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- Eighth Judicial District
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- Casemaker Free Online Legal Research
- Lawyer Compensation Survey Results

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11th HOUR?

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Guide to Member Benefits

For more information visit www.nmbar.org; or contact State Bar of New Mexico Membership Services, 5121 Masthead NE, Albuquerque, NM 87109
Phone: (505) 797-6033 • E-mail: membership@nmbar.org

Through the stated or implied endorsement of Alliance Program Participants, the State Bar of New Mexico assumes no liability for claims, losses, costs, damages, judgments or settlements including costs, expenses and attorneys fees arising from or in any manner relating to (1) any inaccurate representations made by the participant, (2) any breach of any warranty or any default in the performance of any of the covenants made by the participant, and (3) any negligent acts or omissions, whether inadvertent or intentional, and any willful misconduct by participant.
February - Video Replay Tuesdays

Medicare’s New Coverage: The Impact on Your Clients
Tuesday, February 7
10 a.m. – Noon
State Bar Center
1.7 General CLE Credits
☐ $79

The Changing Law Regarding Church-State Issues
Tuesday, February 7
12:30 p.m. – 4:30 p.m.
State Bar Center
4.0 General CLE Credits
☐ $149

Current Legalities and Realities of the End of Life Debate
Tuesday, February 7
8 a.m. – Noon
State Bar Center
2.9 General and 0.8 Ethics CLE Credits
☐ $149

2005 Professionalism: Lawyers Concerned for Lawyers
Tuesday, February 7
1 p.m. – 3 p.m.
State Bar Center
1.6 Professionalism Credits
☐ $79

Ethics: Now What Are You Gonna Do?
Tuesday, February 7
3 p.m. – 4 p.m.
State Bar Center
1.0 Ethics CLE Credits
☐ $49

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

Name __________________________
NM Bar # _______________________
Street _________________________
City/State/Zip ___________________
Phone __________________ Fax __________________
E-mail _______________________
Program Title __________________
Program Date ___________________
Program Location _______________
Program Cost __________________

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

With respect to my clients:
I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party.

---

**Meetings**

**February**

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

2 Prosecutors Section Board of Directors
   3 p.m., State Bar Center

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

8 Law Office Management Committee
   noon, State Bar Center

9 Public Law Section Board of Directors
   noon, Risk Management Division, Santa Fe

9 Business Law Section Board of Directors
   4 p.m., State Bar Center

10 Board of Editors, noon, State Bar Center

10 International and Immigration Law Section Board of Directors
   1:30 p.m., State Bar Center

11 Ethics Advisory Committee
   10 a.m., State Bar Center

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**State Bar Workshops**

**February**

1 Lawyer Referral for the Elderly Workshop
   9 a.m., Munson Senior Center, Las Cruces

2 Lawyer Referral for the Elderly Workshop
   12:30 p.m., Socorro Senior Center

8 Social Security Disability Workshop
   6 p.m., Mimbres Valley Learning Center, Deming

15 Lawyer Referral for the Elderly Workshop
   10:30 a.m., Jicarilla Shopping Center Conference Room, Dulce

16 Lawyer Referral for the Elderly Workshop
   11 a.m., Tierra Amarilla Senior Center, Tierra Amarilla

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

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

23 Consumer Debt-Bankruptcy Workshop
   5:30 p.m., Branigan Library, Law 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.
NOTICES

COURT NEWS

NM Supreme Court Board of Legal Specialization
Comments Solicited

The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199-2860. Environmental Law: Thomas M. Hnasko Natural Resources–Oil and Gas Law: William F. Carr Real Estate Law: Edward J. Roibal Trial Specialist–Civil Law: Turner W. Branch Trial Specialist–Criminal Law: Ray Tushig

Client Protection Fund Commission

The Supreme Court recently created the Client Protection Fund Commission by Rule17A-001, published in the Jan. 16 Bar Bulletin. The Supreme Court will make four appointments to the commission. Members interested in serving on this commission should send a letter of interest and a resume no later than Feb. 17 to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Judicial Information Systems Council

A vacancy exists on the New Mexico Supreme Court Judicial Information Systems Council (JIFFY). Members wishing to serve on the council should send a letter of interest and brief resume by Feb. 17 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:
- Monday-Friday, 8 a.m.–5:30 p.m.
- Saturday, 10 a.m.–3 p.m.
- Closed holiday weekends

The library has statutes, rules, regulations, etc., plus, FREE computer access to Westlaw and Lexis. It also has many other computer-based research tools.

Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.

First Judicial District Court

ADR Program Change

The 1st Judicial District Court has issued an administrative order adopting an Alternative Dispute Resolution (ADR) Pilot Project which will substantially change the court’s ADR program. The major components of the restructured program are the implementation of quality assurance features and payment of settlement facilitators. The transition to the new ADR program structure is expected to be complete by May 1.

Attorneys who practice in the district are invited to apply for inclusion on the court’s list. Attorneys who are already on the court’s list of volunteer settlement referees will receive an information and application packet in the mail. Other attorneys who practice in the district may request a packet by e-mail or phone.

For more information or to request a packet, contact the supervising judge of the ADR Program, District Judge Raymond Z. Ortiz, Div. III, (505) 827-5083 or sfedroz@nmcourts.com, or Celia A. Ludi, Esq., ADR program director, (505) 827-5072, or sfedcal@nmcourts.com.

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 the year of 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 Feb. 2 to Apr. 6. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, 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.

Eighth Judicial District Announcement of Vacancy

A vacancy on the 8th Judicial District Court will exist in Raton as of Feb. 1 upon the retirement of the Honorable Peggy J. Nelson.

The chair of the 8th 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 Sandra Bauman, (505) 277-4700, to receive e-mail/fax/mail. The deadline for applications is 5 p.m., Jan. 31. Applications received after that date will be not considered.

Case Reassignment

Effective Feb. 1, Judge Sam B. Sanchez, Division II, will be seated in Taos County. All Taos County cases previously assigned to Division I, Judge Peggy J. Nelson, will now be reassigned to Judge Sanchez, Division II, as well as any new cases filed thereafter. All Colfax and Union County cases previously assigned to Judge Sanchez, Division II, and any new cases filed thereafter, will be reassigned to the newly appointed judge upon taking office.

Cases in which Judge Sanchez, Division II, was assigned to preside following the
excusal or recusal of Judge Nelson shall remain with Division II.

All cases in which Judge Nelson, Division I, was assigned to preside following the excusal or recusal of Judge Sanchez will remain assigned to Division I.

Parties may exercise their right to challenge or excuse Judge Sanchez 10 days from Feb. 1 pursuant to Supreme Court Rule 1-088.1

Retirement Party

A retirement party for the Hon. Peggy J. Nelson will be held from 7 to 11 p.m., Feb. 3, at the Sagebrush Inn Convention Center, 1508 Paseo del Pueblo Sur, Taos. Call Kelan Emery, Esq., president of the Taos County Bar Association, (505) 758-7997, for more information.

STATE BAR NEWS

15th Annual Summer Law Clerk Program

The State Bar of New Mexico is partnering with major New Mexico law firms and governmental law departments to provide excellent employment opportunities for diverse and deserving law students at the University of New Mexico School of Law. The Summer Law Clerk Program provides law students who have capable research and writing skills with the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions.

The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that have nothing to do with performance or the potential for success as an attorney. The rigorous application and interview process combines a unique learning experience for law students with a unique insight into the qualifications and potential of our applicants.

Working with law firms and agencies who are committed to the ideal of diversified applicant pools, the Summer Law Clerk Program has been bringing down artificial barriers to employment, producing quality law clerks and diversifying attorney applicants for nearly a generation.

Law firms or agencies interested in participating in the 2006 Summer Law Clerk Program should contact Art Jaramillo, ajaramillo@aol.com, by 5 p.m., March 1. Interviews will be held at UNM on March 4.

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., Feb. 6, 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.

Client Protection Fund Commission

The Supreme Court recently created the Client Protection Fund Commission by Rule17A-001, published in the Jan. 16 Bar Bulletin. The State Bar will make two appointments to the commission. Members interested in serving on this commission should send a letter of interest and a resume no later than Feb. 17 to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Board of Bar Commissioners

Casemaker Free Online Legal Research Coming Soon for New Mexico Lawyers

The State Bar of New Mexico is proud to offer its newest member benefit, Casemaker. Casemaker is online legal research made available to State Bar members at no charge. That’s free legal research.

Casemaker will be available from the State Bar’s Web site at www.nmbar.org with an anticipated launch date of July 2006 as part of the annual meeting in Durango. The library will include most everything needed for the New Mexico lawyer, including federal material.

Casemaker allows searches by:
• word, word combinations or phrases,
• official case citation,
• statute number,
• judge’s name and
• attorney’s name.

New Mexico lawyers will get access to all other member state libraries, which currently include: Alabama, Colorado, Connecticut, Georgia, Idaho, Indiana, Kentucky, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington and West Virginia. Casemaker promises to be a tremendous asset to New Mexico practitioners.

Watch for more information about Casemaker and visit www.casemaker.us. Contact Joe Conte jconte@nmbar.org or (505) 797-6099 with questions.

Lawyer Compensation Survey Results Available

Results from the 2005 Lawyer Compensation Survey conducted by Research & Polling, Inc., are now available online at www.nmbar.org. Member usernames (Bar ID number) and passwords (last name) will be required to access the data. Additional copies may be purchased for $25 plus tax. Order online or request copies by contacting Madonna Vandeventer, mvandeventer@nmbar.org, or (505) 797-6035.

Employment and Labor Law Section

Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Feb. 1. (Lunch is not provided). For information about the section, visit the State Bar Web site, www.nmbar.org, or call Carlos Quiñones, section chair, (505) 248-0500.

Mandatory Disclosure of Malpractice Insurance

Rule No. 05-8500. In the Matter of Mandatory Disclosure of Professional Liability Insurance Coverage 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 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.”
Paralegal Division
Monthly Brown Bag CLE for Attorneys and Paralegals

The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., Feb. 8, at the State Bar Center. Anne Rose, Ph.D., will present Use of Forensic Psychological Evaluations in the Courtroom. Participants will earn 1.0 general CLE 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.

Public Law Section
Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the 2006 Public Lawyer Award. The award is presented to an attorney or other legal professional in recognition of contributions to the practice of public law. Nominations must be postmarked by Mar. 31. Any questions regarding the fellowship should be directed to J. Brent Moore, (505) 476-3783.

Young Lawyers Division
2006 Summer Fellowships

The Young Lawyers Division (YLD) of the State Bar of New Mexico is currently accepting applications for its 2006 Summer Fellowships. Two fellowships will be awarded by the YLD to two law students who are interested in working in unpaid legal positions in the public interest or government sector during the summer of 2006. The fellowship awards are intended to provide the opportunity for law students to work in positions that might not otherwise be possible because the positions are unpaid. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer.

In order to be eligible for the fellowships, applicants must be a current law student in good standing with their school. To apply, applicants must provide the following documents postmarked by Mar. 31: (1) a letter of interest to YLD from the applicant that details the student's interest in public interest law or the government sector; (2) a resume of the applicant; and (3) a written offer of employment to the applicant for an unpaid legal position in public interest law or the government sector for the summer of 2006. All documents must be submitted to the following address: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, New Mexico Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, New Mexico 87501. Applications must be postmarked by Mar. 31. Any questions regarding the fellowship should be directed to J. Brent Moore, (505) 476-3783.

Other Bars
Albuquerque Bar Association
Annual Meeting Luncheon

The Albuquerque Bar Association’s annual meeting luncheon will be held at noon, Feb. 7, at the Albuquerque Petroleum Club. Mayor Martin Chavez will present the luncheon program on The State of the City. The CLE program, May It Pore the Court, 2006 Update, moderated by Wendy York, will be held from 1:30 to 3:45 p.m. Attendees will earn 2.0 general CLE credits. Lunch only: $20 members/$25 non-members with advanced reservation, $5 additional at the door. Lunch and CLE: $60 members/$85 non-members, $5 additional at the door. CLE only: $40 members/$60 non-members. Register for lunch by noon, Feb. 6, by:
2. Sending e-mail to abqbar@abqbar.com.
3. Calling (505) 243-2615 or (505) 842-1151.
4. Faxing to (505) 842-0287.

American Bar Association
Midyear Meeting

The American Bar Association’s midyear meeting will be held Feb. 8–13 in Chicago. The ABA House of Delegates is meeting on Feb. 13. The agenda was printed in the Dec. 26, Vol. 44, No. 51 Bar Bulletin and is also available on the ABA’s Web site at www.abanet.org/leadership/2006/midyear/prelimagenda.doc. ABA members are asked to review the agenda and direct questions or comments to State of New Mexico Delegate Mary Torres, (505) 848-1800, or mtorres@modrall.com.

Nominations Solicited

Karen Mathis, the president-elect of the American Bar Association, is privileged to fill vacancies on the American Bar Association (ABA) standing and special committees, commissions, working groups, task forces and other ABA entities for the 2006-2007 association year. A list of those committees was printed in the Jan.. 2, Vol.
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.

**UNM School of Law**

**Law Library**

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**Other News**

**2006 Paralegal of the Year Nominations**

Gain national exposure, earn recognition for the paralegal profession and bring prestige to a respected colleague. Nominate a peer for the Legal Assistant Today’s (LAT) 2006 Paralegal of the Year Award.

Since 1998, LAT has honored a paralegal who demonstrates a profound commitment to his or her career and strives to shape the future of the paralegal field. The winner will be chosen by the LAT Editorial Advisory Board and be featured in the September/October 2006 issue. The winner will receive a $1,000 cash prize, an award plaque and a complimentary one-year subscription to LAT. His or her division will also receive $100. Two runners-up will each receive an award plaque and a one-year subscription to LAT, as well as be featured in the September/October issue.

Sponsored by Image Capture Engineering, the Paralegal of the Year contest is open to all paralegals who meet the contest’s requirements:

- Nominees must have a minimum of three years’ experience as a paralegal/legal assistant.
- Self-nominations are not allowed.
- Nominators must submit a statement on the nomination form providing information on the nominee’s significant activities in four categories—from career accomplishments to civic contributions.

Nominations are due May 5. For complete contest requirements and to fill out a nomination form, go to www.legalassistant-today.com and click on the Paralegal of the Year Award logo.

**National Legal Fiction Writing Competition for Lawyers**

SEAK, Inc., a provider of continuing education and professional training for lawyers, is sponsoring the 5th Annual National Legal Fiction Writing Competition for Lawyers. The competition is open to any licensed attorney in the U.S. and its territories. A short story or novel excerpt in the legal fiction genre should be submitted. There is no fee to enter the competition and authors will maintain the original copyright to their materials. A cash prize of $1,000 will be awarded to the First Prize winner.

The deadline for submissions is June 30. For more information, interested attorneys should contact Kevin J. Driscoll, Esq., (508) 548-4542 or kevin.driscoll@verizon.net.

The Bar Bulletin now accepts letters to the editor. Submit letters to notices@nmbar.org.

The complete editorial policy may be found on www.nmbar.org under Publications/Media.
Happy Birthday, State Bar

One hundred State Bar members and staff packed the lobby of the State Bar Center on Jan. 19 to celebrate the 120th birthday of the State Bar.

First known as the New Mexico Bar Association, the State Bar was organized on Jan. 19, 1886, in Santa Fe and has continued uninterrupted and only slightly changed since that time. It was formed, to quote from the original constitution, “to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, to encourage a thorough and liberal legal education and to cherish a spirit of brotherhood among the members…”.

State Bar President Virginia Dugan welcomed guests and commented on the issues and events that captured our attention over the past years.

“The ever-increasing rate of change in our society and our systems of justice mandates that we not only continue the effort started by 19 of our brethren in 1886, but that as a body of some of the finest minds in the state, we redouble our efforts to study and improve upon the collection of laws, precedents, arbitration and mediation that has come to constitute our legal system of today. I thank you for joining me in a celebration of that system,” she said.

Dugan’s remarks focused attention on the Bar’s role in shaping the legal profession.

“Bar associations have taken us from a system of apprenticeships in law to our present arrangement of accredited law schools, bar examinations, and continuing peer scrutiny to assess the fitness of our attorneys. Bar associations have been at the forefront of legal education, settlement of grievances against attorneys and promoting legal reform,” she said.

As part of the celebration, the oldest and youngest practicing attorneys and the longest practicing male and female attorneys were honored.

Thomas P. Foy, 91, is the Bar’s oldest practicing attorney. He graduated from Notre Dame Law School and joined the State Bar in August 1946. Foy served in World War II and is a survivor of the Bataan Death march. He served two terms as the 6th Judicial District attorney and as a state representative from the 39th district from 1978 to 1998. In 2004, he received an honorary doctorate of humane letters degree from Western New Mexico University in recognition of his exemplary service to his country, state, Silver City and Western New Mexico University.

Our longest practicing male attorney is Lynell Skarda of Clovis. Skarda graduated from the University of California at Berkeley in 1937 and Washington and Lee School of Law in 1941. He joined the State Bar in 1941. During his career as a lawyer, he spent 20 years on the Committee to Establish Uniform Jury Instructions for Civil Courts and was the district attorney in the 9th Judicial District. He also clerked for The Honorable Sam G. Bratton in the U.S. Court of Appeals for the 10th Circuit. He has spent most of his career in private practice. Mr. Skarda will celebrate his 91st birthday in August.

Our longest practicing female attorney is Lynn Allan. Allan graduated from Washington College of Law at American University in 1964 and practiced criminal law in Washington for 10 years. In 1974, she joined the State Bar and worked for about a year as the assistant executive director. She has practiced criminal law in Albuquerque since then.

James C. Slattery, our youngest attorney, is 24. He graduated from Lipscomb University in Nashville in 2002, completed law school at Pepperdine University in 2005 and joined the State Bar last September. During law school, Slattery had externships with Judge Harry Pregerson of the U.S. Court of Appeals, 9th Circuit, in LA and with Judge Ricardo Urbina of the U.S. District Court in Washington D.C. He is now serving a one-year clerkship with U.S. District Court Judge James Browning in Albuquerque.

“...to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, to encourage a thorough and liberal legal education and to cherish a spirit of brotherhood among the members…”

State Bar of New Mexico
Original Constitution
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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Mail To: State Bar of New Mexico, Accounting Department, PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 797-6019
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E = Ethics  
P = Professionalism  
VR = Video Replay  
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WRITS OF CERTIORARI

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

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

**Effective January 30, 2006**

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

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As Updated by the Clerk of the New Mexico Supreme Court

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

**EFFECTIVE JANUARY 30, 2006**

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**CERTIORARI GRANTED AND SUBMITTED TO THE COURT**

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

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<tr>
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From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-002

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RAUL PACHECO,
Defendant-Appellant.
No. 24,154 (filed: November 8, 2005)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
DON MADDOX, District Judge

PATRICIA A. MADRID
Assistant Attorney General
Santa Fe, New Mexico
M. ANNE KELLY,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

JOHN BIGELOW,
Chief Public Defender
JENNIFER BYRNS,
Assistant Public Defender
Santa Fe, New Mexico
for Appellant

MICHAEL E. VIGIL, JUDGE

1 This case requires us to determine the consequence of an interpreter being present while the jury deliberated Defendant’s guilt or innocence without the benefit of an oath or instruction to ensure that she neither participate in or interfere with the jury’s deliberations. We hold that in these circumstances there is a presumption of prejudice. Since the presumption was not overcome, we reverse Defendant’s convictions and remand for a new trial.

BACKGROUND

2 During voir dire and throughout the trial, an interpreter was present so that two of the jurors could understand what was taking place. An interpreter was also used to assist one of the witnesses at Defendant’s request, although the transcript does not disclose whether it was the same interpreter.

3 The State correctly points out that it is not clear from the record whether an interpreter was present during the jury’s deliberations. However, Defendant’s motion for a new trial asserts that the interpreter was present while the jury deliberated, and that she was not given an oath not to participate directly or indirectly in the jury deliberations. The State did not contradict this factual assertion. Moreover, a failure or refusal to provide an interpreter to assist the non-English speaking jurors in their deliberations would constitute reversible error in itself because without an interpreter they could not meaningfully participate in the deliberations. *State v. Gallegos*, 88 N.M. 487, 489, 542 P.2d 832, 834 (Ct. App. 1975) (“It is self-evident that a juror who does not possess a working knowledge of English would be unable to serve because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused.” However, “[s]uch would not be the case if testimony and evidence were translated.”). Accordingly, we presume that the trial court properly accommodated the two non-English speaking jurors by allowing the interpreter to assist them in deliberations. *See State v. Rojo*, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (holding that where the record is doubtful or deficient, every presumption is indulged by the reviewing court in favor of the correctness and regularity of the proceedings in the trial court).

DISCUSSION

4 The effect of the interpreter’s presence while the jury deliberated without the benefit of an oath or instruction concerning her proper role and that she not participate in or interfere with the deliberations of the jury presents a legal question which we review de novo. *See State v. Juarez*, 120 N.M. 499, 502, 903 P.2d 241, 244 (Ct. App. 1995) (stating a de novo standard of review is appropriate for threshold constitutional issues).

5 Two separate constitutional rights are at issue in this case. First, our Constitution guarantees that every citizen shall have the right to serve as a juror whether or not he or she can speak, read, or write the English language. N.M. Const. art. VII, § 3 directs, “[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . language or . . . inability to speak, read or write the English or Spanish languages.” To implement the constitutional right, our Supreme Court issued the *Non-English Speaking Juror Guidelines* (NES Guidelines) in 2000, a copy of which are attached as an Appendix to this opinion. The Supreme Court has also directed that “the trial court must make every reasonable effort to protect a juror’s rights under Article VII, Section 3 of the New Mexico Constitution and to accommodate a juror’s need for the assistance of an interpreter.” *State v. Rico*, 2002-NMSC-022, ¶ 1, 132 N.M. 570, 52 P.3d 942. Any failure to do so must be justified by unique needs and limitations. Id. ¶ 12. *See also NES Guidelines* Introduction, Section I (stating, “all courts are encouraged to implement the standards [of the Guidelines] to the fullest extent possible”).

6 The second constitutional right at issue in this case is the right of a defendant to be tried by a juror, described as “one of the most important safeguards against tyranny which our law has designed.” *Lee v. Madigan*, 358 U.S. 228, 234 (1959). Most recently, in *Blakely v. Washington*, 542 U.S. 296, ___, No. 02-1632, slip op. at 9 (U.S. June 24, 2004), the United States Supreme Court has observed that the right to a jury trial “is no more procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” *Id.* For this reason, both the United States and New Mexico Constitutions guarantee criminal defendants the right to a jury trial. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”); N.M. Const. art. II, § 12 (“The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”).

7 The heart of a jury’s function lies in its deliberations. To ensure that the constitutional right to a jury trial is fully protected, we have recognized that communications with jurors occurring during deliberations directly bearing on the issues in the trial,

[8] The presence of an interpreter during jury deliberations does not constitute, per se, the presence of an unauthorized person giving rise to a presumption of prejudice. *See Rico*, 2002-NMSC-022, app. at 575 (noting that in protecting the constitutional right of non-English speaking citizens to serve on a jury, “we believe that the use of court interpreters during jury deliberations does not constitute an unauthorized presence in the jury room”); *United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987) (holding that “an important social policy argues against automatically foreclosing members of an important segment of our society from jury duty simply because they must take an interpreter into the jury room”). However, “the presence of any nonjuror creates a danger that he or she will participate in the deliberations.” *People v. Giezman*, 555 N.E.2d 259, 263 (N.Y. 1990). This danger is particularly acute for an interpreter who is actively translating during the deliberation process itself. We must therefore strike a balance between protecting the right of non-English speaking citizens to serve as jurors and the sanctity of the jury’s deliberations.

[9] In *Dempsey*, the Tenth Circuit considered whether a sign language interpreter could accompany a deaf juror during deliberations. 830 F.2d at 1086. The court expressed concern that it could never know for sure whether the interpreter had improperly influenced the jury with her “facial expressions, pauses, gestures[,] or otherwise.” *Id.* at 1091. However, the court noted that the trial court had required the interpreter to take an oath that she would translate correctly and that she would not interfere with or participate in the jury’s deliberations. *Id.* Further, after the jury’s deliberations, the trial court asked the interpreter whether she had participated in the jury’s deliberations other than to translate. *Id.* Because the interpreter’s oath to act strictly as an interpreter and not to participate in the deliberations “sufficiently protected the jury’s deliberations, the court held that the interpreter’s presence did not warrant a new trial of the defendant. *Id.* at 1092; accord *Guzman*, 555 N.E.2d at 263 (holding that the district court may sufficiently protect against the danger of improper participation by the interpreter by instructing the interpreter and the jurors that the interpreter may not participate in deliberations).

[10] The NES Guidelines seek to protect the constitutional right of non-English speaking citizens to serve on a jury, and to also ensure that a defendant’s right to a fair trial is not compromised by the use of an interpreter. They do so by emphasizing the interpreter’s limited role. Section III(C)(5) (pre-deliberation instructions) provides:

Prior to excusing the jury for deliberations, the trial judge should, on the record in the presence of the jury, instruct the court interpreter who will be providing interpretation services for an NES juror that the interpreter should not interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations but should be strictly limited to interpreting the jury deliberations. The trial judge should also ask the court interpreter to affirmatively state on the record that the interpreter understands the trial judge’s instructions.

(Emphasis added.) Section III(C)(6) (post-deliberation instructions) provides:

Following jury deliberations but before the jury’s verdict is announced, the trial judge should ask the court interpreter on the record whether the interpreter abided by his or her oath to act strictly as an interpreter and not to participate in the deliberations. The interpreter’s identity and answers should be made a part of the record. At the request of a party to the litigation, the jurors may also be questioned to the same effect. The trial judge should also instruct the court interpreter not to reveal any aspect of the jury deliberations after the case is closed.

(Emphasis added.)

[11] No guidance was given to either the interpreter or the jury regarding the interpreter’s role during deliberations because no pre- and post-deliberation instructions were given. The only oath given to the interpreter was before the first witness was called, as follows: “Do you solemnly swear that you will faithfully and impartially interpret English into Spanish and Spanish into English the testimony about to be given in the cause now on trial so help you God?” See NES Guidelines, Section III(C)(2); NMSA 1978, § 38-10-8 (1985) (stating that an interpreter, “before entering upon his duties, shall take an oath that he will make a true and impartial interpretation or translation in an understandable manner using his best skills and judgment in accordance with the standards and ethics of the interpreter profession”).

[12] Moreover, apart from a brief explanation to Victim when she testified that the interpreter “is translating everything you’re saying from English into Spanish”, the trial court offered no explanation of the interpreter’s presence, or guidance to the jurors that her sole duty was to interpret. This failure also contravened the NES Guidelines, Section III(C)(4), which directs:

Prior to the commencement of proceedings, the trial court judge should explain the role of the court interpreter to those present in the courtroom by explaining that the interpreter was appointed by the court to assist jurors or prospective jurors who do not understand English. The judge should also explain to the jury that the interpreter is only allowed to interpret and that the jurors may not ask the interpreter for advice or other assistance. The judge should also explain that, for those English speaking jurors who may understand the non-English language spoken by the court interpreter, the jurors should disregard what they hear the interpreter say and rely solely on the evidence presented in English.

[13] Absent any of the foregoing explanations, instructions, or oaths required by the NES Guidelines or any other protections such as in *Dempsey*, relating to jury deliberations, we cannot presume that the interpreter or jurors were even aware of the interpreter’s limited duty only to interpret during deliberations. Cf. *Saunders v. State*, 49 S.W.3d 536, 540-41 (Tex. Ct. App. 2001) (holding that the court’s failure
to administer an oath to the interpreter to not participate in any manner in the jury deliberations did not merit reversal when the court’s instructions to the jury that the interpreter is not a member of the jury and will not give advice when deliberating was directed to the interpreter as well as the jury members). Without protective instructions or an oath, as we have discussed, we are left to speculate about the interpreter’s role while this jury deliberated Defendant’s guilt or innocence. In light of the sanctity of the jury room, we will not speculate that no improper communications took place when the safeguards to prevent such communications were not implemented.

{14} New Mexico has a long tradition of finding a “presumption of prejudice” by the mere presence of an unauthorized person before a trial jury or grand jury when it is performing its core function. State v. Coulter, 98 N.M. 768, 770, 652 P.2d 1219, 1221 (Ct. App. 1982) (holding a presumption of prejudice arose when alternate juror was present during jury deliberations); Davis v. Traub, 90 N.M. 498, 499-500, 565 P.2d 1015, 1016-17 (1977) (adopting holding of State v. Hill, 88 N.M. 216, 220, 539 P.2d 236, 240 (Ct. App. 1975), that “the presence of an unauthorized person before the grand jury requires dismissal of the indictment, without the necessity of showing prejudice”); Baird v. State, 90 N.M. 667, 669, 568 P.2d 193, 195 (1977) (holding that a defendant need not show prejudice where the district attorney is present during grand jury deliberations).

{15} We agree with the dissent that an interpreter is, in effect, an officer of the court who assists the court in the trial. However, in light of her unique and sensitive role in perhaps the most crucial part of the trial, her presence while the jury deliberates is unauthorized in the absence of any appropriate protections. Furthermore, our cases also recognize a presumption of prejudice when communications with jurors occur while they are deliberating without following proper procedures. Hovey v. State, 104 N.M. 667, 669-70, 726 P.2d 344, 346-47 (1986) (holding that presumption of prejudice resulted when the judge and jury had a communication relating to the issues of the case without the presence of the defendant); State v. Gutierrez, 78 N.M. 529, 531, 433 P.2d 508, 510 (Ct. App. 1967) (holding that under standards of due process, there is a presumption of prejudice arising from any unauthorized communication with a trial juror during trial); see also Remmer v. United States,

347 U.S. 227, 229 (1954) (“In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.”).

{16} We recognize that Rule 11-606(B) NMRA provides a possible avenue for determining whether an interpreter exceeded her proper role. In the present case, however, absent the safeguard of the trial court fulfilling its obligation in the first place to impress upon the interpreter and juror that the interpreter’s role is limited solely to interpreting, we are unwilling to consider the interpreter’s unauthorized presence pursuant to the Rule 11-606(B) avenue. First, as we have already discussed, the jurors were not told of the interpreter’s limited duty only to interpret, so they would not even be aware of whether an impropriety occurred. Secondly, citizens called to serve as jurors may have all kinds of native languages, such as Chinese, Russian, Vietnamese, Navajo, German, or Spanish. Without his own interpreter, a defendant cannot even interview the non-English speaking jurors about any possible impropriety.

{17} Ultimately, our goal is to protect the integrity of the jury’s decision making process. Consistent with these principles, we have recently reiterated, “we must take every precaution to avoid casting even the slightest doubt on the propriety of jury verdicts in criminal proceedings.” State v. Rodriguez, 2004-NMCA-125, ¶ 12, 136 N.M. 494, 100 P.3d 200, cert. granted, 2004-NMCERT-010, 136 N.M. 541, 542, 101 P.3d 807, 808. We facilitate full and frank discussions during deliberations, protect the fairness and impartiality of jury decisions, and prevent the possibility of undue influence on jurors, by presuming prejudice in this case.

{18} We therefore hold that an interpreter may accompany a non-English speaking juror into the jury room during deliberations provided that the trial court first requires the interpreter to take an oath that he or she will not participate in or interfere with the jury’s deliberations. See Dempsey, 830 F.2d at 1092. The interpreter’s oath must be given on the record and in the jury’s presence. Giving the oath on the record will dispel the possibility or even appearance of an impermissible thirteenth juror. Giving the oath in the presence of the jury will clarify for the jury what the interpreter’s role is during deliberations and further safeguard the sanctity of the jury room. See Guzman, 555 N.E.2d at 263 (noting that the danger presented by the interpreter’s presence during jury deliberations may be overcome by instructing the jury and the interpreter that the interpreter may not participate in deliberations and “that any breach should be reported to the court”). The interpreter’s oath creates a presumption that the interpreter will act properly during deliberations. See Territory of N.M. v. Thomason, 4 N.M. 154, 167, 13 P. 223, 228 (1887) (holding that where an interpreter is “acting under oath and the order of the court, the presumption should be in favor of proper action by him, rather than against it”).

{19} The State argues, and the dissent agrees, that because Defendant did not object to the trial court’s failure to administer an appropriate oath to the interpreter until after the jury had rendered its verdict, Defendant waived the issue. We will not extend the possibility of waiver to the jury deliberation process in the absence of any safeguards to impress upon the interpreter, and the jury, that the interpreter’s role is limited to that of interpreting. Were we to uphold Defendant’s conviction despite the fundamental flaw of the lack of any interpreter instruction, we would undermine the foundation of our jury system, and ultimately diminish public confidence in a defendant’s right to a fair trial. We accordingly refuse to speculate that no improper communication took place when the safeguards to prevent such communication were absent. See Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993) (holding that a deficient reasonable doubt instruction is a structural defect in the very constitution of the trial mechanism and therefore incapable of correction by harmless error analysis); United States v. Atkinson, 297 U.S. 157, 160 (1936) (holding that errors which “seriously affect the fairness, integrity or public reputation of judicial proceedings” may be raised for the first time on appeal); State v. Bindyke, 220 S.E.2d 521, 531 (N.C. 1975) (holding that, despite the defendant’s failure to object, the presence of an alternate juror in the jury room during deliberations “is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict”). We may, in our discretion, consider issues that a defendant failed to preserve if they involve “general public interest” or a “fundamental error or fundamental rights of a party.” Rule 12-216(B) NMRA. As we have already discussed, this
case involves fundamental rights. “Because a fundamental right is involved, the issue is reviewable.” Coulter, 98 N.M. at 770, 652 P.2d at 1221; see State v. Orona, 92 N.M. 450, 455-56, 589 P.2d 1041, 1046-47 (1979) (reviewing the trial court’s improper communication with the jury despite the defendant’s failure to lodge an objection until after the verdict had been returned); see also State v. Barber, 2004-NMSC-019, ¶ 16, 135 N.M. 621, 92 P.3d 633 (recognizing that “another strand runs through the fundamental error doctrine that focuses less on guilt and innocence and more on process and the underlying integrity of our judicial system”); State v. Holloway, 106 N.M. 161, 163-64, 740 P.2d 711, 713-14 (Ct. App. 1987) (recognizing that some rights are so fundamental that they cannot be waived); State v. Osborne, 111 N.M. 654, 661-62, 808 P.2d 624, 631-32 (1991) (holding that the failure to instruct on essential elements is reversible fundamental error even when the defendant aided in the error and did not request instructions).

{20} To the extent Defendant’s conduct can be construed as a waiver of his own rights, we doubt he could waive the rights of the non-English speaking jurors. As we have said, this case not only involves Defendant’s constitutional right to be tried by a jury, it also involves the constitutional right of non-English speaking persons to serve as jurors. A concomitant of this right, as we have observed, is the right to deliberate without any interference or participation by a “thirteenth juror.” The protections of these constitutional rights of a juror should not be measured by a defendant’s actions or inactions. Instead, it is the obligation of the trial court to ensure this structural integrity of the trial process. We therefore disagree with the dissent that the trial court “did not have the opportunity to address the interpreter’s presence . . . . ” Dissent, ¶ 26. The trial court had an ample opportunity and the obligation to protect this constitutional right of the jurors.

{21} In this case, the trial court only required the interpreter to take an oath to faithfully and impartially translate the testimony. We hold that this oath was insufficient to safeguard against interference, or the appearance of interference, with the jury’s deliberations. The failure of the trial court to administer an appropriate oath to the interpreter resulted in a presumption of prejudice; see Coulter, 98 N.M. at 769, 652 P.2d at 1220, which the State has not attempted to overcome. See id.

{22} Based on the foregoing, we reverse and remand for a new trial consistent with this opinion. Because we remand for a new trial, we need not address Defendant’s remaining contentions.

{23} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

I CONCUR:

IRA ROBINSON, Judge

JAMES J. WECHSLER, Judge (dissenting).

{24} I respectfully dissent. Although I agree with the majority with regard to the right of a non-English speaking citizen to serve on a jury and the importance of a jury trial and jury deliberations, I do not agree that there was a presumption of prejudice or any indication that Defendant’s rights were prejudiced.

{25} My point of departure with the majority is the conclusion that the presence of the interpreter in the jury room was unauthorized. I start from the opposite premise. As Defendant states, the non-English speaking jurors had the constitutional right to be accompanied by the interpreter into the jury room. See Rico, 2002-NMSC-022, ¶¶ 5-9. Thus, I begin with the premise that the interpreter’s presence in the jury room was not unauthorized. Indeed, in its order denying a petition for writ of prohibition or alternative writ of superintending control in State ex rel. Martinez v. Third Judicial District, No. 26,109 (January 26, 2000), attached as an appendix to Rico, 2002-NMSC-022, our Supreme Court stated that it believed that “the use of court interpreters during jury deliberations does not constitute an unauthorized presence in the jury room.” Instead, it stated that the “interpreter’s role is bound by ethical constraints, court rules and orders, and court instructions. To the extent that these safeguards may be breached in an individual case, the normal appellate process for correcting other trial errors will provide the most effective remedy.” Id.

{26} There was a breach in the safeguards in this case because the trial court permitted the interpreter into the jury room without an oath to not interfere with or participate in the jury deliberations or an instruction to the interpreter and the jury about the role of the interpreter. The majority concludes that unless the district court administers such an oath to the interpreter, the interpreter’s presence in the jury room is unauthorized. It relies on Dempsey, which holds that court procedures or instructions can assist the court to determine that no impropriety took place when a defendant has raised the issue in the trial court. Dempsey, 830 F.2d at 1091-92. Dempsey does not address the circumstances of this case in which the district court did not have the opportunity to address the interpreter’s presence, and the issue is raised, as a matter of fundamental error, without any evidence of impropriety. Moreover, the Tenth Circuit in Dempsey did not engage any presumption of prejudice. Rather, it considered any undue influence on the part of the interpreter to “rest upon speculation” in the absence of evidence of any impropriety. Id.

{27} The determinative issue to me, when the record does not show any prejudice to Defendant, is whether the district court or Defendant should have the responsibility for the absence of the safeguarding oath or instruction. Because I do not believe that the interpreter’s presence was unauthorized, I would focus the inquiry in this case on whether Defendant waived his right to a fair and impartial trial. I would conclude that the integrity of the judicial process has not been so vitiated that Defendant did not need to raise his argument that there may have been a defect in the process to the district court. As observed by our Supreme Court in State v. Sanchez, 2000-NMSC-021, ¶ 26, 129 N.M. 284, 6 P.3d 486, “the right to trial by a fair and impartial jury is a fundamental right,” but even fundamental rights “may be waived or lost by the accused” if the State demonstrates a waiver. (Internal quotation marks and citations omitted.) See State v. Singleton, 2001-NMCA-054, ¶ 11, 130 N.M. 583, 28 P.3d 1124 (stating that “the right to a fair and impartial jury is a fundamental right that can be waived”). While failure to preserve an issue may be a factor in determining whether there has been a waiver, it does not end the inquiry. See State v. Escamilla, 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988) (stating that appellate courts will not consider issues not preserved unless they involve fundamental rights or fundamental error, but that even issues involving fundamental rights, including the right to a fair and impartial jury, may be waived).

{28} I believe Defendant waived his argument by not objecting in the trial court. Defendant had requested that a certified interpreter be present at trial to translate for a witness. I disagree with the majority’s assertion that “the transcript does not disclose” whether the same interpreter was used for the jurors. The transcript of the court’s statements and the interpreter’s voice on the tapes of the trial make it clear
to me that the interpreter was the same. Because Defendant had requested a certified interpreter, I assume that the interpreter was certified and trained in accordance with the Court Interpreters Act, NMSA 1978, § 38-10-5 (1985). See appendix to Rico, 2002-NMSC-022 (pointing to “ethical constraints” as a factor restricting an interpreter’s role during jury deliberations).

[29] The court administered an oath to the interpreter at the beginning of trial that the interpreter would interpret properly in the case. The court further explained that two jurors had requested an interpreter. The interpreter’s participation as an aide to jurors gives rise to a reasonable expectation that she would interpret for the jurors during jury deliberations. Although the court also has the responsibility to ensure the correctness of the process and the protection of Defendant’s rights, I do not believe that Defendant can sit silently as the trial proceeds and not be bound by events that reasonably can be anticipated. See Singleton, 2001-NMCA-054, ¶ 12.

[30] Notably, Defendant’s motion for a new trial argues that the trial court neglected to give the interpreter an oath, not that Defendant was not aware that the interpreter was present in the jury room. There is no indication in the record that Defendant, the jurors, or any other participant had any question about the interpreter’s involvement. See Dempsey, 830 F.2d at 1092.

[31] Not having alerted the trial court to the issue at trial, Defendant raised the issue in a motion for a new trial, stating, speculatively, “we will never know whether the interpreter participated directly or indirectly in the deliberations.” But Defendant did not utilize the avenue provided by the Rules of Evidence to properly challenge the validity of the jury’s verdict. See Dempsey, 830 F.2d at 1092. Under Rule 11-606(B), Defendant could have called upon jurors to testify as to whether the interpreter participated in the jury deliberations in any manner. Defendant did submit a post-trial affidavit from an empaneled potential juror for another purpose, but he did not submit any juror affidavit concerning the presence of the interpreter in the jury room. See State v. Mann, 2002-NMSC-001, ¶ 10, 131 N.M. 459, 39 P.3d 124 (noting that in motion for new trial on basis of juror misconduct defense counsel stated that interviewed jurors had information about misconduct). As a result, the record is without any indication of prejudice.

[32] I note that this case is not one which falls within the type of cases the majority cites as reflecting “a long tradition of finding a ‘presumption of prejudice’ by the mere presence of an unauthorized person before a trial jury or grand jury” performing its core function. Coulter, 98 N.M. at 770, 652 P.2d at 1221; Baird, 90 N.M. at 669, 568 P.2d at 195; Davis, 90 N.M. at 499-500, 565 P.2d at 1016-17; Hill, 88 N.M. at 220, 539 P.2d at 240. In Coulter, the only trial jury case cited, there was an irregularity that resulted in the unauthorized presence; an alternate juror who had heard the evidence and was prepared to deliberate was present for deliberations. Coulter, 98 N.M. at 768, 652 P.2d at 1219. In the grand jury cases, a clear impropriety had occurred. In Baird, the district attorney was present during grand jury deliberations contrary to statute. Baird, 90 N.M. at 668-69, 568 P.2d at 194-95. In Davis, an investigator from the attorney general’s office, whose presence was not statutorily authorized, was present during grand jury testimony. Davis, 90 N.M. at 499-500, 565 P.2d at 1016-17. In Hill, an attorney privately employed by a relative of the victim improperly presented the facts to a grand jury. Hill, 88 N.M. at 218, 539 P.2d at 238. I agree with the majority that the presence in each of these cases was unauthorized and a presumption of prejudice would apply. The interpreter’s presence, however, is different. She is, in effect, an officer of the court who assists the court in the trial. With this role, as earlier discussed, she was not an unauthorized presence, and I would not presume prejudice because of her presence.

[33] Nor do I agree with the majority’s reliance on the NES Guidelines as authority for applying a presumption of prejudice in this case. The NES Guidelines are not rules and state desired procedures, not necessarily required ones. NES Guidelines, Section I (“Because each local court has unique needs and limitations, these guidelines may not be applicable in all courts. Accordingly, these guidelines should not be considered mandatory directives that must be followed in all cases.”).

[34] Lastly, I do not agree with the majority that affirming Defendant’s convictions would constitute allowing Defendant to waive the jurors’ rights. Rico and Singleton both clearly indicate that a defendant can waive his or her right to object to the violation of a juror’s right to serve under the New Mexico Constitution. Rico, 2002-NMSC-022, ¶ 8-9 (stating that “a criminal defendant who does not object to an exclusion of a juror in violation of Article VII, Section 3 has waived his or her ability to do so on appeal”); Singleton, 2001-NMCA-054, ¶ 9-16 (stating that “New Mexico courts have recognized that both the state and the defendant in a criminal action can protect the rights of prospective jurors to be free from discriminatory exclusion” and affirming Defendant’s convictions despite the exclusion of a juror in violation of Article VII, Section 3). The Supreme Court of the United States has similarly held that a defendant can waive his or her right to object to the violation of a juror’s right to serve under the Equal Protection Clause. See Batson v. Kentucky, 476 U.S. 79, 87 (1986) (noting that a juror’s right to equal protection is clearly violated when he or she is excluded on the basis of race); Teague v. Lane, 489 U.S. 288, 297-98 (1989) (holding that the defendant waived his right to challenge the exclusion of jurors in violation of the Equal Protection Clause because he raised that issue too late).}

[35] Because I do not agree with the majority that a prophylactic remedy is required in this case, and because Defendant did not alert the trial court to any problem or demonstrate any prejudice, I respectfully dissent.

JAMES J. WECHSLER, Judge

APPENDIX

Supreme Court of New Mexico

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Non-English Speaking Juror Guidelines

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I. INTRODUCTION

These guidelines are intended to assist in the efforts of the New Mexico Judiciary to incorporate non-English speaking (NES) citizens into New Mexico’s jury system. Because each local court has unique needs and limitations, these guidelines may not be applicable in all courts. Accordingly, these guidelines should not be considered mandatory directives that must be followed in all cases. However, all courts are encouraged to implement the standards set forth below to the fullest extent possible.

II. NON-ENGLISH SPEAKING JUROR ASSISTANCE SERVICES

A. Scope
   Article VII, Section 3, of the New Mexico Constitution provides that “[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages.” To comply with this constitutional mandate, all courts should strive to incorporate all New Mexico citizens into our jury system regardless of the language spoken by a prospective NES juror. Because most potential NES jurors speak Spanish as their primary language, these guidelines seek to implement statewide standards for accommodating prospective jurors who speak Spanish. However, where financially and logistically possible, all courts are encouraged to implement these guidelines for other languages.

B. Court Interpreters
   Upon request by an NES citizen called for jury duty, all courts should appoint a court interpreter to assist the NES juror or prospective juror. In the absence of a specific request for a court interpreter, all courts should independently determine whether a juror or prospective juror is in need of a court interpreter. To make this determination, a court may consider conducting a limited interview of the juror or prospective juror to assess whether the juror or prospective juror is capable of understanding the proceedings in English.

C. Jury Summons
   The New Mexico jury summons form should include a statement in Spanish notifying citizens called for jury duty that assistance is available for those who cannot understand English. The Spanish notice should also provide a telephone number that prospective NES jurors may call for further assistance. The Administrative Office of the Courts (AOC) is responsible for producing jury summonses for local courts that will include an appropriate Spanish notice. The AOC will coordinate with local courts to ensure that an adequate number of trained court personnel are available to respond to calls for assistance from prospective NES jurors.

D. Juror Questionnaire
   The AOC is responsible for preparing a Spanish version of the juror questionnaire used by local courts. The AOC is also responsible for distributing copies of the Spanish version of the juror questionnaire to all local courts. All local courts should provide a Spanish version of the juror questionnaire upon request from any prospective juror. All local courts should also make arrangements to have court personnel available to provide an oral, Spanish translation of the juror questionnaire and to otherwise assist prospective NES jurors who cannot read Spanish.

E. Juror Orientation Materials
   The AOC is responsible for distributing to all local courts copies of the Spanish version of jury orientation materials approved by the Supreme Court. To the extent that local courts may provide English language jury orientation materials to prospective jurors, those courts should also make arrangements to provide oral, Spanish translations when needed. Alternatively, courts are encouraged to produce written translations of juror orientation materials.

F. Jury Selection
   All courts should make arrangements to have a court interpreter available for prospective NES jurors during the jury selection process. Upon arriving for jury selection, the court should introduce the court interpreter appointed to assist prospective NES jurors and advise prospective NES jurors that they should alert the interpreter if they have any questions during the process. The transcript of proceedings need not include the foreign language statements of the court interpreter or prospective NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for a prospective NES juror.

Although a court interpreter may provide interpretation services for more than one prospective NES juror at a time, a court interpreter ordinarily should not be used to interpret for both a litigant and a prospective NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for both the litigant and the prospective NES juror. Subject to availability, courts are encouraged to avoid using the same court interpreter for jury selection and trial in the same case.

Prospective NES jurors are subject to peremptory challenges and challenges for cause the same as any other prospective juror. However, a prospective NES juror may not be challenged or excused simply because that juror is unable to read, write, or speak the English language. Moreover, the trial court should not excuse a prospective NES juror who asks to be excused simply because he or she cannot read, write, or speak the English language. Exercising its discretion in ruling on an objection to service by any citizen, the court would do in ruling on an objection to service by this juror, as the court would do in ruling on an objection to service by any citizen. In the event that a court interpreter will not be available to provide interpretation services for a prospective NES juror who would otherwise be selected to serve on the jury, the presiding judge may either postpone the proceedings until a court interpreter is available or excuse the juror from service for that proceeding only, provided that the prospective NES juror is recalled for jury selection for the next scheduled proceeding. If an interpreter
cannot be obtained after reasonable effort, the prospective NES juror may be excused permanently.

**G. Trial Proceedings**

All courts should make arrangements to have a court interpreter available for all NES jurors during all trial proceedings. The transcript of proceedings need not include the foreign language statements of the court interpreter or the NES juror, provided that the transcript clearly indicates when a court interpreter was used to interpret for an NES juror. Although a court interpreter may provide interpretation services for more than one NES juror, a court interpreter ordinarily may not provide interpretation services for both a litigant and an NES juror or for a witness and an NES juror. However, when the litigant and his or her attorney can communicate in the same non-English language for confidential communications, the court interpreter may be used to otherwise interpret for the litigants, witnesses, other court participants, and NES jurors. Subject to availability, courts are encouraged to avoid using the same court interpreter for the trial and for jury deliberations.

**H. Jury Deliberations**

All courts should make arrangements to have a court interpreter available for all NES jurors during all jury deliberations. One court interpreter may provide interpretation services for more than one NES juror at a time during deliberations. To the extent that documentary exhibits are submitted to the jury for consideration during deliberations, the court interpreter assigned to assist NES jurors may provide an oral translation of the written material. With respect to jury instructions submitted to the jury, courts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors may provide an oral translation of the written material.

**III. Court Interpretation Standards for NES Jurors**

When providing the court interpretation services to NES jurors and prospective jurors as outlined above, all courts should strive to meet the following standards:

**A. Certification and Availability Standards**

1. **Certified**

All courts should use certified court interpreters to assist NES jurors during all jury selection, trial, and deliberation proceedings. Certification is governed by the provisions of the Court Interpreters Act, NMSA 1978, §§ 38-10-1 to -8 (1985), as administered by the AOC. Except as otherwise provided below, an uncertified court interpreter should only be used if the requirements of NMSA 1978, Section 38-10-3(B) (1985), are met. In the event that a court must use an uncertified court interpreter, the court should consider briefly examining the uncertified court interpreter to establish the qualifications of the interpreter.

2. **Uncertified**

All courts may use uncertified court interpreters to assist NES jurors and prospective jurors in completing the juror questionnaire. Uncertified court interpreters may also be used during the jury orientation process.

3. **Availability**

All courts should maintain a list of locally available certified and uncertified court interpreters and submit an updated list of that list to the AOC by May 1st of each year. For those courts that do not have an adequate number of locally available certified or uncertified court interpreters available to assist NES jurors and prospective jurors, the local court administrator or chief judge should coordinate with the AOC to compile a list of certified and uncertified court interpreters who are available from other areas. The AOC should also assist local courts in the training of local court personnel to assist NES jurors and prospective jurors with the juror questionnaire, jury orientation, and with questions arising outside the context of formal court proceedings.

**B. Written Translation Standards**

1. **Qualification Materials**

The AOC will provide all courts with a written, Spanish translation of the juror qualification form and questionnaire translated by a certified court interpreter.

2. **Trial Materials**

Written materials that are submitted to the jury for consideration during trial or jury deliberations should be orally translated by a certified court interpreter or translated in writing by a certified court interpreter. If a certified court interpreter is not available, the court may use an uncertified court interpreter to orally translate written materials if the requirements of Section 38-10-3(B) are met.

3. **Machine Translation**

A number of services are available on the Internet and elsewhere that provide free or low-cost translation of written materials from English into a number of other languages. Because machine translation may not be accurate, courts should not use machine translation for written materials that are to be used in formal court proceedings, such as jury instructions or documentary exhibits. Although courts may consider using machine translation for other informational and local orientation materials submitted to jurors and prospective jurors, all courts are cautioned against relying exclusively on machine translation without human verification of the accuracy of a machine translation.

**C. Use and Performance Standards**

Before the demanding and sensitive nature of the services provided by court interpreters appointed to assist NES jurors and prospective jurors, all courts are encouraged to use and instruct court interpreters in accordance with the following standards.

1. **Hours of Service**

All courts should strive to limit the amount of time that a court interpreter interprets for an NES juror or prospective juror to avoid court interpreter fatigue. Ideally, two court interpreters should be used as a team to provide interpretation services, and each interpreter should avoid interpreting for more than 30-45 minutes without a rest period. Because this may not be logistically feasible in all circumstances, every court should remain sensitive to the risk of court interpreter fatigue. Whenever a court interpreter suspects that the quality of interpretation may become compromised because of fatigue, the interpreter should advise the trial court judge of the need for a period of rest.

2. **Oath of Interpreter**

Before a court interpreter begins to provide interpretation services for an NES juror or prospective juror during jury selection or trial, the trial judge should administer an oath to the court interpreter in accordance with NMSA 1978, Section 38-10-8 (1985).

3. **Pre-Interpretation Interview**

Prior to providing interpretation services for an NES juror or prospective juror, with the knowledge and permission of the court, the court interpreter should briefly interview the NES juror or prospective juror to enhance the effectiveness of the interpretation by becoming familiar with the speech patterns and linguistic traits of the NES juror or prospective juror.

4. **Courtroom Explanation of the Role of the Interpreter**

Prior to the commencement of proceedings, the trial court judge should explain the role of the court interpreter to those
present in the courtroom by explaining that the interpreter was appointed by the court to assist jurors or prospective jurors who do not understand English. The judge should also explain to the jury that the interpreter is only allowed to interpret and that the jurors may not ask the interpreter for advice or other assistance. The judge should also explain that, for those English speaking jurors who may understand the non-English language spoken by the court interpreter, the jurors should disregard what they hear the interpreter say and rely solely on the evidence presented in English.

5. Pre-Deliberation Instructions

Prior to excusing the jury for deliberations, the trial judge should, on the record in the presence of the jury, instruct the court interpreter who will be providing interpretation services for an NES juror that the interpreter should not interfere with deliberations in any way by expressing any ideas, opinions, or observations that the interpreter may have during deliberations but should be strictly limited to interpreting the jury deliberations. The trial judge should also ask the court interpreter to affirmatively state on the record that the interpreter understands the trial judge’s instructions.

6. Post-Deliberation Instructions

Following jury deliberations but before the jury’s verdict is announced, the trial judge should ask the court interpreter on the record whether the interpreter abided by his or her oath to act strictly as an interpreter and not to participate in the deliberations. The interpreter’s identity and answers should be made a part of the record. At the request of a party to the litigation, the jurors may also be questioned to the same effect. The trial judge should also instruct the court interpreter not to reveal any aspect of the jury deliberations after the case is closed.

7. Equipment

With the assistance of the AOC, all courts should make arrangements to provide equipment for use by a court interpreter who will be providing interpretation services for NES jurors. The AOC will develop standards and seek funding to acquire adequate equipment for use by court interpreters throughout the state who will be providing interpretation services for NES jurors and prospective jurors. The equipment should allow interpreters to provide interpretation services for multiple persons with minimum disruption of the court proceedings.

To the extent that the AOC and local courts are unable to provide court interpreters with interpretation equipment, all courts should assist court interpreters with the logistical arrangements for providing interpretation services whenever possible. Accordingly, prior to jury selection or trial proceedings, court personnel should identify the number of NES jurors or prospective jurors scheduled to appear in court. This information should be provided to the appointed court interpreter so that the interpreter can make arrangements for the appropriate equipment and seating arrangements. The interpreter should obtain the prior approval of the trial court if special equipment and seating arrangements are needed. The bailiff should inform counsel if any seating changes have been made to accommodate NES jurors or prospective jurors.

IV. COURT INTERPRETATION COSTS

A. Jury and Witness Fee Fund

All costs associated with administering these guidelines and providing services for NES jurors and prospective jurors should be paid from the Jury and Witness Fee Fund. To the extent that such costs are initially incurred at the local court level, local courts may seek reimbursement from the Jury and Witness Fee Fund.

B. Interpreters in Civil Cases

The costs for a court interpreter to provide interpretation services to an NES juror or prospective juror in civil cases should be paid by the court through the Jury and Witness Fee Fund.

C. Interpreter Compensation

Court interpreters appointed to provide interpretation services for NES jurors or prospective jurors should be paid at a fixed rate in accordance with the approved fee schedule established by the AOC. However, all courts are free to employ a certified interpreter on a full-time basis or under contract at a mutually agreed upon compensation rate.

V. COURT INTERPRETER RECRUITMENT AND TRAINING

A. Administration

The AOC is responsible for the recruitment and training of court interpreters to provide interpretation services for NES jurors and prospective jurors. Consistent with the New Mexico Judicial Branch Personnel Rules, local court personnel are encouraged to train for and become certified as court interpreters.

B. Special Training

The AOC, in consultation with the Court Interpreters Advisory Committee, will develop supplemental training standards for court interpreters who will provide interpretation services for NES jurors and prospective jurors. These standards should be incorporated into the general certification process for all new court interpreters.

EFFECTIVE DATE:
Guidelines are effective November 15, 2000

John M. Greacen
Date
Director, Administrative Office of the Courts

OPINION

RODERICK T. KENNEDY, JUDGE

{1} In this case we examine when and how police conduct in the investigation of a misdemeanor traffic violation exceeds the bounds of reasonableness to impinge upon constitutional protections against illegal searches and seizures. We hold the post-midnight visit to Defendant’s home during which police ordered Defendant to be awakened and then demanded that Defendant exit his home constitutes a non-consensual investigative detention. We further hold the seizure amounted to an illegal seizure under the New Mexico and United States Constitutions because it was unsupported by reasonable suspicion. As a result, we reverse the district court.

The evidence obtained as a result of the post-midnight visit by the police to the Defendant’s home is suppressed as to the identification of Defendant and any admissions Defendant made as a consequence of that police visit.

PROCEDURAL HISTORY AND FACTS

{2} On the facts set forth below, Defendant filed a motion to suppress with the metropolitan court, claiming an unconstitutional seizure of his person. The metropolitan court granted Defendant’s motion, entered an order suppressing the evidence obtained from the police visit, and dismissed the case. The State then appealed de novo to the metropolitan court, claiming an unconstitutional search.

{3} On April 20, 2003, Officer Moore of the Albuquerque Police Department was working near Osuna Road and I-25. As Officer Moore left the area and prepared to enter southbound I-25, he observed two motorcycles on the roadway a short distance ahead of him. One of the motorcycles was red. The driver of the red motorcycle was a blond man, 18 to 25 years of age, who was swerving in and out of traffic and “popp[ing]” “wheelies.” Officer Moore considered this “shocking” behavior and a “potential accident.” Officer Moore initiated pursuit. He activated his overhead lights and later his siren, but the motorcycles did not stop. Both motorcycles then rapidly accelerated. Officer Moore lost sight of the speeding motorcycles when his vehicle developed engine trouble.

{4} Officer Moore recorded the license plate number of the red motorcycle and decided to pursue the matter at a later time. When he looked up the plate number, Officer Moore learned that the number did not correspond to a valid vehicle registration. Other officers suggested that the “9” Office Moore had recorded as the first digit of the plate number was likely a “P” because motorcycle plate numbers begin with a “P.” Officer Moore confirmed that motorcycle plate numbers began with a “P” by observing registered motorcycles parked outside a motorcycle shop. When he substituted the “9” with a “P,” he found that the plate number corresponded to a motorcycle registered in Defendant’s name. The address on the registration was Defendant’s home.

{5} Officer Moore was asked on the witness stand about standard procedures for investigating traffic violations. He testified that he had been confident that the registered owner was the driver he had observed, he could have mailed Defendant a summons to appear in court on the charges based on the registration information. However, Officer Moore was uncertain whether the driver he had observed and the motorcycle’s registered owner were the same person. Officer Moore did not want to inconvenience Defendant if Defendant was the motorcycle’s owner but innocent of the behavior Officer Moore had observed. Officer Moore thus decided to contact Defendant personally.

{6} Officer Moore worked the “graveyard” shift and did not report for duty again until about 10:00 p.m. on Tuesday, April 22. Officer Moore testified that once he returned to duty, he considered it imperative to continue his investigation and to contact anyone who might know something about the motorcycle. It does not appear that he considered pursuing his investigation during daytime hours. Officer Moore testified that “it would be irresponsible for me to make contact with [Defendant] at a time where I was not acting in my duties as a police officer or at least during my duty hours.”

{7} Officer Moore went to the address of the motorcycle’s registered owner, “in hopes of making contact or at least observing a motorcycle there or making contact with the owner, certainly the driver that day, because I had no idea at that point whether the driver was in fact the owner of the vehicle.” He believed someone would likely be at home because of the late hour. He was not particularly concerned about the lateness of the hour because that was when he worked, and he took calls throughout his shift. On the whole, Officer Moore believed the danger of the violation he had
observed outweighed any inconvenience to the owner of making contact at a late hour. Officer Moore also testified he was certain that if Defendant had not been the driver he had observed, Defendant, as owner of the motorcycle, would “want to know how recklessly his motorcycle was being operated.”

[8] Officer Moore arrived at Defendant’s home at 12:21 a.m., the morning of Wednesday, April 23, 2003. Officer Moore had neither an arrest warrant nor a search warrant when he went to Defendant’s home. He was dressed in full uniform and was driving his police car. Officer Moore noticed a motorcycle parked on the property at Defendant’s home, but did not attempt to associate it with the incident. Officer Moore’s knock on the door was answered by a young man who was Defendant’s roommate. Officer Moore asked if Defendant was at home. Defendant’s roommate replied in the affirmative and asked why Officer Moore was there. Officer Moore told Defendant’s roommate that he was conducting an investigation and wanted to speak with Defendant. Defendant’s roommate said Defendant was in the back and that he would get him. Officer Moore knew Defendant would need to be awakened to talk with him.

[9] When Defendant got to the door, Officer Moore told him that he was investigating a traffic violation and asked him to step outside the house. When Defendant exited the house, Officer Moore recognized Defendant as the person he had seen on the red motorcycle. At that time, Officer Moore advised Defendant that he was, at that point, conducting a criminal investigation.

[10] Officer Moore read Defendant a Miranda advisory, which Defendant indicated he understood. In the course of their conversation, Defendant admitted that he was the motorcycle driver officer Officer Moore had observed the previous Sunday. Officer Moore informed Defendant he was considering citing Defendant for reckless driving but that he needed to leave.

[11] After leaving Defendant’s home, Officer Moore conferred with his supervisor. Officer Moore was told by his supervisor to contact Defendant again at “a more reasonable hour” and to either cite Defendant or issue a summons on the charge. Later that same morning of April 23, at approximately 6:30 a.m., Officer Moore delivered the citation to Defendant at Defendant’s home.

[12] In metropolitan court, Defendant’s motion to suppress the evidence obtained during Officer Moore’s late night visit to Defendant’s home was granted and the case was dismissed. The State appealed de novo to the district court. The district court heard and denied Defendant’s motion to suppress and issued a written order incorporating its observations from the suppression hearing. Defendant appeals as part of a conditional plea agreement that followed denial of his motion to suppress.

STANDARD OF REVIEW

[13] Questions about whether a person has been seized in violation of the Fourth Amendment of the United States Constitution are mixed questions of law and fact. State v. Walters, 1997-NMCA-013, ¶ 8, 123 N.M. 88, 934 P.2d 282. Questions surrounding the suppression of evidence are mixed questions of law and fact. State v. Vandenberg, 2003-NMSC-030, ¶ 17, 134 N.M. 566, 81 P.3d 19. We will not disturb a district court’s ruling on a motion to suppress evidence when it is supported by substantial evidence, unless the law was erroneously applied to the facts. Walters, 1997-NMCA-013, ¶ 8. Questions of law are reviewed de novo. Hedicke v. Gunville, 2003-NMCA-032, ¶ 9, 133 N.M. 335, 62 P.3d 1217. Questions of fact are reviewed to determine whether the district court’s ruling is supported by substantial evidence when the facts are viewed in the light most favorable to the prevailing party. State v. Lopez, 109 N.M. 169, 171, 783 P.2d 479, 481 (Ct. App. 1989).

DISCUSSION

[14] The Fourth Amendment of the United States Constitution protects the right of the people to be free from unreasonable searches and seizures. We first discuss whether the police conduct during the visit to Defendant’s home constituted a seizure of Defendant for purposes of constitutional analysis. We conclude it did. Officer Moore compelled Defendant’s participation in his investigation by using his authority as a police officer. He exercised that authority in a manner that would lead most innocent reasonable persons in Defendant’s position to believe they were not free to leave or otherwise terminate the encounter.

[15] Next, we determine whether the seizure was unreasonable. We conclude the seizure was unreasonable. The seizure exceeded permissible constitutional limitations on the type of citizen participation police may compel. The seizure was not supported by reasonable suspicion and it was accomplished in an overly intrusive manner.

[16] Based on these conclusions, we hold the evidence Officer Moore obtained as a result of the visit to Defendant’s home in the post-midnight hours was obtained in violation of Defendant’s rights under the United States Constitution and must be suppressed.

Police Contact With Defendant Constituted a Seizure

[17] When determining whether a person was seized, we evaluate (1) the circumstances surrounding the contact, including whether police used a show of authority; and (2) whether the circumstances of the contact reached “such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave.” State v. Affsprung, 2004-NMCA-038, ¶ 6, 135 N.M. 306, 87 P.3d 1088 (internal quotation marks and citation omitted). For constitutional purposes, the phrase “free to leave” also includes whether the person who is approached by the police would feel free to disregard the officer or terminate the encounter. See, e.g., id. ¶ 16. “[W]hether a person was accosted and restrained in such a manner that a reasonable person in the same circumstances would believe he [or she] was not free to leave” is a question of fact. Walters, 1997-NMCA-013, ¶ 8.

[18] A seizure does not occur simply because a police officer approaches an individual and asks a few questions. The Fourth Amendment of the United States Constitution permits a police officer to approach an individual and ask a moderate number of questions “in order to investigate possible criminal behavior when the officer has a reasonable suspicion that the law has been or is being violated.” State v. Taylor, 1999-NMCA-022, ¶ 7, 126 N.M. 569, 973 P.2d 246 (internal quotation marks and citation omitted). Police contact is consensual “[s]o long as a reasonable person would feel free to disregard the police and go about his business,” or “to decline the officers’ requests or otherwise terminate the encounter.” Florida v. Bostick, 501 U.S. 429, 434, 439 (1991) (internal quotation marks and citation omitted); accord Walters, 1997-NMCA-013, ¶¶ 12-13. For a contact requested by the police to remain consensual, the police are not permitted to “convey a message that compliance with their requests is required.” State v. Jason L., 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted); see also State v. Miller, 80 N.M. 227, 229-30, 453 P.2d 590, 592-93 (Ct. App. 1969) (holding there is not a seizure of a person in a constitutional sense so long as the officer does not demand contact under...
Contact becomes a seizure when police restrain the liberty of a person “by means of physical force or show of authority.” Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); see also Jason L., 2000-NMSC-018, ¶ 14 (holding a consensual encounter is transformed into a seizure when police “convey a message that compliance with their requests is required” (internal quotation marks and citation omitted)). We have held that a seizure occurs when there is either a “use of physical force by an officer or submission by the individual to an officer’s assertion of authority.” State v. Sanchez, 2005-NMCA-081, ¶ 10, 137 N.M. 759, 114 P.3d 1075 (internal quotation marks and citation omitted).

The United States Supreme Court instructs courts to consider carefully the precise factual setting and circumstances of police contact because there is no “litmus-paper test for distinguishing a consensual encounter from a seizure.” Florida v. Royer, 460 U.S. 491, 506 (1983). Rather, [the] test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to “leave” will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.


We have noted that a seizure might be indicated” by some of the following: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” Id. ¶ 18 (internal quotation marks and citation omitted). However, we must also take account of subtly coercive police actions. See Schneckloth v. Bustamonte, 421 U.S. 218, 228-29 (1973). This inquiry presumes an objective test where “an innocent reasonable person” is the object of police contact, thereby rendering “the subjective perceptions of the particular individual” irrelevant. Walters, 1997-NMCA-013, ¶ 12

We have held that a seizure occurred after police knocked on the defendant’s car window, asked the defendant to exit his vehicle, then proceeded to ask questions, because an innocent reasonable person would not feel free to leave or refuse the officer’s requests. State v. Boblick, 2004-NMCA-078, ¶ 10, 135 N.M. 754, 93 P.3d 775. We have held a seizure occurred when a defendant was awakened by officers with a pat on the knee, and the officers then restrained the defendant’s movement when he “came up fighting.” State v. Garcia, 83 N.M. 490, 492, 493 P.2d 975, 977 (Ct. App. 1971). In the Tenth Circuit, an individual’s consent to search was invalidated because it was obtained after the individual was “routed” out of bed by a group of officers in the middle of the night. Harless v. Turner, 456 F.2d 1337, 1338-39 (10th Cir. 1972).

In this case, Officer Moore testified it was after midnight when he arrived at Defendant’s home. He was dressed in full uniform when he knocked on the door. When Defendant’s roommate answered the door, Officer Moore identified himself as an officer conducting an investigation of a two-day old traffic incident. He asked that Defendant be awakened and present himself. Defendant responded to Officer Moore’s summons and came to the door. Officer Moore asked Defendant to step outside his home. “A knock at the door only ripens into a seizure when law enforcement officers use their authority . . . to command the occupants to open the door.” United States v. Jerez, 108 F.3d 684, 705 (7th Cir. 1997) (internal quotation marks and citation omitted).

Officer Moore undertook his contact with Defendant under the authority of his office and used his authority in a particularly compelling manner to initiate and structure his contact with Defendant. He required Defendant to be awakened after midnight with the news that a police officer was waiting at the door wanting his participation in an investigation. A person awakened in the middle of the night in response to a police request is particularly vulnerable. See Jerez, 108 F.3d at 690. Under such circumstances as indicated before us, in which the investigation concerned a two-day old traffic incident that, as we later discuss, lacked any exigency allowing it to be conducted after midnight, we believe that Defendant was not free to exercise his own will.

The district court suggested that a “person doesn’t have to answer the door. If they do answer the door, they [can] say ‘No thanks, I don’t want to talk about it.’ Whether it’s a police officer or solicitor or someone else[,]” The State similarly construes Officer Moore’s conduct as an “invitation” for Defendant to come to the door. As simple as the district court and the State tried to make this situation sound, their views do not describe the facts in this case where, with less reason than would support mailing a summons to Defendant, Officer Moore knocked on the door of Defendant’s home after midnight, asked that he be awakened to present himself at the door, and then asked him to exit his home in furtherance of an official police investigation. A person is seized within the meaning of the Fourth Amendment “if a reasonable person would not have felt free to decline [the officer’s] requests to open the door or to otherwise ignore the [officer’s] presence.” Id.

The State also submits that our inquiry into whether Defendant felt “free to leave” should be limited by Walters. We disagree. The State leaves unanswered the question of to where a defendant intruded upon in his home while he slept could possibly feel “free to leave.” See, e.g., Bostick, 501 U.S. at 436 (holding that where a person has no desire to leave and would remain whether or not the police were present, the test is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”). We believe most innocent, reasonable people are not likely to feel free to refuse police contact when they are awakened at a very late hour and told that the police are at the door specifically wanting to speak to them about an investigation. We expect that most innocent, reasonable people would conclude that police would compel their participation in an investigation at such an hour only in cases of emergency or clear necessity. As we later discuss, there was no emergency justifying Officer Moore’s contact with Defendant after midnight. Under the totality of these circumstances in which the investigation involved a two-day old traffic incident, we thus conclude that Officer Moore’s contact with Defendant amounted to an investigative seizure or detention and that constitutional protections against unwarranted search and seizure applied the moment Defendant was awakened in response to Officer Moore’s command that he present himself at the door of his home. We next determine whether the seizure of Defendant’s person was reasonable.
Police Seizure of Defendant Was Not Reasonable

{27} We determine whether a seizure violates the constitution under the facts of the case by balancing the degree and nature of the intrusion into the individual’s privacy against the interest of the government in preventing and detecting crime. Jason L., 2000-NMCA-018, ¶ 14. When a person is seized, the State must demonstrate that the facts, together with any rational inferences from those facts, reasonably support the invasion of a person’s personal security. Sanchez, 2005-NMCA-081, ¶ 11; State v. Jones, 114 N.M. 147, 150, 835 P.2d 863, 866 (Ct. App. 1992).

{28} In this case, we consider two particular aspects of whether the seizure of Defendant constituted an unreasonable invasion of Defendant’s privacy as secured by the Fourth Amendment. The first is whether the seizure was supported by reasonable suspicion. The second is whether the seizure reflected minimal police imposition on constitutionally-protected privacy and possessory interests.

{29} Seizures must be supported by reasonable suspicion. See Afsprungr, 2004-NMCA-038, ¶ 19. To determine whether the seizure was supported by reasonable suspicion, “our first inquiry is to determine what facts were available to [the officer] and what inferences logically flowed from those facts.” State v. Cobbs, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985). Next, we determine whether these facts “warrant a person of reasonable caution in believing that criminal activity was possibly afoot.” Id. at 627, 711 P.2d at 904; see also State v. Prince, 2004-NMCA-127, ¶ 10, 136 N.M. 521, 101 P.3d 332.

{30} Inarticulate hunches and unsupported intuition are insufficient to meet the greater reasonable suspicion standard. State v. Galvan, 90 N.M. 129, 131, 560 P.2d 550, 552 (Ct. App. 1977); see also State v. Montoya, 94 N.M. 542, 544, 612 P.2d 1353, 1355 (Ct. App. 1980) (noting that “an awareness of specific articulable facts, together with rational inferences,” must underlie the suspicion required to justify “intrusion into a sphere in which the defendant could maintain a reasonable expectation of privacy”). Last, “[r]easonable suspicion must exist at the inception of the seizure” and “cannot rely on facts which arise as a result of the encounter.” See Jason L., 2000-NMCA-018, ¶ 20.

{31} Where reasonable suspicion is present, police intrusions “should minimize the imposition on privacy and possessory interests protected by the Fourth Amendment.” State v. Wagener, 1998-NMCA-124, ¶ 14, 126 N.M. 9, 966 P.2d 176. Such intrusions must be limited in scope to the circumstances that initially justified the contact. State v. Romero, 2002-NMCA-064, ¶ 10, 132 N.M. 364, 48 P.3d 102. The methods employed by police “should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion.” Taylor, 1999-NMCA-022, ¶ 25 (internal quotation marks and citation omitted).

{32} In general, persons are entitled to a greater expectation of privacy in their homes. In Wagener, we recognized that “evidence supporting the need for a warrantless entry [into a home] should be stronger when the suspected crime is a misdemeanor than when it is a felony.” 1998-NMCA-124, ¶ 21 (emphasis added). The Tenth Circuit has articulated that the warrantless arrest in a person’s home for a minor traffic violation was an unreasonable seizure under the Fourth Amendment. Howard v. Dickerson, 34 F.3d 978, 982 (10th Cir. 1994). Police encounters at a person’s dwelling in the middle of the night are especially intrusive and must be examined with great caution. See Jerez, 108 F.3d at 690-91. Police contacts that occur at night involve a greater degree of intrusion than those that occur in the daytime. See State v. Garcia, 2002-NMCA-050, ¶ 16, 132 N.M. 180, 45 P.3d 90. At common law, nighttime searches were “regarded with revulsion” because of the indignity of rousing people from their beds. See, e.g., Commonwealth v. DiStefano, 495 N.E.2d 328, 332 (Mass. App. Ct. 1986). Today, we require separate reasonable cause for authorization to execute a nighttime search. See Rule 6-208(B) NMRA. This requirement recognizes that, “the greater intrusion of a nighttime entry must be offset by a greater showing of need.” See Garcia, 2002-NMCA-050, ¶ 16 (internal quotation marks and citation omitted). “[T]he true test of the constitutionality of a nighttime search is whether it was necessary to make the search at that time.” Id. (internal quotation marks and citation omitted). As noted above in our discussion of the extent to which Officer Moore’s conduct constituted a seizure, the nighttime encounter contributed to the conveying of a message that compliance with his “request” to come to the door was required.

{33} When Officer Moore went to Defendant’s home, he was operating on no more than a possible ownership connection between Defendant and the motorcycle. His presence was based solely upon having the name and address of the registered owner of a red motorcycle with a license number that mostly matched what he had recorded the morning of the incident. Officer Moore’s testimony was clear that the evidence he had linking Defendant to what he had seen the morning of the incident was insufficient for him to feel comfortable mailing Defendant a summons. He did not have any information as to whether Defendant was the person Officer Moore had observed driving the motorcycle two days earlier. As a result, the evidence Officer Moore believed insufficient to mail Defendant a summons comprises the very facts and inferences Officer Moore needed to establish the reasonable suspicion necessary to justify further investigation by seizing Defendant’s person.

{34} The district court concluded that Officer Moore had reasonable suspicion “to go to the door, especially once he walked up and saw a red motorcycle on the porch, it’s not conclusive on it, but that’s some additional factor that [Officer Moore] was at the right place and [Defendant was] the right person to investigate.” The district court also stated as it ruled, “I don’t find that there’s any requirements, either under the law or the constitution . . . . to have reasonable suspicion [or] probable cause before commencing the investigation.”

{35} We find it difficult to reconcile the district court’s comments with Officer Moore’s testimony. Officer Moore testified he intended to go to the house “in hopes of making contact or at least observing a motorcycle there or making contact with the owner” and that he had no idea whether the owner of the motorcycle was the driver he had observed. Officer Moore also testified that when he approached Defendant’s door and saw a motorcycle on the front porch, he did not then “check that vehicle or make any kind of determination whether that vehicle was the one [he] had seen. . . .” He simply saw that motorcycle and continued on.” We deduce from his testimony that Officer Moore did not check the license plate of the motorcycle on the porch against the registration he had earlier obtained. Thus, we do not agree with the district court’s view of this evidence as supporting reasonable suspicion, and hold that insufficient evidence exists to support a finding of reasonable suspicion on Officer Moore’s part.

{36} Furthermore, there was no exigency to justify Officer Moore’s visit to Defendant’s home after midnight to investigate a
two-day old misdemeanor traffic violation. None of the common exigencies such as officer safety, a danger of dissipated or destroyed evidence, or offender flight required immediate action in this case. Two days had already elapsed. The only rationale Officer Moore cited for his visit was his belief that someone was likely to be at home (without regard that Defendant might be sleeping) and that he commonly responded to calls during a typical midnight shift.

{37} Looking at the totality of the circumstances involved in Officer Moore’s pursuit of this traffic violation, Officer Moore’s intrusion exceeds both the governmental interest in pursuing the violation and the minimal level of intrusion that should be permitted in its investigation. See Jason L., 2000-NMSC-018, ¶ 14. As noted in Wagoner, the justification for an investigatory encounter at a defendant’s home should be commensurately greater when the offense itself is a petty misdemeanor. 1998-NMCA-124, ¶ 21. In this case, we are not only dealing with a petty misdemeanor -- we are dealing with a two-day-old petty misdemeanor.

{38} The State said it could find no case limiting Officer Moore’s conduct, but “[m]aybe it sort of violates some sort of personal sense of what public officials should do.” The district court said, “[i]t may be impolite, may[be] even boorish.” However, it found no problem with Officer Moore’s actions, citing to United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973), for the proposition that although neither neighborly nor genteel, officers listening to conversations through a hotel room door was not constitutionally prohibited. However, the facts of Fisch are readily distinguishable. In that case, the court found that the defendants had no expectation of privacy because the defendants were loud enough to be overheard by the passive surveillance from the next room. Id. at 1077. Unlike Fisch, however, this case involved nothing passive on Officer Moore’s part, and was not a case of Defendant’s exposing himself to Officer Moore’s investigation but of Officer Moore’s using the weight of his official mien to compel Defendant’s presence.

{39} The State makes much of an argument that Officer Moore was “authorized” to go onto Defendant’s front porch and initiate contact with Defendant. However, in concluding that Defendant was unconstitutionally seized, we have given the most weight to the nature and underlying justification for seizing Defendant and not the location of the contact.

{40} In conclusion, when Officer Moore used his authority to compel Defendant to be awakened and to exit his home, Officer Moore was not basing his actions on a reasonable suspicion that Defendant was the perpetrator of the traffic violation Officer Moore had witnessed two days earlier. Absent reasonable suspicion, and in view of the minor nature of the two-day-old offense that was the subject of Officer Moore’s seizure of Defendant, we conclude that police intrusion into Defendant’s security was unconstitutionally intrusive. We hold Officer Moore’s seizure of Defendant violated Defendant’s constitutional protection against unwarranted searches and seizures.

Evidence Must Be Suppressed

{41} Under the exclusionary rule, unconstitutionally obtained evidence is inadmissible at trial. State v. Gutierrez, 2004-NMCA-081, ¶ 6, 136 N.M. 18, 94 P.3d 18. As such, evidence obtained as the result of an illegal detention must be suppressed. See, e.g., Prince, 2004-NMCA-127, ¶¶ 20-21. Here, the result of Defendant’s exiting the house on Officer Moore’s request was that Officer Moore acquired evidence he would not have otherwise had but for his illegal conduct. We have held that Officer Moore’s seizure of Defendant was unconstitutional. Therefore, the evidence police obtained as a result is inadmissible.

CONCLUSION

{42} Having held that Defendant was seized without reasonable suspicion and that the evidence obtained as a result of Defendant’s illegal detention must be suppressed, we reverse the district court’s denial of Defendant’s motion to suppress. We remand this case for further proceedings consistent with this opinion.

{43} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
JAMES J. WECHSLER, Judge
Opinion

A. Joseph Alarid, Judge

(1) Plaintiffs Paragon Foundation, Inc., and Kit and Sherry Laney (Plaintiffs or the Laneys), appeal the district court’s order dismissing their case with prejudice and without oral argument. Based on the following, we affirm the dismissal of Plaintiffs’ complaint.

FACTUAL AND PROCEDURAL BACKGROUND

(2) A United States District Court entered an order and supplemental injunction in December 2003, enjoining the Laneys from placing livestock on United States Forest Service (Forest Service) lands without a valid permit. The Laneys were ordered, “in coordination with and under the direction of, the . . . Forest Service, to physically remove all livestock in which they have an ownership interest” from Forest Service lands. In an attempt to enforce the federal court order, the regional forester of the Forest Service and the New Mexico Livestock Board’s (the Board) appointed executive director, Dan Manzanares (Manzanares), entered into a Memorandum of Understanding (MOU) in February 2004.

(3) The MOU stated that the federal court order would be implemented and that compliance with the specified protocol in the MOU would be deemed to be consistent with all applicable New Mexico statutes and regulations. The MOU provided that the inspection and transportation of the impounded livestock would take place in accordance with New Mexico’s administrative regulations. It further defined the role that the Forest Service would play in the impoundment, transportation, sale, distribution of proceeds, and disposal of the livestock. The MOU was apparently created because the Forest Service wanted to ensure that it understood New Mexico statutes and codes related to the impoundment and transport of livestock. The Forest Service did not want to violate state law during the execution of the federal court order. Manzanares signed the MOU on February 20, 2004. A copy of the signed MOU was not presented to the entire Board until shortly before the Board’s March 5, 2004, meeting.

(4) Plaintiffs filed a complaint in March 2004 alleging that the MOU between the Forest Service and the Board violated the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 1999) (OMA). The complaint alleged that in February 2004, the Board entered into the MOU with the Forest Service when Manzanares executed the MOU on behalf of the Board without the Board’s authority or approval. Plaintiffs contended that no public meeting of the Board was held and a majority of the Board did not approve or authorize the MOU before the MOU was executed by Manzanares, thus violating the OMA. Plaintiffs alleged that they were entitled to a judgment declaring the MOU rescinded, void ab initio, vacated, and of no effect. Plaintiffs also sought injunctive relief preventing the Board and related persons from enforcing, implementing, and operating under the MOU. In addition, Plaintiffs sought attorney fees and costs pursuant to Section 10-15-3(C). Plaintiffs also filed an emergency motion for a temporary restraining order against the Board to prevent the implementation of the MOU. After a hearing, the district court denied Plaintiffs’ motion for injunctive relief.

(5) The Board moved for summary judgment. The Board contended that no genuine issue of material fact existed because the MOU was not executed by the Board and the Board did not act on it. The MOU was merely approved by Manzanares. The Board contended that the OMA did not apply to action taken by individual public officers or employees, and therefore Plaintiffs had no claim under the OMA. The Board contended that the MOU meant nothing and had no binding affect, but that Plaintiffs wanted the district court to find it invalid under the OMA in order to obtain
attorney fees and costs, even though the MOU affected no one’s legal rights.

Plaintiffs argued that material issues of fact existed; however, they responded that they agreed with the Board that no evidence existed that a quorum of the Board members acted in any fashion in regard to the MOU. In addition, Plaintiffs officially moved to file an amended complaint to add a claim. The Board opposed this motion. Both parties made motions on discovery issues. Plaintiffs argued that they needed to conduct more discovery to controvert the Board’s motion for summary judgment and moved for a continuance. Defendant opposed the motion. These issues will be discussed in more detail in the subsequent sections of this opinion.

Finally, the district court ordered that Plaintiffs’ motion to file a first amended complaint and motion to continue and conduct additional discovery be denied. Further, without hearing oral argument on the motion, the district court granted the Board’s motion for summary judgment and dismissed Plaintiffs’ complaint with prejudice. Plaintiffs appeal this order.

DISCUSSION

The District Court’s Order Granting Summary Judgment on the OMA Violation Alleged in the Complaint

The district court granted the Board’s motion for summary judgment. It determined that there was no violation of the OMA because the OMA did not apply to this action. It found that there were no genuine issues of material fact and that Manzanares acted without a quorum of the Board when he signed the MOU.

Mootness

Due to the status of the livestock, the issue of mootness was briefed to the district court. It appears that Plaintiffs’ cattle have been rounded up, impounded, or otherwise removed, and therefore, the MOU serves no real purpose at this point. Given this state of affairs, it would appear that the issue regarding the MOU and the violation of the OMA is moot. Below, both parties agreed that this case is not moot. Plaintiffs argued that there had been no change in policy or action by the Board and the violation was complete when the MOU was executed and the livestock removed. The Board contended that even though the MOU is moot because the Forest Service is no longer removing any of the Laney's livestock, the issue of whether a quorum of the individual members of the Board ever took action on the MOU survives.

Given these arguments, even though the issue is moot because the cattle have been sold or otherwise disposed of, the issue regarding the execution of the MOU by Manzanares and the implication of the OMA is an important policy issue that is likely to occur again if the issue is not directly addressed. See In re Pernell, 92 N.M. 490, 493, 590 P.2d 638, 641 (Ct. App. 1979). We therefore consider the OMA issue.

2. OMA

After reviewing the motion for summary judgment, Plaintiffs’ response, affidavits, discovery responses of various sorts, and other proper matters in their file, the district court granted summary judgment. It determined that there were no genuine issues of material fact on the claim for the OMA violation alleged in the complaint. Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The issue on appeal is whether the [movant] was entitled to a [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 (citation omitted). “The movant need only make a prima facie showing that he is entitled to summary judgment.” Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). The movant for summary judgment may establish a prima facie case without affidavits if, through discovery, it appears the party opposing the judgment cannot factually establish an essential element of his or her case. See Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992). “Upon the movant making a prima facie showing, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits.” Roth, 113 N.M. at 334-35, 825 P.2d at 1244-45. “On appeal, the prevailing movant for summary judgment has the burden to sustain summary judgment.” Kelly v. St. Vincent Hosp., 102 N.M. 201, 204, 692 P.2d 1350, 1354 (Ct. App. 1984). “If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper.” Roth, 113 N.M. at 335, 825 P.2d at 1245.

Given that standard, we look at the law that was the basis of Plaintiffs’ complaint. The OMA states the following:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy on the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.


All meetings of a quorum of members of any board . . . held for the purpose of formulating public policy, including the development of . . . rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board . . . are declared to be public meetings open to the public at all times.[]

§ 10-15-1(B). The OMA further states that “[n]o resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1.” § 10-15-3(A).

Under the law, if a quorum of the Board members did not act on the MOU, the OMA was inapplicable, there was no OMA violation, and summary judgment was proper. Plaintiffs contend that the district court erred in granting summary judgment because there are genuine issues of material fact. Plaintiffs continue to argue that Manzanares executed the MOU on behalf of the Board without a quorum of the Board members’ approval in an open meeting. Plaintiffs contend that the MOU violated the OMA when five of the Board’s nine members considered the MOU outside a public meeting.

The Board argues that summary judgment was proper because no genuine issues of material fact existed to show that the OMA applied to the MOU, and because the MOU was executed by Manzanares without a quorum of the Board members authorizing it. Hence, they claim that Plain-
ttiffs have no claim under the OMA, which requires that a quorum of the Board act. The Board argues that “the MOU is only the non-binding and meaningless opinion of [Manzanares] that does not fall under the [OMA].” We agree with the Board that the MOU was not a proper action under Section 10-15-3, and thus there was no OMA violation.

{15} The facts support the contention that a quorum never took any action on the MOU, and summary judgment was proper. First, the complaint states, and the Board agrees, that Manzanares did not have the authority or approval of the Board to enter into the MOU. Plaintiffs contradict themselves when they contend that the MOU is an action of the Board and then state that Manzanares did not have authority from the Board to approve the MOU.

{16} Furthermore, an examination of the discovery answers provided by the individual Board members shows that Plaintiffs failed to support their claim that a violation of the OMA occurred or that a genuine issue of material fact existed. The facts presented to the district court establish that the MOU was not approved or authorized by a quorum of the Board in public or private meetings. The record reflects that Manzanares executed the MOU without the Board’s approval. Though there were some knowledge and perhaps limited involvement with some Board members, this does not amount to a private approval of the MOU by a quorum in violation of the OMA. The following facts provide support that a quorum was not involved in the process leading up to the execution of the MOU.

{17} Bill Sauble, the vice chairman of the Board, had approximately three or four discussions with Manzanares concerning the MOU from the middle of February up to the Board meeting on March 5, 2004. He saw drafts of the MOU and made some comments about the MOU. He discussed the MOU with the Board between March 1 and March 5, which was after the MOU was executed. Bill King, the chairman of the Board, stated that prior to March 5, 2004, he discussed the MOU with Manzanares and Board member Joe Delk on one occasion. King also stated that his involvement in the process leading up to the signing of the MOU was limited to Manzanares faxing him a copy for comments, and he had no comments. Board member Delk stated that he had no involvement in the process leading up to the signing of the MOU. Delk had some discussions with some Board members regarding the dispute between the Laneyes and the Forest Service and how the Board should handle the issue. However, Delk was not aware of the existence of the MOU until he received it in the mail on February 27, 2004. In fact, Delk stated that when he received the signed copy of the MOU, he “was completely surprised and offended to see [it], . . . [and] could not believe that [Manzanares] would sign a document of this significance without Board review and approval.”

{18} Board member, Tweeti Blancett, stated that she was aware of the Laney “problem,” but had no conversation with anyone concerning the MOU before it was signed by Manzanares. She was given a copy of the MOU after it was signed. Board member, David Kincaid, conversed with Delk and Sauble about the MOU before the March 5 Board meeting, but stated that he had no involvement in the process leading up to the signing of the MOU. Kincaid, Delk, and Blancett all stated that they “were caught completely by surprise to find [the MOU] had been signed by [Manzanares] without allowing each member of the . . . Board to read, provide input and vote on this most important document.” Board member, Kenneth Miller, stated that he spoke with Delk, Sauble, Manzanares, and King about the MOU after it had already been signed. He had no involvement in the process leading up to the signing of the MOU. The remaining Board members did not have any conversations about the MOU on or before the March 5 board meeting nor did they have any involvement in the process leading up to the execution of the MOU.

{19} In answering the interrogatories, Manzanares, who is not a member of the Board, stated that a quorum of the individual Board members never took action on the MOU. Manzanares stated that he signed the MOU under his authority as executive director of the Board. Manzanares further stated that he did not speak to King regarding his approval of the MOU until after he signed it. Manzanares only had conversations with Sauble about the MOU and his approval of it.

{20} Thus, the discovery supports that there was no issue of material fact and established that a quorum did not approve the MOU. Still, Plaintiffs argue that there are genuine issues of material fact because they dispute the four undisputed material facts contained in the Board’s motion for summary judgment. A review of the four undisputed material facts supports the district court’s conclusion that summary judgment was appropriate. First, the Board argued that it was undisputed and no genuine issue existed that the federal court order ordered the Forest Service to impound the Laneyes’ livestock if they did not comply with the order. There is no issue of fact because the federal order did order such action. However, even if there was a dispute, this issue is irrelevant and immaterial as to whether the OMA was violated.

{21} Second, the Board argued that it was undisputed that Manzanares approved the MOU dealing with how the livestock would be impounded. Again, there is no genuine issue with regard to this fact. Manzanares alone signed the MOU and a quorum of the Board members did not approve the MOU at an opening meeting. Plaintiffs have not established that the Board approved the MOU.

{22} Third, the Board maintained that the Board did not authorize Manzanares to approve the MOU. Plaintiffs contend that a letter addressed to Manzanares from a person not involved in this action, some comments by a Board member, and the Assistant Attorney General demonstrate that the MOU was an action of the Board. This is without merit. The facts establish that a quorum of the Board did not take action or have any involvement in the execution of the MOU.

{23} Finally, the Board argued that it was undisputed that no evidence existed that a quorum of the Board members acted in any fashion in regards to the MOU. Initially, Plaintiffs admitted that this fact was undisputed. They now attempt to change their admission and argue that a quorum of the Board considered the MOU, impoundment, or related issues. Despite this change in theory, the facts show that a quorum did not act on the MOU.

{24} Plaintiffs also argue that Manzanares is the Board’s agent and his actions are the Board’s actions. Manzanares did enter into the MOU as director of the Board. However, contrary to Plaintiffs’ argument, Manzanares’ execution of the MOU did not bind the Board. The Livestock Code, NMSA 1978, §§ 77-2-1 to -29 (1889, as amended through 2004), governs the Board’s actions. Manzanares did not act on the MOU, he “was completely surprised when he received the signed copy of the MOU, he “was completely surprised and offended to see [it], . . . [and] could not believe that [Manzanares] would sign a document of this significance without Board review and approval.” Board member, Tweeti Blancett, stated that she was aware of the Laney “problem,” but had no conversation with anyone concerning the MOU before it was signed by Manzanares. She was given a copy of the MOU after it was signed. Board member, David Kincaid, conversed with Delk and Sauble about the MOU before the March 5 Board meeting, but stated that he had no involvement in the process leading up to the signing of the MOU. Kincaid, Delk, and Blancett all stated that they “were caught completely by surprise to find [the MOU] had been signed by [Manzanares] without allowing each member of the . . . Board to read, provide input and vote on this most important document.” Board member, Kenneth Miller, stated that he spoke with Delk, Sauble, Manzanares, and King about the MOU after it had already been signed. He had no involvement in the process leading up to the signing of the MOU. The remaining Board members did not have any conversations about the MOU on or before the March 5 board meeting nor did they have any involvement in the process leading up to the execution of the MOU.

{25} Thus, the discovery supports that there was no issue of material fact and established that a quorum did not approve the MOU. Still, Plaintiffs argue that there are genuine issues of material fact because they dispute the four undisputed material facts contained in the Board’s motion for summary judgment. A review of the four undisputed material facts supports the district court’s conclusion that summary
Board avers, Manzanares’ largely unilateral action is non-binding and meaningless, as he can only act pursuant to those powers delineated in the Code.

[25] Without a quorum of the Board members acting on the MOU, there was no viable OMA claim. See Trujillo v. Gonzales, 106 N.M. 620, 621-22, 747 P.2d 915, 916-17 (1987) (stating that the action of two commissioners extending an employment offer to the plaintiff was without statutory authority under Section 10-15-3). In Trujillo, the Court held that “the oral promise made by two commissioners, not at a duly constituted meeting of the Board, does not bind the county.” See id. Similarly, here, there was no vote or action by a quorum of the Board during a public meeting or at any other time regarding the MOU, and Manzanares’ action does not bind the Board.

[26] Manzanares’ largely unilateral action in negotiating with the Forest Service and executing the MOU did not involve a meeting of a quorum of the Board members. Therefore, the OMA did not apply to the MOU or Manzanares’ action. While Manzanares’ action may not have been authorized by the law, under the facts of this case, there is no valid OMA claim. The district court did not err in granting summary judgment.

**Denial of Plaintiffs’ Motion to File First Amended Complaint**

[27] Plaintiffs appeal the denial of their motion to file a first amended complaint. The “denial of a motion to amend will be reversed only upon a showing of clear abuse of discretion.” See-D-A-Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces, 105 N.M. 433, 436, 733 P.2d 1316, 1319 (1987). Under Rule 1-015(A) NMRA, once an answer has been filed, the decision to allow an amended complaint rests solely within the sound discretion of the trial court. Schmitz v. Smentowski, 109 N.M. 386, 390, 785 P.2d 726, 730 (1990); Vernon Co. v. Reed, 78 N.M. 554, 555, 434 P.2d 376, 377 (1967). Although the Rule 1-015 expressly states that amendments should be liberally allowed, the “denial of a motion to amend is subject to review only for a clear abuse of discretion.” See Vernon Co., 78 N.M. at 555, 434 P.2d at 377; Schmitz, 109 N.M. at 390, 785 P.2d at 730. “[A]n abuse of discretion is said to occur when the court exceeds the bounds of reason, all the circumstances before it being considered.” Clancy v. Gooding, 98 N.M. 252, 255, 647 P.2d 885, 888 (Ct. App. 1982) (internal quotation marks and citation omitted).

[28] After Plaintiffs filed their complaint, they raised the issue that the MOU may also have violated the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to -7 (1961, as amended through 1999) (JPAA). Eventually, on June 9, 2004, they formally moved to amend their complaint to add the JPAA claims. On appeal, they contend that the MOU is a joint powers agreement and that because the MOU was not approved by the secretary of the finance and administration department, the MOU is void. The Board contends that the MOU is not a joint powers agreement, as it was not executed by the Board in an open meeting, it did not violate the JPAA, and it did not have to be approved by the secretary of the department of finance and administration. We agree with the Board that the denial of Plaintiffs’ motion was proper due to the failure of Plaintiffs to provide any sufficient basis for the amendment.

[29] Because the motion to amend to add the JPAA claim was insufficient and futile on its face, granting the motion would have served no purpose. See State v. Elec. City Supply Co., 74 N.M. 295, 299, 393 P.2d 325, 328 (1964). There was no basis for the amendment of Plaintiffs’ complaint, and the district court did not abuse its discretion. The JPAA states in relevant part that:

> If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting parties may be located outside this state; provided, however, nothing contained in this [JPAA] shall authorize any state officer, board, . . . to make any agreement without the approval of the secretary of finance and administration as to the terms and conditions thereof.

¶ 11-1-3 (citation omitted).

[30] Under the set of facts that were presented to the district court, there was no basis for the JPAA claim. The JPAA was not implicated because, as stated above, the MOU was not approved or authorized by the Board. There was no Board action or approval of the MOU by the secretary of finance and administration, and the MOU is therefore not a joint powers agreement. Given the facts and arguments, the district court did not abuse its discretion in denying Plaintiffs’ motion to amend their complaint to add a JPAA claim.

**Denial of Plaintiffs’ Motion to Continue and Conduct Additional Discovery and Related Issues**

[31] The district court denied Plaintiffs’ motion to conduct additional discovery and to continue. We review discovery orders by a district court for an abuse of discretion. Hartman v. Texaco Inc., 1997-NMCA-032, ¶ 20, 123 N.M. 220, 937 P.2d 979; see Design Prof’s Ins. Cos. v. St. Paul Fire & Marine Ins. Co., 1997-NMCA-049, ¶ 18, 123 N.M. 398, 940 P.2d 1193 (stating that the district court’s ruling on whether to permit further discovery before ruling on summary judgment motion is reviewed for an abuse of discretion). Likewise, we review the district court’s denial of Plaintiffs’ motion for a continuance for an abuse of discretion. See Schmidt v. Sapor, 82 N.M. 355, 358, 482 P.2d 58, 61 (1971) (The granting or denying of continuances is a matter within the sound discretion of the trial court, and such actions will be reviewed only where palpable abuse of discretion is demonstrated.”).

[32] Plaintiffs contend that the district court abused its discretion when it ruled on Plaintiffs’ motions. First, Plaintiffs argue that the district court was unreasonable, patently unfair, and abused its discretion when it did not permit Plaintiffs to submit a proposed discovery question. This proposed question regarded the individual Board Members’ understanding of “why” the MOU was executed. Plaintiffs contend that the question was relevant to the issues of whether the Board entered into the MOU, under what circumstances the Board entered into the MOU, and whether Manzanares was authorized to act. We disagree with Plaintiffs’ contention.

[33] The district court did not abuse its discretion in its ruling. The district court properly ruled that the question as to “why” the MOU was created should not be submitted to the Board. Asking individual board members “why” the MOU was created served no purpose when most of the Board members did not even know of the MOU until after Manzanares had already signed it. The discovery responses support the fact that a quorum of the Board members never took action on the MOU. Therefore, the district court’s ruling that Plaintiffs’ proposed discovery should not be submitted to the Board was not an abuse of discretion.

[34] Second, Plaintiffs argue that the district court erred in not allowing them to conduct additional discovery and depositions before the hearing on the Board’s motion for summary judgment. Plaintiffs also maintain that they should have been granted a continuance. Plaintiffs contend
that they needed more time to conduct discovery and that the district court’s order prevented them from conducting meaningful discovery at every step of the litigation. Because of this prohibition and refusal to grant a continuance, Plaintiffs assert that they could not effectively counter the Board’s motion for summary judgment.

{35} Based on the answers to discovery that were already gathered, additional discovery was unnecessary. The issue regarding the MOU and the OMA did not require a lot of discovery. After the Board and Manzanares answered interrogatories, it was clear to the district court that further discovery would be fruitless given the Board’s and Manzanares’ responses. The Board opposed Plaintiffs’ motion to conduct additional discovery and depositions because Plaintiffs failed to offer any evidence that a quorum of the Board took any action on the MOU approved and signed by Manzanares.

{36} The statements in the discovery requests establish that most of the Board members were unaware of the MOU prior to its execution by Manzanares. The Board contended that only one Board member, Sauble, had any involvement in the process leading up to the signing of the MOU. All remaining eight individual board members had no involvement in the process leading up to the signing of the MOU. The Board’s answers to Plaintiffs’ interrogatories made it clear that a quorum did not act on the MOU or even know about it before it was signed. Therefore, a quorum of the Board did not take action on the MOU in violation of the OMA. Allowing additional discovery and depositions would have only prolonged the litigation of a claim that had no merit. The district court did not abuse its discretion in denying Plaintiffs’ motion to allow additional discovery.

{37} Nor did the district court abuse its discretion when it denied Plaintiffs’ motion for a continuance. As stated above, the answers to the discovery questions established that there were no issues of material fact. Continuing the case would not have changed this. The district court did not err in its ruling.

{38} Third, Plaintiffs contend that the district court erred in granting summary judgment before the deposition transcript of Manzanares was returned pursuant to Rule 1-030(E) NMRA. On June 2, 2004, the district court permitted Plaintiffs to depose Manzanares prior to a hearing on the Board’s motion for summary judgment. The district court granted summary judgment on August 18, 2004. Manzanares’ deposition transcript was returned on September 14, 2004. Plaintiffs contend that they were not able to use the deposition to further create genuine issues of material fact, and that the district court abused its discretion by rushing to judgment and granting summary judgment without the benefit of the deposition.

{39} This argument has no merit. Based on the discovery statements that were already obtained from Manzanares, there was no need to wait for the deposition transcript. The interrogatories provide the facts to support that the Board did not act on the MOU. These interrogatories provide sufficient, undisputed information that Manzanares acted without the Board’s approval in an open or private meeting when he executed the MOU.

{40} Finally, Plaintiffs argue that the district court erred by deeming oral argument unnecessary before granting Defendant’s motion for summary judgment. It is within the district court’s discretion when considering a motion for summary judgment to hold an oral hearing. Nat’l Excess Ins. Co. v. Bingham, 106 N.M. 325, 327, 742 P.2d 537, 539 (Ct. App. 1987). We therefore hold that the district court did not abuse its discretion. The issue was fully briefed, and the district court had affidavits, interrogatories, and other documents that were attached to the motion in addition to those included in the court file. With all of this information, the district court deemed oral argument unnecessary.

CONCLUSION

{41} For the foregoing reasons, we affirm the district court’s order of dismissal.

{42} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

I CONCUR:

CELIA FOY CASTILLO, Judge

RODERICK T. KENNEDY, Judge (specially concurring).

KENNEDY, Judge (specially concurring).

{43} I concur wholeheartedly with the majority in this case, but write separately because I believe this opinion goes farther than the case merits. The United States District Court issued an order for the Forest Service to round up and sell the Laney’s cattle at a livestock auction in New Mexico. The Forest Service, which was obviously not the owner of the cattle, would have to find a way to comply with the New Mexico Livestock Code in order to effect the federal court’s order. The federal judgment was a “Foreign Judgment” as defined by NMSA 1978, § 39-4A-2 (1989). However, we do not here address the question as to whether the judgment should have been filed in a New Mexico district court to give it effect for purposes of full faith and credit. See U.S. Const. art. IV, § 1; see also, Walter E. Heller Western, Inc. v. Ditto, 1998-NMCA-068, ¶ 5, 125 N.M. 226, 959 P.2d 560 (“The rights to execute and levy to enforce a foreign judgment in New Mexico derive from the domestication by a New Mexico district court, not by the grant of judgment by the originating foreign court.”).

{44} The Livestock Code’s purpose is in part to prevent the “illegal movement of livestock.” See § 77-2-1. The Code also promotes the control of disease in livestock by requiring inspections, and regulates the ownership, transportation, and sale of animals. No one is allowed to “buy, receive, sell, dispose of or have in his possession any livestock in this state” without executing or possessing a bill of sale. NMSA 1978, § 77-9-21(A) (1993). Possession of any livestock without possessing a bill of sale is presumed illegal possession of the animal under Section 77-9-21(B). Similarly, the operator of a livestock auction is required to pay the proceeds of a sale of cattle only to the owner of the cattle. See NMSA 1978, § 77-10-3(E) (1999). Under the Code, there exists a well-delineated procedure for the impoundment and disposition of trespassing cattle. See NMSA 1978, §§ 77-14-1 to -36 (1901, as amended through 1999). The federal court’s order required many of these provisions to be bent or ignored for its judgment to be effected.

{45} Potentially, the federal court’s order required some accommodation by New Mexico if the Forest Service was to round up and sell the Laney’s cattle. The cattle would bear the Laney’s brand. The cattle would presumably not be accompanied by a bill of sale authorizing their possession by the Forest Service but rather a copy of a federal court’s order—something not contemplated as a document of title under the Code. For the Director of the Board to agree to procedures outside of the Code to effect the federal court order is ultra vires and therefore not covered by the OMA. That the cattle were rounded up and sold (we surmise) according to the federal order renders the matter moot. I do not see broader policy implications to this case as presented to us or a likelihood that this situation will be so common as to justify our going beyond the mootness to delve further into the merits, although the majority is correct in their analysis.

RODERICK T. KENNEDY, Judge
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