A Message from the President

Dear Members,

It has truly been an honor and a privilege to serve the State Bar of New Mexico as President this past year. I am certain that those who came before me as president and those who will follow would agree that this is one of the most challenging professional opportunities for any attorney. I am grateful and humbled to have had the chance to serve as your State Bar President.

I want to express my thanks to those of you who took the time to contact me regarding issues and concerns facing our profession. I encourage all of us to continue to be active in the State Bar and the profession, and I leave this position knowing that the State Bar is in the very capable hands of the Board of Bar Commissioners (BBC) and an excellent State Bar staff. As I turn the gavel over to Virginia R. Dugan, who will serve as your next President, I would like to give you a brief update on some of the major issues we’ve tackled this year.

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The 2006 License and Dues Forms have been mailed. See page 8
Lawyers Professional Liability Insurance

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THE FINAL STRETCH
TUES., DEC. 27 - FRI., DEC. 30 • STATE BAR CENTER

The Annual Review of Civil Procedure
7.5 General and 1.2 Ethics CLE Credits • $229
☐ Dec. 27, 9 a.m. • 4:30 p.m.
☐ Dec. 29, 9 a.m. • 4:30 p.m.

Bridge the Gap 2005: Developing Winning Courtroom Strategy
6.3 General, 2.0 Professionalism and 1.2 Ethics CLE Credits • $239
☐ Dec. 27, 9 a.m. • 5 p.m.
☐ Dec. 29, 9 a.m. • 5 p.m.

The Basics of Real Estate Transactions from Negotiation to Closing
5.6 General and 1.0 Ethics CLE Credits • $179
☐ Dec. 27, 9 a.m. • 3 p.m.

Dementia, Capacity and Undue Influence of the Elderly
4.2 General CLE Credits • $119
☐ Dec. 27, 9 a.m. • 12:30 p.m.
☐ Dec. 29, 9 a.m. • 12:30 p.m.

Current Legalities and Realities of the End of Life Debate
3.5 General and 1.0 Ethics CLE Credits • $129
☐ Dec. 27, 1 • 5 p.m.
☐ Dec. 29, 1 • 5 p.m.

How to Win Your Next Jury Trial Using the Power Trial Method
7.2 General CLE Credits • $219
☐ Dec. 28, 9 a.m. • 3:30 p.m.

Legislative Process: A 2005 Update
2.4 General CLE Credits • $79
☐ Dec. 28, 10 a.m. • Noon

Cashing Out: Six Ways Business Owner Clients Can Sell Their Businesses
1.8 General CLE Credits • $69
☐ Dec. 28, 1 • 2:30 p.m.

Recent Changes to the UCC in New Mexico
1.2 General CLE Credits • $49
☐ Dec. 28, 2•45 • 3:45 p.m.

Lawyering with Emotional Intelligence
2.0 Professionalism and 1.2 Ethics CLE Credits • $99
☐ Dec. 28, 9 • 11:45 a.m.

DUI in New Mexico
5.3 General CLE Credits • $149
☐ Dec. 28, 12•15 • 4:45 p.m.

Public Health Emergencies
4.5 General, 2.0 Professionalism and 1.2 Ethics CLE Credits • $199
☐ Dec. 28, 9 a.m. • 4 p.m.

2005 Professionalism: Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community
2.0 Professionalism CLE Credits • $59
☐ Dec. 29, 8•30 • 10:30 a.m.
☐ Dec. 29, 12•30 • 2:30 p.m.
☐ Dec. 30, 8•30 • 10:30 a.m.

Ethics: Now What Are You Gonna Do?
1.2 Ethics CLE Credits • $39
☐ Dec. 29, 10•30 • 11:30 a.m.
☐ Dec. 29, 2•45 • 3:45 p.m.
☐ Dec. 30, 10•30 • 11:30 a.m.

REGISTRATION: VIDEO REPLAYS - THE FINAL STRETCH

Name: ___________________________________________ NM Bar#: _______________________
Firm: _______________________________________________________________________________
Address: _____________________________________________________________________________
City/State/Zip: __________________________________________________________________________
Phone: __________________________ Fax: ____________________________________________
E-mail address: ________________________________________________________________
Program Title: ______________________________________ Program Date/Time: ______________
Program Cost: $__________ Payment Options: ☐ Enclosed is my check in the amount of $__________ (Make Checks Payable to: CLE)
☐ VISA ☐ Master Card ☐ American Express ☐ Discover ☐ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. ____________________________________________ Exp. Date ____________
Signature ___________________________________________________________________________

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797 - 6071. Register Online at www.nmbar.org
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*From the New Mexico Court of Appeals*

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**Professionalism Tip**

As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

**Meetings**

**December**

20  Children’s Law Section Board of Directors, noon, Juvenile Justice Center

**January**

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

9  Attorney Support Group 5:30 p.m., First United Methodist Church, Albuquerque

9  Taxation Section Board of Directors noon, via teleconference

11  Law Office Management Committee noon, State Bar Center

11  Membership Services Committee noon, via teleconference

**State Bar Workshops**

**January**

25  Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar

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

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

**February**

22  Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar

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

The Client Protection Commission and Fund are expected to be established by the Supreme Court very soon. New Mexico has long been last in the nation with its client protection fund. In fact, the fund was bankrupt and unable to accept any claims in 2003, leaving individuals who were financially harmed by dishonest and unscrupulous attorneys with no recourse. In 2004 and 2005, the State Bar stepped in and funded client protection, without a dues increase, up to $50,000. Seeking a more permanent and equitable solution to the client protection problem, the BBC asked the Supreme Court to establish a Client Protection Commission within the State Bar and to fund the Client Protection Fund through MCLE sanctions. The Supreme Court embraced this concept and is expected to issue the corresponding rules soon.

Casemaker is perhaps the greatest membership benefit the State Bar can offer its members. Casemaker, a free online legal research product similar to Lexis or Westlaw, will be launched during our annual meeting in Durango in July 2006. Casemaker is a product made available at no cost to members through the State Bar and will contain most every aspect of legal research needed by New Mexico practitioners. It also will contain federal material and will provide members with access to the other 23 Casemaker states, which include Texas, Colorado and Utah. Look for more information about Casemaker in the coming months.

Mandatory Disclosure of Malpractice Insurance has been adopted by the Supreme Court. As you are most likely aware, the Supreme Court issued an Order mandating the disclosure of malpractice insurance by all New Mexico attorneys beginning in 2006 as part of your 2006 dues and licensing statement, which you should already have received. The State Bar’s Lawyers Professional Liability Committee (LPL), chaired by Briggs Cheney, studied the issue at length and, through the BBC, recommended that the Supreme Court adopt an Order for disclosure to the Court, without disclosure to the public. The BBC and Supreme Court agreed with the LPL Committee’s belief that this issue should be addressed incrementally, and that the first step is to collect data necessary to know what percentage of New Mexico lawyers have coverage.

Reciprocal Licensing between states for attorneys has been the subject of much study and discussion in recent years, both nationally and in New Mexico. The fundamental issue is whether reciprocity benefits or hurts the New Mexico Bar and the public. On this question, the membership of the State Bar is divided. Consequently, the BBC did not make a recommendation to the Supreme Court either in favor of or against the controversial issue of reciprocity. I expect this issue to be the subject of additional study over the coming years.

The Bridge to Justice Legal Helpline was created in 2005 with a grant from the IOLTA program and support from the State Bar. This modest means legal helpline seeks to fill the gap for an under-served portion of New Mexico’s population—the working poor. The program helps those whose income is just above the limit for most legal service providers with legal information, advice and limited brief services on consumer protection and employment issues, housing, landlord/tenant and foreclosures. This helpline has served over 250 residents since January.

The Classroom Law Project was another new program for 2005. In partnership with the Center for Civic Values and the State Bar, this classroom program paired attorneys with classroom teachers in every grade level to promote students’ recognition of the impact of law in their daily lives, awareness of their rights and responsibilities as citizens and an appreciation of the legal system of the United States. This pilot program is expanding to more schools in 2006.

Consumer education and elder issue workshops continued throughout the state and in every judicial district in 2005. Topics which were addressed included consumer debt and bankruptcy, estate planning, end-of-life issues and advanced directives, immigration, housing and landlord/tenant.

The Senior Legal Handbook was completed in 2005 by the Lawyer Referral for the Elderly Program, and over 1,500 copies have been distributed to seniors across the state. The handbook, written for the layperson, provides a legal resource on a wide variety of senior legal topics. The handbook is also available on the State Bar Web site.

KOB Call-In & Univision Spanish Call-In: The KOB Call-in assisted over 1,600 callers to this popular legal information resource run by the Bar Foundation in cooperation with the Senior Lawyers Division. In addition, the Bar Foundation added a new quarterly Spanish call-in program in cooperation with the local Univision station, providing the state’s Spanish-speaking population a resource for legal information.

Access to Justice Commission: The State Bar and the Bar Foundation continued to work in 2005 with the Supreme Court’s Access to Justice Commission on issues surrounding civil legal services for the poor. Four public hearings were held throughout the state to receive input from the community on access to the justice system. The commission is currently working on new pro bono and funding initiatives to support civil legal services for the poor.

New Pro Bono Plan: In September 2005, the Board of Bar Commissioners approved a new ten-step pro bono plan presented by the State Bar’s Legal Services and Programs Committee and will work with the Supreme Court and the Access to Justice Commission to increase the pro bono effort in this state. This new initiative includes judicial leadership, local bar involvement and new incentives for attorneys. The implementation phase should begin in 2006.

Pro Hac Vice: The State Bar supported the new Supreme Court Rule on Pro Hac Vice begun in January 2005, and since that time over $68,000 has been raised from out-of-state attorneys seeking to appear in New Mexico state court. The fund will be distributed annually beginning in 2006 to support civil legal services for the poor.

Legal Assistance for Military Personnel (LAMP): The LAMP program was created to assist military personnel who are serving our country in a time of war and are in need of legal services. Since there are three military bases in New Mexico, there has been a greater number of requests for legal assistance here than in some other states. The LAMP program receives calls and e-mails from military personnel stationed all over the world who need legal assistance in New Mexico. In 2005 we referred 28 cases to private attorneys for pro bono assistance.

Again, I thank you for the opportunity to serve as President of the State Bar of New Mexico. It has been my pleasure.

Sincerely,

Charles J. Vigil
President
Court News

NM Supreme Court Judicial Performance Evaluation Commission

Improving The Performance of Judges

The Judicial Performance Evaluation Commission (JPEC), created by the New Mexico Supreme Court, evaluates the performance of appellate, district and metropolitan court judges standing for retention in New Mexico.

The commission's work in 2005 focuses on conducting final evaluations of the 14 Bernalillo County Metropolitan Court judges standing for retention: Sandra Clinton, Kevin Fitzwater, Frank Gentry, Theresa Gomez, Victoria Grant, J. Wayne Griego, Cristina Jaramillo, Loretta Lopez, Anna Martinez, Judith Nakamura, Daniel Ramczyk, Frank Sedillo, Sharon Walton and Victor Valdez. At least 45 days before the November 2006 general election, JPEC will release the results of the evaluation to the media and the public.

Lawyers who have had direct experience with the above Bernalillo County Metropolitan Court judges between Aug. 1, 2004 and Sept. 26, 2005 will receive a questionnaire to complete in the beginning of January 2006. It is important to the project to get such feedback. The JPEC would like to see an increase in the response rates from attorneys with direct experience with the judges. Please take the time to complete and return the questionnaire.

The questionnaires are returned to Research and Polling, Inc., consultant to JPEC. Research and Polling puts together aggregate results by population group (lawyers, jurors, court staff and resource staff). The JPEC does not see individual results. Comments are retyped and submitted to JPEC for review and not provided to the judges. Research and Polling destroys the individual responses; thus, JPEC does not know who completed the survey.

For additional information, contact Felix Briones, Jr., JPEC chair, (505) 325-0258.

Law Library

December Hours

The New Mexico Supreme Court Law Library will be closed on the following dates and times.

December 23—Will close at 1 p.m.
December 24—Closed
December 26—Closed

December 30—Will close at 1 p.m.
December 31—Closed

First Judicial District Court

Annual Family Law Potluck

The 1st Judicial District Court will host its annual Family Law potluck at noon, Dec. 20, in the Grand Jury Room of the Steve Herrera Judicial Complex (second floor) in Santa Fe. Judge Raymond Z. Ortiz will be in attendance. Bring a dish to share. For more information, contact Elege Simons, (505) 982-3610, or esimons@rubinkatzlaw.com.

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1978 to 1987

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the court, in Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1978 to 1987 included 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 Jan. 13, 2006.

Attorneys who may 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 be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the Court in the civil cases for years 1991 to 1992, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 20 to Dec. 22. Verify exhibit information with the Special Services Division, (505) 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Fourth Judicial District Court

Announcement Of Vacancy

A vacancy on the 4th Judicial District Court will exist in Las Vegas as of Dec. 31 upon the retirement of the Honorable Jay G. Harris.

The chair of the 4th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/index.htm, or call Reva Chapman, (505) 277-5665, to have an application e-mailed/faxed/mailed. The deadline for applications is 5 p.m., Dec. 22. Applications received after that date will not be considered.
Fifth Judicial District Court

Announcement of Vacancy

A vacancy on the 5th Judicial District Court will exist in Carlsbad as of Dec. 31 upon the resignation of the Honorable James L. Shuler.

The chair of the 5th Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site: http://lawschool.unm.edu/judsel/index.htm, or call Reva Chapman, (505) 277-5665, to have an application e-mailed/faxed/mailed. The deadline for applications is 5 p.m., Dec. 22. Applications received after that date will not be considered.

Sixth Judicial District Court

Change of Physical Location of Public Auctions

Effective immediately, all public auctions relating to Grant County cases in the 6th Judicial District Court will be held in the foyer/lobby of the Grant County Courthouse, Silver City, New Mexico.

Thirteenth Judicial District Court

New District Court Clerk

As of Dec. 5, the 13th Judicial District Court in Valencia County has a new district court clerk. All correspondence should be addressed to: Geri Lynn Sanchez, District Court Clerk. The address and telephone number remain the same.

U.S. District Court For The District of New Mexico

Suspension of 2006 Annual Federal Bar Dues

With the concurrence of all active Article III judges in the District of New Mexico, it is ordered that as of Jan. 1 the annual attorney bar dues of $25 shall be suspended for the calendar year 2006. All delinquent dues are still required to be paid. The administrative order may be viewed on the court’s Web site: http://www.nmcourt.fed.us.

STATE BAR NEWS

 Attorney Support Group Change in Meeting Date

Due to the holidays, the next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 9, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Appointments to the Board of Editors

With the approval of the Board of Bar Commissioners, incoming President Virginia Dugan appointed Paul Bleicher, Elizabeth Staley (attorney positions) and Janet Blair (lay position) to the board of editors to serve two-year terms. These appointments replace departing members Cathryn Novich Brown, Robert Cates, and Steven Sandoval.

Mandatory Disclosure of Malpractice Insurance

Rule No. 05-8500, In the Matter of Mandatory Disclosure of Professional Liability Insurance Coverage (reprinted on page 23 from the Aug. 8, Vol 44, No. 31 Bar Bulletin), states that lawyers are exempt from the provisions of the order when “...the attorney’s entire compensation [is] derived from the practice of law ... in the attorney’s capacity as an employee handling the matters of a corporation or organization, or an agency of the federal, state, or local government ...” (emphasis added). It also excludes judges. A part-time federal magistrate would not be exempt.

If a corporate or agency lawyer moonlights and bills clients (or does contingency work), he or she must report. For example, attorneys working at Sandia Labs, the public defenders or Sun Health, having all of their income paid by their corporate client, do not have to report.

Paralegal Division

The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., Jan. 11, at the State Bar Center. Briggs Cheney will present Substance Abuse in the Office: The First To Know ... Then What? Attendees will earn 1.0 CLE ethics credit. The cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. Registration begins at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 872-7470, or Amy Paul, (505) 883-8181.

OTHER BARS

Albuquerque Bar Association

Monthly Meeting Luncheon and CLE

The Albuquerque Bar Association’s monthly meeting luncheon will be at noon, Jan. 3, at the Albuquerque Petroleum Club. U.S. District Court Chief Judge Martha Vazquez will provide the luncheon address. The CLE program, Protecting Consumers from Predators, will be presented by Richard Feferman of Feferman & Warren.

2006 LICENSE AND DUES

• The 2006 license and dues forms have been mailed.
• License and dues are due on or before Feb. 1, 2006.
• Members who have not received the form by the end of December should notify the State Bar office, (505) 797-6092 or (505) 797-6035.
• For members’ convenience, dues may be paid online through secured eCommerce at www.nmbar.org.
• License and disciplinary fees are mandatory and must be paid to maintain license status.
• Without exception, dues and license fees are due regardless of whether you received your form.

Late fees may be assessed if payment is not postmarked by Feb. 1, 2006.
for 2.0 general CLE credits, will be held from 1:30 to 3:30 p.m. Lunch only: $20 members/$25 non-members; lunch and CLE: $60 members/$85 non-members; and CLE only: $40 members/$60 non-members. Register by noon, Dec. 29, at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail or phone to the Bar office at 400 Gold SW, Suite 620, Albuquerque 87102; or call (505) 842-1151 or (505) 243-2615.

**American Bar Association**

**2006 Michael Franck Award**

The American Bar Association (ABA), through the Center for Professional Responsibility, is pleased to announce the 2006 Michael Franck Award. The award is named in honor of the late director of the State Bar of Michigan and long-time champion of improvements in lawyer regulation in the public interest. The ABA presents this award each year to someone whose contributions in the professional responsibility field evidence the highest level of dedication to the legal profession. Additional information and an application form are located online at http://www.abanet.org/cpr/franck.html. Questions can be directed to cpr@abanet.org or to George Kuhlman, ABA Ethics Counsel, (312) 988-5300. The award will be presented June 1 at the 32nd National Conference on Professional Responsibility in Vancouver, British Columbia. The deadline for nominations is Jan. 6.

**UNM School of Law**

**Law Library Exam and Holiday Hours**

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<td>Dec. 23–Jan. 2</td>
<td>Library Closed</td>
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<tr>
<td>Jan. 3–10</td>
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<td>Jan. 8</td>
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<td>Jan. 11</td>
<td>Library resumes regular hours, 8 a.m. to 11 p.m.</td>
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**LEGAL SPECIALIZATION**

Thank you to the 2005 Board of Legal Specialization for their efforts and support of this New Mexico Supreme Court Program.

**2005 Legal Specialization Board**

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<tr>
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<td>Farmington</td>
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<tr>
<td>Thomas M. Domme</td>
<td>Albuquerque</td>
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<tr>
<td>Daniel Shapiro</td>
<td>Albuquerque</td>
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<td>Daniel J. Behles</td>
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<td>Twila B. Larkin</td>
<td>Albuquerque</td>
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<td>David Thomson</td>
<td>Santa Fe</td>
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Thank you to each of the fourteen (14) Legal Specialization Specialty Committees for their work throughout the year. Each Specialty Committee reviews attorney applications for certification or recertification and provides a recommendation of approval or denial to the Board. The Legal Specialization program could not exist without the volunteer efforts of the Board and Specialty Committees.

Access www.nmbar.org> Other Bars/Legal Groups for information regarding the Legal Specialization program including a list of Board Certified Specialists.
Join a State Bar Practice Section

By joining you may:
• Obtain networking and educational opportunities with colleagues.
• Be connected to other section members through electronic discussions.
• Engage in legislative advocacy.

Become a member by:
• Visiting a section page of www.nmbar.org. Click on Divisions/Sections/Committees and select the section you wish to join.
• Completing the form below.

Please check the section(s) you wish to join and indicate method of payment.

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<td>$15</td>
<td>☑ Check enclosed ☑ Visa ☑ Amer. Express</td>
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<tr>
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<td>$20</td>
<td>☑ Master Card ☑ Discover</td>
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<td>✚ Business Law</td>
<td>$10</td>
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The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

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**Hearsay**

Curtis W. Schwartz, of the Modrall Sperling law firm, has been recognized among 2006’s Best Lawyers in America in the areas of tax, trusts and estates. This is the 16th consecutive year that he has received this honorable recognition. Schwartz represents clients in state and federal tax matters from a wide range of industries including extractive, retail, manufacturing, transportation, franchise, defense and construction. He has worked extensively with industry-specific taxes such as severance, gasoline, motor fuel and motor transportation taxes and with taxes of general application such as the corporate income, gross receipts and property taxes.

Bruce Hall, a partner with the law firm of Rodey, Dickason, Sloan, Akin & Robb, PA, was selected by Lawdragon Magazine, as one of the top 500 judges in the United States. The term “top 500 judges” encompasses court judges as well as private mediators. Hall, a practicing litigator and mediator, was chosen from thousands of nominated judges and mediators nationwide, considered by practicing lawyers and judges to be the finest in their field.

The top 500 judges will be announced in the January 2006 issue of Lawdragon Magazine, a national publication and Web site for lawyers. Lawdragon has been featured in the Times of London and Bloomberg Business News as the guide to the best lawyers and judges in the United States.

Kenneth Bateman, a partner with the Santa Fe firm of Gerber & Bateman, PA, was named a Fellow of the American College of Trust and Estate Counsel (ACTEC), an organization of over 2,600 trust and estate lawyers and law professors from the United States and Canada who have been affirmed by their peers as having made outstanding contributions to the practice of trust and estate law. Bateman is a member of Wealth Counsel, LLC, the Real Property, Probate and Trust Section of the American Bar Association and the Real Property, Probate and Trust Section and Taxation Law Section of the State Bar of New Mexico.

The Albuquerque Bar Association named Chief Magistrate Judge Lorenzo F. Garcia as the “Outstanding Judge of 2005” at the Bar Association’s Annual meeting and luncheon on Dec. 6.

Judge Garcia is one of the state’s longest-serving judges with a judicial career that spans close to 28 years. He was first appointed to the First Judicial District Court in 1978 and during his second term of office was named to the New Mexico Court of Appeals. He retired from the appellate court prior to his appointment to the U.S. District Court in 1992. Judge Garcia was previously a partner with Santa Fe’s prestigious Jones Law Firm where he focused on complex litigation.

Geno Zamora has announced his intention to run for the office of attorney general. In addition to Zamora’s legal practice, his public service experience includes community leadership positions such as president of the St. Michael’s High School Foundation, member of the Supreme Court Criminal Justice Task Force, member of the New Mexico Sports Authority, board member of the New Mexico Bar Association and Hispanic Bar Association, and president of the First Judicial District Bar Association.

Attorney Robert L. Smith has joined the Revo Law Firm, PA, as an associate specializing in personal injury cases. Smith has 13 years experience in civil and criminal defense law. He has a bachelor’s degree and a law degree, both from UNM.

**In Memoriam**

Doctor (Doc) S. Morrisey, 74, a retired Air Force lieutenant colonel who practiced law in Albuquerque after his military career, died Nov. 10. Morrisey was the husband of the late Charlesetta “Charlie” Morrisey, a prominent community activist and volunteer. Morrisey moved to Albuquerque in 1970 when he was transferred from Massachusetts to Kirtland Air Force Base. After retiring from the military, he graduated from the UNM School of Law and practiced civil law in Albuquerque.

David A. Rammelkamp, 57, a resident of Albuquerque, died Dec. 3. He is survived by his wife, Pennie Rammelkamp, of Albuquerque; daughter, Abby Rammelkamp of Perth, Australia; mother, Mabel Rammelkamp of Albion, MI; and brothers, Robert Rammelkamp of Los Angeles and Charles Rammelkamp of Baltimore. Rammelkamp was a practicing attorney in Atlanta and Albuquerque. He was a loving husband and dad who will be greatly missed.
MY HOUSE IS YOUR HOUSE
EMINENT DOMAIN AFTER KELO

By Lora Anne Lucero and Randy Van Vleck

The United States Supreme Court’s decision in Kelo v. City of New London, 125 S.Ct. 2655 (2005), was the hot-button eminent domain case in the 2004 term. This case has been widely misunderstood as a broadening of the power of eminent domain, while in truth, it simply represents an affirmation of 50 years of takings jurisprudence.

The City of Albuquerque, Bernalillo County and the New Mexico Municipal League, among others, have adopted resolutions opposing the result in Kelo. Following the lead of at least 22 states, legislation may be introduced in the 2006 New Mexico Legislature urging reform of the eminent domain codes. Reforms may be needed in this arena but not because the Kelo Court made any sweeping changes to the Public Use Clause. To the contrary, the Court refused to heed the request of petitioners and some amici to either jettison economic development as a permissible public use or, in the alternative, to devise a higher level of scrutiny for eminent domain when used to promote economic development projects. Instead, Justice John Paul Stevens, in an important victory for local governments, gave deference to the rationale and decisions of a local governmental entity emphasizing the “great respect” that the Supreme Court owes to state legislatures and state courts in discerning local public needs. “For more than a century,” he noted, “our public use jurisprudence has wisely eschewed rigid formulas determining what public needs justify the use of the takings power.” 125 S.Ct. at 2664.

While debate ensues in the state capitols and city halls around the country, it might be useful to consider the Kelo facts which have all but been drowned out in the rush to “reform.”

The city of New London, Connecticut, lost more than 1,500 jobs following the closure of the Naval Undersea Warfare Center in 1996. By 1998, the city’s unemployment rate was nearly double that of the state. The state designated the community a “distressed municipality.” A private nonprofit development agency was enlisted to assist the city in planning for the revitalization of the Fort Trumbull area. In February 1998, a pharmaceutical company announced it would build a $300 million research facility adjacent to Fort Trumbull. Hoping the facility would be a catalyst for further revitalization, neighborhood meetings were held and economic development plans were prepared. The state committed more than $15 million for the effort. The state reviewed and approved the plans, which called for a waterfront conference hotel, restaurants, shopping, marinas and a pedestrian river walk. On one parcel, 90,000 square feet of research and development office space was planned to complement the pharmaceutical research facility.

New London’s negotiations with the majority of property owners were successful; but nine owners refused to sell, and condemnation proceedings were initiated. The property owners argued their properties were not blighted and the taking violated the “public use” requirement of the Fifth Amendment. Unlike New Mexico, Connecticut had no requirement that the property to be taken for economic development purposes be blighted or in a deteriorated condition. The Connecticut Supreme Court ruled all of the proposed takings were valid and that economic development qualified as a valid public use. The United States Supreme Court agreed.

The court readily recognized that it has long been accepted that government may not take property from one individual for the sole purpose of transferring it to another private party, even if the first person is paid just compensation. On the other hand, it is equally clear that property may be transferred from one private party to another if future “use by the public” is the purpose of the taking. An historic example of this is the transfer of private land to a common carrier (railroad).

In the first of its pronouncements to be widely misunderstood, the court reiterated its position on use of condemned land by the public. “This court long ago rejected any literal requirement that condemned property be put into use for the general public.” While this has been characterized as a gross expansion of the power of eminent domain, it is in truth simply a restatement of 50 years of takings jurisprudence.

Justice Stevens, along with Justices Breyer, Souter, Ginsburg and Kennedy, concluded that “[t]he city has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community”… and “[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption”… the “plan unquestionably serves a public purpose.” 125 S.Ct. at 2665. Justice Stevens mentioned the words “planning,” “plans,” and “planner” more than 30 times in his opinion, emphasizing the importance of planning for community revitalization.

Finally, the Court left open the possibility of stricter regulation of such eminent domain practices by emphasizing that nothing in the decision would prevent any state from placing further restrictions on its exercise of the takings power. New Mexico has in place additional restrictions; therefore, the mass hysteria the nation has generally experienced in response to the Kelo decision is not an issue in New Mexico.

The New Mexico Legislature has enacted a more restrictive process that applies when eminent domain is to be used for economic development purposes. See NMSA § 42A-3-1. The eminent domain process begins with Article II, Section 20 of the New Mexico Constitution. This section provides that private property shall not be taken or damaged for public use without just compensation. This authority alone leaves New Mexico citizens in the same situation as Susette Kelo.

However, New Mexico statutory law limits eminent domain and defines acceptable public use as follows:

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private buildings and grounds;

(2) canals, aqueducts, reservoirs, tunnels, flumes, ditches, conduits for conducting or storing water for drainage, the raising of banks of streams and the removing of obstructions;

(3) roads, streets, alleys and thoroughfares;

(4) parks and playgrounds;

(5) ferries, bridges, electric railroads or other thoroughfares or passways for vehicles;

(6) canals, ditches, flumes, aqueducts and conduits for irrigation;

(7) electric lines;

(8) electric utility plants, properties and facilities consistent with the authority granted in Chapter 3, Article 24 NMSA 1978;

(9) the production of sand, gravel, caliche and rock used or needed for building, surfacing or maintaining streets, alleys, highways or other public grounds or thoroughfares; and

(10) public airports or landing fields incident to the operation of aircraft. NMSA 1978 §42A-3-1.

Notably absent from the statute is any reference to a municipality’s ability to condemn private property for economic development purposes. Additional statutes specify powers granted to municipalities. Condemnation for economic development purposes is specifically provided for in (1) NMSA §3-46-1 to §3-46-45, the Urban Development Law; (2) NMSA §3-60-1 to §3-60-67, the Community Development Law; and (3) NMSA §3-60A-1 to §3-60A-13 and §3-60A-14 to §3-60A-48, the Metropolitan Redevelopment Code. These sections provide the only vehicle by which private property can be condemned for economic development purposes. These three statutes also provide significant safeguards for the private individual to prevent a Kelo-type situation from happening in New Mexico.

First, as a precondition to using any of these statutes to condemn property for economic development purposes, the local governing body must adopt a resolution determining that a slum or blight condition exists in the area. Additionally, the resolution must specify that the rehabilitation, clearance or redevelopment of that area is in the interest of the public health, safety, morals or welfare of the municipal residents. A public hearing must be held prior to, and in support of, the resolution. Redevelopment may then take place, but only in accordance with a comprehensive redevelopment plan that is also subject to discussion at a public hearing. These procedures may not protect an individual’s property from being condemned for economic development purposes. However, they are intended to ensure that the government has established a comprehensive plan for the redevelopment; that the territory slated for condemnation (as a whole) is in a blighted or deteriorating condition; and, most importantly, that the public has had not one, but several opportunities to voice its concerns on the issue.

Eminent domain abuses do occur. At a minimum, a property owner targeted with condemnation of his home will suffer from the turmoil and upheaval regardless of whether the public needs his property for a freeway, a baseball stadium, or a less traditional economic development project, as was the case in New London.

Additional statutory reforms may be considered in the wake of Kelo. For example, rather than restricting the power of eminent domain, the New Mexico Legislature might examine how compensation is calculated when property is taken. Perhaps some additional compensation over and above the constitutional minimum may be required in certain circumstances. “Just compensation” might not be just.

As one approach, Professor Thomas Merrill suggests that when occupied homes, businesses or farms are taken, the owner might be entitled to a percentage bonus above fair market value equal to one percentage point for each year the owner has continuously occupied the property. In the alternative, Professor Merrill suggests that when a condemnation produces a gain in the underlying land values due to the assembly of multiple parcels, some part of this assembly gain might be shared with the people whose property is taken. [Planning & Environmental Law, Vol. 57, No. 9]

A further requirement might be that condemnations be connected to a “carefully formulated” plan with meaningful public participation. The public perception, rightly or wrongly, is that many of the development and land use approvals at the local level appear arbitrary and unreasonable because they are not connected to the community’s plan. Justice Stevens acknowledged the importance of the City of New London’s economic development plan in the revitalization of the community. Similarly, New Mexico legislators might seize this opportunity and elevate the status of a community’s comprehensive plan to ensure further that the power of eminent domain is not wielded in an arbitrary or seemingly random manner. Eminent domain is a tool of last resort, but it should remain a tool in the community’s land use toolbox.

About the Authors

Lora Anne Lucero, American Institute of Certified Planners, a professional accreditation of the American Planning Association, is a resident of Albuquerque and editor of the Planning and Environmental Law Journal. She consults with the American Planning Association’s Amicus Curiae Committee, which filed an amicus brief in support of the City of New London.

Randy Van Vleck is the general counsel to the New Mexico Municipal League, a board certified specialist in local government law and fellow in local government law of the International Municipal Lawyer’s Association.
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<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>2.0 P</td>
</tr>
</tbody>
</table>
### WRITS OF CERTIORARI

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

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

**EFFECTIVE DECEMBER 16, 2005**

<table>
<thead>
<tr>
<th>Petitions for Writ of Certiorari Filed and Pending:</th>
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<tr>
<td>NO. 29,504 McNeill v. Rice Engineering (COA 25,213)</td>
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<td>NO. 29,580 State v. Graham (COA 25,836)</td>
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<td>NO. 29,529 State v. Phillips (COA 25,147)</td>
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<td>NO. 29,560 Montoya v. Brave (12-501)</td>
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**Certiorari Granted but not yet Submitted to the Court:**

(Parties preparing briefs)

<table>
<thead>
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<th>Date Writ Issued</th>
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<td>NO. 29,179 State v. Taylor (COA 23,477)</td>
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<td>NO. 29,334 State v. Garvin (COA 24,299)</td>
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<td>NO. 29,350 Doe v. Santa Clara Pueblo (COA 25,125)</td>
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<td>NO. 29,442 State v. Jojola (COA 24,148)</td>
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<td>NO. 29,484 State v. Wilson (COA 25,017)</td>
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<td>NO. 29,437 City of Sunland Park v. Harris (COA 23,593)</td>
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<td>NO. 29,478 State v. Monteleone (COA 24,811/24,795)</td>
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<td>NO. 29,495 State v. Campos (COA 25,513)</td>
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<td>NO. 29,517 State v. Bonjour (COA 25,633)</td>
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<td>NO. 29,515 Shiver v. NM Mutual Casualty (COA 25,106)</td>
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<td>NO. 29,521 State v. Parra (COA 25,484)</td>
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<td>NO. 29,527 State v. Chee (COA 25,112)</td>
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<td>NO. 29,528 State v. Jensen (COA 24,905)</td>
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<td>NO. 29,507 State v. Noriega (COA 25,593)</td>
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<td>NO. 29,505 State v. Bocanegra (COA 25,382)</td>
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<td>NO. 29,533 State v. Kirby (COA 25,891)</td>
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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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

EFFECTIVE DECEMBER 16, 2005

CERTIORARI GRANTED AND SUBMITTED TO THE COURT

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Name</th>
<th>Submission Date</th>
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<tbody>
<tr>
<td>NO. 29,538</td>
<td>State v. Gallegos (COA 24,480)</td>
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<tr>
<td>NO. 29,537</td>
<td>State v. Rodarte (COA 25,273)</td>
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PETITION FOR WRIT OF CERTIORARI DENIED:

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<tr>
<th>No.</th>
<th>Case Name</th>
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<td>NO. 29,531</td>
<td>State v. Jones (COA 24,864)</td>
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<tr>
<td>NO. 29,526</td>
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<td>NO. 29,542</td>
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<td>State v. Rogers (COA 25,738)</td>
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</table>

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

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fé, NM 87504-2008 • (505) 827-4925
EFFECTIVE DECEMBER 9, 2005

PUBLISHED OPINIONS

NO. 25159  6th Jud Dist Grant CV-03-47, In re Application for Permit in Gila-San Francisco Underground Water Basin; Silver City, Exxon Mobil and State Engineer v. Scartaccini (affirm) 12/5/05

NO. 24902  1st Jud Dist Santa Fe PB-97-152, In re Estate of Alex Armijo; Cecilia Redman-Tafoya v. Anthony Armijo (reverse) 12/5/05

NO. 25348  9th Jud Dist Curry SA-03-29, Katrina Vigil and Taylor Allen v. Paul and Shannon Fogerson (affirm) 12/5/05

NO. 24979  2nd Jud Dist Bernalillo CV-03-3133, Steven Nance v. L.J. Dolloff Associates, Inc. (affirm) 12/6/05

NO. 25100  7th Jud Dist Torrance DM-01-7, Ariel Poncho v. James Bowdoin v. Jamie Poncho (reverse and remand) 12/7/05

NO. 2399  23rd Jud Dist Dona Ana CR-01-576, State v. Elisa Bravo (affirm) 12/8/05

NO. 25205  5th Jud Dist Chaves CR-03-143, State v. Andrew Nichols (affirm) 12/8/05

NO. 24662  2nd Jud Dist Bernalillo CV-03-3237, Daniel Hernandez v. Wells Fargo (affirm) 12/8/05

NO. 24026 & 24027 & 24042  2nd Jud Dist Bernalillo CV-00-3870 & 95-6031, Albuquerque Commons Partnership v. Albuquerque City Council (reverse) 12/9/05

UNPUBLISHED OPINIONS

NO. 25907  2nd Jud Dist Bernalillo CR-03-2947, State v. Jerry Sedillo (affirm) 12/5/05

NO. 25899  2nd Jud Dist Bernalillo CR-03-2770, State v. Raymondo Gomez (affirm) 12/5/05

NO. 26129  12th Jud Dist Lincoln JR-05-11, State v. Tiffany T. (affirm) 12/6/05

NO. 25758  1st Jud Dist Santa Fe CV-02-223, Erika Cameron v. R. Lar Thomas (affirm) 12/7/05

NO. 25854  12th Jud Dist Otero CR-04-391, State v. Marvin Dean (affirm) 12/8/05

NO. 24699  1st Jud Dist Los Alamos DM-01-311, Liaohai Chen v. Ruowei Mo (affirm in part, reverse in part and remand) 12/9/05

NO. 25050  2nd Jud Dist Bernalillo CV-94-8466 and CV-95-1515, Sunchase Construction v. Regional Housing Authority and Lion Enterprises (affirm) 12/9/05

NO. 24358  12th Jud Dist Otero CR-02-20, State v. Ernie Fritz (affirm) 12/9/05

NO. 25867  5th Jud Dist Eddy CR-04-149, State v. Juan Rascon (affirm) 12/9/05

NO. 24425  2nd Jud Dist Bernalillo CV-95-6031, Albuquerque Commons Partnership v. Albuquerque City Council (vacate grant of attorney fees and costs) 12/9/05

Slip opinions for published opinions may be read on the court’s Web site:
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From the New Mexico Supreme Court
Effective October 26, 2005

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### Clerk Certificates

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<td><strong>Beatriz Aguirre-Strong</strong></td>
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<tr>
<td>1004 Tony Sanchez, SE</td>
</tr>
<tr>
<td>Albuquerque, NM 87123</td>
</tr>
<tr>
<td>(505) 332-3940</td>
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<tr>
<td><strong>John R. Biggers</strong></td>
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<td>PO Box 1469</td>
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<td>Austin, TX 78767-1469</td>
</tr>
<tr>
<td>(512) 472-9881</td>
</tr>
<tr>
<td><strong>Michelle S. Leighton</strong></td>
</tr>
<tr>
<td>4725 16th St., #101</td>
</tr>
<tr>
<td>Boulder, CO 80304</td>
</tr>
<tr>
<td>(303) 444-0236</td>
</tr>
<tr>
<td><strong>Anne Elizabeth Beauchene</strong></td>
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<td><strong>Sean E. Garrett</strong></td>
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<td><strong>Barbera W. Stephenson</strong></td>
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NO. 05-8500*
IN THE MATTER OF MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE COVERAGE

ORDER

WHEREAS, this matter came to the Court upon the recommendation of the New Mexico Board of Bar Commissioners and the New Mexico State Bar’s Lawyers Professional Liability Committee after significant study and consideration by both organizations;

WHEREAS, the Court recognizes the obligation of New Mexico attorneys to protect the public seeking professional legal advice, and to protect themselves in the event they require professional liability insurance;

WHEREAS, the Court acknowledges the importance of ascertaining the insured status of attorneys licensed in the State of New Mexico, in anticipation of assessing the future course of action, if any, regarding the possibility of allowing public access to information of a similar nature; and

WHEREAS, the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that, pursuant to Rule 17-202(A) NMRA of the Rules Governing Discipline, the State Bar of New Mexico shall include in the annual registration statement, certification of the following information:

1) Whether the attorney is engaged in the private practice of law or whether the attorney is exempt from the provisions of this Order because the attorney’s entire compensation derived from the practice of law is received in the attorney’s capacity as an employee handling legal matters of a corporation or organization, or any agency of the federal, state, local government, or a member of the judiciary who is prohibited by statute or ordinance from practicing law;

2) The county of the attorney’s primary practice and the number of practitioners in the attorney’s firm;

3) If engaged in the private practice of law, whether the attorney currently maintains in force and effect professional liability insurance, other than an extended reporting endorsement; and, if so, disclosing to the State Bar the amount of coverage, the amount of the deductible; and the name of the insurer; and

4) Whether the attorney intends to continuously maintain professional liability insurance during the period of time the lawyer is engaged in the private practice of law.

IT IS FURTHER ORDERED that the foregoing information shall be certified by each attorney admitted to the active practice of law in New Mexico in such form as may be prescribed by the State Bar of New Mexico as approved by this Court. The information submitted pursuant to this order is designed for internal use by the New Mexico State Bar and the Supreme Court only;

IT IS FURTHER ORDERED that full participation is essential so that this Court is apprized of the status of professional liability coverage within the Bar. Noncompliance with this order or supplying false information shall be treated as seriously as failure to pay annual license fees, see Rule 17-202 NMRA, and may lead to suspension, as outlined in Article II, Section 2.3 of the State Bar Bylaws;

IT IS FURTHER ORDERED that, if certification of the required information is not received before the last day of March, the Board of Bar Commissioners, through its Executive Director, shall certify to this Court the names of all active members failing to comply with the requirements set forth in this order; and

IT IS FURTHER ORDERED that the adoption of this order shall not make the State Bar of New Mexico, its officers, directors, representatives, or membership liable in any way to any person who has suffered loss by error or omission of an attorney. This order is adopted solely for the purposes stated herein and not for the purpose of making the State Bar of New Mexico, its officers, directors, representatives, or membership insurers or guarantors for clients with respect to the attorney-client relationship. This order does not create a claim against the State Bar of New Mexico for failure to provide accurate information or a report on the insured status of any attorney, or for implementation of any provision of this order.

IT IS SO ORDERED.

Done in Santa Fe, New Mexico, this 29th day of July, 2005.

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

BACKGROUND

{2} Drawing from the record and the briefs, we assume the following facts are accurate. Tazue Akutagawa (wife) and her now deceased husband, Taro Akutagawa (husband) engaged John Laflin—a principal in the Law Firm—to provide estate planning services. Laflin prepared a series of estate planning documents for the Akutagawas beginning in 1979, with various revisions and amendments, through 2002. The Akutagawas requested an estate plan that would be consistent with Japanese traditions and customs. Laflin prepared an A-B Trust for the Akutagawas, which consisted of a revocable survivors trust (Trust A) and an irrevocable decedents trust (Trust B). In accordance with Japanese custom, their eldest son, Stanley Yoshiro Akutagawa (son) was to be responsible to see to the needs of Taro or Tazue and his siblings, and to effect the wishes of his parents as to the distribution of property. The Akutagawas contend that the primary purpose of the trust was to allow all property owned by them at the death of the first of them to be available to support the survivor of them for his or her lifetime. Laflin contends in preparing the trust, the Akutagawas expressed a desire to minimize future estate taxes.

{3} The A-B Trust arrangement set up for the Akutagawas by Laflin is apparently a very common estate planning technique used in estates of married couples who want to provide for the surviving spouse and at the same time minimize estate taxes. The defense expert, Kenneth C. Leach (Leach), asserted by affidavit that Laflin and the Law Firm complied with the standard of care required of estate planning attorneys by including critical language in the trust amendment.

{4} In preparing revisions to the trust documents in 1998 and subsequently in 2002, a critical paragraph governing distributions from Trust B during the lifetime of the surviving spouse—present in previous versions of the trust—was omitted. As a result of the omission, the provisions for Trust B require that for any distributions from the trust, one of the trustees must be independent. Since neither wife nor son are independent as to Trust B, the wishes of the Akutagawas that the trust be controlled by son are thwarted by the omission. The omission of the critical paragraph prevents wife from practical access to the property that she thought would be available to her.

{5} It is unclear from the complaint when Plaintiffs became aware of the omission restricting the unconditional access of the surviving spouse to the Trust B assets to the extent required by applicable Internal Revenue Code and Internal Revenue Service regulations, so as to minimize the potential for future estate taxes. The governing A-B Trust agreement required that assets in the trust be divided between Trust A and Trust B so that each trust had a net community asset value equal to one-half the total value of the trust estate. Under the terms of the estate plan, half of the Akutagawas’ property becomes property of Trust B after the death of the first spouse. Language in versions of the trust agreement prior to 1998 provided that distributions under Trust B would be under the control of the son and surviving spouse. The parties stipulated that there are no allegations or claims for legal malpractice for any legal services or advice provided by Laflin prior to the preparation and signing of the 1998 trust amendment.
of the critical paragraph. Laflin stated in his affidavit that he became aware of the omission only when the complaint was filed.

6 Laflin met with Plaintiffs following husband’s death and made several suggestions for the division of the trust assets between the A and B Trust, all of which were rejected by Plaintiffs. The value of the total gross estate at the time of husband’s death was less than one million dollars, so no federal or state tax returns were due. No action or inaction by Laflin reduced the aggregate net value of the estate, and the value of the estate was the same, with or without the estate planning services and advice provided by Laflin. To divide the assets as required by the trust agreement, wife contributed the household effects and artwork to Trust B, conveyed the family residence from the trust to herself, and revoked Trust A in its entirety. This was done after terminating the services of Laflin, and not in reliance upon any legal advice provided by Laflin.

7 The Plaintiffs’ theories of negligence in their complaint are that Laflin breached the standard of care by not honoring their wishes, by giving them negligent advice after husband died, and generally by negligently misrepresenting the efficacy of certain estate options available to them. Defendant moved for summary judgment, arguing that Plaintiffs’ allegations did not establish any legally compensable damages, and, further, that Plaintiffs had wholly failed to mitigate their damages, if any. Following oral argument on the matter, the district court granted the motion for summary judgment based on lack of damages.

DISCUSSION
8 The Akutagawas raise three issues on appeal. They contend that the district court erred (1) in finding that there are no issues of material fact in dispute, (2) in finding that the failure to mitigate serves to dismiss their cause of action in its entirety, and (3) in considering notions not on the record and improperly weighing the evidence.

STANDARD OF REVIEW
9 “The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law.” Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978. “[W]e examine the whole record for any evidence that places a genuine issue of material fact in dispute.” Rummel v. Lexington Ins. Co., 1997-NMSC-041, ¶ 15, 123 N.M. 752, 945 P.2d 970. The Defendant moved for and was granted summary judgment on the issue of damages. We limit our review on appeal to the issue of damages. We review the record to determine if there is any material fact in dispute as to the Plaintiffs’ claim for damages, and whether Defendant was entitled to judgment as a matter of law. “We review these legal questions de novo.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

10 “The party moving for summary judgment bears the burden of making a prima facie showing that no genuine issue of material fact exists.” Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 163, 848 P.2d 1086, 1090 (Ct. App. 1993). A prima facie showing is defined as “such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.” Id. (internal quotation marks and citation omitted). Once a defendant movant meets the initial burden of negating at least one of the essential elements upon which a plaintiff’s claims are grounded, the burden shifts to plaintiff to come forward with admissible evidence to establish each required element of the claim. Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 231-32, 836 P.2d 1249, 1252-53 (Ct. App. 1992).

ANALYSIS
11 In a suit for legal malpractice, “a plaintiff must prove three essential elements: (1) the employment of the defendant attorney; (2) the defendant attorney’s neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff.” Rancho del Villacito Condos., Inc. v. Weisfeld, 121 N.M. 52, 55-56, 908 P.2d 745, 748-49 (1995) (internal quotation marks and citation omitted). Plaintiffs have the burden of showing not only negligence on the part of their attorney but also that their damages were proximately caused by that negligence. When the attorney’s negligence involves failure to take certain action, the client must show that if the attorney had acted then the client would not have suffered damage, at least not to the same degree. Carrillo v. Coors, 120 N.M. 283, 288, 901 P.2d 214, 219 (Ct. App. 1995) (citation omitted). In this case, Plaintiffs were required to show that the alleged negligent conduct of Laflin, and the omission of the critical paragraph in the 1998 and 2002 trust documents, resulted in legally compensable damages.

12 We begin with a review of the damages Plaintiffs allege to have suffered as the result of Defendant’s malpractice. In their complaint and affidavits from wife, son, and Taro and Tazue’s daughter Edith Keiko Lambert, Plaintiffs allege the following damages:

[ Wife is precluded for the rest of her life from practical enjoyment of the property . . . built up during the . . . marriage.

[D]amages [to Trust B . . . include the . . . ramifications of the ongoing competing interests arising from Trust B’s terms and the fact that it is not able to fulfill its primary purpose [which is] the well being of [Wife].

Plaintiffs will . . . have to employ other professionals to guide [them] in coping as best they can to meet the needs of [Wife] while not violating the terms of Trust B.]

Plaintiffs have suffered losses and will continue to suffer losses based on the information provided by the [Law] Firm.

[The actions] by the [Law] Firm [have caused] conflict within [the] family [, and will result in] additional expense[s] for accountants, trustees and lawyers.

[O]nce my mother passes we will have to pay fiduciary fees to an independent trustee.

[W]e now have to pay accountants to file income tax returns for an irrevocable trust that does not need to exist.

We will also have to pay the expense of accounting to the beneficiaries of the trust.

There are likely to be lawsuits from the beneficiaries . . . that we will now have to be prepared to fight at no doubt considerable expense.

The mess created by the [Law] Firm has damaged the relationship of my family. My mother suffers great pain every day.

I [son] personally know of and will testify of the damage to my mother and to the property that I was charged by my late father to use for my family’s needs.

[The] family has and will suffer
greatly at the hands of the [Law Firm].
[Wife is] deprived of property that [she and husband] . . . built up . . . specifically to provide for the survivor of the two of [them, that the Law Firm has] ruined [her] life[,] and damaged] relationship[s] with [her] children[.]”

{13} In support of summary judgment, Defendant submitted affidavits from Laflin and Leach. Laflin stated in his affidavit that a critical paragraph governing distributions from Trust B during the lifetime of the surviving spouse was inadvertently omitted from the execution draft. Laflin stated that he did not realize the paragraph had been omitted until the complaint was filed. Laflin further stated that the error in omitting the paragraph could be corrected through judicial reformation. Laflin provided evidence that he had offered to pay all legal expenses associated with a judicial proceeding seeking to reform the trust by incorporating the omitted paragraph, without waiving Plaintiffs’ rights in the suit if the reformation was not successful. Laflin argues that in failing to accept the offer of a no risk possibility of reformation, Plaintiffs have refused to mitigate their damages. Laflin asserts that reformation would have provided a complete mitigation; that is, the damages the Akutagawas claim they have suffered because the trust was not structured according to their wishes would be entirely obviated.

{14} In his affidavit, Leach stated that Defendant complied with the standard of care required of estate planning attorneys in preparing the documents for the Akutagawas, and that reformation to incorporate the omitted paragraph would be a routine matter. Leach also stated that based on the size of the estate at the time of husband’s death, no estate tax return needed to be filed.

{15} Plaintiffs allege economic damages and damages from emotional distress. The allegations of economic damages refer primarily to future damages. For example, Plaintiffs state that they “will now have to employ other professionals to guide” them, and “will . . . have to pay the expense[s] of accounting.” These damages can be viewed as speculative and not compensable. See Lovington Cattle Feeders, Inc. v. Abbott Labs., 97 N.M. 564, 568, 642 P.2d 167, 171 (1982) (stating that “damages, to be recoverable, must be proven with reasonable certainty and not be based upon speculation”); Rael v. F & S Co., 94 N.M. 507, 511, 612 P.2d 1318, 1322 (Ct. App. 1979) (stating that “[d]amages based on surmise, conjecture or speculation cannot be sustained. Damages must be proved with reasonable certainty.”). Perhaps more to the point, we agree that these damages would be obviated if the reformation effort was successful.

{16} Plaintiffs’ only allegation of current economic damages, that they “have to pay accountants to file income tax returns for an irrevocable trust that does not need to exist,” is also not compensable. Both Laflin and Leach stated in their affidavits that the estate plan and trust arrangement was consistent with the stated desires of the Akutagawas. If, as Plaintiffs themselves argued, the purpose of the trust arrangement was to allow the eldest son to control the assets during the lifetime of the surviving spouse, without giving him the assets outright, then the A-B Trust arrangement was necessary to accomplish this objective. Plaintiffs did not rebut Defendant’s assertion that this could only be done through a trust arrangement, such as the A-B Trust. Furthermore, Plaintiffs have not established that any expenses incurred in the administration of the trust were the result of the omitted paragraph or any other negligence on behalf of the Defendant, rather than the normal costs of trust administration.

{17} Wife, son, and Lambert all confirm in their affidavits that it was the intent of the parents, consistent with Japanese custom, for the eldest son to control family assets and be responsible for the well-being of the surviving parent, siblings, and other heirs after the death of the first parent. Although there is a dispute about whether the Akutagawas intended the trusts to avoid tax consequences, that becomes irrelevant to the issues of damages. At the time of husband’s death, the estate was sufficiently small so that a trust arrangement was not necessary to avoid estate tax consequences. However, a trust was still necessary to carry out the undisputed intent of the Akutagawas. Laflin admits that an essential paragraph was omitted from the documents that would allow the Akutagawa’s intent to be carried out. Arguably, the Akutagawas could have suffered damages resulting from the omission of this paragraph between the time the omission was identified and the time the Law Firm offered to reform the trust document. For example, if it became necessary for the Akutagawas to hire an independent trustee, or pay an accountant during that time period, directly resulting from the omitted paragraph, those damages may be compensable. But the Akutagawas make no such allegations, and declined the offer to reform.

{18} Plaintiffs challenge the basic notion that they failed to mitigate their damages. Plaintiffs argue that after husband’s death and the discovery of the error in the documents, they could not seek reformation because that would place them (specifically wife and son) in violation of their existing fiduciary responsibility. We disagree. The aim of the proposed reformation was the fulfillment of the undisputed intent of the decedent. Plaintiffs cannot simultaneously argue that the mistake is undisputed by the entire family and yet rely on the existence of the mistake to refuse all offers to fix it.

{19} Plaintiffs also argue that the trial court improperly went on to rule that applying the equitable doctrine of mitigation, Laflin is entitled to judgment as a matter of law. Plaintiffs contend that mitigation may have reduced their damages, but would not eliminate all the damages they suffered. We agree with Plaintiffs that failure to mitigate does not necessarily bar all recovery for damages and usually only serves to reduce the amount of recoverable damages. Air Ruidoso, Ltd. v. Executive Aviation Ctr., Inc., 1996-NMSC-042, ¶ 14, 122 N.M. 71, 920 P.2d 1025 (“It is a well established principle in New Mexico that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct.”). However, in this case Plaintiffs alleged no compensable economic damages other than those described above. Further, Plaintiffs failed to rebut the expert testimony regarding the availability and effect of reformation. Finally, Plaintiffs’ argument that Laflin intentionally omitted the paragraph does not affect their claim for compensatory damages or the remedial effect of the offered reformation. Thus, in this case, the offered remedy could have resulted in the complete avoidance of the damages asserted by Plaintiffs. In this rare instance, Plaintiffs refusal to accept the offer of a complete remedy could reasonably be viewed as a failure to establish a material question of fact as to any economic damage.

{20} The remainder of the damages alleged by Plaintiffs—that “[t]he mess created by the [Law] Firm has damaged the relationship of my family” and “the [Law Firm] has ruined [Wife’s] life”—are best characterized as damages for emotional distress. We begin by determining whether
emotional harm alone is sufficient damage as a matter of law to support a claim for legal malpractice.

[21] Generally speaking, damages for emotional distress in ordinary negligence actions are not permitted in New Mexico. Flores v. Baca, 117 N.M. 306, 313, 871 P.2d 962, 969 (1994). New Mexico allows recovery for stand alone emotional distress only in limited circumstances, including intentional infliction of emotional distress, in connection with certain intentional economic torts, and in contractual situations where the specialized nature of the contract naturally contemplated that reasonable care would be taken to avoid the infliction of severe emotional distress. See Jaynes v. Strong-Thorne Mortuary, Inc., 1998-NMSC-004, ¶ 18, 124 N.M. 613, 954 P.2d 45 (stating that “[i]ntentional infliction of emotional distress arises when a defendant intentionally or recklessly causes severe emotional distress through extreme and outrageous conduct”); Flores, 117 N.M. at 311, 871 P.2d at 967 (stating that courts permit recovery for mental anguish caused by breach of contract in cases in which the purpose of the contract would be frustrated unless such damages were awarded, for example in a contract for funeral services). New Mexico does not recognize negligent infliction of emotional distress as a cause of action except for bystander liability. Jaynes, 1998-NMSC-004, ¶ 21.

[22] Although New Mexico courts have not directly addressed the issue of emotional distress in legal malpractice cases, other jurisdictions provide guidance. Most jurisdictions do not allow recovery for emotional distress in legal malpractice absent extreme and outrageous conduct. See, e.g., Selsnick v. Horton, 620 P.2d 1256, 1257 (Nev. 1980) (holding that since appellant’s suit against attorney was premised solely on ordinary negligence, and since appellant did not allege nor attempt to prove extreme and outrageous conduct, appellant may not recover damages for emotional distress). The court’s reasoning in Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557 (Minn. 1996), is instructive. In Lickteig the court held that, “as in other negligence actions, emotional distress damages are available in limited circumstances. There must be a direct violation of the plaintiff’s rights by willful, wanton or malicious conduct; mere negligence is not sufficient.” Id. at 562. In our case, as in Lickteig, there are no allegations or proof of willful, wanton, or malicious conduct, therefore a claim for emotional distress damages will not lie. See Andrews v. Stallings, 119 N.M. 478, 491, 892 P.2d 611, 624 (Ct. App. 1995) (stating that “[t]o recover for the intentional infliction of emotional distress” a plaintiff must show that the defendant’s conduct was extreme and outrageous, and was done recklessly or with the intent to cause severe emotional distress).

[23] In denying a claim for emotional damages in a bankruptcy malpractice case, the Iowa Supreme Court noted that a party may not recover damages for emotional distress in an action premised on mere negligence where the plaintiff has suffered no economic harm, except “where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm.” Lawrence v. Grinde, 534 N.W.2d 414, 420 (Iowa 1995) (internal quotation marks and citations omitted). In assessing the level of stress necessary to support such a claim, the court adopted the following test: “whether the distress inflicted is so severe that no reasonable man could be expected to endure it.” Id. at 421 (internal quotation marks and citation omitted). The court went on to note that the majority view among jurisdictions “is that emotional distress is not a reasonably foreseeable consequence of and does not ‘naturally ensue’ from an act of legal malpractice[.]” and that “precedent runs strongly against recovery [of emotional distress damages] in cases of legal malpractice.” Id. at 422 (alteration in original) (internal quotation marks and citation omitted). The Texas Supreme Court disallowed recovery for mental anguish damages in a legal malpractice claim, stating that “when the injuries caused by an attorney’s negligence are economic, the plaintiff can be fully recompensed by the recovery of any economic loss. Restoration of the pecuniary interest suffices to return a plaintiff to her prior circumstances.” Douglas v. Delp, 987 S.W.2d 879, 885 (Tex. 1999). The court reasoned that unlike physician malpractice where mental anguish is a foreseeable result of a doctor’s negligence, the foreseeable result of an attorney’s negligence typically extends only to economic loss. Id.

[24] The Wyoming Supreme Court also held that damages for emotional suffering were not available in a legal malpractice case which alleged that an attorney negligently failed to assert property claims in a divorce action or where the attorney negligently gave incorrect legal advice about a visitation order. Long-Russell v. Hampe, 39 P.3d 1015, 1021 (Wyo. 2002). The Wyoming court relied on Lickteig, and further noted that “[i]t is generally agreed that mere sorrow, anger, worry and fear are not compensable and recovery for more serious emotional distress is restricted because of the burden for the judicial system and defendants.” Long-Russell, 39 P.3d at 1018. Although not all inclusive, we believe these cases provide guidance to the issue in the present case.

[25] The reasoning in these cases supports our holding that emotional distress damages alone are not compensable in a legal malpractice case where, as here, there are no allegations of intentional infliction of emotional distress or some heightened level of culpability resulting in severe distress such that no reasonable person could be expected to endure. We are mindful of our concerns expressed in Andrews v. Saylor, 2003-NMCA-132, ¶ 16, 134 N.M. 545, 80 P.3d 482, that legal malpractice should be treated no differently than other types of professional malpractice. We stated our concern in Andrews that “our adoption of a special rule that insulates malpracticing lawyers from jury scrutiny of their conduct would give the public the impression that we are simply lawyers protecting other lawyers.” Id. Disallowing damages for mental distress in this case is consistent with our concerns in Andrews, and the principle of general tort law.

[26] Finally, Plaintiffs assert that the district court improperly considered matters not of record and improperly weighed evidence. We have reviewed the transcript of the summary judgment hearing. The transcript reveals that the district court asked questions concerning husband and wife’s motivation for settling on the trust structure and also speculated about the estate tax consequences of the actions taken by son and wife after husband’s death. We do not see how these questions and observations impinged on the resolution of the basic question presented by Defendant’s motion for summary judgment. Further, we see no evidence that the district court weighed any evidence.

CONCLUSION

[27] The summary judgment in Defendant’s favor is affirmed.

[28] IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
JAMES J. WECHSLER, Judge
APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
SILVIA E. CANO-GARCIA, District Judge

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OPINION
LYNN PICKARD, JUDGE

1. Defendant appeals her conviction of attempt to commit trafficking (by manufacturing). Defendant was convicted after entering a conditional guilty plea, reserving the right to appeal whether the general/specific rule required the State to charge Defendant with possession of drug paraphernalia, NMSA 1978, § 30-31-25.1(B) (1990). Defendant’s conviction resulted from her arrest for shoplifting medications containing ephedrine. Defendant intended to sell the medications so that the ephedrine could be used to manufacture methamphetamine. On appeal, Defendant argues that (1) she should have been charged with possession of drug paraphernalia, instead of attempt to commit trafficking (by manufacturing) because ephedrine meets the definition of drug paraphernalia as defined by NMSA 1978, 30-31-2(V) (2002), and (2) the general/specific rule is applicable under the facts of this case. We disagree and affirm.

2. We note Defendant’s appeal raises no issue concerning whether her acts could amount to an attempt to manufacture controlled substances. See State v. Brenn, ___ NMCA 121, ¶¶ 23-24, ___ NM ___, ___ P.3d ___ [No. 24, 763 filed Aug. 22, 2005] (holding that possession of 5000 pseudoephedrine pills, some of which were unpackaged, together with other acts that would ultimately lead to the manufacture of methamphetamine, were sufficient to constitute an attempt). In addition, we would not reach the issue of whether Defendant’s acts constituted an attempt, because the issue was not reserved in the plea agreement. See State v. Hodge, 118 N.M. 410, 416-17, 882 P.2d 1, 7-8 (1994).

FACTS AND BACKGROUND

3. Defendant was arrested for shoplifting eight boxes of non-prescription medications containing ephedrine. Defendant told officers that she would receive $100 if she brought back the medications to Deming, New Mexico. She also admitted that she was aware that the medications are used to manufacture methamphetamine. Defendant was charged with trafficking (by manufacturing). Defendant entered her conditional guilty plea to attempt to commit trafficking (by manufacturing). This appeal follows.

DISCUSSION

4. Defendant argues that she should have been charged under Section 30-31-25.1(B), which prohibits possessing drug paraphernalia with the intent to deliver the paraphernalia knowing that it will be used to manufacture a controlled substance. Defendant argues that she should have been charged under Section 30-31-25.1(B) because ephedrine meets the definition of drug paraphernalia as defined by Section 30-31-2(V). We disagree.

5. The meaning of language used in a statute is a question of law that we review de novo. State v. Rowell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). We give such language its ordinary and plain meaning unless the legislature indicates a different interpretation is necessary. State v. Hicks, 2002-NMCA-038, ¶ 11, 132 N.M. 68, 43 P.3d 1078. If the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation. State v. Jonathan M., 109 N.M. 789, 790, 791 P.2d 64, 65 (1990). We closely examine the overall structure of the statute that we are interpreting. State v. Calvert, 2003-NMCA-028, ¶ 15, 133 N.M. 281, 62 P.3d 372.

6. Section 30-31-2(V) defines drug paraphernalia as follows:

“Drug paraphernalia” means all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act.

Section 30-31-2(V)(1)-(12) then lists examples of paraphernalia including kits, devices, testing equipment, scales, balances, dilutants, adulterants, separation gins, sifters, blenders, bowls, containers, spoons, capsules, balloons, envelopes, objects designed for use in storing or concealing...
controlled substances, syringes, needles, pipes, masks, roach clips, and bongs. Section 30-31-2(V)(13) then reads as follows:

{[In} determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) statements by the owner or by anyone in control of the object concerning its use;
(b) the proximity of the object, in time and space, to a direct violation of the Controlled Substances Act . . . or any other law relating to controlled substances or controlled substance analogs;
(c) the proximity of the object to controlled substances or controlled substance analogs;
(d) the existence of any residue of a controlled substance or controlled substance analog on the object;
(e) instructions, written or oral, provided with the object concerning its use;
(f) descriptive materials accompanying the object that explain or depict its use;
(g) the manner in which the object is displayed for sale; and
(h) expert testimony concerning its use.]

For the convenience of the reader, we reproduce Section 30-31-2(V) in its entirety in an Appendix. (7) Here, the statute is clear and unambiguous. The plain meaning and ordinary usage of the terms listed in the statute’s examples of drug paraphernalia indicate that the legislature intended that drug paraphernalia be limited to the instruments and tools used to prepare, package, and administer controlled substances and controlled substance analogs or the ingredients used to cut them, and not to the ingredients used to make them. The statute does not list drug precursors, such as ephedrine, see NMSA 1978, § 30-31B-3(C) (1989), or over-the-counter medications containing a drug precursor as an example of paraphernalia, and no example listed in the statute can be interpreted to apply to such precursors. Drug precursors and over-the-counter medications are specifically addressed by the legislature in the Controlled Substances Act in NMSA 1978, §§ 30-31B-1 to -18 (1989, as amended through 2004). Whether the medications Defendant shoplifted are exempt as drug precursors under that Act, see § 30-31B-2(L), is irrelevant to the issue now before the Court, which is whether the legislature intended ingredients used to make drugs to be drug paraphernalia. We conclude that the legislature was aware of how to list drug precursors or over-the-counter medications containing a drug precursor as an example of drug paraphernalia if it intended for these substances to be considered drug paraphernalia. See State v. Anderson, 110 N.M. 382, 385, 796 P.2d 603, 606 (Cl. App. 1989) (stating that where the legislature utilizes a term in a section of a statute, and that term is absent from another portion of the statute, the legislature did not intend for the second statute to apply to that term). Thus, we determine that Section 30-31-2(V) clearly and unambiguously does not include ephedrine within its definition of drug paraphernalia.

{[8}] Defendant argues that Section 30-31-2(V)(13)(a) supports her argument that the ephedrine should be considered paraphernalia. Section 30-31-2(V)(13)(a) provides that in determining whether an object is drug paraphernalia, a court should consider “statements by the owner or by anyone in control of the object concerning its use.” Here, Defendant contends that we should consider her statement that she had shoplifted the medications containing ephedrine with the intent to sell the medications, knowing that the ephedrine would be used to manufacture methamphetamine. In responding to Defendant’s argument, we first note that Section 30-31-2(V)(13)(a) is specifically listed as just one consideration that courts should take into account when determining whether an object is drug paraphernalia. We also reject Defendant’s claim that her statements transformed ephedrine into drug paraphernalia, because we do not believe that the legislature intended for an owner of an object to define the object as drug paraphernalia through his or her statements even when the object falls outside the definition of drug paraphernalia as defined by the language of the statute. Rowell, 121 N.M. at 114, 908 P.2d at 1382 (holding that we will not interpret a statute in a way that would render the statute unreasonable, unjust, or absurd).

(9) Finally, Defendant directs our attention to State v. Frazier, 42 P.3d 188, 193 (Kan. Ct. App. 2002), in which the court held that ephedrine falls within the definition of drug paraphernalia because ephedrine is a material used to manufacture methamphetamine. We agree with Defendant that the statute that the Frazier court interpreted in concluding that ephedrine is drug paraphernalia is substantially similar to our statute defining drug paraphernalia. However, we decline to follow the holding of Frazier. We note that the Frazier court concluded that ephedrine was drug paraphernalia because ephedrine was a material, and it is used to manufacture methamphetamine; however, the court did not analyze how the term “material” should be interpreted when reviewing the statute as a whole and taking into consideration the examples of drug paraphernalia listed by the Kansas legislature. We have previously held that when we interpret our statutes, we should read the statute as a whole, and each section should be construed in connection with every other section. State v. Hall, 119 N.M. 707, 710, 895 P.2d 229, 232 (Cl. App. 1995). Thus, we do not adopt the holding of Frazier, because we conclude that the Frazier court did not follow cases that we deem controlling on the issue of statutory construction.

{[10}] We find no merit in Defendant’s argument that she should have been charged with possession of drug paraphernalia because ephedrine is neither a drug precursor nor a controlled substance analog. The State was correct by not charging Defendant with possession of drug paraphernalia because over-the-counter medications containing ephedrine are not drug paraphernalia. Furthermore, the State properly charged Defendant because certain conduct that goes far enough in amassing the ingredients and preparing them to manufacture methamphetamine is proscribed by the offense of attempt to commit a violation of Section 30-31-20(A)(1), which criminalizes trafficking (by manufacturing). Section 30-31-20(A)(1) states that:

A. As used in the Controlled Substances Act . . . “traffic” means the:

(1) manufacture of any controlled substance enumerated in Schedules I through V or any controlled substance analog as defined in Subsection W of Section 30-31-2[,]”

Schedule II lists methamphetamine as a controlled substance. NMSA 1978, § 30-31-7 (A)(3)(c) (1979). Therefore, methamphetamine is a controlled substance whose trafficking (by manufacturing) is prohibited by Section 30-31-20(A)(1).

2. The general/specific rule is not applicable under the facts of this case because Section 30-31-25.1(B) does not apply to Defendant.

(11) Defendant argues that the general/ specific rule prohibits her charge with attempt to commit trafficking (by manufacturing) because Section 30-31-25.1, which prohibits the possession of drug paraphernalia with
the intent that the paraphernalia will be used to manufacture a controlled substance or a controlled substance analog, specifically prohibits her conduct. We disagree. The general/specific rule is applicable when two statutes prohibit the same conduct, although one statute prohibits the conduct more specifically than the other statute. State v. Blevins, 40 N.M. 367, 368, 60 P.2d 208, 209 (1936) (concluding that the general/specific rule applies if both statutes condemn the same offense). In such cases, we have held that the legislature intended to limit the charging discretion of the State by requiring the State to charge a defendant with the statute that specifically proscribes the defendant’s conduct. State v. Cleve, 1999-NMSC-017, ¶ 26, 127 N.M. 240, 980 P.2d 23, modified on other grounds as stated in State v. Perea, 2001-NMCA-002, ¶¶ 9-19, 130 N.M. 46, 16 P.3d 1105.

Here, we have already determined that ephedrine is not paraphernalia. Thus, under the circumstances of this case, Section 30-31-25.1(B) and Section 30-31-20(A)(1) do not prohibit the same conduct, and the general/specific rule is not applicable.

CONCLUSION

We affirm.

IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

RODERICK T. KENNEDY, Judge

APPENDIX

30-31-2. Definitions

V. “drug paraphernalia” means all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act [30-31-1 NMSA 1978]. It includes:

(1) kits used, intended for use or designed for use in planting, propagating, cultivating, growing or harvesting any species of plant that is a controlled substance or controlled substance analog or from which a controlled substance can be derived;

(2) kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances or controlled substance analogs;

(3) isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant that is a controlled substance;

(4) testing equipment used, intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances or controlled substance analogs;

(5) scales or balances used, intended for use or designed for use in weighing or measuring controlled substances or controlled substance analogs;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite dextrose and lactose, used, intended for use or designed for use in cutting controlled substances or controlled substance analogs;

(7) separation gins and sifters used, intended for use or designed for use in removing twigs and seeds from, or in otherwise cleaning and refining, marijuana;

(8) blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances or controlled substance analogs;

(9) capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances or controlled substance analogs;

(10) containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or controlled substance analogs;

(11) hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injecting controlled substances or controlled substance analogs into the human body;

(12) objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, with or without screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetor tubes and devices;

(d) smoking and carburetor masks;

(e) roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small to hold in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chilams;

(l) bongs; or

(m) ice pipes or chillers; and

(13) in determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) statements by the owner or by anyone in control of the object concerning its use;

(b) the proximity of the object, in time and space, to a direct violation of the Controlled Substances Act [30-31-1 NMSA 1978] or any other law relating to controlled substances or controlled substance analogs;

(c) the proximity of the object to controlled substances or controlled substance analogs;

(d) the existence of any residue of a controlled substance or controlled substance analog on the object;

(e) instructions, written or oral, provided with the object concerning its use;

(f) descriptive materials accompanying the object that explain or depict its use;

(g) the manner in which the object is displayed for sale; and

(h) expert testimony concerning its use[.]

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2002, Worker’s counsel caused him to change medical providers from Drs. Reeve and Castillo to Dr. Jonathan Burg. Dr. Burg, who did not trust and, it appears, regularly rejected Dr. Castillo’s surgical evaluations, referred Worker to Dr. Claude Gelinas for surgical evaluation.

Employer paid temporary total disability and permanent partial disability benefits and on October 15, 2001, offered a light-duty position to Worker. After Worker rejected the offer, Employer reduced the benefits it paid to Worker. Thereafter, on October 17, 2002, Worker filed a complaint with the Administration.

Sometime after litigation commenced, Employer discovered that Worker had suffered at least three back injuries before the August 2001 accident. The first incident occurred in 1988, when Worker suffered a low back injury while lifting materials on the job at Bowers Electric. He was treated by Dr. McCutcheon, and was unemployed for approximately a year and a half while pursuing a workers’ compensation claim. The second incident occurred in 1992, when Worker suffered a low back injury while lifting kegs on the job at Coors Distributing. He was treated at Lovelace Medical Center and was unable to work for a period of time. The third incident occurred in 2000, when Worker was involved in an automobile accident for which he sought treatment at Lovelace for back pain and muscle spasms, again requiring Worker to take a leave of absence from work.

After learning about Worker’s medical history, Employer filed a motion in limine and, in the alternative, for sanctions. Employer asserted that Worker had not disclosed relevant and pertinent material information concerning his prior back injury condition and history. Employer contended that the doctors’ causation opinions were inadmissible because they were based on misinformation and an untrue history. Employer asked the court to sanction Worker for untrue statements in his deposition and for misrepresenting his medical history to his doctors. The workers’ compensation judge (WCJ) denied the motion. After a hearing on the merits, the WCJ entered findings of fact and conclusions of law and a compensation order was entered in Worker’s favor. The appeal in No. 24,315 followed. We consolidated the two appeals.

Employer raises four points of error, challenging: (1) the sufficiency of the evidence of causation to support the compensation order, (2) the denial of a motion to exclude certain expert testimony as a sanction for alleged bad faith discovery practices, (3) the determination that an offer of employment was reasonably rejected, and (4) the award of attorney fees.

In short, we do not think the WCJ’s disability determination can stand on the WCJ’s findings, due to lack of sufficient clarity, explanation, and specificity in the findings and the disability conclusion.
and we think it appropriate to remand for further consideration. In particular, the record presented to us is insufficient for us to assess precisely what injury the healthcare providers determined was caused by Worker's on-the-job accident and whether causation was properly found. This case's ambiguous record has been exacerbated by the failure of Worker to alert this Court to the relevant legal authority. This is an unusual case, and we conclude that the unusual remedy of remand for further findings is necessitated. As we describe later in this opinion, Worker has been diagnosed as having two maladies of the lower back: (1) radiculopathy at the L4 vertebra, and (2) degenerative disk disease at the L5-S1 vertebrae. The degenerative disk disease appears to have preexisted the on-the-job injury at issue; however, Worker does not appear to be claiming that the accident aggravated his existing condition, but rather that the accident caused the radiculopathy. Without additional findings and explanation from the WCJ, we are simply unable to meaningfully apply our workers’ compensation law regarding preexisting injury and the circumstances under which a medical expert must possess a worker’s full medical history before rendering an opinion as to causation of an injury. While we arguably could reverse on this record, we believe doing so could potentially deprive Worker of benefits when they may be justified and deprive him of the opportunity to properly demonstrate which injury was caused by his workplace accident.

{8} Later in this opinion, we delve further and in much greater detail into the background and reasons why we think the case should be remanded. Further, we think the WCJ’s findings of fact and conclusions of law in the case should be remanded. We think the WCJ’s findings of fact and conclusions of law in this case were not adequately supported by the record. We think it appropriate to remand for further consideration.

STANDARD OF REVIEW

{9} We apply a whole record standard of review when considering appeals from judgments of the Administration. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 127, 767 P.2d 363, 366 (Ct. App. 1988). Whole record review requires us to consider all the evidence properly admitted by the WCJ to determine whether there is substantial support for the judgment. Id. at 128, 767 P.2d at 367. The entire record is viewed in the light most favorable to the judgment. Martinez v. Fluor Utah, Inc., 90 N.M. 782, 783, 568 P.2d 618, 619 (Ct. App. 1977). To warrant reversal, this Court must be persuaded it “cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the whole record furnishes.” Tallman, 108 N.M. at 129, 767 P.2d at 368. “When reviewing the sufficiency of evidence, we account for the whole record, including what fairly detracts from the result the fact finder reached.” Rodriguez v. McAnally Enters., 117 N.M. 250, 252, 871 P.2d 14, 16 (Ct. App. 1994). “To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so.” Tallman, 108 N.M. at 128, 767 P.2d at 367.

DISCUSSION

I. THE CAUSATION ISSUE

{10} Worker bore the burden of establishing the causal connection between the 2001 accident and the injury to his back. In this regard, NMSA 1978, § 52-1-28(B) (1987), specifically provides:

In all cases where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish that causal connection as a probability by expert testimony of a health care provider, as defined in [NMSA 1978, § 52-4-1 (1993)], testifying within the area of his expertise.

In satisfaction of this requirement, Worker relied on the opinions of two of his treating physicians, Dr. Reeve and Dr. Burg, as well as the opinion of a surgeon to whom he had been referred for evaluation, Dr. Gelinas. Below, Employer asserted that the testimony of these physicians could not satisfy Worker’s statutory burden of proof, because they had not been informed about pertinent historical information. Employer renews this argument on appeal.

{11} Generally speaking, whole record review of WCJ determinations is deferential. See Rodriguez, 117 N.M. at 252, 871 P.2d at 16 (observing that “[w]e defer to the fact finder’s resolution of conflicts in the evidence and indulge all inferences in favor of the findings” when engaging in whole record review). However, we are required to scrutinize the basis for expert opinions to ensure that all pertinent underlying facts have been taken into account. See Chavarria v. Basin Moving & Storage, 1999-NMCA-032, ¶ 20, 127 N.M. 67, 976 P.2d 1019 (observing that when engaging in whole record review, “we consider whether an expert has available all the pertinent underlying facts necessary to form an opinion”); Martinez, 115 N.M. at 185, 848 P.2d 1112 (noting that “[f]ailure of an expert to have available all underlying facts needed to form a reasonable opinion is but one example of evidence lessening the weight of expert testimony”); Grudzina v. N.M. Youth Diagnostic & Dev. Ctr., 104 N.M. 576, 582, 725 P.2d 255, 261 (Ct. App. 1986) (observing that “an expert’s opinion is only as good as the factual basis for it”).

{12} For the present purposes, the case of Niederstadt v. Ancho Rico Consol. Mines, 88 N.M. 48, 536 P.2d 1104 (Ct. App. 1975), assumes center stage. Niederstadt involved a challenge to the sufficiency of the evidence to support a determination that an injury was causally related to a workplace accident. Id. at 50-51, 536 P.2d at 1106-07. Conflicting medical testimony was presented. Id. at 51, 536 P.2d at 1107. One of the worker’s treating physicians reported that the worker’s condition was caused by the 1972 workplace accident which was under consideration. Id. Another physician opined that the worker’s condition was caused by a separate incident that occurred in 1959, rather than in 1972, with a workplace accident. Id. The district court was persuaded by the first doctor’s opinion and awarded both total temporary and permanent partial disability benefits. See id. at 49, 536 P.2d at 1105.

{13} On appeal, this Court evaluated the conflicting doctors’ testimony. It observed that the second doctor was able to compare the medical notes describing the worker’s condition after the 1959 incident with his condition after the 1972 accident, from which he found no appreciable change in the condition of the worker’s back. See id. at 51, 536 P.2d at 1107. By contrast, the Court found no indication in the record
that the first doctor was ever informed about the 1959 incident, or that he had any opportunity to consider the medical records relating to that incident. Id. The Court held that “since pertinent information existed about which [the first doctor] apparently had no knowledge, his opinion cannot serve as the basis for compliance” with the precursor to Section 52-1-28(B).

Niederstadt, 88 N.M. at 51, 536 P.2d at 1107. As a result, the award of benefits was reversed “with instructions to enter judgment for the defendants.” Id. at 52, 536 P.2d at 1108.

{14} The essence of Niederstadt is that a healthcare provider must be informed about a pertinent prior injury before he or she can render an opinion as to the cause of a subsequent injury. This Court has limited application of the Niederstadt rule to cases in which “there is uncontradicted testimony of a medical expert that the information on prior injuries is pertinent.” Mendez v. Sw. Cnty. Health Servs., 104 N.M. 608, 612, 725 P.2d 584, 588 (Ct. App. 1986).

{15} The Niederstadt rule was recently cited by the New Mexico Supreme Court in Banks v. IMC Kalium Carlsbad Potash Co., 2003-NMSC-026, ¶ 35, 134 N.M. 421, 77 P.3d 1014. The Court in Banks cited Niederstadt for the proposition that “if the expert who testifies [as to causation in a workers’ compensation case] lacks pertinent information, his or her opinion cannot satisfy the burden imposed by Section 52-1-28.” Banks, 2003-NMSC-026, ¶ 35. Accordingly, we view the Niederstadt rule as precedent. See generally Aguilera v. Palm Harbor Homes, Inc., 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993 (observing that this Court is bound by New Mexico Supreme Court precedent).

{16} As mentioned earlier in this opinion, Worker suffered at least three injuries involving his back prior to the 2001 accident. Of these, the work injury in 1988 is the significant one giving rise to the question whether it was pertinent to the causal relationship between the 2001 accident and the injured condition of Worker’s back, examining also the doctors’ knowledge of Worker’s 1988 injury and preexisting degenerative disk condition. In view of the foregoing legal authorities, this Court addresses whether Drs. Reeve and Burg, who gave opinions on causation in their deposition testimony, lacked pertinent information about Worker’s prior 1988 injury and back condition, such that their opinions should be rejected, particularly in the face of expert opinion testimony that Worker’s history showed that his degenerative disk condition following the 2001 accident was virtually the same as it was following the 1988 injury. It is apparent that Drs. Reeve and Burg were not presented with a complete prior medical history.

{17} Dr. Reeve, the first physician to see Worker after his 2001 injury, saw and treated Worker from early August 2001 until mid July 2002. A post-injury MRI in August 2001 ordered by Dr. Reeve showed the following: “The L5-S1 disc shows loss of signal consistent with disc degeneration. There is diffuse annular disc at L5-S1 indenting the epidural fat. This does not appear to be displacing the nerve roots, however. The L4-5 and L5-S1 facet joints show degenerative arthritic change.” The MRI conclusions were “(1) mild annular diffuse disc protrusion, L5-S1 without nerve root displacement[, and] (2) facet arthritis, L4-5 and L5-S1.” Further, a post-accident EMG and nerve conduction study showed findings consistent with an active L4 radiculopathy.

{18} Dr. Reeve determined Worker reached maximum medical improvement (MMI) on October 26, 2001, and had a ten percent whole body impairment rating. Dr. Reeve’s impressions at that time were “1. Chronic low back pain[, and] 2. Active L4 radiculopathy based on EMG.” In his deposition testimony, Dr. Reeve stated that his specific diagnosis was L4 radiculopathy. He saw no L5-S1 radiculopathy, or sciatic nerve involvement stemming from L5-S1. He correlated the L4 radiculopathy to the L4-L5 region. And he based his ten percent impairment rating predominantly on the EMG, which supported “irritability in the L4 distribution” on the lumbar paraspinous at L4-L5. Dr. Reeve’s diagnosis placed on a Workers’ Compensation Administration Form Letter to Health Care Provider (Administration Form Letter) on December 10, 2002, was disc herniation with radiculopathy. This conformed to his “Impression” of “Disc herniation with radiculopathy” stated in a July 12, 2002, follow up note.

{19} When asked during his deposition if he told Dr. Reeve about all of his prior back injuries, Worker stated, “I only had one prior back injury, and I did tell him about it.” Yet Worker also testified that he did not remember giving Dr. Reeve his medical history, and that he never told Dr. Reeve he had a permanent impairment and was placed on work restriction as a result of his 1988 injury. Dr. Reeve testified that Worker denied a history of previous back injuries. Further, Dr. Reeve unequivocally testified that he was unaware of the 1988 injury. Similarly, Worker failed to inform Dr. Reeve about his visits to Dr. McCutcheon in 1988 and Lovelace in 1992, and Dr. Reeve testified that he was unaware of any prior treatment for back injuries, including any diagnostic workups such as the 1989 MRI. As well, Worker acknowledged that he provided no information about the 1992 and 2000 incidents to Dr. Reeve. Dr. Reeve testified that he was under the impression that the 2001 injury to Worker’s back represented a new development. He further testified that prior to obtaining a medical opinion about the causal relationship between the degenerative condition of Worker’s back and the 2001 injury, doctors providing opinions should have been supplied with Worker’s prior MRIs and any other similar historical information.

{20} Because Dr. Reeve’s testimony is a critical component of the causation issue, we set out a portion of the questions and answers in his deposition:

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1 Even Worker’s primary care physician, Dr. Pereira, whom Worker saw in December 2001 for an opinion regarding his August 2001 injury, was unaware of Worker’s prior history. This physician’s opinion was not presented at trial. Worker testified at trial that he lied to this physician about his medical history, including the current accident, because he wanted an opinion from the provider that was not swayed by knowledge that his injury was work-related. A Lovelace report prepared by Dr. Pereira states that Worker complained of low back pain for the previous thirty days, did not recall any particular injuries, but remembered that he might have been throwing trash prior to the onset of symptoms. It also states that Worker does not have any history of back injuries that he recalls.
Q ... So when questioned about a history of prior back pain or back injuries, is it correct to understand that when it says “denies low-back pain” that [Worker] was also denying a history of prior back injuries and back pain?
A Yes.
Q Okay. Doctor, I didn’t see anywhere in this medical record where [Worker] reported to you that he had previously treated with Dr. McCutcheon for back problems. I’m talking about just the initial August 1st, 2001, record, which I’m going to go ahead and mark as Exhibit B to the deposition.
A We didn’t obtain that history.
Q Okay. And, Doctor, had [Worker] told you that he had previously treated with Dr. [Allen] Gelinas for back pain and back problems, would that have been history that you would have documented and recorded in his medical records?
A Yes.
Q Okay. Doctor, I didn’t see anywhere in the history section where [Worker] reported to you that he had received previous medical treatment with Lovelace Healthcare for back pain and back problems.
A Well, we didn’t obtain that history, no.
Q If [Worker] would have reported to you that he had previous back injuries and medical treatment for back pain at Lovelace Healthcare System, would that have been information you would have recorded in his medical records?
A Yeah, it would have been important information for us to have.
Q Okay. Doctor, I didn’t see anywhere in here that [Worker] told you that in connection with previous back pain complaints, he had been diagnosed with degenerative changes in his lower back by his treating healthcare providers. Didn’t see that anywhere. Do you know whether he made that and provided that information as part of his history?
A No, we were treating this as if it were a new back injury that was sustained at work.
Q All right. Doctor, so is it fair to say as a layman that what these doctors have found is that there are people walking around with no back pain that if you took them and put them under MRI, the older they get, the more likely they are going to have a bulge or herniation?
A Absolutely.
Q So that when trying to come up with causation opinions as to whether a bulge or herniation or protrusion is related to a specific incident or complaint of back pain, there really needs to be a full analysis of all the available information?
A Right.
Q Would that mean that the treating doctor would need an accurate and complete history from the patient to have a good baseline to understand where the patient’s been in connection with where they are currently to make causation opinions?
A Yes, I think so.

\{21\} Dr. Burg, who first saw Worker in November 2002, testified that he was aware Worker had received treatment at Lovelace “about eight years prior” to the 2001 injury. Accordingly, it appears that Dr. Burg had some sort of information about Worker’s 1992 incident. However, Dr. Burg had no knowledge of the identities of Worker’s prior healthcare providers. There is no indication that Dr. Burg was aware of the incidents in 1988 and 2000, and most importantly, Dr. Burg was unaware of the 1989 MRI. Without seeing the MRI, Dr. Burg acknowledged that he could not say how long the degenerative changes in Worker’s back had existed.

\{22\} On Dr. Burg’s referral for a surgical evaluation, Dr. Claude Gelinas examined Worker on March 19, 2003. Dr. Claude Gelinas did not testify by deposition or otherwise. Records showed that Dr. Claude Gelinas determined from the 2001 MRI that Worker had “one level degenerative changes with broad base disk bulge and foraminal stenosis at the L5-S1 level.” He diagnosed “degenerative disk disease L5-S1.” He noted that Worker needed a “lumbar fusion L5-S1.” Dr. Claude Gelinas completed a Workers’ Compensation Administration Form Letter which certified that the disk degeneration was causally related to the 2001 accident. Worker has not shown us anything in the record to indicate that Dr. Claude Gelinas considered any information about Worker’s prior history of back injuries in forming his conclusions about Worker’s 2001 injury.

\{23\} Dr. Castillo, who performed a surgical evaluation of Worker several months after the 2001 accident at Dr. Reeve’s request, had copies of records relating to Worker’s first back injury in 1988. Among these records were a 1989 physician’s report of Dr. McCutcheon and a 1989 MRI. Dr. Castillo testified that “it would be difficult to try and assign causation if [the physician has] an inaccurate medical history and there’s multiple other incidents of similar or the same back problems in the past.” Comparing the degenerative changes at L5-S1 shown on Worker’s 2001 MRI with the preexisting degenerative changes that were first noted by Dr. McCutcheon’s record in 1989, Dr. Castillo stated that “[t]he degenerative changes were definitely preexisting.” He further testified that in reviewing the 2001 MRI scan showing L5-S1 involvement, he looked “for things that may have changed pathologically or things that might need surgery to get better, and it was also interesting to note that it wasn’t much different than the MRI scan in 1989.” Comparing the studies and examinations done in 1989 with the 2001 MRI, Dr. Castillo stated that “[t]here doesn’t seem to have been a significant change,” and also stated that the interpretation of the MRI showing Worker’s degenerative disk condition in 1988 was “almost basically the exact interpretation of the MRI done in 2001.” When asked if the degenerative changes which Dr. Claude Gelinas in 2003 wanted to approach surgically preexisted August 1, 2001, Dr. Castillo stated that “[t]he degenerative changes predated the injury.” Finally, Dr. Castillo testified that it was fair to say he was not aware of any permanent or significant major change in Worker’s overall health condition as a result of the 2001 incident; that the degenerative condition in 2001 was “obviously” documented in the 1989 MRI; and that it was fair to say he was of the opinion the degenerative condition of L5-S1 that Dr. Gelinas wanted to address surgically preexisted Worker’s 2001 injury.

\{24\} The foregoing testimony unequivocally
shows Dr. Castillo’s opinions that Worker’s post-August 2001 degenerative disk condition preexisted the 2001 injury and that there was no evidence of a significant change in that condition as a result of that 2001 incident. We find nothing in the record to contradict Dr. Castillo’s testimony concerning the significance of Worker’s prior back injuries. Worker’s argument that the other doctors did not express a similar opinion about the relevance of Worker’s prior history is unpersuasive. When Drs. Reeve and Burg testified by deposition, they were not aware of Dr. Castillo’s testimony or of the 1989 MRI.

{25} Worker did not tender requested findings of fact. Employer’s requested findings of fact brought to the WCJ’s attention Worker’s prior history of back injuries and medical treatment. The requested findings specifically pointed to exhibits reflecting Worker’s June 1988 injury at Bowers Electric; to medical examinations, diagnoses, and physician imposed physical restrictions and treatment relating to Worker’s 1988 back injury; and to a judicial determination of a five percent permanent impairment rating due to complaints of pain in his low back from the 1988 injury. Employer’s requested findings also pointed out that “Worker was found to have a lumbar spine sprain, lumbar spondylosis at L-4 & L-5, S-1 and CT scan and MRI showed degeneration of L-5 and the lumbar spondylosis of the facets at L-5 and L-4 bilaterally,” all in connection with Worker’s 1988 injury.

{26} Employer’s requested findings further specifically pointed to a Notice of Accident Form Worker filled out on May 26, 1992, claiming a lifting accident. The requested findings showed that Worker was not returned to work until June 23, 1992. In addition, the requested findings also showed that Worker was off work following a motor vehicle accident in June 2000, from which he sought medical treatment at Lovelace for back pain and muscle spasms.

{27} Perhaps most significant are Employer’s requested findings in regard to Dr. Castillo’s opinions that were based on the doctor’s comparison of 1988-89 medical information and the 2001 medical information. To support Employer’s findings showing a preexisting injury and low back pain and the lack of any significant change in Worker’s degenerative disk condition from 1988 to 2001, Employer set out for the WCJ pertinent portions of Dr. Castillo’s deposition testimony, as set out earlier in this opinion.

{28} Employer’s requested conclusions of law included conclusions that Worker did not establish causation to a reasonable degree of medical probability, that Worker’s back condition was not caused by, and was not a natural direct result of, the August 2001 injury but rather was a preexisting condition from injuries such as Worker’s 1988, 1992, and 2000 incidents, and also from a preexisting spondylosis condition, along with naturally occurring degenerative back changes.

{29} In his “Medical Findings,” the WCJ noted that Worker was seen by Drs. Claude Gelinhas and Castillo. Following that, the WCJ found that Worker’s injury from the August 2001 incident was degenerative disc disease at L5-S1 and L4 radiculopathy. In the WCJ’s findings related to “Defenses,” the WCJ acknowledged Worker’s June 1988 work-related injury, workers’ compensation award and a year and a half off work, and limitation of work to the medium category. All of Employer’s requested findings specifically regarding Dr. Castillo’s opinions were rejected. All of Employer’s requested conclusions of law regarding Worker’s preexisting injury were also rejected by the WCJ. Neither the WCJ’s findings of fact nor conclusions of law mentioned anything in regard to the issue of whether the 2001 injury was related in any way to or combined in any way with a preexisting condition.

{30} There exists no indication in the record that Drs. Reeve and Burg based their medical opinions about the cause of Worker’s degenerative disk condition on anything other than the post-2001 injury MRI and other post-injury medical information. The record does reflect that Drs. Burg and Reeve each had in their records an October 16, 2001, letter from Dr. Castillo to Dr. Reeve that briefly referred to Worker’s history of back problems for which he had seen a physician in Dr. Castillo’s office in 1989 and, specifically, to low back pain and left leg pain and a negative MRI at that time. In his letter, Dr. Castillo assessed Worker’s condition in October 2001 as, among other things, mechanical low back pain, and he found Worker’s August 2001 MRI to be normal for all practical purposes. Dr. Castillo’s letter did not specify what was shown on the 1989 MRI. The exhibits to Dr. Reeve’s deposition also contain a copy of a January 9, 1989, letter from Dr. McCutcheon to Dr. Allen Gelinas regarding Worker’s June 1988 accident and referring to a CAT scan and an MRI. Readings of the CAT scan and the MRI showed a “desiccation of the L5 disc on the MRI, and... lumbar spondylosis of the facets at L5 and L4 bilaterally.” Neither Dr. Reeve nor Dr. Burg testified that they reviewed or considered Dr. Castillo’s references to the 1988 injury and related MRI or Dr. McCutcheon’s letter.

{31} The critical circumstances are the following: (1) according to Dr. Castillo, the 1989 MRI and the 2001 MRI, when compared, showed the same condition; (2) Dr. Castillo’s testimony in that regard was not contradicted; (3) Drs. Burg and Reeve did not testify they were aware of the 1988 injury, did not testify that they considered whether that injury was important, and never compared the two MRIs; and (4) the 1988 injury and 1989 MRI and the comparison of MRIs constituted pertinent medical information to consider in arriving at a medical opinion in regard to the 2001 injury. It might be that the 1988 injury and 1989 MRI would not have changed the opinions of Drs. Burg and Reeve. Their opinions may have differed from Dr. Castillo’s in regard to the significance of the 1988 injury and 1989 MRI. Perhaps the L4 radiculopathy diagnosed in 2001 was a new condition unrelated to a preexisting injury. But what is critical is that Drs. Burg and Reeve rendered opinions without at the very least testifying that they considered the 1988 injury and 1989 MRI and testifying to what, if any, medical significance they attributed to the 1988 injury and 1989 MRI. We find it noteworthy that the deposition of Dr. Castillo was taken on June 4, 2003, after the depositions of Worker and Drs. Burg and Reeve, which were taken in April and May 2003. Worker could have assured through supplemental depositions of Drs. Burg and Reeve that they considered Worker’s prior injury and preexisting condition as shown on the 1989 MRI in the
same manner as did Dr. Castillo.

{32} Based substantially on the foregoing recitations, we filed an opinion in this appeal on April 1, 2005, determining that Drs. Reeve’s and Burg’s opinions could not “satisfy the burden imposed by Section 52-1-28.” *Banks, 2003-NMSC-026*, ¶ 35. We stated that to the extent that they were uninformed about Worker’s specific medical history, including what the 1989 MRI showed, Drs. Reeve and Burg lacked pertinent information indicating that Worker’s degenerative disk condition following the 2001 injury was preexisting, rather than a new development caused by the 2001 incident. And we held that, in light of Dr. Castillo’s uncontradicted testimony about the significance of Worker’s degenerative disk condition after the 1988 injury and related MRI, by analogy to *Niederstadt*, there was insufficient evidence of a medical probability that Worker’s back condition related to his degenerative disk disease was an injury caused by the 2001 incident.

{33} Then, based on two motions for rehearing filed by Worker, this Court revised the April 1, 2005, opinion in an opinion filed on May 12, 2005, and we then withdrew the revised opinion in order to reevaluate our determinations in regard to the application of *Niederstadt* to bar Worker’s claim. In his rehearing motions, the substance of which we now address, Worker takes issue with our view of the facts in the record as well as with our application of *Niederstadt*. Worker contends that our focus on Worker’s preexisting degenerative disk condition is unwarranted and erroneous. He also contends that even were the degenerative disk condition to be given due consideration on the question of disability, *Niederstadt* does not apply because the existence of a preexisting degenerative disk condition does not change his right to receive full disability benefits for the condition.

{34} We think it necessary in connection with the rehearing motions to detail the record origins of the primary issue raised by Employer in this appeal, namely, the point that Worker failed to meet his burden under Section 52-1-28 to prove that his degenerative disk disease was caused by the 2001 injury. The discussion also relates to Employer’s point that the WCJ erred in denying Employer’s motion in limine to exclude the causation opinions of the doctors.

A. THE RECORD ORIGINS OF THE CAUSATION ISSUE AS IT PERTAINS TO THE ABSENCE FROM DRs. REEVE’S AND BURG’S OPINIONS OF ANY KNOWLEDGE OF OR RELIANCE ON THE HISTORY OF PREEXISTING DEGENERATIVE DISK DISEASE

{35} On June 3, 2003, Employer filed a motion in limine stating, among other things, that because of Worker’s withholding of medical information regarding his prior injuries and preexisting condition, the doctors’ causation opinions were based on “inaccurate and untrue medical history provided by Worker” and were therefore inherently unreliable, misleading, and inaccurate. Employer argued that the admission and consideration of opinions as to causation based on incomplete, inaccurate, and untruthful medical history would be unduly prejudicial and unfair to Employer. In this motion, Employer did not cite *Niederstadt*. However, in conclusion Employer stated that the doctors’ causation opinions were inadmissible because they relied on assumptions unrelated to the specific facts of the case, i.e., they were based on an assumption that Worker did not have a history of preexisting back conditions and injuries.

{36} On June 30, 2003, Employer filed requested findings of fact and conclusions of law stating essentially that: Worker failed to disclose to the doctors his previous history of back injuries, including among others the 1988 injury and treatment; it is important in forming an opinion on causation for doctors to have such information; because Worker did not provide such information, his doctors were unable to provide a reliable causation opinion; Dr. Reeve’s impairment rating may have resulted due to lack of information and should be rejected; Worker did not establish causation to a reasonable degree of medical certainty; and Worker’s claimed injury and back condition was a preexisting condition, he had no current disability due to his back condition, and if he had a disability from a back condition, the disability was a natural and direct result of a preexisting condition and/or injury. Employer did not cite case law in its requested findings of fact and conclusions of law.

{37} In August 2003, the parties and the WCJ signed a pretrial report in which one of the contested issues was stated as, “[w]hether Worker’s degenerative disc disease in his low back was caused or permanently aggravated by the incident on August 1, 2001.” The pretrial report simply noted Employer’s motion in limine filed June 3, 2003, under “Other Matters.”

{38} The WCJ’s findings of fact and conclusions of law entered on August 25, 2003, raised as one of the issues for decision “[w]hich of Worker’s injuries, if any, were caused by the August 1, 2001 work accident?” The WCJ then entered a finding of fact stating: “As a direct and proximate result of the accident of August 1, 2001, to a reasonable medical probability, Worker suffered an injury to the low back at the L4-L5 and L5-S1 levels. The nature of the injury is degenerative disc disease at L5-S1 and L4 radiculopathy.” Under “Defenses,” the WCJ made no findings in accordance with Employer’s requested findings on causation. The WCJ then determined that Worker was entitled to temporary total disability benefits, to continue “according to law.”

{39} Employer’s docketing statement upon filing an appeal asserted that there was no evidence in the record that the 2001 incident resulted in a degenerative disk condition, because, at the time of their depositions, Drs. Reeve and Burg had not received all of Worker’s medical records and had assumed that Worker’s “base-line condition had no prior back injuries.” Employer also stated, as it had in certain of its requested findings, that Worker had lied to those doctors in regard to his prior back injuries. Further, Employer noted that Worker did not claim in the compensation proceeding that he had a preexisting condition that was permanently aggravated by the 2001 accident. Further, Employer stated that it was error for the WCJ not to have ruled on its motion in limine, reiterating the questions about the validity of the doctors’ causation opinions based on incomplete, inaccurate, and untruthful medical history. In the docketing statement, Employer requested this Court to remand and require the WCJ to make rulings on Employer’s objections.

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of the doctors’ testimony and requests that the testimony be stricken. Employer did not list Niederstadt under its list of authorities.

{40} As indicated earlier in this opinion, in its brief in chief on appeal to this Court, Employer contends that Worker failed to meet his burden of showing, by expert medical opinion testimony, that the 2001 injury was the cause of his degenerative disk condition. The defect, Employer argues, is that the doctors testified that according to the information Worker supplied and their examinations only, Worker’s degenerative disk condition was caused by the 2001 incident. Within this argument, including the discussion that the doctors were unaware of the 1989 MRI, Employer states:

Due to the qualifications these doctors placed on their own opinions, neither doctor’s testimony can support a finding that the August 1, 2001 incident caused Worker’s degenerative disc condition. See Niederstadt v. Ancho Rico Consolidated Mines, 88 N.M. 48, 51, 536 P.2d 1104, 1107 (Ct. App. 1975) (holding that where pertinent information exists that the physician apparently had no knowledge of, his or her opinion cannot serve as the basis for compliance with Section 52-1-28); Banks v. IMC Kalium Carlsbad Potash Co., 2003-NMSC-026, ¶ 35, [134] N.M. [421], 77 P.3d 1014 (“[I]f the expert who testifies lacks pertinent information, his or her opinion cannot satisfy the burden imposed by Section 52-1-28[].”); Grudzina v. New Mexico Youth Diagnostic & Dev. Ctr., 104 N.M. 576, 582, 725 P.2d 255, 261 (Ct. App. 1986) (“[A]n expert’s opinion is only as good as the factual basis for it[].”)

Further, citing Niederstadt, Employer argues that the record shows that only one doctor, Dr. Castillo, compared the 1989 MRI to Worker’s post-2001 injury condition; Dr. Castillo determined that Worker did not suffer any significant change to his back condition as a result of the 2001 injury. Based on the lack of medically reliable evidence in the record that the 2001 incident caused Worker’s degenerative disk condition, Employer argues that the WCJ’s finding was erroneous and should be reversed. Further, Employer argues that the WCJ abused his discretion in failing to grant its motion in limine.

{41} In his answer brief on appeal, Worker does not mention Niederstadt. Worker nowhere argues that Employer did not preserve a Niederstadt argument. As indicated later in this opinion, Worker argues that there was substantial evidence of causation based on the testimony of the doctors.

B. THE APPROACH OF THIS COURT BASED ON THE BRIEFS ON APPEAL AND WORKER’S APPROACH ON REHEARING

{42} In studying the causation issue and Niederstadt based on the state of the appellate briefs, we determined that Niederstadt applied because Drs. Reeve and Burg did not have pertinent information in regard to Worker’s medical condition, in that they were not aware of and did not consider the 1989 MRI and Dr. Castillo’s testimony that Worker’s degenerative disk condition remained unchanged from 1989 through the 2001 injury. It was only after our first opinion in this case that Worker appears to have awakened to the fact that Employer had been arguing the Niederstadt principle below, had actually cited and argued Niederstadt in its brief in chief, and that the Niederstadt principle was at issue on appeal. We will discuss this more.

{43} The history of our opinions in this case is that we filed an opinion on April 1, 2005, withdrew it and filed a revised opinion on May 12, 2005, and then withdrew the revised opinion in order to further consider Worker’s two motions for rehearing. We asked the parties to file supplemental briefs because of case law raised for the first time as well as clearer arguments made in Worker’s motions for rehearing, and out of concern that perhaps existing case law relating to preexisting injuries and conditions rendered Niederstadt inapplicable.

{44} In his rehearing motions, Worker argues that his preexisting degenerative disk condition was essentially insignificant with respect to the disability determination relating to the 2001 injury, in that his current disability was predominantly based on L4 radiculopathy and there was no medical evidence that the preexisting degenerative disk condition was pertinent to the L4 radiculopathy. He points to evidence indicating that surgical repair of the preexisting degenerative disk condition would be ineffective to treat the L4 radiculopathy. He emphasizes that, while Drs. Reeve and Burg recognized the existence of degenerative disk disease and that the condition may have contributed to Worker’s disability, the doctors’ impairment ratings on which the WCJ based a disability conclusion were grounded predominantly on their diagnoses of L4 radiculopathy.

Further, Worker argues on rehearing that in applying Niederstadt we ignored established case law in this jurisdiction holding that compensation is to be paid for the full resultant disability when a preexisting condition combines with the new post-accident condition to constitute the resultant disability. See Reynolds v. Ruidoso Racing Ass’n, 69 N.M. 248, 254-58, 365 P.2d 671, 675-78 (1961); Edmiston v. City of Hobbs, 1997-NMCA-085, ¶ 21-23, 123 N.M. 654, 944 P.2d 883. Worker also argues that we did not consult cases that limit Niederstadt. See Mendez v. Sw. Cnty. Health Servs., 104 N.M. 608, 725 P.2d 584 (Ct. App. 1986); Sanchez v. Molycorp, Inc., 103 N.M. 148, 703 P.2d 925 (Ct. App. 1985); Martinez, 90 N.M. 782, 568 P.2d 618. Thus, in sum, Worker contends that evidence of the preexisting degenerative disk condition is not significant in the determination of causation of his disability, since: (1) the disability was primarily and predominantly due to L4 radiculopathy; and (2) the entire resultant disability is compensated, and compensation is not apportioned or diminished by only measuring an enhancement based on an aggravation from the 2001 injury.

{45} A troubling aspect of Worker’s rehearing position is that, in our view, Worker ignores the fact that the WCJ found “injury to the low back at the L4-L5 and L5-S1 levels[,] [t]he nature of [which] is degenerative disc disease at L5-S1 and L4 radiculopathy.” The WCJ determined disability based on this description of Worker’s injury. The WCJ’s disability determination was, therefore, necessarily based at least to some degree on degenerative disk disease and on that degenerative disk disease having been caused by the 2001 injury. Furthermore, the
disability determination was necessarily rooted only in the causation opinions of Drs. Reeve and Burg. Thus, the disability determination was suspect if the causation opinions were suspect.

{46} Initially Worker did not focus on the L4 radiculopathy as the only significant result of the accident, but he does now. In his answer brief fact recitation, Worker attributed causation significance to the degenerative disk disease. Worker stated that an MRI ordered by Dr. Reeve showed “facet arthritis at L4-L5 with diffuse disk profusion at L5-S1, without nerve root displacement.” Worker stated that “Dr. Reeve changed his diagnosis to degenerative disk disease at L5-S1 and L4 radiculopathy.” Worker further stated that Dr. Reeve referred Worker to Dr. Castillo for surgical consultation because of Worker’s chronic back pain and history of disk herniation. Moreover, although Worker indicated that Dr. Reeve gave him an impairment rating of ten percent largely based on the L4 radiculopathy, Worker also indicated that Dr. Reeve certified that Worker sustained “disk herniation with radiculopathy.” Further, Worker stated that Dr. Burg diagnosed “disk herniation with L4 radiculopathy, severe, needs surgery.”

{47} Also in his answer brief, Worker specifically argued that the record contained substantial evidence supporting the WCJ finding that Worker’s degenerative disk condition was causally related to the 2001 injury. He in fact argued that the “overwhelming evidence” to support finding cannot be disregarded on appellate review. As a corollary, Worker argued that his doctors’ opinions as to degenerative disk disease and causation were sufficient based on what they knew when they testified by deposition. Notwithstanding the foregoing approach in his answer brief and the undivided nature of the WCJ’s determination of injury, Worker on rehearing essentially wants this Court to eliminate degenerative disk disease as a significant element in the WCJ’s disability determination. Worker, however, has not shown, and we doubt Worker can show without further proceedings below, the extent of the significance the WCJ attached to the degenerative disk disease in the disability determination.

{48} A further troubling aspect of Worker’s position on rehearing relates to Niederstadt. Despite the fact that Employer argued Niederstadt on the causation issue in its brief in chief, Worker’s answer brief was silent in regard to Niederstadt. Not until his first rehearing motion did Worker cite or discuss Niederstadt and cases discussing or limiting Niederstadt, namely, Mendez, Sanchez, and Martinez. Further, not until Worker’s second motion for rehearing did Worker mention the law of preexisting conditions as it relates to compensation as set out in Reynolds and Edmiston.

{49} We studied Niederstadt further following Worker’s second rehearing motion’s discussion for the first time of Reynolds and Edmiston. Hypothetically, where an undisclosed, pertinent preexisting condition would, once disclosed, be determined to have combined with the recent injury and to be a part of a present disability determination, Niederstadt might be inapplicable. The notion of Niederstadt’s possible inapplicability stemmed from the law in Reynolds and Edmiston requiring compensation for full disability even where the recent injury arises in part from a preexisting condition. We asked the parties to file supplemental briefs on this issue.

{50} In its supplemental brief, Employer argues that a preexisting condition from a prior injury is relevant in cases such as the present case in which Worker claims that the current injury “is the sole cause of his disability.” More particularly, the relevance, according to Employer, is that the preexisting condition from the prior injury can show that Worker already had the very condition that he now complains was solely caused by the 2001 injury. Employer argues the preexisting condition can also show that the current injury did not cause the condition diagnosed by the doctors or the disability or the extent of the disability as determined by the WCJ. It is this sort of case, Employer argues, to which Niederstadt does apply, since “if a preexisting injury or condition is an alternative cause of the worker’s disability, then the failure of an expert to at least consider the preexisting condition would necessarily render his or her opinion on causation insufficient.” Neither Reynolds nor Edmiston are of concern, Employer argues, because unlike the present case in which Worker did not claim his workplace injury combined with or aggravated any preexisting condition, in Reynolds and Edmiston “the preexisting condition and the workplace injury combined to produce an overall condition of disability.” Edmiston, 1997-NMCA-085, ¶ 23. Employer also argues that Niederstadt is needed for cases such as the present case where a worker hides significant medical history from his doctors. The principle in Niederstadt is essential, according to Employer, to protect the integrity of the workers’ compensation system and to assist in assuring that the law is construed so that it favors neither worker nor employer.

{51} In his supplemental brief, Worker argues that Niederstadt remains viable law but is inapplicable in the present case. Worker states that there is no medical evidence in the present case that Drs. Reeve’s and Burg’s opinions concerning medical causation are defective because they lacked pertinent information. Also, for Worker, the preexisting condition was not pertinent because the disabling condition was predominately caused by L4 radiculopathy which, as opposed to “degenerative disk disease with L4 radiculopathy,” was not preexisting and was unattributable to the 1988 injury and related condition. Further, Worker characterizes Niederstadt as having been limited by case law following it to merely set out an evidentiary rule that has very narrow application, whereas Reynolds and Edmiston set out substantive rules of law interpreting the nature of causation as required under Section 52-1-28. According to Worker, Reynolds and Edmiston control because Worker’s L4 radiculopathy aggravated, exacerbated, or combined with a preexisting condition, namely, degenerative disk disease, and the resulting disability determination was appropriate.

{52} Finally, Worker essentially argues that degenerative disk disease does not occur overnight, and Drs. Reeve and Burg knew that this condition was preexisting when the doctors gave their opinions in regard to causation and impairment. Thus, Worker asserts, whether Drs. Reeve and Burg knew of the 1989 MRI is irrelevant; it was not pertinent, since they knew that the degenerative disk disease predated the 2001 injury. Worker states that “WCJs know that MRIs reflecting degenerative disk disease are neither essential to, nor dispositive of a low back disability.
diagnosis.” According to Worker, the WCJ, given his expertise, was able to understand that there was a preexisting degenerative disk disease and determine that it became symptomatic with the 2001 injury. Had Worker presented his case under Reynolds and Edmiston, or had he even alerted the WCJ to them through findings or a closing brief (both of which appear to have been requested by the WCJ, and neither of which was filed by Worker), and had the WCJ entered findings relating to the preexisting condition and Employer’s requested findings on nondisclosure and causation, our view, and the outcome here, may well have been different.

C. REMAND IS NECESSARY TO RESOLVE THE ISSUE

{53} We think the causation and Niederstadt questions here are by no means subject to clear and easy analysis and answer due in no small part to Worker’s lack of disclosure and to the nature of the WCJ’s finding on the nature of the injury. The problem, as we see it, lies in how we are to meaningfully review the WCJ’s determinations where we do not have the benefit of a fully developed case with reasoning and explanatory findings necessary to decide whether error occurred.

{54} We are not satisfied with the presentation of the injury and causation issues below in the workers’ compensation proceeding. Nor are we satisfied that the WCJ’s findings of fact and conclusions of law adequately cover the questions raised. The WCJ made no findings, including explanatory findings, in regard to whether Worker failed to disclose prior injuries and preexisting conditions to Drs. Reeve and Burg, and whether and why, if he did fail to disclose the information, the failure to disclose had any impact on the doctors’ opinions and his own determinations of the nature of the injury, causation, and disability. It does appear that Worker claimed that the 2001 incident was the sole cause of the degenerative disk condition or, at least, of one aspect of the injury that was ultimately diagnosed as “disc herniation with radiculopathy” found by the WCJ to be “an injury to the low back at the L4-L5 and L5-S1 levels,” and, more specifically, “degenerative disc disease at L5-S1 and L4 radiculopathy.” It is apparent from the record that Drs. Reeve’s and Burg’s opinions as to impairment and thus the WCJ’s determinations as to causation and disability followed exactly on that course. There was no evidence by Drs. Reeve and Burg to the contrary. The only testimony on the issue of the preexisting condition was that of Dr. Castillo, who believed that the degenerative disk condition remained virtually unchanged from the 1989 MRI through the 2001 injury. What is lacking in development by Worker and the WCJ’s decision is whether the degenerative disk condition seen after the 2001 injury was solely caused by a prior injury and not a condition caused by the 2001 incident. Worker wants this Court to look back and determine that it is unimportant whether Drs. Reeve and Burg knew of the preexisting degenerative disk condition because the condition obviously combined with the 2001 injury to contribute to Worker’s disability and also because the degenerative disk condition was a relatively insignificant aspect of the WCJ’s disability determination, which was based on Dr. Reeve’s testimony that L4 radiculopathy was the predominant consideration for his impairment rating. We will not speculate on that.

{55} We are convinced that the WCJ needs to review the record and enter more detailed and explanatory findings of fact and conclusions of law with respect to: (1) the significance and pertinence, if any, of the preexisting conditions shown by Employer; (2) whether Worker disclosed those conditions to the doctors rendering causation opinions; (3) what effect, if any, any failure to disclose these conditions had on those causation opinions; and (4) if not answered in any of these findings, why the failure to disclose did or did not materially affect the causation opinions and thus the WCJ’s disability determination. To the extent, if any, the WCJ sees the issues or concerns differently than does this Court, the WCJ should set out in a reasoned decision as to how he views the issues, including the application or not of Niederstadt.

{56} This case does not fit within the norm of workers’ compensation cases that involve the issue of causation. Worker did not disclose, and primary doctors were, from all appearances unaware of, the 1989 MRI. Without acknowledging his preexisting condition, Worker was claiming that the 2001 injury was the sole cause of the degenerative disk condition of which he complained. Based on Dr. Castillo’s testimony indicating that Worker’s condition was unchanged from the 1989 MRI to his condition after the 2001 injury, Employer can argue that without a medical opinion on causation to the contrary, it was the 1988 injury that was the cause of the degenerative disk condition of which Worker complained after the 2001 injury. Although Drs. Reeve, Burg, and even Gelinas may have assumed that the degenerative disk condition of which Worker complained was an aggravation of a preexisting degenerative disk condition producing Worker’s impairment, there is no indication from the doctors that they went through impairment and causation analyses based on the existence of a preexisting condition stemming from the 1988 injury. This out of the ordinary set of circumstances required more in explanatory findings to support the WCJ’s disability determination.

{57} This case points out why workers and their attorneys must take exceptional care to assure that the worker’s probative prior injuries and preexisting conditions are laid out for the worker’s doctors, and why the parties need to take care to assure that preexisting conditions are expressly covered in doctors’ depositions and in the WCJ’s findings of fact and conclusions of law.

II. EMPLOYMENT OFFER REJECTION

{58} In his Compensation Order’s findings of fact, the WCJ presented one of the issues as “[w]as worker extended a valid offer of return to work on October 15, 2001, and, if so, did Worker unreasonably refuse to accept said offer?” The WCJ found:

27. Worker was offered a return to work light duty by Employer on October 15, 2001.

28. The offer of return to work involved moving trucks and materials in the yard and did not involve over the road driving or loading and unloading.

29. The offer of return to work was for the nightshift.

30. Worker’s regular job and the job he was performing at the time of his work related accident as a driver, working days.

31. Worker reasonably refused a return to work offer which was
for the nightshift as opposed to the regular dayshift Worker was performing when he was injured.

The WCJ concluded that “Worker did not unreasonably refuse an offer of return to work.”

Worker could have done light duty work.

{59} NMSA 1978, § 52-1-25.1(B)(1990) of the Workers’ Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2004), provides that “[i]f, prior to the date of [MMI], an injured worker’s health care provider releases the worker to return to work and the employer offers work at the worker’s pre-injury wage, the worker is not entitled to temporary total disability benefits.”

{60} Employer contends that Worker unreasonably refused its offer of return to light duty work and Worker therefore was not entitled to temporary total disability benefits. The light duty job outline declined by Worker stated the schedule to be an average of approximately 40 hours a week, from 7:00 p.m. to 3:30 a.m., with the following functions:

The functions of the job include, but are not limited to, moving trucks in the yard to the docks at which they are needed; instructing and providing feedback to the loaders in the proper loading of delivery trucks; assisting the night managers/supervisors in any duties as assigned.

Worker signed under the portion of this document that stated: “I have read and understand the job duties and terms of the Light Duty program offered by Zanios Foods and choose to decline the job.”

{61} Employer argues that Dr. Reeve released Worker to a light duty position at the time of the October 15, 2001, job offer, citing a return to work authorization signed by Dr. Reeve on October 12, 2001. Employer further points to Dr. Reeve’s deposition testimony indicating that Worker could have done light duty work.

Dr. Reeve testified:

A In fact, when I gave him the impairment -- and I do this generally with all -- not generally. I do it with all patients. I discuss light duty, tell them based on the MRI and the physical findings and the rest that I think that light duty would be the most appropriate. I tell them that light duty generally means no lifting greater than 20 pounds, and no extreme exertional activity. And I don’t recall there being a discussion that he could not do light duty at all.

Q Okay.

A Generally, my pattern of behavior would be if they did dispute the light duty, then I would request the functional capacity eval to determine whether -- you know, what they really -- if light duty was appropriate or not.

In addition, Employer shows that the job offered did not require Worker to do anything that was restricted in light duty work, and that while the job offer involved driving at the yard, an earlier August 8, 2001, restriction as to driving trucks was not continued in the October 12 return to work authorization. Finally, Employer states that the WCJ made no finding that Worker was unable to perform the light duty work offered by Employer.

{62} Arguing, then, that the WCJ’s conclusion that Worker reasonably refused the work offer was based solely on the change in shift time from day to night, Employer contends that, under New Mexico law, the conclusion was erroneous, citing cases indicating that reasonableness is measured by physical ability to perform the job duties. See Garcia v. Borden, Inc., 115 N.M. 486, 493, 853 P.2d 737, 744 (Ct. App. 1993) (“We think it is implicit in the language of Section 52-1-26 that the legislature intended that where a worker is given a release to return to work, the release anticipates that the worker return to the type of work he was doing prior to the accident or work which he or she is otherwise physically capable of performing.”); see also Villanueva v. Sunday Sch. Bd., 121 N.M. 98, 104, 908 P.2d 791, 797 (Ct. App. 1995) (holding evidence sufficient for finding that worker was physically able to perform the job duties); Jeffrey v. Hays Plumbing & Heating, 118 N.M. 60, 61, 878 P.2d 1009, 1010 (Ct. App. 1994) (holding that worker’s refusal to take the modified duty position because he wanted to start his own business was unreasonable).

{63} Worker argues that, under New Mexico law, physical capacity to perform the work is not the only relevant consideration. Worker quotes language from Jeffrey which states: “Rejection of the employer’s offer does not necessarily mean that the worker is voluntarily unemployed or underemployed. There may be sound, appropriate reasons for the worker not to take the job. For example, the timing of the offer may be highly relevant.” Id. Further, Worker relies on Garcia, which discusses Section 52-1-26 (relating to permanent partial disability), and which states the requirement that a worker return to gainful employment as soon as possible does not “mean that [e]mployer can offer any work that has the same pre-injury wage, and thereby make [w]orker ineligible to receive disability benefits, even though [w]orker is unable to perform the work.” 115 N.M. at 493, 853 P.2d at 744. Lastly, by invoking Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, Worker argued that “New Mexico courts now interpret the provisions of the Workers’ Compensation Act to avoid abuse of the quid pro quo embodied by the Act by both worker and employer.” Technical compliance by Employer, Worker contends, is not dispositive of Worker’s right to temporary total disability benefits following the offer of return to work.

{64} Worker raises several arguments that generally focus on the reasonableness of his refusal of the job offered to him. These arguments include that he was not aware that a prior driving restriction had been lifted, that he felt it was not safe for him to operate a large vehicle, and that he both thought that he had been fired and he did not have an opportunity to discuss the work with the doctors.

{65} Worker acknowledges that Drs. Reeve and Castillo both testified that Worker reached MMI in October 2001 and could return to work. However, Worker contends the WCJ rejected those opinions when he found in his August 2003 compensation order that Worker had not yet reached MMI and was currently restricted from returning to work. Further, while acknowledging that “the record certainly contains some evidence that [Worker] could have returned to work pursuant to the October 15, 2001 ‘light duty’ offer by [Employer],” Worker argues that “the record also contains substantial evidence that Worker could not perform the duties described and his refusal to accept the return to work offer was reasonable under the circumstances.”

{66} Dr. Reeve testified:

A ... I’m sorry to interrupt you,
but I think he may have been temporarily restricted from driving because of narcotics, pain medication. I don’t know that I would have kept him on the restrictions at the time I put him at MMI.

A  At MMI -- what we do, if we’re in the initial phase of a person having a lot of back pain, they’re given Darvocet or Percocet, Vicodin, and as a commercial driver, we’re pretty much obligated to take them off the road.

Q  Let me go back and just make sure that I maintain the train of thought here. If you remove a restriction, that would also be included within your medical records, is that correct?

A  Well, I don’t recall us removing that restriction, but I think what I’m trying to do is justify why that restriction was in the first stages of that program. It’s a normal course and scope, when a person comes to MMI, we would have delineated that, you know, in the healthcare provider release, that they would be permanently -- because those are permanent restrictions when we do that.

When we write those in the notes, those are temporary restrictions that are subject to change at any time. Sometimes they go from light to medium, heavy to medium or sometimes light to heavy within a week.

I think what happened on that was that the patient probably was receiving narcotics, and they wanted him off the road, but at the time of permanent release, I wouldn’t have kept him off of the road.

Q  I want to discuss the job offer that was revealed to you, I think, earlier in the course of this deposition. My first question is did you participate in any way in the formulation of that job offer?

A  No. I don’t understand your question. You mean did I discuss it with the employer?

Q  The employer or the employee.

A  No. Well, I released the patient to light duty. I didn’t discuss with the employer the job description.

Q  Uh-huh. So you didn’t -- you can’t say at this point in time that you released [Worker] to that particular job?

A  Well, I released him to a light-duty job, and based on that description, that would be a light-duty job.

Q  Okay. It required him driving a truck?

A  (Witness nods head.)

Q  Is that correct?

Q  And also no driving, at least as of August 16. You have no record of ever having rescinded that particular restriction?

A  Well, we put him on a driving restriction at that point. As I stated, I wouldn’t have continued him on the driving restriction indefinitely.

{67} We are unpersuaded by Worker’s reliance on general language from Jeffre and Garcia, cases that, in fact, support Employer’s position. Worker does not offer New Mexico case law, and we are aware of none, that permits a Worker to decline a job offer based on the job schedule offered, without a reasonable justification for that refusal. Nor does Worker offer case law, and we are aware of none in New Mexico, that permits Worker to decline a job offer based alone on his own subjective view of his ability to perform the offered work, where the job comes within the restrictions placed by the worker’s doctor. There is nothing in the record that requires us to conclude that Worker could not have taken the opportunity to meet with Dr. Reeve to discuss the offered job duties. Dr. Reeve’s testimony essentially was that the August 2001 restriction on driving was temporary, related to a time period to get adjusted to drugs, and related to over-the-road commercial driving, and that the restriction was not carried through in the October 2001 light duty restrictions. Worker’s light duty involved driving the truck only in the yard. Nothing in the light duty job outline on its face required activity restricted by the October 12, 2001, return to work authorization. We see nothing in the WCJ’s findings that indicates anything wanting, defective, or unreasonable with respect to Employer’s offer. The WCJ made no finding, and Worker did not ask for one, that he was fired before he visited with Dr. Castillo.

{68} Further, the WCJ did not find that Worker was unable to perform the light duties offered, or even that Worker believed he was unable to perform those light duties as of October 15, 2001. The WCJ did not make a finding as to what activities were restricted by Dr. Reeve. Nor did the WCJ determine that the light duties required Worker to perform restricted activities. The only finding regarding restriction from work was within the WCJ’s benefits analysis, in which the WCJ found that Worker was “currently medically restricted from returning to work,” not that Worker was restricted from returning to work at the time of the job offer. The only finding that can reasonably be construed as constituting the basis for the WCJ’s finding and conclusion of reasonable refusal to return to work is the WCJ’s statement that “Worker reasonably refused a return to work offer which was for the nightshift as opposed to the regular dayshift Worker was performing when he was injured.” However, Worker points to no evidence in the record from which it can be inferred there were legitimate reasons Worker was unable to work the nightshift, and the WCJ does not set out any.

{69} We cannot accept the reasons given by Worker in his answer brief as legitimate reasons to decline the job offer. Worker does not point to anything in the record that indicates Worker discussed any of these reasons or excuses with Employer or with Dr. Reeve or even Dr. Castillo. Worker does not point to anything in the record that requires acceptance of Worker’s apparent view that he could not postpone accepting or declining the offer until he was able to meet again with the doctor and to show the doctor the duties required. Further, except perhaps for the nightshift, it appears to us that the WCJ did not accept any of the reasons gleaned by Worker from his testimony and set out earlier in this opinion.

{70} A WCJ’s assessment of whether a rejection is reasonable must be backed up by stated findings describing the reasons for Worker’s rejection of the job offer and indicating why the reasons are reasonable. WCJ clarity and expressed reasoning is essential to our effective and meaningful review. Cf. Atlitco Coalition v. Maggiore, 1998-NMCA-134, ¶ 17, 19, 125 N.M.
Based on its arguments on lack of support for causation, Employer argues that the WCJ abused his discretion in rejecting Employer’s motion to exclude the causation testimony of Drs. Reeve and Burg. Our ruling remanding the causation issue for further consideration removes this as an issue at this time. Further, it appears to us that a decision on the issue of causation will make this point moot.

IV. ATTORNEY FEES

{73} Employer asks us to reverse the WCJ’s award of attorney fees if we reverse and the effect of the reversal is to deny Worker compensation. Employer further asserts that the WCJ erred in awarding attorney fees to Worker. The primary ground underlying Employer’s attack is what Employer considers malfeasance on Worker’s part in various ways described in Employer’s brief. Worker answers Employer’s claims.

{74} We must assume that the WCJ was fully aware of the actions and failures to act on Worker’s counsel’s part as alleged by Employer. The WCJ could and presumably did evaluate that conduct in rejecting Employer’s argument that attorney fees should not be awarded. After a review of the record and the arguments, we cannot say that given the WCJ’s determinations in favor of Worker, the WCJ abused his discretion in awarding Worker’s attorney fees. See Pesch v. Boddington Lumber Co., 1998-NMCA-026, ¶ 7, 124 N.M. 666, 954 P.2d 98 (holding the award of attorney fees to be within the discretion of the WCJ, not to be overturned absent abuse of discretion).

{75} Nevertheless, whether attorney fees should be awarded depends upon the success of Worker’s claim. See Montoya v. Anaconda Mining Co., 97 N.M. 1, 7, 635 P.2d 1323, 1329 (Ct. App. 1981); Baeteman v. Springer Bldg. Materials Corp., 108 N.M. 655, 657, 777 P.2d 383, 385 (Ct. App. 1989). In light of our remand on other issues, we remand the attorney fee issue for further consideration. Whether the WCJ’s award remains the same or changes will depend upon the WCJ’s findings and conclusions following remand of the causation and rejection of job offer issues and any reevaluation of attorney fees that may be necessitated by the WCJ’s ultimate determinations.

CONCLUSION

{76} We remand the causation issue as well as the job rejection issue for further consideration by the WCJ consistent with this opinion. After such further consideration, the WCJ shall make the necessary reevaluation as to the award of attorney fees. The WCJ shall enter any further findings of fact, conclusions of law, and order within thirty days of the date this Opinion is filed. The parties shall supplement the record in this appeal with whatever the WCJ enters, and any other pertinent matters, and shall do so within ten days of entry of any further findings of fact, conclusions, and/or order.

IT IS SO ORDERED.

JONATHAN B. SUTIN,
Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
CYNTHIA A. FRY, Judge
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The Judicial Conference of the United States has authorized the appointment of a new full-time United States Magistrate Judge for the District of New Mexico at Las Cruces, New Mexico. The current annual salary of a Magistrate Judge is $149,132 per annum. The term of office is for eight years. A full public notice is posted in the office of the Clerk of the U.S. District Court at all federal courthouse locations in New Mexico, or on the Court’s external web page at www.nmcourt.gov. Application forms may be obtained from the Court’s external web page, from the Intake Courter at the federal courthouse locations, or by calling (505) 871-2567. Applications must be submitted by potential candidates only, to be received by January 13, 2006.

Legal Secretary
If you want to look forward to going to work every day, are willing to work hard and have fun at the same time, this is the job for you. Dixon, Scholl & Bailey, P.A. is seeking an experienced full time legal assistant. Applicant must have experience in Word Perfect and Microsoft Word. We offer a competitive salary, health insurance and 401k benefits. Position available in January, 2006. Please send resume to Jerry Dixon at P.O. Box 26416, Albuquerque, NM 87125-6416.

Paralegal
Paralegal experienced in litigation for uptown location needed. Competitive salary DOE. FAX resume to 822-8037.

Legal Secretary/Assistant
Legal secretary/assistant, 3+ years experience a must, litigation office in uptown area. Salary DOE. FAX resume to 822-8037.

Legal Secretary/Assistant
Legal secretary/assistant needed for small, busy law firm specializing in family law. Candidates must possess strong organizational and communication skills, the ability to work independently and solid working knowledge of Word, Wordperfect and Timeslips. Submit cover letter and resume (including references) to Sanford Siegel, 202 Girard SE, Albuquerque, NM 87106 or fax to (505) 232-0060.

Santa Fe Experienced Paralegal
Small (2 attys) established (1984) Santa Fe firm needs a bright, energetic, mature, meticulous and trustworthy paralegal. Prior NM experience preferred. Very substantial client contact. Excellent communication and organizational skills required. Computer intensive, informal non-smoking office. Competitive Salary DOE + monthly profit sharing; 100% paid Medical/Hosp; Parking; paid holidays; sick and personal leave; gasoline and cell phone reimbursement. CV with cover letter please to P.O. Box 4817, Santa Fe, NM 87502-4817.

Wills, Trusts and Probate
Legal Assistant
Catron, Catron & Portow, a small Santa Fe AV-rated law firm, seeks a full-time legal assistant with experience in New Mexico wills, trusts, and probate. Good writing and computer skills are necessary along with knowledge of forms and procedures. Salary DOE; good benefits. Send letter of interest with resume, references and writing samples to pgacey@catronlaw.com or fax to 505-986-1013. All applications will be kept in confidence.

Staff Assistant III
Legal Secretary
PNM Resources (NYSE:PNM) is seeking a legal secretary/staff assistant with 3-5 years experience, preferably with some litigation experience. The ideal candidate must possess strong organizational skills, the ability to work well in a team environment, good communication skills and a solid working knowledge of Outlook, Microsoft Word and Excel, legal research tools and the Internet. The ability to transcribe documents and familiarity with Timeslips or similar timekeeping software is preferred. To learn more about our Staff Assistant III position and to apply on-line visit www.pnmresources.com. Resumes MUST be received by January 13, 2006. This position will be based in Albuquerque, New Mexico. PNM Resources is an equal opportunity / Affirmative Action employer. Women and minorities are encouraged to apply.

Consulting

Forensic Psychiatrist
Yale trained and board certified in both Adult and Forensic Psychiatry. Available for consultation, psychiatric evaluations, record review and expert witness testimony. Experienced in both criminal and civil matters. Call Dr. Kelly at (505) 463-1228.

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Relieve front desk stress with a remote reception staff. Let our professionals answer your phone, handle scheduling, greet clients for package pickup and delivery at our conveniently located Albuquerque office. Call Deb Austin at 796-9600 or (877) 345-3525 www.officealternatives.com.

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Downtown Offices for Lease
Downtown offices for lease - individual offices available starting at $300.00/mo. Full service, shared conference room - ACLU Building, 1410 Coal SW - Call Gayle Page at Berger Briggs 505-247-0444.

Downtown Office Space
Prestigious office space on 7th floor of 40 First Plaza available for full or partial sublease. Space includes 8 offices, 3 conference rooms, kitchen, supply room, reception area, and secretarial areas. Convenient to courthouses and parking. Will consider sublease of entire premises (total 5,264 sq. ft.) or other configurations. One and one half years remaining on term with 5-year renewal at favorable rate. Contact Randall McDonald (505) 243-3000 or rjm@fojolaw.com.

For Rent
North Valley Office Building
Newly renovated office suites, shared conference room, reception area, kitchen, waiting area, security system. 5 minutes from Courthouses. Rent all or part (2600”). 1901 Candelaria NW (near Rio Grande Blvd. NW). Kathleen or Adam: (505) 459-4528.

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $350 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

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Season’s Greetings
and a Happy New Year!

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