education Department is seeking an advanced attorney in its Office of General Counsel. This attorney will be the lead attorney in 4 areas: federal Impact Aid-20 U.S.C. 7709(b) / 34 C.F.R. 222.162; state contracts and federal grants; public records requests; and the formatting, editing and filing of agency administrative rules). This attorney will also perform general legal duties. Must hold a law degree and a valid (in good standing) NM bar license and have 6 years legal experience, 3 of which involved administrative law, civil law, or state/federal litigation. Extensive public school or state administrative law experience may be considered in lieu of 1 year. Salary: $43,064–$76,556 per year w/benefits, depending on experience. Perm. Send a copy of a letter of interest, your resume, copy of bar card, under 15-pg writing sample to: Public Education Department, Human Resources-Rm 131, 300 Don Gaspar, Santa Fe, NM 87501-2786, no later than September 26, 2005. The State of NM is an EOE.

Associate Attorneys
We are seeking associate attorneys with three to five years of experience in civil litigation who want to broaden their litigation skills while working in a collegial, growing, mid sized, AV rated firm. Initially, tasks will include researching the law, developing facts, writing briefs, arguing motions, and taking depositions. We are looking for attorneys with a sincere interest in the defense of employment, health, commercial, or professional liability litigation. Please send a resume and succinct writing sample to Bannerman & Williams, P.A., 2201 San Pedro NE, Building 2 Suite 207, Albuquerque, NM 87110 or Fax to 837-1800. To learn more about us, visit www.NMCounsel.com.<http://www.NMCounsel.com>.
Paralegal/Legal Assistant
Congenial Albuquerque uptown firm seeks experienced litigation paralegal/legal assistant. We offer an excellent benefit package and salary commensurate with experience. Please fax resume to Bauman, Dow & Leon PC at (505) 883-3194. All responses kept in confidence.

Paralegal
Sturges, Houston & Sexton, P.C. is looking for an experienced, motivated paralegal to become a member of a very busy litigation practice. Knowledge of Timeslips 11 a plus. Good benefits and salary DOE. Send resume to Firm Administrator, P.O. Box 36210; Albuquerque, NM 87176-6210 or e-mail to Firm Administrator, P.O. Box 36210; Albuquerque, NM 87176-6210 or e-mail to BryanCzak@sturgeshouston.com.

Legal Assistant/Secretary
Full-time position available for legal assistant/secretary for small but extremely busy firm. Candidate should have a minimum of 5 years experience in public finance and transactional work, excellent typing skills and work well in a team setting. Competitive salary and benefit package. Please submit resume to rgomez@bhf-law.com or fax to 505.244.9266.

Legal Secretary
OfficeTeam, the leader in specialized administrative staffing is looking for qualified legal secretaries in the Albuquerque and Santa Fe areas. The ideal candidates must be self-starters with 1+ years legal experience. Experience putting together pleadings and litigations, and proficiency in Word or WordPerfect are required. OFFICETEAM, Specialized Administrative Staffing, Call Today. EOE. 505-888-4002, 6501 Americas Pkwy NE, Albuquerque, NM 87110. www.officeteam.com.

Legal Secretary
The law office of Miller Stratvert P.A. is accepting resumes for a legal secretary with a minimum of 5-7 years experience in litigation or in commercial / transactional law. Candidates must possess excellent writing and proofreading skills, legal terminology proficiency, organizational skills, MS Word/Outlook, be self-motivated and able to work with minimal supervision in a busy, fast-paced environment. Our firm offers competitive salary and a positive work environment. Please fax resume to Administrator at (505) 243-4408.

Paralegal
City of Santa Fe, City Attorney’s Office is currently seeking a full-time paralegal. The position requires at least five (5) years legal experience with advanced legal skills in litigation and contract review. To obtain an application, visit our website at www.santafenm.gov. Please submit your application to Human Resources, 200 Lincoln Avenue, P.O. Box 909, Santa Fe, NM 87504.

Consulting
Government Contracts Consultant: Government Contracts Consulting with over 25 years experience in subcontracts, contract administration, specifications, changes, small business contracting plans, policies, terminations, and remedy procedures. Contact Information: e-mail, dwebbthe3rd@comcast.net, telephone number 505-239-4170.

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ANNUAL EMPLOYMENT AND LABOR LAW SEMINAR

State Bar Center, Albuquerque  
Friday, October 7, 2005  
8.1 General CLE Credits

Co-Sponsor: Employment and Labor Law Section

8:00 a.m. Registration  
8:30 a.m. Impact of Changes to the Fair Labor Standards Act  
Camille Olson, Esq., Seyfarth Shaw LLP, Chicago

9:30 a.m. Current Developments at the EEOC  
Cari Dominguez, Chair-Equal Employment Opportunity Commission, Washington, DC

10:30 a.m. Break

10:45 a.m. Summary Presentation of Actual Case Before Jurors Who Will Then Deliberate and Reach a Decision  
Marty Esquivel, Esq., Narvaez Law Firm PA, Whitney Warner, Moody & Warner PC and JoAnn Erickson, Jury Consultant

11:45 a.m. Annual Section Meeting and Lunch (provided at State Bar Center)

1:00 p.m. Settlement Issues in Employment Law Cases  
Hon. Karen Molzen, United States Magistrate Judge

2:00 p.m. Labor Law Presentation  
Lee Peiffer, Esq., University of New Mexico

3:00 p.m. Break

3:15 p.m. Developments in Employment and Labor Law in New Mexico and Beyond  
Danny Jarrett, Esq., Noeding & Jarrett PC and S. Charles Archuleta, Esq., Keleher & McLeod PA

4:00 p.m. Focus Group/Juror Feedback  
JoAnn Erickson, Marty Esquivel, Esq. and Whitney Warner, Esq.

5:00 p.m. Adjourn

REGISTRATION – Annual Employment and Labor Law Seminar  
Friday, October 7, 2005 • State Bar Center, Albuquerque  
8.1 General CLE Credits

☐ Standard and Non-Attorney - $189  |  ☐ Government & Paralegal - $ 179  
☐ Employment and Labor Law Section Member - $169

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