HATS OFF TO OUR VOLUNTEERS

The Young Lawyers Division would like to thank the following volunteers for their time & effort in making the Junior Judges Program a huge success!

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<tr>
<th>Mikal Altomare</th>
<th>Feliz Martone</th>
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<tr>
<td>Christina Anaya</td>
<td>Kyle Nayback</td>
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<td>Sarah Armstrong</td>
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<td>Ann Badway</td>
<td>Hilary Noskin</td>
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<td>Jennifer Caballero</td>
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<td>Ingrid Carlin</td>
<td>Valerie Reighard</td>
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<td>Martha Chicoski</td>
<td>Renae Richards-Charney</td>
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<td>Brian Colón</td>
<td>Tamara Safarik</td>
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<td>Tina Cruz</td>
<td>Pia Salazar</td>
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<td>Amanda Sanchez</td>
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<td>Tatiana Engelmann</td>
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<td>Judith Finfrock</td>
<td>Stephanie Schaeffer</td>
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<td>Victoria B. Garcia</td>
<td>Jere Smith</td>
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<td>Amy Glasser</td>
<td>Lara Sundermann</td>
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<td>Honorable Cristina S. Jaramillo</td>
<td>Lindsay Van Meter</td>
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<td>Lauren Keefe</td>
<td>Christina Vigil</td>
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<td>Larry Kronen</td>
<td>David Waymire</td>
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<td>Alex Limkin</td>
<td>Paul Yarbrough</td>
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<td>Antonio Maestas</td>
<td>Briana Zamora</td>
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YLD also thanks to the New Mexico State Bar Prosecutors Section for co-sponsoring the 2006 Junior Judges Program

Special thanks to Junior Judges Chair Martha Chicoski for her hard work and dedication in bringing this great program to New Mexico!
Bill Kitts Mentor Program

Creating Partnerships for Professional Development

Who was Bill Kitts?

Albuquerque lawyer Bill Kitts was a professional who loved and respected the law. He committed time and expertise in assisting young and new lawyers. A great loss to the community, Bill Kitts was killed in an automobile accident in 1982. The Bill Kitts Mentor Program was formed in the fall of 1992 to remember and honor this dedicated attorney.

Visit www.nmbar.org and select “Attorney Services/Practice Resources,” then “Mentorship Program” to obtain mentor practice area and contact information. For more assistance, or to become a mentor, contact the State Bar at membership@nmbar.org; or call (505) 797-6033.

**Alamogordo**

John R. Hakanson

**Albuquerque**

Nancy Jean Appleby
Jeffrey C. Brown
Sealy H. Cavin, Jr.
Peter C. Chestnut
Richard J. Crollett
John James D’Amato, Jr.
Philip B. Davis
Leonard J. DeLayo, Jr.
Peter V. Eaton
Stephen G. Durkovich
Roger V. Eaton
Stephen P. Eaton
Paula I. Forney
Mike Gallegos
Robert D. Gorman
Michael F. Hacker
J. Edward Hollington
Tova Indritz
Stephen D. Ingram
Whitney Johnson
Pamela D. Kennedy
James P. Lyle
Alan M. Malott
Marshall G. Martin

Gary J. Martone
Jane Marx
John P. Massey
Stephen E. McIlwain
Phillip P. Medrano
Mark C. Meiering
Daniel J. O’Brien
Susan E. Page
The Hon.
Daniel E. Ramczyk
Walter L. Reardon, Jr.
Edward R. Ricco
The Hon.
William F. Riordan
Alfred M. Sanchez
Andrew G. Schultz
The Hon. Frank A. Sedillo
Ronald J. Segel
Edward W. Shepherd
Sanford H. Siegel
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Donald E. Swaim
Mary Teresa Torres
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**Clovis**

Richard F. Rowley, II

**Corrales**

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Frederick H. Sherman

**Farmington**

John C. Booth
Richard L. Gerdin
Damon Weems

**Gallup**

The Hon. Robert W. Ionta

**Hobbs**

Craig J. La Bree
M. J. Collopy
William G. Shoobridge

**Las Cruces**

Marci E. Beyer
John Darden
Francisco M. Ortiz
Kieran F. Ryan
Richard D. Watts

**Los Lunas**

Charles S. Aspinwall
H. Vern Payne

**Rio Rancho**

Dennis W. Montoya

**Santa Fe**

Eric R. Biggs
Douglas Booth
Patrick A. Casey
John R. Fox
Linda G. Hemphill
C. David Henderson
Edmund H. Kendrick
Gary R. Kilpatrick
Nancy M. King
Joe L. McClougherty
William Panagakos
Roger L. Prucino
James E. Snead, III
Bruce Thompson

*Mentor volunteers acknowledge that they have been in practice for at least five years, have had no formal disciplinary sanctions during the past five years, maintain malpractice coverage, and are members in good standing of the State Bar of New Mexico.*
NATIONAL SATELLITE

1
Advanced Estate Planning Practice Update - Spring 2006
State Bar Center • via satellite
Thursday, June 1, 2006 • 10 a.m. - 2 p.m.
3.6 General CLE Credits

For practitioners whose experience is at an intermediate (or higher) level, this update offers an opportunity to explore the most current and important issues in estate planning and wealth transfer taxation. Topics are selected with emphasis upon identifying and solving problems that practitioners will confront in their practice, how to bring about desired results, as well as when and why particular procedures or choices are appropriate.

- Standard Fee $199

also available via LIVE WEBCAST

7
Cause and Effect of Arbitration Clauses: What Should You Consider When Drafting an Arbitration Clause for a Contract?
State Bar Center, Albuquerque
Wednesday, June 7, 2006 • 11:30 a.m.
1.0 General CLE Credit

Co-Sponsor: Business Law Section

What considerations should be taken into account when deciding whether to use an arbitration clause in a contract? What are the practical effects that certain drafting decisions might have on any arbitration proceeding pursuant to the clause? Are there particular New Mexico issues that you should consider? Hear comments on and gain insights into these matters from two knowledgeable and experienced New Mexico practitioners.

- Standard Fee $45

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 ______________
**Table of Contents**

Notices .................................................................................................................. 6–09
Legal Education Calendar ...................................................................................... 10–11
Writs of Certiorari ................................................................................................. 12–13
List of Court of Appeals’ Opinions ....................................................................... 14
Clerk Certificates .................................................................................................. 15–17
Opinions .................................................................................................................. 18–46

*From the New Mexico Supreme Court*

2006-NMSC-018, No. 28,867: State v. Rodriguez ................................................. 18
2006-NMSC-019, Nos. 29,018/29,042: In the Matter of Pamela A.G. ................. 21
2006-NMSC-020, No. 29,442: Campos v. Murray .............................................. 25
2006-NMSC-021, No. 29,552: In the Matter of Honorable Florencio “Larry” Ramirez ................................................................. 28

*From the New Mexico Court of Appeals*

2006-NMCA-048, No. 24,801: Smith v. City of Santa Fe ..................................... 31
2006-NMCA-049, No. 25,006: McMinn v. MBF Operating, Inc. ......................... 36
2006-NMCA-050, No. 24,518: Chevron U.S.A., Inc. v. State of New Mexico ex rel. Department of Taxation and Revenue ............................................... 41

Advertising ......................................................................................................... 47

**Professionalism Tip**

With respect to opposing parties and their counsel:

In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful.

**Meetings**

May

23
Technology Committee, 4 p.m., State Bar Center
24
Membership Services Committee, noon, State Bar Center
25
Natural Resources, Energy and Environmental Law Section, noon, State Bar Center
25
Appellate Practice Section Board of Directors, 3 p.m., Montgomery & Andrews, P.A., Santa Fe

June

5
Attorney Support Group, 5:30 p.m., Law Office of Scott Vorhees, Santa Fe
6
Employment and Labor Law Section Board of Directors, noon, State Bar Center

**State Bar Workshops**

May

24
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
25
Lawyer Referral for the Elderly Workshop, Topic: Nursing Home Medicaid 1:15 p.m., Meadowlark Senior Center, Rio Rancho
25
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
31
Consumer Debt/Bankruptcy Workshop 6 p.m., Las Vegas VFW, Las Vegas

June

22
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
28
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

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

COURT NEWS
NM Supreme Court
Proposed Revisions to the Rules of Appellate Procedure
The Supreme Court is considering proposed revisions to the Rules of Appellate Procedure. Written comments on the proposed amendments may be sent to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848, by May 29. For reference, see the May 8, (Vol. 45, No. 19) Bar Bulletin.

NM Court of Appeals
Open Meeting of Committee on Administrative Appeals
An ad hoc committee of district and appellate judges and lawyers practicing in the area of administrative appeals will meet at 1:30 p.m., July 11, at the State Bar Center. The purpose of the meeting is to evaluate practice and procedures under Section 39-3-1.1 now that the statute is over five years old. Some of the problems that have been noted include: (1) the time for appeal needs clarification; (2) the definition and manner of preparation of the record needs clarification; (3) the rules governing statements of issues could be improved; (4) decisions by administrators, particularly city and county governments, are sometimes inadequate for review; (5) the standards of review do not seem to be complied with; (6) some cases should go directly to the Court of Appeals; and (7) administrative decision makers, district and appellate judges and practitioners could benefit from education on the issues related to Section 39-3-1.1. Those who have interest in this area of law or who have noted these or additional problems should attend this meeting. For more information, contact Judge Lynn Pickard at (505) 827-4903 or coalp@nmcourts.com.

First Judicial District Court
Family Law Brownbag
The First Judicial Court will host its family law brownbag meeting at noon, June 13, in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The meeting will focus on the role of accountants and/or financial planners in the divorce process. For more information or to suggest agenda items to be discussed, contact Elege Simons, (505) 988-5600, or esimons@simonsfirm.com. Provide one dollar, name and bar number and receive 1.0 CLE credit, pending approval.

Destruction of Exhibits
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases
1974 to 1988
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the Court, in Criminal, Civil, and Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1974 to 1988, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through June 9.

Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) 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.

Destruction of Tapes
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases
1971 to 1995
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy tapes filed with the Court, in Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1971 to 1995, included but not limited to cases that have been consolidated. Cases on appeal are excluded.

Attorneys who have cases with tapes, and wish to have duplicates made, should verify tape information with the Special Services Division (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after May 24 by Order of the Court.

Second Judicial District Court
Nominees
The District Court Judicial Nominating Commission convened on May 10 in Albuquerque and completed its evaluation of the eight applicants for the vacancy on the 2nd Judicial District Court. The Commission recommends the following two applicants (in alphabetical order) to Governor Bill Richardson:

William Parnall
Stan Whitaker

Eleventh Judicial District Court
Announcement of Vacancy
A vacancy on the 11th Judicial District Court will exist in Gallup as of June 30 due to the retirement of Judge Joseph L. Rich.

The chair of the 11th 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 at http://lawschool.unm.edu/judsel/application.php, or e-mailed/faxed/mailed by calling Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., May 22. Applications received after that date are not considered.

District Courts and Bernalillo County Metropolitan Court
Announcement of Vacancies
The following seven vacancies will exist as of July 1 due to the creation of new judgeships by the New Mexico State Legislature.

• One vacancy in the 3rd Judicial District in Las Cruces.
• Two vacancies in the 5th Judicial District: one vacancy will exist in Carlsbad, and one will exist in Roswell.
• One vacancy in the 9th Judicial District in Clovis.
• One vacancy in the 11th Judicial District in Farmington.
• One vacancy in the 13th Judicial District in Bernalillo.
• One vacancy in the Bernalillo County Metropolitan Court in Albuquerque.

The chair of the Judicial Nominating Commission solicits applications for these
positions from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or e-mailed/faxed/mailed by calling Sandra Bauman, (505) 277-4700. Applicants are advised to clearly indicate which position they are applying for. The deadline for applications is 5 p.m., May 22. Applications received after that date are not considered.

U. S. District Court for the District of New Mexico

Opinion Retrieval System

The Federal Bar Association is sponsoring a program to produce a collection of the Court’s opinions on compact disc. The CD collection contains a master disc which includes all documents that are contained in the Court’s Opinion Retrieval System and weekly discs which contain documents filed in each of the weeks during the program. The CD collection will be maintained by the 10th Circuit Library, Albuquerque Branch, and can be viewed at the library, or copies of the discs can be provided at no cost. This program will be available until the replacement of the Court’s Opinion Retrieval System is implemented in Fall 2006.

Workers’ Compensation Administration

Destruction of Exhibits and Depositions

The New Mexico Workers’ Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2004 (excluding causes on appeal). The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque. They can be picked up until May 26.

For further information, contact the Workers’ Compensation Administration, Clerk of the Court Alex Maestas, (505) 841-6843 or (800) 255-7965. Exhibits and depositions not claimed by the specified date will be destroyed.

STATE BAR NEWS

Annual Meeting

Resolutions and Motions

The 2006 Annual Meeting of the State Bar of New Mexico will be held at noon, July 21, at the Taos Convention Center in Taos. Resolutions and motions to be considered must be submitted in writing and received in the office of Executive Director Joe Conte, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., June 21.

Casemaker 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 summer 2006.

Watch for more information about Casemaker and visit www.casemaker.us.

Contact Joe Conte, jconte@nmbar.org, or (505) 797-6099 with questions.

Committee on Women and the Legal Profession

Family Leave Policy Survey

A family leave policy survey, created by the State Bar’s Committee on Women and the Legal Profession, was sent by e-mail to State Bar members on May 17. The committee encourages members to complete the survey by May 31. Results should provide information on the types of leave policies that are in place across different segments of practice, types of policies that are significant to practitioners, ways in which firms/organizations might improve their policies and a means to compare New Mexico with other jurisdictions. The survey may also be accessed through www.nmbar.org.

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 next meeting will be held at noon, June 6, at the State Bar Center, a departure from its regularly scheduled meeting on the first Wednesday of each month. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call Carlos M. Quinoñes, section chair, (505) 248-0500.

Solo and Small Firm Practitioners Section

Meeting Rescheduled

The next meeting of the Solo and Small Firm Practitioners Section will be held June 20 at the State Bar Center in conjunction
with the CLE, Lurking Dangers in Real Estate Contracts for all NM Lawyers, presented by Ron Taylor. The program will begin at 11:45 a.m. with registration and lunch and will conclude at 1:15 p.m. The cost of the program is $45, lunch included. To register, call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and click on CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Young Lawyers Division
Professional Clothing Drive

The Young Lawyers Division is collecting professional clothing to donate to both Dismas House, a nonprofit organization that transitions nonviolent offenders from incarceration to parole, and The Crossroads, a nonprofit organization that assists homeless women and children.

Professional clothing donations are being accepted at the following four locations:
• State Bar of New Mexico
 5121 Masthead NE, Albuquerque
• The Romero Law Firm
 1001 5th Street NW, Albuquerque
• Bats, Thornton & Baehr, P.C.
 4101 Indian School Road NE, Albuquerque
• State Bar of New Mexico Annual Meeting, Taos Convention Center
July 20-22, 2006

Contact Briana Zamora, bhzamora@btblaw.com, or (505) 884-0777, with questions or to volunteer as a clothing collection point outside of Albuquerque.

Lunch only: $20 members/$25 nonmembers; lunch and CLE: $50 members/$70 non-members; CLE only: $30 members/$45 non-members.

Register for lunch by noon, June 5. Lunch is an additional $5 without reservations. Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

NM Criminal Defense Lawyers Association
Summer CLE

The Summer CLE of the New Mexico Criminal Defense Lawyers Association will be held from 9 a.m. to 5 p.m., June 23, at the UNM School of Law. Timothy P. O’Toole, chief of the Special Litigation Division of the Public Defender Service for the District of Columbia, will speak on Litigating Eyewitness ID Issues in the Courtroom. Barbara Bergman, UNM law professor and current president of the National Association of Criminal Defense Lawyers, will present Creative Uses of Evidence. Other topics include Winning Motions to Suppress, Case Law Updates and Fourth Amendment Issues. There will be a membership meeting and Driscoll Award presentation at lunch. Registration begins at 8:30 a.m., and participants may earn 6.25 general CLE credits. For more information, visit www.nmcdla.org, e-mail nmcdladir@aol.com, or call (505) 992-0050. Discounts and partial scholarships are available for NMCDLA members.

Other News

Legal FACS
Torrance County Pro Se Forms Clinic

Legal FACS will conduct a free pro se forms clinic from 9 a.m. to noon, June 21, at the Neil Mertz Judicial Complex in Estancia (Highway 14, west side of the road). The clinic is for self-represented litigants and domestic violence victims who cannot afford to hire an attorney for divorce, legal separation, annulment, name change, child custody orders, spousal/child support enforcement orders and/or other related family matters. Litigants will have the opportunity to discuss their case with an attorney and visit with a paralegal and/or domestic violence victim advocate.

Individuals interested in the clinic must call Legal FACS, (505) 256-0417. Legal FACS will conduct intake to verify qualification for the program. All pro se litigants must make an appointment and will be seen by appointment only on June 21.

NM Center on Law and Poverty
2006 Legal Services Training

The New Mexico Center on Law and Poverty announces its annual Statewide Legal Services Conference, a training which addresses poverty law issues. This conference will be of interest to those working in the system of civil legal service providers as a professional or volunteer or to those doing pro bono work in this area.

The conference will be held June 13–14 at the Professional Development Center of the State Bar. The keynote address will be delivered on the morning of June 13th by Lieutenant Governor Diane Denish. The conference will also feature professionalism training by Chief Justice Richard Bosson, ethics training by Michael Browde of the UNM School of Law, and A Look at the Significant New ABA Standards on Providing Civil Legal Aid with Sarah Singleton. Other topics to be covered include: consumer law, family law, Medicaid, bankruptcy law, predatory lending, depositions, discovery techniques, housing law, unemployment law, and more.

The registration fee is $100 for public interest lawyers and $150 for private attorneys. To learn more, including how to register for the event, check the Trainings section at www.nmpovertylaw.org; call Stacey Leaman at the Center on Law and Poverty, (505) 255-2840; or e-mail stacey@nmpovertylaw.org. CLE credit is pending.

Other Bars
Albuquerque Bar Association
Monthly Luncheon and CLE

The Albuquerque Bar Association’s monthly luncheon will be held at noon, June 6, at the Albuquerque Petroleum Club. The State of the Courts will be presented by The Honorable Richard C. Bosson, Chief Justice, New Mexico Supreme Court.

The CLE, Inside the Court of Appeals: Pointers on Appellate Practice will be presented by The Honorable Cynthia Fry, New Mexico Court of Appeals; The Honorable Michael D. Bustamante, Chief Judge, New Mexico Court of Appeals; and Edward Ricco, Rodney Dickson Sloan Akin & Robb PA. The CLE, from 1:30 to 3 p.m., will qualify for 1.5 general CLE credits.

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Ensuring Racial and Ethnic Fairness

by A. Samuel Adelo

Throughout the history of New Mexico, interpreters have played an important role. Two historic events show us that the people of New Mexico have been conscious that languages and cultures are a dynamic part of our state. Before 1846, New Mexicans communicated in Spanish and in the languages of the Indian tribes and pueblos, including Navajo, Keres, Tiwa and Towa. In 1846, General Stephen Watts Kearney rode into Santa Fe with U.S. troops and declared New Mexico to be part of the United States. Captain David Waldo, who was a master of the Spanish language, assisted General Kearney in writing the code of laws, known as the Kearney Code, and translating them into Spanish. Consequently, the functionally literate people of the times could read the Kearney Code in either English or Spanish.

The next historic event was the State Constitutional Convention in 1911 when New Mexico sought statehood in the North American Union. At least 33 of the delegates to that convention were of Hispanic descent. Protecting the rights of all citizens, the 1911 Constitution states that citizens will not be deprived of the right to vote because they cannot write English or Spanish. Section 14 is of particular note to persons who are interested in racial and ethnic fairness in the courts and who want to ensure the administration of justice across languages and cultures. It states, “In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and the cause of the accusation; to be confronted with witnesses against him; to have the charge and the testimony interpreted to him in a language he understands.”

There are many stories about the quality of interpreting in the courts—some factual, some apocryphal. Those stories refer to the professional quality of interpreters before a 1985 law required court interpreter certification. This law was based on a project undertaken by Dr. Guadalupe Valdes, then a professor of linguistics at New Mexico State University and a certified federal court interpreter. She tape-recorded interpretations done in Doña Ana County courts, and I monitored the courts in the northern part of New Mexico. We found many errors committed by court interpreters who had never been certified by an objective criterion reference test as is now done in federal and many state courts. We received the support of then Justice Daniel Sosa, who many years before as an attorney had been an active member and leader of the Mexican American Legal Defense Fund. We succeeded in persuading the legislature to pass a law requiring certification of court interpreters by an objective criterion-referenced written and oral test. Today, New Mexico, as a member of the National Consortium of Court Interpreters, certifies interpreters by requiring candidates to pass simultaneous, consecutive and sight translation tests. However, for the court interpreter to ensure racial and ethnic fairness and guarantee the linguistically challenged defendant due process of law, teamwork is essential.

In this context, teamwork means that the judge, the prosecutor, defense counsel and, in juvenile cases, the probation officer have to work closely with the court interpreter. The judge should speak no faster than 140 words per minute and ensure that all participants do likewise. He should also ensure that all participants avoid jargon and acronyms and speak clearly and loudly enough so that the court interpreter can hear every word clearly. When the court interpreter cannot hear the words of the judge, counsel, witnesses and probation officers, due process is thwarted. Remember, the court interpreter does a very unnatural thing not usually done in civilized society—speak while someone else is speaking. Moderate speed in the source language is basic. The interpreter has to process what was said in the source language through 19 cognitive steps before he or she can translate into the target language. The linguistically challenged defendant has to understand in his or her language what was said in the source language. Otherwise, only a babble of unintelligible voices is heard.

For too long, the public in general has misunderstood the nature of the work performed by court interpreters and translators. Some people erroneously think that being bilingual suffices in order to be a qualified and effective court interpreter. The court interpreter must have a working knowledge of legal, substantive and procedural terms, regional expressions and slang. He or she must keep abreast of the continual changes in both the source and the target languages and have a working knowledge in two languages of technical terms and police and layman’s jargon.

For the court interpreter to ensure due process of law, racial and ethnic fairness requires teamwork among the judge, the prosecutor, defense counsel, the witnesses and all the parties who participate in the judicial system at all levels.

Adelo, now retired, has been a free lance court interpreter for 24 years in the U.S. District Court and the New Mexico state district courts. He taught court interpreting for the Haury Court Interpreter Institute at the University of Arizona. He has interpreted in Texas, Oklahoma, Nebraska and Arizona. Adelo served as chair of the New Mexico Court Interpreters Advisory Committee to the New Mexico Supreme Court.

Articles printed in this publication are solely the opinion of the author. Publication of any article in the Bar Bulletin is not deemed to be an endorsement by the State Bar of New Mexico or the Board of Bar Commissioners of the views expressed therein. Our purpose is to provide an educational resource for all members of the State Bar on matters related to the justice system, the regulation of the legal profession and the improvement of the quality of legal services.
### LEGAL EDUCATION

#### MAY

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<tr>
<th>Date</th>
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<td>FMLA Update</td>
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<td>23</td>
<td>Liability Issues for Trustees: What a Trustee Must Tell Beneficiaries</td>
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<td>24</td>
<td>Electronic Legal Resources: A World of Legal Information at UNM School of Law Library</td>
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<td>24</td>
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<td>25</td>
<td>Major Issues in Arbitration</td>
<td>Albuquerque</td>
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<td>Ethical Dilemmas: How to Solve Them</td>
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#### JUNE

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<td>1</td>
<td>Advanced Estate Planning Practice Update, Spring 2006</td>
<td>National Satellite</td>
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<td>EEOC Technical Assistance Program</td>
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<td>2006 Estate Planning Update, Parts 1 and 2</td>
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<td>Advanced Section 1031 Exchanges</td>
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<td>Ethical Forms of Compensation</td>
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G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
**June**

8 Corporate Counsel: Caught in the Crossfire  
Teleconference  
TRT, Inc.  
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8 Immigration  
Las Cruces  
Paralegal Division of New Mexico  
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9 Internet Sources and Resources  
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12 Prescriptions for Electronic Discovery  
Teleconference  
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13–14 Creative Tax Planning for Real Estate Transactions, Parts 1 and 2  
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13 Insurance Coverage Litigation  
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13 Sarbanes-Oxley: Does Privilege Still Exist?  
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14 ACE-PACER Electronic Filing  
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14 Intermediate Gross Receipts and Compensating Tax in NM  
Albuquerque  
Lorman Education Services  
6.6 G  
(715) 833-3940  
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14 Moral Character Test: Its Affect on Admissions and Retention  
Teleconference  
TRT, Inc.  
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14 New Animal Legislation in New Mexico  
Albuquerque  
Paralegal Division of New Mexico  
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14–16 Public Sector Employment Law Update  
Albuquerque  
Council on Education in Management  
16.5 G  
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15 Current Issues in Mediation  
Teleconference  
TRT, Inc.  
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15 Legal Aspects of Condominium Development and Homeowners Associations  
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15 Sometimes It’s All About Losses: Understanding the “Passive Activity” and “At Risk” Limitations  
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16 2006 Tax Symposium: Matters Affecting Federal and State Tax Practice  
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16 Deeds Descriptions and the Law  
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17 Dispute Review Board Training Course  
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Construction Dispute Resolution Services  
5.5 G, 1.0 E, 1.0 P  
(505) 474-9050  
www.constructiondisputes-cdrs.com

19 Turning the Tables: Bias Directed at Attorneys  
Teleconference  
TRT, Inc.  
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## WRITS OF CERTIORARI

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

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

**Effective May 22, 2006**

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

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<th>NO.</th>
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### Certiorari Granted but not yet Submitted to the Court:

(Parties preparing briefs)

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

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

**Effective May 22, 2006**

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<td>29,735</td>
<td>Allen v. Edelman (COA 26,024)</td>
<td>4/18/06</td>
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<td>McMinn v. MBF Operating Acquisition Corp. (COA 25,006)</td>
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<td>Garcia v. Dorsey (12-501)</td>
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<td>NM Dept. of Labor v. Echostar (COA 25,777)</td>
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<td>State v. Bricker (COA 24,719)</td>
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<td>State v. Jensen (COA 24,905)</td>
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**Certiorari Granted and Submitted to the Court:**

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

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<td>State Farm v. Luebbers (COA 23,556)</td>
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<td>Lopez v. San Felipe Pueblo (COA 25,884)</td>
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<td>State v. Attsen (COA 25,274)</td>
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<td>Montoya v. Ulibarri (12-501)</td>
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<td>Salazar v. Torres (COA 23,841)</td>
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**Petition for Writ of Certiorari Denied:**

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<td>Fallis v. Blair (12-501)</td>
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### Unpublished Opinions

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<th>Parties</th>
<th>Outcome</th>
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<td>24849</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-00-4692, STATE v H Katz</td>
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Slip Opinions for Published Opinions may be read on the Court’s website:
Clerk's Certificate of Name, Address, and/or Telephone Changes

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Eleventh Judicial District Court
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It is undisputed in this case that, with respect to the DWI charge against Defendant, the jury foreman mistakenly signed the not guilty verdict form when the jury had unanimously found Defendant guilty. The error was reported to the bailiff by some of the jurors shortly after the trial judge announced that the jury was discharged. The question in this case is whether, having announced that the jury was discharged, the trial court could correct the verdict form to reflect the true verdict of the jury. The trial court corrected the error while the jury was still in its presence and control by polling each juror and confirming that none of them intended to acquit Defendant of DWI but, instead, that they had unanimously found him guilty of DWI. Defendant appealed the correction arguing that double jeopardy precluded the trial court holding that the verdict form to the Court of Appeals confirming that none of them intended to acquit Defendant of DWI but, instead, that they had unanimously found him guilty of DWI. The error was reported to the bailiff by some of the jurors shortly after the trial judge announced that the jury was discharged. The question in this case is whether, having announced that the jury was discharged, the trial court could correct the verdict form to reflect the true verdict of the jury. Therefore, there was no double jeopardy violation. The Court of Appeals reversed and Defendant’s conviction for DWI is reinstated.

PROCEDURAL BACKGROUND

Defendant was tried before a jury for DWI, driving on a suspended or revoked license, and concealing his identity from a police officer. After the jury concluded its deliberations, it returned to open court at 3:12 p.m. to announce its verdict. In accordance with local practice, the verdicts were handed to the court clerk to be read aloud announcing that Defendant was not guilty. The jurors each stated that the verdict read aloud announcing that Defendant was not guilty of DWI was not their verdict. The clerk read that Defendant had been found guilty of driving on a suspended or revoked license and of concealing his identity, but not guilty of driving while intoxicated. After the prosecution and the defense declined to poll the jury, the record reflects the following: THE COURT: All right. I’m going to discharge the jury. And thank you for working with us and for us today. Please call the Code-a-Phone over the weekend. Thank you. THE BAILIFF: Please stand for the jury. (Note: Jury out at 3:15 p.m.) THE BAILIFF: One moment, Your Honor. I’m moving the jury back into the jury room. They’re saying that a verdict was read wrong. THE COURT: All right. That’s fine. THE BAILIFF: Let us see what’s going on. Okay? I’ll be right back with you in just a moment. THE COURT: It was not read wrong. THE BAILIFF: They were saying the DWI verdict was read wrong. THE CLERK: I read what it says. THE COURT: Let’s have the verdict forms. [DEFENSE COUNSEL]: And I thought I was a legal genius. THE COURT: Please be seated. I’m thinking. All right. What I’m going to do – the jury is still intact. The Court is going to ask them to come back in. I’m, going to – [PROSECUTOR]: Poll. THE COURT: – show the verdict forms to the foreman. I’m going to ask him to read that and ask him if it is correct. We are going to have a poll – [DEFENSE COUNSEL]: That’s what I was going to suggest. THE COURT: – of the jury. At 3:20 p.m. the jury was brought back into open court from the adjacent jury room and all twelve jurors stated that the verdict read aloud announcing that Defendant was not guilty of DWI was not their verdict. The foreman stated that he had signed the not guilty verdict form by mistake. The trial judge found that the mistake was clerical and entered the true verdict as guilty of DWI. The trial judge then polled the jury again, this time asking whether their verdict on DWI was guilty. The jurors each stated that their verdict was guilty of DWI.

DISCUSSION

Defendant appealed to the Court of Appeals contending that the trial court violated
his right to be free from double jeopardy when it reassembled the jury to correct the verdict form. We generally review double jeopardy claims de novo. City of Albuquerque v. One (1) 1984 White Chevy Ut., 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94; State v. Reyes-Arreola, 1999-NMCA-086, ¶ 5, 127 N.M. 528, 984 P.2d 775. However, where factual issues are intertwined with the double jeopardy analysis, we review the trial court’s fact determinations under a deferential substantial evidence standard of review. State v. Gonzales, 2002-NMCA-071, ¶ 10, 132 N.M. 420, 49 P.3d 681. 

In doing so, we will not weigh the evidence or substitute our judgment for that of the trial court, State v. Garcia, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72, and all reasonable inferences supporting the fact findings will be accepted even if some evidence may have supported a contrary finding. State v. Bankert, 117 N.M. 614, 618, 875 P.2d 370, 374 (1994). As discussed below, the double jeopardy analysis does involve fact issues.

{4} To decide whether the correction of the verdict form from not guilty to guilty violated Defendant’s constitutional right to be free from double jeopardy, we must first determine whether the trial judge erred in reassembling the jury once he announced he was going to discharge the jury. As the Court of Appeals pointed out in its opinion, “[w]hether a trial court may reassemble a discharged jury to amend, clarify, or correct a verdict is the subject of a surprising number of cases throughout the country.” Rodriguez, 2004-NMCA-125, ¶ 7. Some states categorically preclude the reassembly of a jury to correct a verdict once the trial judge announces his or her intent to discharge the jury. See, e.g., West v. State, 92 N.E.2d 852, 855 (Ind. 1950). Other states analyze whether the jury was discharged by investigating whether the jury actually left the presence and control of the court. See, e.g., State v. Brandenburg, 120 A.2d 59, 61 (N.J. Hudson County Ct. 1956). In New Mexico, in a case where the jury was called back to the courtroom to correct a verdict one day after they were discharged, we stated that “[a]fter a verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to reassemble and alter their verdict.” Murray v. Belmore, 21 N.M. 313, 319, 154 P. 705, 707 (1916). Despite this statement, we refused to set aside the corrected verdict because appellant’s attorney “purposely refrained” from objecting to the reassembly of the jury in an apparent attempt to force a new trial for his client. Id. at 319-20, 154 P. at 707-08.

{5} What remains unanswered in New Mexico law is: when is a jury actually discharged? The Court of Appeals held that a functional approach to answering the question was consistent with New Mexico law. Rodriguez, 2004-NMCA-125, ¶ 13. We agree with the Court of Appeals on this point. The functional approach to determining whether a jury has been discharged requires a determination of whether the jury is still in the presence and control of the trial court, and if not, whether the jury was possibly influenced by an unauthorized contact. See State v. Green, 995 S.W.2d 591, 609-613 (Tenn. Crim. App. 1998) (reviewing cases from several jurisdictions). We find the analysis in Green persuasive. In Green, the court held that a verbal discharge or dismissal of the jury does not render the jury discharged for purposes of subsequent reassembly to correct or amend a verdict. Id. at 609. Instead, the court considered two issues: (1) whether the jury was separated from the presence and control of the trial court; and (2) whether there was a possibility of outside contacts or influence on the jury. Id. at 612-13; see also Commonwealth v. Brown, 323 N.E.2d 902, 904-05 (Mass. 1975) (holding reassembly permissible where jurors remained in control of the trial court by virtue of being in custody of court officers and had no opportunity for outside influence). An important query on the second issue is whether the record reflects that one or more jurors entered an area occupied by the general public.

{6} In this case, although the Court of Appeals adopted the functional approach, it went further and presumed prejudice because, in its view, the record was silent with respect to whether any juror was contaminated by a bystander or court official. Rodriguez, 2004-NMCA-125, ¶¶ 11-13. The Court of Appeals would require the State to specifically rebut the presumption of prejudice. Id. ¶ 13. Presumably, the burden was on the State because the change to the verdict form favored the State. Implicit in its holding is that the State was obligated to present evidence that no juror was near a member of the general public; for example, providing testimony or a statement that members of the public were not in proximity to any juror. The Court of Appeals would also implicitly require proof that court officials themselves did not speak to any juror in an attempt to influence a change in the verdict. Id.

{7} Although we think it is reasonable to presume prejudice once a juror has left the presence and control of the court into an area occupied by the general public, we decline to presume prejudice when the judge is able to articulate a finding that the jury did not leave the court’s presence and control and remained intact. In addition, because they are officers of the court, we decline to presume that court officials have contaminated a juror or the jury, although counsel are at liberty to raise the issue. In any event, the party who would benefit from the correction of the jury verdict form should be given an opportunity to rebut any presumption of prejudice.

{8} In this case, we believe the record is clear that the jury did not leave the presence and control of the court. Immediately after announcing that the jury was discharged, the trial court stated: “The court has been told by the bailiff, before you people exited, that the verdict had been read wrong as to count I .” The judge specifically found that the jury was intact. At a subsequent hearing regarding an appeal bond, the trial court judge reiterated his observations of the events. “[A]s the jury left – before they exited the Court, before they even left the jury room, the foreman of the jury informed the bailiff that the judge had misread the verdict, that [it] was not the correct verdict.” It is undisputed that the only reason the jury was reassembled before they left the courtroom was to correct a jury verdict form that did not accurately reflect the result of the jury’s deliberations.

{9} Had defense counsel or the prosecutor observed that a juror had left the court’s presence and control or had been in contact with a member of the public between the reading of the verdict and its correction, it would have been incumbent on them to make their statement for the record. Instead, both parties seemed to be in agreement with the trial court that the jury remained intact and had not left the presence and control of the court. During the appeals bond hearing, the prosecutor stated:

[T]he jury was exiting the room and actually hadn’t even gone in to collect their items from the jury room when the bailiff who was also present, stopped and the Court and everyone else and said there’s an error here, they claim an error and they were immediately brought back into the Court. They never left the courtroom itself proper totally, and I’m including the jury room in that, because it is sequestered from the rest of the
building, so no tampering or any other type of (inaudible) may be given to those members and they were brought back in and immediately polled.

Defense counsel has never disputed the statements for the record made by the judge or the prosecutor. At the same hearing where the prosecutor made his statements for the record, defense counsel commented as follows:

Defense Counsel: I could find no case law except case law that went back to like 1873 that said that the jury had been discharged and were wandering about "gaily" I believe it said and then were called back. District Judge: Well, our people, our people really didn’t even get out of the chute.

Defense Counsel: Yeah.

District Judge: They were right there . . . .

No doubt a better record of the proceedings might have been made. For example, the trial judge or either party could have made a more specific statement that the jurors, while leaving the jury box to return to the adjacent jury room to retrieve their personal items, alerted the court that a verdict had been incorrectly reported. Or, the trial judge or either party could have made a more specific statement that no juror had left the courtroom, jury room, or entered an area occupied by the general public. More specific statements would have made clear that the jury room was immediately adjacent to the courtroom and that the jurors were not entering the spectator section of the courtroom, and any disagreement by the parties could have been recorded. Alternatively, each juror could have been asked on the record whether he or she had left the courtroom or entered an area occupied by members of the general public and, if so, whether the juror or any member of the general public commented about the jury verdict. Finally, because of the events of this case, we encourage litigants to take advantage of the rule which permits either party or the court to poll the jury. Had the jury been polled immediately after the verdict was read in this case, we are confident the error with the verdict form would have been revealed even before the judge announced that he intended to discharge the jury.

Although a better record might have been made, we believe the record in this case was adequate. Reviewing the record in the light most favorable to the trial court’s findings, we are satisfied that the jury was not separated from the presence and control of the trial court and that no juror exited into an area occupied by the general public permitting the possibility of outside contacts or influence on the jury. Because no outside influence tainted the corrected verdict, we cannot find that entry of the jury’s chosen verdict was barred by the constitution. For these reasons, the trial court is affirmed and the Court of Appeals is reversed.

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
In this neglect and abuse proceeding we consider whether the Petitioners’ procedural due process rights were violated when Child’s out-of-court statements were admitted to prove allegations of sexual abuse. Petitioners contend their due process rights were violated because four hearsay statements of Child were admitted without giving them an opportunity to question Child regarding the allegations. The Children’s Court admitted the statements under the catch-all exception to the hearsay rule, finding that the statements by the child were spontaneous, consistent, and contained language that a child four years of age normally would not use, thus concluding the statements were trustworthy and reliable. The Court of Appeals affirmed and held that the Children’s Court adequately safeguarded the Petitioners’ due process rights by investigating the reliability of the statements before admitting the statements as evidence of sexual abuse. We affirm the Court of Appeals. Although we agree with the hearsay analysis employed by the Court of Appeals, we take this opportunity to emphasize those procedural safeguards that are necessary to afford a minimum level of due process in an neglect and abuse proceeding when the child does not testify.

Petitioners are the natural grandparents and adoptive parents of Child (hereinafter referred to as “Parents” and/or “Mother” and/or “Father”). In November 2001, nine days before Child’s fourth birthday, the New Mexico Children, Youth and Families Department (“CYFD”) filed an Abuse and Neglect Petition against Parents and took Child into custody. The Petition was based on allegations of unsafe, unsanitary, and uninhabitable living conditions. Approximately four months later, after Child had lived with two different sets of foster parents, CYFD amended the Abuse and Neglect Petition to allege that Father had sexually abused Child, and Mother failed to protect Child from the abuse.

The allegations of sexual abuse were based on statements made by Child to four different individuals: first to her foster mother, then to a CYFD social worker, later during a “Safe House” interview, and finally to Child’s therapist. The initial statement was made spontaneously to the foster mother while Child was taking a bath. The foster mother noticed that Child was “trying to stick a washcloth up her bottom” and asked Child what she was doing. Child announced that she was “sexing” herself. When the foster mother asked Child, “Who told you about that?”, Child said, “My dad Chico,” referring to her natural grandfather/adopted father. Child announced, “This is the way my mom Pam and my dad Chico have sex, my dad sexes my mom back here,” pointing to her anus, and “He sexes my mom here too,” pointing to her vaginal area. Child went on to state, “And when my dad was sexing me, I tried to push him off because he was too heavy, and I kept saying ‘No! No!’ but he wouldn’t get off and I couldn’t push him off.”

The foster mother then called the CYFD social worker, who visited Child that same day. The social worker asked Child what she had talked to her foster mother about during her bath. Child told the social worker “Chico tried to sex me” and that Chico had gotten on top of her, and that she had tried to push him off but he was too big. Child said that Chico had “put his here,” pointing to her crotch. Child also told the social worker that her mom Pam was in the room and had told her “to get up, or get off and pull up her pants.”

Twelve days later Child was taken to a “Children’s Safe House” where she was interviewed on videotape by a trained clinical forensic interviewer. The interviewer did not ask Child about the allegation of
sexual abuse until Child brought it up herself. Child again said that her dad Chico had “poked her ‘pee-pee’ (which she identified by pointing to her crotch) with his ‘pee-pee’ (which she described as something that comes out of his pants).” Child also reported that she had seen Father and Mother “f-- ing” and that Mother had seen Father “f-- ing” Child.

[6] The fourth statement was made to Child’s therapist. Child told the therapist that “Chico put his wee to mine and I put mine to his.” During a private therapy session, Child also spontaneously told her therapist “I don’t like it when Chico f--ks me,” and that “Mom was mad because Chico f--ked me.”

[7] Prior to the adjudication hearing on the sexual abuse allegations, CYFD gave notice to Father and Mother of its intent to offer the Child’s statements as evidence under the hearsay rule. The notice did not indicate which hearsay exception CYFD was relying on, but Rule 11-803(X) NMRA, requires prior notice to an adverse party. Rule 11-804 B(5) NMRA, similarly requires notice to the adverse party when the declarant is unavailable. These two exceptions, often called “catch-all” or residual exceptions, provide that statements not specifically covered by any of the other hearsay exceptions, but with the “equivalent circumstantial guarantees of trustworthiness” of the other hearsay exceptions, may be admissible under circumstances when:

1. the statement is offered as evidence of a material fact;
2. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
3. the general purposes of these rules and the interests of justice will be served by the admission of the statement into evidence.

Rule 11-803 (X) NMRA; see also Rule 11-804 B(5) NMRA.

[8] Father filed a Motion in Limine to exclude the hearsay statements of Child, arguing the statements lack the “equivalent circumstantial guarantees of trustworthiness” required by 11-803(X); admission of the statements would deny Father due process because of his lack of opportunity to participate in the questioning of Child; and Child was not competent to testify. The Children’s Court judge considered the motion at the beginning of the adjudicatory hearing. After hearing argument the judge decided to reserve his ruling until he heard the evidence relating to the statements.

[9] The foster mother, the CYFD social worker, the safe house interviewer, and Child’s therapist all testified regarding the statements made to them by Child. In addition, Child’s therapist offered uncontested testimony that it would be hurtful, rather than helpful, to have Child testify, and stated that in her opinion, it was not likely that Child would say anything in the court setting. At the conclusion of the testimony, the Children’s Court judge ruled that Child’s hearsay statements were admissible. The court found the circumstances surrounding Child’s statements made them trustworthy, particularly due to the spontaneity, repetition, and consistency of the statements, and the fact that a child of age three or four would not normally know about sexual matters. In light of all the evidence, the court found the statements reliable and admissible under 11-803(X).

The court then concluded that clear and convincing evidence supported the allegations of neglect and abuse as defined in the Children’s Code, NMSA 1978, § 32A-4-2(B)(3) and (4), and § 32A-4-2(E)(3)(2006).

[10] The question we consider is whether Parents’ due process rights were violated when Child’s out-of-court statements were admitted without Parents having an opportunity to question or confront Child. We review the constitutional claim of denial of due process de novo. State ex rel. Children, Youth and Families Dep’t v. Mafin M., 2003-NMSC-015, ¶ 17, 133 N.M. 827, 70 P.3d 1266.

[11] The interest of parents in the care, custody, and control of their children is a fundamental liberty interest. Troxel v. Granville, 530 U.S. 57, 65 (2000). Whenever a proceeding affects or interferes with the parent-child relationship courts must be careful to afford constitutional due process. State ex rel. Children, Youth and Families Dep’t v. Stella P., 1999-NMCA-100, ¶ 14, 127 N.M. 699, 986 P.2d 495. Although we recognize the proceeding at issue was not for the termination of parental rights, the statutory scheme enacted by our Legislature to protect children and adjudicate parental rights “represents a continuum of proceedings which begins with the filing of a petition for neglect and abuse and culminates in the termination of parental rights.” State ex rel. Children, Youth and Families Dep’t v. Maria C., 2004-NMCA-083, ¶ 25, 136 N.M. 53, 94 P.3d 796. While it has been held that termination proceedings must be conducted in a constitutional manner, Mafin M., 2003-NMSC-015, ¶ 18, neglect and abuse proceedings must also be conducted in a manner that affords the parents constitutional due process. The question is how much process is due, and did Parents in this case receive the minimum level of due process?

[12] The amount of process due depends on the particular circumstances of each case because procedural due process is a flexible right. See State ex rel. Children, Youth and Families Dep’t v. Lorena R., 1999-NMCA-035, ¶ 17, 126 N.M. 670, 974 P.2d 164. Due process requires “timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.” Lorena R. 1999-NMCA-035, ¶ 26 (quoting In re L.V., 482 N.W.2d 250, 257 (Neb. 1992)). It is the right to confront and cross-examine adverse witnesses that is the main issue in this case. Because neglect and abuse proceedings are civil proceedings, the Confrontation Clause of the Sixth Amendment of the U.S. Constitution, as interpreted in Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that out-of-court statements by witnesses are barred under the Confrontation Clause, unless witness is unavailable and defendant had prior opportunity to cross-examine witness, regardless of whether such statements are deemed reliable by the court), is not at issue here. See In re Esperanza M., 1998-NMCA-039, ¶ 15, 124 N.M. 735, 955 P.2d 204. The opportunity to confront a witness

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1 § 32A-4-2(B)(3) defines an abused child as one “who has suffered sexual abuse or sexual exploitation inflicted by the child’s parent, guardian or custodian.” § 32A-4-2(B)(4) defines an abused child as one “whose parent has knowingly, intentionally or negligently placed the child in a situation that may endanger the child’s life or health.” § 32A-4-2(E)(3) defines a neglected child as one “who has been physically or sexually abused, when the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm.”
in a civil neglect and abuse proceeding is not an absolute right. Instead the right requires that parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness.

{13} To determine whether Parents’ right to confront and cross-examine a witness comport with the reasonableness requirement of due process, we employ the balancing test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). See Mafin M., 2003-NMSC-015, ¶ 19. This balancing test requires the weighing of three factors. One, the private interest at stake. Two, the government’s interest. Three, whether the procedures used increased the risk of erroneous deprivation of the private interest. See Mathews, 424 U.S. at 335. Parents’ interest in maintaining “a parental relationship with [their] children is a fundamental right that merits strong protection.” Mafin M., 2003-NMSC-015, ¶ 20 (quoting State ex rel. Children, Youth and Families Dep’t v. B.J., 1997-NMCA-021, ¶ 11, 123 N.M. 99, 934 P.2d 293). The government’s interest in protecting the welfare of children is equally significant. See State ex rel. Children, Youth and Families Dep’t v. Anne McD., 2000-NMCA-020, ¶ 23, 128 N.M. 618, 995 P.2d 1060. Therefore, whether Parents were given due process turns on whether the procedures used for the admission of Child’s hearsay statements increased the risk of an erroneous finding of abuse which could lead to the deprivation of Parents’ fundamental right to maintain their relationship with Child, and whether additional procedural safeguards would eliminate or lower that risk. Id. ¶ 24.

{14} Significantly, whether Parents were afforded due process does not depend on a showing that they would have prevailed had they cross-examined Child or excluded the hearsay statements. Parents “need only demonstrate that there is a reasonable likelihood that the outcome might have been different.” Maria C., 2004-NMCA-083, ¶ 37 (citing Cleveland Bd. of Educ. v. Lowdermilk, 470 U.S. 532, 544 (1985)).

{15} In this case, the Children’s Court judge analyzed the admissibility of Child’s statements following the procedure required by Rule 11-803(X) for determining whether the statements were trustworthy and reliable. Parents contend that without the right to confront and cross-examine Child this procedure was inadequate to eliminate or minimize the risk of an erroneous finding of abuse. “In evaluating whether this procedure created a risk of an erroneous deprivation . . . we look to the purpose of confrontation and cross-examination. The purpose is to ensure the integrity of the fact-finding process by ‘subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.’” In re A.M., 13 P.3d 484, 488 (Okla. 2000) (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)). The Oklahoma court concluded: “It is evident that any restriction a judge places on the opportunity for face-to-face confrontation and cross-examination of adverse witnesses enhances the risk of an erroneous deprivation of parental rights.” Id. Although we agree with this statement, in this case the Children’s Court judge did not restrict Parents’ opportunity for cross-examination. Neither parent called Child as a witness, nor did they ask permission of the court to allow them to question Child. Instead, they simply sought to exclude Child’s hearsay statements. It was only during closing arguments that Parents suggested that the judge himself interview Child before admitting the out-of-court statements. Cf. In re Tamara G., 295 A.D.2d 194, 200 (N.Y. App. Div. 2002) (finding that the balancing of interests in a sexual abuse case weighed in favor of examining the 11-year-old daughter, at least in camera, in order to clarify numerous unexplained inconsistencies in her statements). Indeed, Parents did not indicate below nor have they indicated on appeal what questions they might ask Child, making it difficult to determine what value, if any, cross-examination of this four-year-old child would have offered. Although there are situations where cross-examination, even of a very young child, will enhance the integrity of the fact-finding process, Parents have failed to articulate with any degree of specificity how confrontation of Child would have enhanced the fact-finding process in this case.

{16} In this case the Children’s Court judge did not admit the hearsay statements as substantive evidence until he was convinced of their reliability under Rule 11-803(X). He made the finding that the hearsay statements were inherently reliable based on Child’s age, the manner in which the statements were made, and the consistency of the statements. The trial judge’s adherence to the requirements of Rule 11-803(X) helped to ensure due process for Parents. As detailed previously, Child’s statements were unambiguous in both the description of the abuse and the identity of the abuser. The terms used by Child to describe the details of the abuse were consistent with her age, refuting any implication that Child was coached or influenced in her statements. The foster mother testified to behavior by Child that included frequent masturbating with her hand, with her dolls and with the family dog. Child also simulated acts of sexual intercourse between her unclothed dolls. The program therapist testified that Child exhibited sexualized behavior, and that this would typically be a learned activity in a four-year-old child. The therapist also testified that Child suffered from nightmares and sleep disturbances, behaviors she found consistent with Post Traumatic Stress Disorder caused by a traumatic event, such as sexual abuse. Here, Child’s sexualized behavior and the expert testimony of the therapist that Child’s behavior was consistent with child sexual abuse make it more probable that Child was abused and supports a logical inference that the act of abuse described in Child’s hearsay statement occurred. Child’s identification of Father as the abuser was also consistent and spontaneous, as were Child’s statements regarding Mother’s knowledge of the abuse. This evidence provided the circumstantial guarantee of trustworthiness required by the hearsay catch-all exceptions.

{17} In addition, the safe house interview was both audio and video recorded, affording Parents the opportunity to point out any impropriety in the questioning techniques employed by the interviewer. No such improprieties have been noted by Parents, and thus we are not persuaded that Parents have shown that admission of the out-of-court statements increased the risk of an erroneous deprivation of their relationship with Child.

{18} Although it is almost always true that the integrity of the fact-finding process is enhanced by rigorous testing in the context of an adversary proceeding before the trier of fact, as this case demonstrates there are circumstances when other procedural protections and safeguards must supply the “scrupulous fairness” required when the State “interferes with a parent’s right to raise their children.” Maria C., 2004-NMCA-083, ¶ 50 (citing Lorena R., 1999-NMCA-035, ¶ 19). The trial judge must determine the proper procedure and safeguards to be utilized in each case, based on factors such as the age of the child, the nature of the parent-child relationship, and the particular emotional state of the child. See In re Michael C., 557 A.2d 1219, 1221 (R.I. 1989) (discussing the age of child, the potentially violent relationship between father and child, and possible psychological trauma to the child). Although Rule
11-803(X) does not require a finding of unavailability, the trial judge should probe for an explanation as to why a child will not testify, such as the explanation offered here by the Child’s therapist. Even in civil cases, in-court confrontation is preferred. We emphasize that trial judges should explore alternatives for the questioning of a child in order to help the fact-finder test the reliability of the child’s statements while also protecting the child’s emotional state.

Alternative procedures such as videotaped depositions or testimony in camera have been used to prevent possible psychological trauma to the child. See In re C.K., 671 A.2d 1270, 1275 (Vt. 1995) (stating that use of alternative procedures for testimony is left to discretion of trial judge); In re Michael C., 557 A.2d at 1220 (describing procedures used for a thirteen year old boy accusing his father of sexual abuse to testify in camera, answering questions written by father’s attorney); In re A.M., 13 P.3d at 488 (recognizing that due process does not entitle a parent to personally confront and cross-examine a child witness if the child would be traumatized by the experience).

In addition, this Court agrees that: “[w]hile we do not expect CYFD to act as [parent’s] counsel, we remind counsel that their role as an attorney for CYFD is analogous to the role of prosecuting attorneys. The prosecutor’s obligation is to protect not only the public interest but also the rights of the accused. Similarly, CYFD must seek not only to protect the children involved; they must see to it also that the parents are dealt with in scrupulous fairness.” Maria C., 2004-NMCA-083, ¶ 51 (internal quotations and citations omitted). We note that the Legislature in 2005 amended the Children’s Code related to the investigation of reports of child abuse to include an obligation for CYFD to notify parents of a safe house interview, unless CYFD determines that notification would adversely affect the safety of the child or compromise the investigation. NMSA 1978, § 32A-4-5(F)(2005). Although the legislation is silent on what role the parents may play during the interview, this may provide an adequate opportunity for parents or their attorneys to ask questions of the child through the safe house interviewer, provided careful procedures are in place to avoid any manipulation or intimidation of the child by the parents. In this case, parents do not point to any improprieties in the questioning of Child during the safe house interview, and we find none.

Although Parents’ due process challenge centers around their right to confront Child, we find it significant to our due process analysis in this case that Parents were allowed to cross-examine the hearsay witnesses and to challenge the reliability of the methods in which the statements were obtained from Child. Parents were also provided with proper notice, the assistance of counsel, and the opportunity to review and present evidence. Combined, these factors weigh heavily against a reasonable likelihood that the outcome would have been different if any additional procedures had been utilized. We conclude Parents were not denied due process. The Court of Appeals is affirmed.

IT IS SO ORDERED.
EDWARD L. CHÁVEZ, Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-020

Topic Index:
Appeal and Error: Appellate Jurisdiction; and Certification
Civil Procedure: Statute of Limitations
Constitutional Law: Due Process
Government: Public Employees
Jurisdiction: Appellate Jurisdiction
Statutes: Constitutionality
Torts: Immunity; Public Employee Torts; Statute of Limitations; and Tort Claims Act

KARLEEN CAMPOS, as parent and next friend of J.C., a minor,
versus
LAWRENCE MURRAY and CHAD DAVIS,
in their individual capacities,
Defendants.
No. 29,422 (filed: April 20, 2006)

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
BRUCE D. BLACK, United States District Judge

PAUL J. KENNEDY                      SEAN OLIVAS
MARY Y.C. HAN                        MELANIE L. FRASSANITO
ADAM S. BAKER                        KELEHER & MCLEOD, P.A.
KENNEDY & HAN, P.C.                  Albuquerque, New Mexico
Albuquerque, New Mexico for Plaintiff

DIANE GARRITY
SERRA, GARRITY & MASIOWSKI, L.L.C.
Santa Fe, New Mexico for Amicus Curiae
New Mexico Association of Counties
New Mexico Municipal League

OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

{1} Plaintiff Karleen Campos’ minor daughter, J.C., was sexually assaulted for several months during 2001 and early 2002. Plaintiff filed a claim on behalf of her daughter in the United States District Court for the District of New Mexico, pursuant to 42 U.S.C. § 1983 (2000), against Defendants Lawrence Murray and Chad Davis in their official capacities as New Mexico State Police officers. Plaintiff’s claim stems from the alleged actions and omissions of the Officers relating to a failure to protect J.C. from sexual abuse. Plaintiff also filed a claim alleging negligence under the New Mexico Tort Claims Act (TCA). NMSA 1978, § 41-4-12 (1977).

{2} Prior to the federal trial, the Officers filed a Motion to Dismiss the state law claims based on the statute of limitations in the TCA. Based on the motion, United States District Judge Black certified two questions to this Court pursuant to Rule 12-607 NMRA 2006:

(A) Whether NMSA §41-4-15, which requires a child of the age of seven years or more to file a claim within two years after the date of occurrence resulting in injury, or death, violates Due Process principles under the New Mexico Constitution.

(B) Whether a claim alleging that government officials created a dangerous situation in which a child was sexually abused by a third party is “based upon personal injury caused by childhood sexual abuse” within the meaning of NMSA §37-1-30.

We accepted certification and now answer the first question in the affirmative and, having done so, find it unnecessary to answer the second question.

BACKGROUND

{3} During the summer of 2001, while Plaintiff was incarcerated, she left her eight-year-old daughter, J.C., in the care of her boyfriend. Around July 28, 2001, Officer Davis was assigned to conduct a criminal investigation of the boyfriend, having received information that he had sexually abused J.C’s cousin. Allegedly, Officer Davis also discovered on this date that J.C. was residing with the boyfriend, but did nothing to notify J.C.’s family that she may be in danger.

{4} Officer Murray then took over the case and allegedly told Plaintiff’s family not to inform Plaintiff about the allegations of sexual abuse because he feared the boyfriend would flee. On December 14, 2001, almost five months after the police found out about the allegations against J.C.’s cousin, that cousin, in a safehouse interview, informed the police that J.C. was also being sexually abused. Plaintiff claims that the Officers still did not contact Plaintiff to warn her of the danger to J.C. Then, in January of 2002, J.C. disclosed to the police that since the summer of 2001 she had been continually raped and sexually assaulted by the boyfriend. Plaintiff filed her claim against the Officers on November 30, 2004, when J.C. was eleven, and nearly three years after the alleged abuse against J.C. was discovered.

{5} Having moved to dismiss the state law claims, the Officers argue that the two-year statute of limitations in the TCA bars the claim. NMSA 1978, § 41-4-15(A) (1977) (stating actions against a government entity or employee are barred “unless such action is commenced within two years . . . , except that a minor under the full age of seven years shall have until his ninth birthday in which to file”). In response, Plaintiff asserts that the TCA does not apply in the instant case because the statute of limitations found in NMSA 1978, Section 37-1-30 (1995) applies in sexual abuse cases involving
mains rather than the TCA. *Id.* (allowing victims of “childhood sexual abuse” until their twenty-fourth birthday or three years after victim “knew or had reason to know” of the abuse to file a claim). Alternatively, Plaintiff claims that even if the TCA statute of limitations governs the claim, and not Section 37-1-30, Plaintiff’s claim is not barred because as a matter of due process J.C. was incapable of meeting its statutory deadline.

[6] The federal court certified both questions to us under Rule 12-607(A):

The Supreme Court may answer by formal written opinion questions of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling:

(1) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals. See also NMSA 1978, § 39-7-1 (1997) (providing for the “Uniform Certification of Questions of Law Act”). We begin by addressing Plaintiff’s alternative argument, which is the first of the two certified questions.

**DISCUSSION**

**The Tort Claims Act Statute of Limitations as Applied to Minors**

[7] The TCA states that “[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless . . . commenced within two years . . . except that a minor under the full age of seven years shall have until his ninth birthday in which to file.” Section 41-4-15(A). The Officers argue that since J.C. was eight years old at the time of the alleged abuse, then under the TCA she had to file her claim within two years, which she failed to do.

[8] The New Mexico Court of Appeals has previously addressed the issue we are being asked to decide here, the only difference being that the case involved a child that was under the age of seven when the injury occurred. *Jaramillo v. Bd. of Regents of the Univ. of N.M. Health & Scis. Ctr.*, 2001-NMCA-024, 130 N.M. 256, 23 P.3d 931. In *Jaramillo*, the Court adopted a reasonableness standard, and found that, under the facts, the child’s due process rights were violated because he was incapable of meeting the TCA deadline. *Id.* ¶ 7, 10. Under this standard when a court addresses a minor’s due process challenge to the TCA’s two-year statute of limitations, it must determine “whether it is reasonable to expect a person in the injured child’s circumstances to meet the [TCA] requirement.” *Id.* ¶ 7. In certifying this question to this Court, the federal court determined that it would be helpful for us to address the “legal standard of reasonableness of this limitation period” as applied to the facts of this case.

[9] In *Jaramillo*, the plaintiff’s son suffered severe brain damage at the age of two after a doctor allegedly mistreated his seizure disorder. *Id.* ¶ 2, 9. The mother filed the complaint six years later, shortly after the child’s ninth birthday, and beyond the tolling period for children injured under the age of seven. *Id.* ¶ 2. In examining whether the TCA statute of limitations violated the child’s due process rights, our Court of Appeals examined its precedent pertaining to a related question of whether the TCA’s ninety-day notice of a claim provision violates a minor’s due process rights. *Id.* ¶ 4. The notice provision requires a victim to notify the government entity against which the claim is being asserted “within ninety days after an occurrence giving rise to a claim.” NMSA 1978, § 41-4-16(A) (1977). In the notice cases, our Court of Appeals has held that the ninety-day notice requirement can be unreasonable as applied to minors, depending on the circumstances, and further that the “burden of giving notice could not be placed on another,” such as a parent or grandparent, absent legislative creation of such a duty. *Jaramillo*, 2001-NMCA-024, ¶¶ 4-5 (citing *Tafoya v. Doe*, 100 N.M. 328, 331-32, 670 P.2d 582, 585-86 (Ct. App. 1983) and *Rider v. Albuquerque Pub. Schs.*, 1996-NMCA-090, ¶¶ 9, 11-15, 122 N.M. 237, 923 P.2d (604).

[10] In examining these notice cases, the Court of Appeals in *Jaramillo* acknowledged the factual distinction between a ninety-day notice provision and a two-year statute of limitations, but questioned the relevance of any difference in terms of the effect on a young child. *Id.* ¶ 6. In both instances a child is being asked to hurdle obstacles that are impossible to overcome at a young age. Based on the disability of being a minor, the Court in *Jaramillo* held that “cases involving children do not focus on the absolute or relative length of time of the requirement, and instead focus on whether it is reasonable to expect a person in the injured child’s circumstances to be able to meet the requirement.” *Id.* ¶ 7. Accordingly, there can be factual situations, such as a teenager victim who has legal representation, where “it is reasonable to expect” a child to be able to meet the requirements of the notice provision or the two-year statute of limitations. See, e.g., *Erwin v. City of Santa Fe*, 115 N.M. 596, 597-99, 855 P.2d 1060, 1061-63 (Ct. App. 1993) (finding that a teenager who had retained counsel will be expected to comply with the ninety-day notice provision).

[11] In *Jaramillo*, however, a severely injured two-year-old, without legal representation, clearly had no capacity to file suit by his ninth birthday. 2001-NMCA-024, ¶¶ 9-10. Accordingly, our Court of Appeals held that the child could not reasonably be expected to comply with the statute of limitations, and thus, as applied, the TCA violated the child’s constitutional due process rights. *Id.*; see also *Tafoya*, 100 N.M. at 332, 670 P.2d at 586 (finding that “one unable to comply with a notice requirement by reason of minority is protected by the reasonableness requirements of the common law, the Fourteenth Amendment to the United States Constitution, or similar provisions in their state constitution”).

[12] *Jaramillo* accurately articulates the law of this State. The only difference with the case before us is that, contrary to *Jaramillo* where the child was two when the injury occurred and nine when the claim was filed, J.C. was eight when the injury occurred and eleven when the claim was filed. We must determine whether there is any reason the standard articulated in *Jaramillo* should not apply equally to J.C.’s situation.

[13] The courts of this State have a “long tradition of interpreting laws carefully to safeguard minors.” *Rider*, 1996-NMCA-090, ¶ 13. The reasonableness standard articulated in *Jaramillo* is part of that tradition. See *Jaramillo*, 2001-NMCA-024, ¶ 7; see also *Jaramillo v. Heaton*, 2004-NMCA-123, ¶¶ 9, 19, 136 N.M. 498, 100 P.3d 204 (applying the reasonableness standard in holding the three-year statute of limitations found in the Medical Malpractice Act violated a minor’s due process rights). This standard is meant to protect children whose claims involve “the special disability of being a minor.” *Jaramillo*, 2001-NMCA-024, ¶ 8. Minors are entitled to such protection because “as a matter of due process, a child who is incapable of meeting a statutory deadline cannot have that deadline applied to bar the child’s right to legal relief.” *Id.* ¶ 10 (citing *Rider*, 1996-NMCA-090).

[14] Based on this legal background, and the reasoning of the Court of Appeals in *Jaramillo*, we see no appreciable difference between an injury that occurs when a
child is two or an injury that occurs when the child is eight. A two-year-old, an eight-year-old, or even an eleven-year-old, are all equally unable to comply with the statute of limitations requirement at such a young age. Age is not the sole determinative inquiry in these cases, but it is a primary factor to be taken into account in determining whether the statute of limitations is being reasonably applied. According to the facts presented to us, J.C. was eight when she was assaulted, and the TCA statute of limitations required that she file suit by age ten. It is unreasonable as a matter of law to ignore the effects of such an extreme burden on a child of such tender years.  

Furthermore, we agree with the Court of Appeals that absent some legislatively imposed duty, we cannot presume that parents will adequately care for their child by filing such a claim in a timely manner. See Jaramillo, 2001-NMCA-024, ¶ 5 (citing Rider, 1996-NMCA-090, ¶¶ 9, 11-15). Common experience teaches us differently. It would be a poor policy choice for our Legislature to penalize a child, already injured, for the subsequent neglect of that child’s parent in failing to file suit in a timely manner. And such a choice becomes all too arbitrary in due process terms when one realizes that the parent who was supposed to file a timely suit on J.C.’s behalf is the same parent who, when incarcerated, left her daughter with the boyfriend who then sexually assaulted her. For these reasons, Section 41-4-15, as applied to J.C. violates her right to due process of law and cannot bar her claim under the TCA.

Childhood Sexual Abuse Under Section 37-1-30  

The United States District Court also asked us to determine “whether a claim alleging that government officials created a dangerous situation in which a child was sexually abused by a third party is ‘based upon personal injury caused by childhood sexual abuse’ within the meaning of NMSA § 37-1-30.” Section 37-1-30 states:

(A) An action for damages based on personal injury caused by childhood sexual abuse shall be commenced by a person before the latest of the following dates:

(1) the first instant of the person’s twenty-fourth birthday; or

(2) three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury . . .

The statute defines “childhood sexual abuse” as any violation of NMSA 1978, Section 30-9-11 (2003), regarding criminal sexual penetration of a minor; NMSA 1978, Section 30-9-13 (2003), regarding criminal sexual contact of a minor; or any violation of the Sexual Exploitation of Children Act, NMSA 1978, Section 30-6A-1 (1984). Section 37-1-30(B). In the case before us, the child suffered “childhood sexual abuse” as defined by the statute. However, the Officers argue that Section 37-1-30 does not apply because they are third parties to the sexual abuse, in essence that the section only applies to claims between the victim and the alleged perpetrator. The Officers also assert that the TCA provides the exclusive remedy for suits against governmental entities, thus Section 37-1-30 cannot govern this claim.

This Court is authorized to answer certified questions “if the answer may be determinative of any issue in pending litigation in the certifying court . . . .” NMSA 1978, § 39-7-4 (1997). Here, the second question presented to this Court seems to have been asked in the event that we answered the first question differently. Having answered the first question in the affirmative there is no need to answer the second question, as doing so is not determinative of any issue before the federal court here. For this reason we need not resolve any of the statutory issues raised by the parties regarding Section 37-1-30.

CONCLUSION

Following the Court of Appeals reasoning in Jaramillo, we discern no meaningful distinction with the case certified. Accordingly we conclude that the two-year statute of limitations in the TCA violates J.C.’s due process rights, and does not apply to bar her claim.

IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-021

INQUIRY CONCERNING A JUDGE
NOS. 2004-097 & 2005-009

IN THE MATTER OF HONORABLE FLORENCIO "LARRY" RAMIREZ
District Judge, Third Judicial District, New Mexico

FORMAL REPRIMAND AND OPINION
No. 29,552 (filed: May 5, 2006)

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for Respondent

FORMAL REPRIMAND AND OPINION
PER CURIAM

{1} This matter comes before the Court on a petition for discipline upon stipulation filed by the Judicial Standards Commission concerning the Honorable Florencio “Larry” Ramirez (Respondent). Following oral argument before this Court, we granted the petition and ordered the stipulated discipline against Respondent. Among other things, we ordered that Respondent receive a public reprimand, which we now issue in the form of this opinion.

{2} These disciplinary proceedings arise out of two separate incidents of misconduct involving Respondent. The first incident concerns Respondent’s actions in his own courtroom in an unrelated matter. The second incident concerns actions Respondent took when his son was cited for drinking in public. Based on the Commission’s stipulated findings of fact, we summarize the events surrounding both of these incidents and then proceed to discuss why Respondent’s actions warrant disciplinary sanctions.

FACTUAL BACKGROUND

{3} Respondent is a district court judge in the Third Judicial District. In the first incident, while acting in his judicial capacity during a juvenile court hearing, Respondent failed to be patient, dignified, and courteous toward a defense attorney appearing before him. In particular, Respondent raised his voice with the attorney, prevented the attorney from making her full objections for the record, and admonished her in front of her client.

{4} The second, unrelated, incident involved actions Respondent took when Las Cruces Police Department officers cited his son and his son’s friends, all of whom were 21 years of age or older, for drinking alcoholic beverages in public in violation of local municipal ordinance. As the officers were issuing the citations, Respondent identified himself to one of the officers as his son’s father by showing the officer his court identification card and his driver’s license. Respondent also asked the other officer issuing citations if she remembered who he was. The officer said she did remember him but continued issuing the citations. Respondent maintains that he was not attempting to intimidate the officers or gain preferential treatment, but was merely identifying himself and confirming his son’s identity at his son’s request. However, Respondent now acknowledges the impropriety of using his judicial title and court identification card in connection with the matter.

{5} After the officers issued the citations, Respondent collected all eight citations from the recipients, who were now standing in a group. Respondent maintains that he collected the citations because he was going to inquire about the possible penalties for the citations. As the police officers were leaving the park, they reported hearing laughter from the group of young men with Respondent and that some of them were looking back at the officers. Respondent maintains that no laughter was directed at the officers. Respondent subsequently left the park in his vehicle, but his involvement in the matter did not end.

{6} Respondent subsequently asked his volunteer court bailiff to assist Respondent’s son and his friends in responding to the citations in the Las Cruces Municipal Court. Specifically, Respondent gave the original citations to his bailiff, who prepared and filed written waiver of arraignment and entry of plea (not guilty) forms with the Las Cruces Municipal Court.

{7} Subsequently, notices of pretrial conference were mailed to all eight of the citation recipients. The pretrial conference was scheduled before Judge Melissa Miller-Byrnes on August 11, 2004. However, prior to that date, Respondent called for Las Cruces Municipal Court Judge James T. Locatelli and left a message with Judge Locatelli’s assistant. Respondent asked that Judge Locatelli return his call and advised that Respondent was sending in his son and a couple of his son’s friends to change their pleas on August 4, 2004. However, Respondent maintains that his son and some of the other citation recipients wanted to appear on August 5, 2004.

{8} In any event, Judge Miller-Byrnes was scheduled to perform public arraignments on August 4, 2004, and Judge Locatelli was scheduled to perform public arraignments on August 5, 2004. Only one of the citation recipients appeared before Judge Miller-Byrnes on August 4. At that time, he changed his plea to “no contest,” and received a deferred sentence, including a deferred fine of $500.

{9} In contrast, the next day five of the citation recipients, including Respondent’s son, appeared before Judge Locatelli. Respondent also came to the court that day but maintains that he was there to confirm that his son had appeared for the hearing and left prior to the commencement of any hearings. In any event, all five citation recipients changed their pleas to “no contest,” and four of the five men (including Respondent’s son) received 90-day deferred sentences and were each required to pay $35 in fees. The fifth citation recipient had an outstanding DWI case pending before the court, so Judge Locatelli consolidated the cases and deferred the sentencing on the drinking in public citation until completion of the DWI trial.

{10} On August 11, the day originally scheduled for pre-trial conferences, the remaining two citation recipients appeared before Judge Miller-Byrnes. The prosecuting police officers also appeared at that
time. In both cases, the citation recipients and the police officers agreed to a change of plea on stipulation that the sentences would be deferred. Judge Miller-Byrnes approved the agreements and sentenced each man to a 6-month deferred sentence and a deferred fine of $500.

Respondent concedes that the foregoing conduct violates several provisions of the Code of Judicial Conduct and constitutes willful misconduct in office. For the reasons that follow, we agree.

DISCUSSION

Respondent’s actions illustrate the need for all judges to remain cognizant of their ethical obligations both on and off the bench. The first incident recounted above involves a task commonly faced by every judge—maintaining order and decorum in the courtroom while remaining patient, dignified and courteous to those appearing before the court. See Rules 21-300(B)(3) and (4) NMRA 2006. Respondent’s conceded violations of the Code of Judicial Conduct establish that he failed to strike the proper balance in his courtroom. See Rule 21-300(4) Committee Commentary (“Judges can be efficient and businesslike while being patient and deliberate.”).

By raising his voice to an attorney appearing before him, Respondent did not maintain decorum in the courtroom or display the kind of dignified and courteous behavior expected of every judge. We are loathe to conceive of a situation when the behavior exhibited by Respondent would be appropriate, but suffice it to say that Respondent’s outburst was not appropriate in this instance. And while there may be times when it is appropriate, and even necessary, for a judge to admonish an attorney, Respondent recognizes that his conduct was unwarranted in this instance.

The most troubling aspect of Respondent’s behavior toward the attorney appearing before him was that Respondent’s actions prevented the attorney from making her full objections for the record. Attorneys are expected to make objections on the record to judicial rulings that they believe are in error. See Rule 1-046 NMRA 2006; Rule 5-601 NMRA 2006; Rule 11-103 NMRA 2006. Such objections are a basic precondition to effective appellate review. See Rule 12-216(A) NMRA 2006. Judicial outbursts that interfere with this common, necessary element of trial proceedings will not be condoned. See Rule 21-300(B)(7) NMRA 2006 (“A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”); Rule 21-300(B)(2) and (8).

As for the second incident of misconduct recounted above, Respondent’s actions are a reminder that the behavior of a judge should be as circumspect off the bench as it is on the bench. See Rule 21-200(A) (“A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); Rule 21-500(A). From the perspective of a parent, Respondent’s attempts to assist his son during a time of trouble may be understandable. And though the child may be an adult, we recognize that the protective impulses of a parent do not cease. Nevertheless, as a judge, Respondent is expected to regulate his behavior in a way that other parents are not. See Rule 21-200(B) (“A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.”).

A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Rule 21-200(A) Committee Commentary.

We recognize that Respondent maintains he did not intend to threaten the officers who were issuing the citations or seek preferential treatment for his son and his son’s friends. But by identifying himself as a judge and asking one of the officers if she knew who Respondent was, the only reasonable view of the encounter is that Respondent was attempting to curry favor based on his status as a judge. Such behavior is an obvious violation of the Code of Judicial Conduct and cannot go unsanctioned. See Rule 21-200(B) (“A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others.”).

Moreover, even if we were to excuse Respondent’s initial actions at the park as the protective impulses of a parent, Respondent’s subsequent actions are simply inexcusable. By calling a municipal court judge to reset hearings and then appearing at the municipal court on the day his son was to appear, Respondent’s actions can only be viewed as a flagrant attempt to use his status as a judge to influence the course of the criminal proceedings against his son and his son’s friends. Id. We cannot expect the public to trust in the impartiality and integrity of the judiciary if we allow even the appearance of judicial impropriety to go unchecked.

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

Rule 21-200(B) Committee Commentary.

Unfortunately, not only did Respondent act inappropriately in his own right, but regrettably, he also solicited his bailiff to do the same on his behalf. Regardless of the fact that his bailiff was not a paid employee, Respondent is responsible for ensuring that his staff behave with the same level of propriety that Respondent is expected to display. See Rule 21-300(C)(2) (“A judge shall inform and require the judge’s staff, court officials and others subject to the judge’s direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official duties.”). Instead, Respondent directed and encouraged his volunteer bailiff to violate the same standards of conduct that Respondent is sworn to uphold.

In short, by failing to appreciate the impact of his actions inside and outside the courtroom, intended or not, Respondent violated several provisions of our Code of Judicial Conduct. Accordingly, we agree that the stipulated disciplinary sanctions for Respondent’s violations of the Code of Judicial Conduct are appropriate. Therefore, Respondent, the Honorable Florencio “Larry” Ramirez, is hereby disciplined as follows:

a. Respondent shall receive a formal reprimand from the Supreme Court, which shall be published in the Bar Bulletin.

b. Respondent shall successfully com-
plete six (6) months of supervised proba-
tion and formal mentorship concerning the
obligations and restrictions imposed by the
Code of Judicial Conduct, including but not
limited to proper judicial temperament and
demeanor, prohibitions against the use of
judicial office to advance private interests,
and restrictions on the use of the prestige
and incidents of judicial office. The Judi-
cial Standards Commission will recom-
mend to the Supreme Court, for approval
and appointment, the person to serve as
Respondent’s mentor while on probation.
The Respondent’s mentor shall report on
the progress and outcome of the probation
and mentorship program to the Supreme
Court and the Commission.

C. Respondent shall successfully com-
plete the October 2005 “Ethics for Judges”
course at the National Judicial College at
his own expense. Respondent shall provide
the Commission with documented proof
of his compliance with this provision by
promptly providing a certificate of success-
ful completion and an affidavit concerning
course attendance at his own expense (in-
cluding copies of receipts).

d. Respondent shall reimburse the
Judicial Standards Commission in the
amount of $1,500.00 for costs and expenses
incurred up to the date of the stipulated
agreement. Payment shall be by certified
check made payable to the State of New
Mexico and delivered to the Judicial Stan-
dards Commission.

e. Respondent shall abide by all terms
and conditions of the plea and stipulated
agreement and the Code of Judicial Con-
duct.

f. The parties shall bear their own costs
and expenses incurred in this matter.

IT IS SO ORDERED.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chavez
APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
CAROL J. VIGIL, DISTRICT JUDGE

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O P I N I O N

CELIA FOY CASTILLO, JUDGE

[1] This case presents us with procedural and substantive issues regarding the validity of a 1999 Santa Fe ordinance as it relates to the drilling of domestic wells within the city limits. On cross-motions for summary judgment, the district court determined, as a matter of law, that the City of Santa Fe (City) did not have the authority to prohibit the drilling of wells within the city’s corporate limits. We hold that the City did have the authority to prohibit domestic wells within the city limits; therefore, we reverse the district court.

I. BACKGROUND

[2] The parties do not dispute any material facts. The City became a home rule charter municipality in 1997. In 1999, the City Council passed the Domestic Well Ordinance, Ordinance No. 1999-3, codified at Santa Fe, N.M., Code [hereinafter Santa Fe Code] ch. XXV, § 1.10 (1999). This ordinance required any person wishing to drill a well within the City’s municipal water service area to apply for a domestic well permit and prohibited the drilling of new domestic wells when the well applicant’s property boundary was located within 200 feet of the City’s water distribution main. Id.

[3] In February 2001, Smiths filed applications for domestic well permits from the City. The permits were denied because the boundary of Smiths’ property was located within 200 feet of the City’s water distribution lines. Smiths followed the City’s appeal process and appealed the decision to the City Manager, then to the Public Utilities Committee, and finally to the City Council; all appeals were denied. Trusts, however, did not apply for a City permit because they were informed, through their legal representatives, that the application would be denied.1

[4] In January 2002, Smiths and Trusts filed a complaint for declaratory relief, asking the district court to declare that the City has no authority to deny the applications or to prohibit Plaintiffs from drilling wells on their properties. Trial was vacated; instead, the parties entered a stipulated order of facts and briefing schedule. After a hearing on the parties’ motions for summary judgment, the district court granted Plaintiffs’ motion and denied the City’s motion. The court ruled that it had jurisdiction to hear Plaintiffs’ declaratory judgment action, that Trusts were not required to exhaust administrative remedies and were therefore proper parties to the action, and that the City was preempted from enacting the Domestic Well Ordinance and had no home rule or other statutory power authorizing such enactment. The City appeals this ruling.

II. DISCUSSION

A. Procedure and Jurisdiction

[5] The City, in its first argument, contends that the district court had no jurisdiction to consider the complaint for a declaratory judgment because (1) Trusts failed to exhaust their administrative remedies by not applying for a drilling permit and (2) Smiths, who did exhaust their administrative remedies, were limited to appellate review by petition for writ of certiorari, as set forth in Rule 1-075 NMRA (regarding writs of certiorari when there is no statutory right to appeal or review). We need not decide these issues because however we decide them will make no difference to the outcome of this appeal; on the merits, we conclude that the City did in fact have the authority to enact the Domestic Well Ordinance and could thus prohibit Plaintiffs from drilling a domestic well. We acknowledge that the special concurrence and dissent relies on cases supporting a determination that jurisdiction does not lie in this case. There is other authority,

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1 Also in 2001, the legislature enacted NMSA 1978, § 3-53-1.1 (2001), which specifically authorized municipalities to enact ordinances restricting the drilling of new domestic water wells, as long as (1) the property line of the applicant is within 300 feet of the municipal water distribution lines, (2) the property is located within the municipal boundaries, and (3) the property is not zoned agricultural. This statute became effective on June 15, 2001. It is not applicable to this case. In 2004, the City Council amended the Domestic Well Ordinance in Ordinance No. 2004-7, § 1. See Santa Fe Code ch. XXV, § 1.10 (2004). The amended ordinance similarly does not apply to this case.
however, that indicates an ordinance may be challenged by declaratory action, as well as by administrative appeal. See Pan Am. Petroleum Corp. v. El Paso Natural Gas Co., 77 N.M. 481, 487, 424 P.2d 397, 401 (1966) (holding that an action for declaratory judgment is not barred because the plaintiff failed to exhaust administrative remedies if the question is one of law and not fact); Moriarty Mun. Sch. v. Pub. Sch. Ins. Auth., 2001-NMCA-096, ¶ 1, 10, 34, 131 N.M. 180, 34 P.3d 124 (holding that the school could sue the insurance authority in contract, even though it failed to timely file a petition for writ of certiorari under Rule 1-075); see also NMSA 1978, § 44-6-2 (1975) (“[D]istrict courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.”); NMSA 1978, § 44-6-4 (1975) (“Any person . . . whose rights . . . are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights . . . thereunder.”); NMSA 1978, § 44-6-14 (1975) (noting that the Declaratory Judgment Act is remedial and should be liberally construed and administered to serve its purpose, that is, “to afford relief from uncertainty and insecurity with respect to rights”); cf. Grand Lodge of Ancient & Accepted Masons of N.M. v. Taxation & Revenue Dep’t, 106 N.M. 179, 181, 740 P.2d 1163, 1165 (Ct. App. 1987) (concluding that declaratory judgment action is not available when there is a complete, statutory remedy, “obviously intended to be exclusive”). While the question of jurisdiction is debatable, a full analysis of this issue is not necessary because our disposition on the merits fully resolves the case. See Taos Mun. Sch. Charter Sch. v. Davis, 2004-NMCA-129, ¶¶ 6, 136 N.M. 543, 102 P.3d 102 (“Because a decision on this jurisdictional issue is not necessary in light of our ruling on the merits . . . we will address the merits . . . and leave the complex and interesting issue of jurisdiction to another day.”). Accordingly, we assume, without deciding, that the district court had jurisdiction to entertain Plaintiffs’ declaratory judgment action, and we now explain our analysis of the merits of this case. See id.

B. Validity of the Ordinance

6 The City’s substantive argument goes to the validity of the Domestic Well Ordinance. The City maintains that its home rule powers and police powers provide the requisite authority for enacting the ordinance. Plaintiffs contend that any authority relied upon by the City is expressly denied or preempted by state law.

1. Standard of Review

7 Summary judgment is reviewed de novo. McGarry v. Scott, 2003-NMSC-016, ¶ 5, 134 N.M. 32, 72 P.3d 608. In the present case, we specifically determine whether a municipality has authority to enact an ordinance pursuant to home rule; this requires interpretation of a constitutional amendment and statutes, both questions of law, which are reviewed de novo. New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 11, 138 N.M. 785, 126 P.3d 1149. [No. 25,073 (N.M. Ct. App. Nov. 29, 2005)].

2. Home Rule Authority and Its Limitations

8 In the Home Rule Amendment, N.M. Const. art. X, § 6, the New Mexico Constitution provides municipalities with the right to adopt a charter and thereby “exercise all legislative powers . . . not expressely denied by general law or charter.” N.M. Const. art. X, § 6(D). Although the power granted under home rule is broad, limitations do exist. New Mexicans for Free Enter., 2006-NMCA-007, ¶¶ 16-17; see also N.M. Const. art. X, § 6(E) (“The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.”).

9 Limitations on home rule authority are evaluated in a two-step process. State ex rel. Haynes v. Bonem, 114 N.M. 627, 631, 845 P.2d 150, 154 (1992). In the first step, a court asks whether a state law is a “general law,” id., that is, a law that applies generally throughout the state, relates to a matter of statewide concern, and impacts inhabitants across the entire state. New Mexicans for Free Enter., 2006-NMCA-007, ¶ 18 (concluding that “the Minimum Wage Act is a general law”). Section 72-12-1, regarding permits for domestic wells, applies generally throughout the state. Moreover, the permitting of domestic wells is a statewide concern because access to water is a necessity for all inhabitants of the state. Thus, we conclude that Section 72-12-1 is a general law.

10 In the second step, we determine whether the general law “expressly denies” the City’s power to prohibit the drilling of domestic wells permitted by the OSE. Haynes, 114 N.M. at 631, 845 P.2d at 154; see also New Mexicans for Free Enter., 2006-NMCA-007, ¶ 19. The Court must consider (a) whether the statute “evinces any intent to negate such municipal power,” New Mexicans for Free Enterprise, 2006-NMCA-007, ¶ 19; (b) whether the effect of the statute implies “a clear intent to preempt that governmental area from municipal policymaking,” id.; see also Haynes, 114 N.M. at 634, 845 P.2d at 157 (“[W]ords or expressions which are tantamount or equivalent to such a negation are equally effective.”); and (c) whether the grant of authority to another governmental body “makes its exercise by [the City] so inconsistent with the [statute] that it is equivalent to an express denial.” In re Generic Investigation into Cable Television Servs., 103 N.M. 345, 351, 707 P.2d 1125, 1161 (1985).

a. Intent to Negate Municipal Power

11 We look at the language of the statute and the permit to determine whether the statute evinces an intent to negate municipal authority to act in a particular area. Plaintiffs argue that the City’s authority to deny a permit to drill is prohibited by “state water law and the terms of the [OSE] permit which specifically authorized Plaintiffs’ well to be drilled.” Although Plaintiffs do not use the language from the home rule cases, it appears they contend that the language of Section 72-12-1, coupled with that of the OSE permit, evinces an intent to negate municipal power to prohibit drilling. See New Mexicans for Free Enter., 2006-NMCA-007, ¶ 19. We disagree.

12 We turn our attention to the language of Section 72-12-1, which designates all underground waters as “public waters” and provides the state engineer with authority to issue a permit when an application is made for domestic use:

[A]ny person . . . desire[ing] to use . . . waters . . . for irrigation of not to exceed one acre of noncommercial trees, law or garden[,] or for household or other domestic use shall make application to the state engineer . . . [T]he state engineer shall issue a permit to the applicant to so use the waters applied for[.]

Section 72-12-1(A) (emphasis added).

13 In interpreting the statute and its effect on home rule authority, we look to the statute’s plain language. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (stating that the primary indicator of legislative intent is the plain language of the statute). Our Supreme Court considered whether the language of a statute negated home rule authority in Westgate Families v.
County Clerk, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983). The Court held that the word “only” in a statute precluded zoning by referendum. Id. The statute provided that a zoning ordinance “shall be passed only by a majority vote of all the members of the board.” NMSA 1978, § 3-21-14(C) (1981) (emphasis added). The Court concluded that this language expressly denied the municipal power to zone by referendum because the statute expressly provided for zoning by representative bodies. Westgate Families, 100 N.M. at 148, 667 P.2d at 455.

{14} We recognize that both Section 72-12-1(A) and the statute construed in Westgate Families contain the mandatory word “shall.” Compare § 72-12-1(A) (“[The state engineer shall issue a permit[].”), with § 3-21-14(C) (providing that a zoning ordinance “shall be passed only by a majority vote”). However, we note the conspicuous absence of the word “only” in the statute governing domestic well permits. See High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶ 5 (noting that the court “will not read into a statute or ordinance language which is not there” (internal quotation marks and citation omitted)). We conclude that the statute does not evince an intent to negate home rule authority. See New Mexicans for Free Enter., 2006-NMCA-007, ¶¶ 19, 20 (concluding that the word “all” within the Minimum Wage Act was not a limitation on municipal authority to set a higher minimum wage); see also Apodaca v. Wilson, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974) (discussing the statutory prohibition on municipal authority to tax in NMSA 1978, Section 3-18-2 (1980), as an example of an express denial of home rule authority), modified as recognized by Haynes, 114 N.M. at 631-32, 634, 845 P.2d at 154-55, 157.

{15} Further, the language of the OSE permit does not negate such authority. See Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (stating that a reviewing court accords some deference to an agency’s interpretation of the statute that governs the agency). Without citing to any regulations on which the permit relies, Plaintiffs extract phrases from within the permit and assert that these phrases prohibit the City from denying a permit to drill a domestic well. Specifically, Plaintiffs contend that certain language in the permit, such as “application is approved” and the “well shall be drilled,” precludes the City’s authority to deny a permit to drill. Plaintiffs pluck this language out of context to make their argument.

{16} The permit reads as follows: “This application is approved for the use indicated, subject to all general conditions and to specific conditions listed above.” (Emphasis added.) The conditions and approvals listed within the permit include Condition H: “The amount and uses of water permitted under this Application are subject to such limitations as may be imposed . . . by law governing domestic water permits. If the law is less restrictive, the permits granted under this Application shall be subject to those limitations.” (Emphasis added.) The City argues that the language of the statute, as interpreted by a reviewing court accords some deference to the City’s interpretation of the statute. We conclude that the plain meaning of the permit language of approval, read together with Condition H, is clear and unambiguous -- the applicant may drill a well if he or she is not limited by a more restrictive municipal ordinance. See Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (“[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” (internal quotation marks and citation omitted)); cf. High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶ 5 (noting that when several sections of a statute are involved, we read them together so that all parts are given effect). Condition B provides that the “well shall be drilled by a driller licensed in the State of New Mexico.” (Emphasis added.) We do not interpret the language of this condition, as suggested by Plaintiffs, to be a mandate that Plaintiffs must be allowed to drill a well. Rather, we interpret this language to be a limitation on who may actually drill the well for the permittee. Plaintiffs argue that the permit rests on regulations, but Plaintiffs do not cite to these regulations. Therefore, we rely on the permit’s language, read as a whole, which clearly contemplates municipal authority to regulate in this area. We conclude that the language of the statute, as interpreted by the OSE in its permit, does not evince an intent to negate municipal authority to deny drilling of domestic wells.

b. Statutory Implication of Intent to Preempt

{17} We examine the effect of the statute to determine whether legislative intent to preempt is implied. Plaintiffs argue that municipal authority to prohibit domestic wells is implicitly preempted because the ordinance conflicts with the “contents, purposes, or pervasive scheme of the statute.” See San Pedro Mining Corp. v. Bd. of County Comm’rs, 1996-NMCA-002, ¶ 9, 121 N.M. 194, 909 P.2d 754. Plaintiffs contend that the City’s denial of a permit to drill would “frustrate or violate established public policy.” See City of Albuquerque v. N.M. Pub. Regulation Comm’n, 2003-NMSC-028, ¶ 7, 134 N.M. 472, 79 P.3d 297 (discussing limitations on home rule authority). “[W]hen two statutes that are governmental or regulatory in nature conflict, the law of the sovereign controls.” Casuse v. City of Gallup, 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987) (holding that the statute requiring members of governing bodies to come from single-member districts clearly intended to preempt a municipality’s right to have at-large elections). We ask whether the effect of the statute implies “a clear intent to preempt [a] governmental area from municipal policymaking.” New Mexicans for Free Enter., 2006-NMCA-007, ¶ 19; see also ACLU v. City of Albuquerque, 1999-NMSC-044, ¶¶ 10, 13, 15, 128 N.M. 315, 992 P.2d 866.

{18} In ACLU, our Supreme Court held that the legislature clearly intended to preempt municipal authority to criminalize the behavior of juveniles. 1999-NMSC-044, ¶ 1. This was the case because the Delinquency Act comprehensively and exhaustively addressed juvenile delinquency and the local ordinance attempted to expose juveniles to criminal punishment, including a fine of up to $500 and imprisonment of up to ninety days. Id. ¶¶ 1, 10-15. This punishment effectively subjected a juvenile to criminal sanctions, contrary to the Delinquency Act; therefore, the ordinance “would circumvent and thereby frustrate the [legislature’s] intent to . . . uniformly enforce laws of a penal nature against [children].” Id. ¶ 13. In the present case, Plaintiffs are correct that the domestic well exception in Section 72-12-1 mandates application to the OSE by a person seeking to drill a domestic well. However, this basic premise does not mean that any local regulation of domestic wells is therefore inconsistent with the state scheme. Our reading of the statute is that it is intended to ensure that the OSE is simply aware of new domestic wells and that they are drilled by a qualified person. This application to the OSE, which results in an automatic and unrestricted permit, does not approximate a comprehensive or exhaustive regulation of such wells. Additional regulation at the local level does not inhibit the notice-oriented mandates of Section 72-12-1. Thus, local regulation, in our view, is consistent with the state statute and, unlike the situation in ACLU, does not circumvent or frustrate the policy established by state law.
[19] Both parties cite to San Pedro. We first note that San Pedro does not construe home rule authority. However, we find its discussion of implied preemption instructive. In San Pedro, this Court focused on the purposes of the New Mexico Mining Act, its regulations, and the county ordinance, and the Court determined that the ordinance was not preempted. 1996-NMCA-002, ¶ 10. The state law did not preempt the county ordinance because the ordinance addressed concerns that were not a focus of the state law. Id. ¶¶ 10, 11, 14. In particular, the primary focus of the state law was to minimize the damage to the land being mined, whereas the focus of the county ordinance was on “development issues with which local governments are traditionally concerned, such as traffic congestion, increased noise, possible nuisances . . . , compatibility . . . with the use made of surrounding lands, appropriate distribution of land use and development, and the effect . . . on surrounding property values.” Id. ¶ 12. Thus, we concluded there was “room for concurrent jurisdiction and regulation” in those aspects of the regulated activity that were left unaddressed by the state law.

[20] As in San Pedro, we find room in the present case for concurrent jurisdiction and regulation. As we have noted, the domestic well exception is primarily aimed at informing the OSE of new domestic wells. Section 72-12-1. There are no statutory requirements that must be met before a domestic well application is approved. See id. The application requires information regarding the location of the well and the use of water, as well as information regarding the driller and the technical specifications of the well. There is no evidence of intent to regulate the use of domestic wells in areas of concern to a municipality, such as depletion of the local aquifers, impact on the quality of the local water, and reliability of the water system. Clearly, state law and the City’s ordinance regarding domestic wells address different areas of concern. Because there is room for concurrent jurisdiction, Section 72-12-1 and the OSE permit do not preempt the City’s power to prohibit the drilling of wells when the applicant can be served by the municipal water system.

c. Local Regulation Barred by Grant of Authority to Another Governmental Body

[21] Plaintiffs contend that the state’s plenary control of water and the grant of authority to the state engineer expressly deny the use of home rule authority to prohibit drilling a domestic well. State ex rel. State Game Comm’n v. Red River Valley Co., 51 N.M. 207, 273, 182 P.2d 421, 462 (1945) (“[F]ollowing the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states[.]” (internal quotation marks and citation omitted)). Plaintiffs assert that the grant of authority to the state engineer “makes its exercise by [the City] so inconsistent with the [law] that it is equivalent to an express denial.” See In re Generic Investigation into Cable Television Servs., 103 N.M. at 348, 351, 707 P.2d at 1158, 1161 (concluding that the constitutional grant of authority to the Commission for “fixing, determining, supervising, regulating and controlling all charges and rates of . . . transmission companies . . . and of determining any matters of public convenience and necessity relating to such facilities” expressly denied municipal home rule authority over cable companies (internal quotation marks and citation omitted)); see also N.M. Pub. Regulation Comm’n, 2003-NMSC-028, ¶ 10 (holding that local governments are precluded from requiring utilities to pay the expense of undergrounding on public highways because the legislature delegated the power to a state agency). We do not agree.

[22] In New Mexico Public Regulation Commission, our Supreme Court concluded that a grant of authority was equivalent to an express denial when “[t]he [I]legislature delegated the power to provide for the relocation of utility facilities within a public highway to the State Highway and Transportation Department.” Id. ¶ 8, 10 (internal quotation marks and citation omitted); see In re Generic Investigation into Cable Television Servs., 103 N.M. at 351, 707 P.2d at 1161. The Department could provide for relocation if it made a “finding that the action provided for is necessitated by highway improvement.” N.M. Pub. Regulation Comm’n, 2003-NMSC-028, ¶ 10 (internal quotation marks and citation omitted). The Department was further directed to “promote the public interest in the highway improvement without undue cost or risk and without impairment of utility service.” Id. (internal quotation marks and citation omitted). The legislature’s grant of authority to the Department made the municipal body’s exercise of that authority “so inconsistent with the [law] that it [was] equivalent to an express denial” when the legislature delegated a definite power to be exercised by a specific governmental entity and provided detailed guidelines and a specific purpose for the Department’s discretionary authority. See In re Generic Investigation into Cable Television Servs., 103 N.M. at 351, 707 P.2d at 1161. We find New Mexico Public Regulation Commission distinguishable from our case.

[23] The authority granted to the state engineer regarding domestic wells in Section 72-12-1 is limited and without discretion. See § 72-12-1(A) (directing a prospective domestic well owner to apply to the state engineer and directing the state engineer to issue a permit). We conclude that this limited grant of authority in regard to domestic wells does not rise to the level of an express denial of home rule authority to act in this area.

[24] Plaintiffs also rely on State ex rel. Reynolds v. Mears, 86 N.M. 510, 515, 525 P.2d 870, 875 (1974), to assert that the grant of authority to the state engineer expressly denies the City’s home rule power to prohibit the drilling of a domestic well. See id. (“It is the function and duty of the State Engineer to regulate and supervise the appropriation, measurement and distribution of the public waters of the State and the apportionment thereof in accordance with the law, so as to prevent waste, prevent the improper location and drilling of wells . . . , to the end that said waters be conserved and be put to beneficial use as contemplated by law, and so as to protect the rights therein of appropriators in accordance with their priorities.” (internal quotation marks and citation omitted)). Mears is distinguishable from the case at hand. In Mears, our Supreme Court specifically addressed wells permitted for beneficial use under the doctrine of appropriation. Id. at 512, 525 P.2d at 872. See generally NMSA 1978, § 72-12-3 (2001) (identifying the information necessary for an application to appropriate water for beneficial use). However, the circumstances here present a question of municipal authority over domestic wells, pursuant to Section 72-12-1. Thus, we conclude that Mears is not applicable to the facts presented in this case.

[25] We also note that the legislature has expressly provided for municipal regulation and conservation of water. We read Section 72-12-1 together with the remainder of the municipal water statutes and the express grants of power to municipalities regarding water. In re Estate of Holt, 95 N.M. 412, 414, 622 P.2d 1032, 1034 (1981) (“It is a familiar rule of statutory construction that all of the provisions of a statute, together
with other statutes in pari materia, must be read together to ascertain the legislative intent.” (internal quotation marks and citation omitted)); see NMSA 1978, §§ 72-12-1 to -28 (1931, as amended through 1998); NMSA 1978, § 3-53-1 (1965) (granting municipalities the authority to regulate, inter alia, wells); NMSA 1978, § 3-53-2 (1965) (granting municipalities the authority to regulate and restrict the use of water); NMSA 1978, § 3-27-1 (1965) (granting municipalities the authority to acquire and operate water facilities, including wells); NMSA 1978, § 3-27-3 (1994) (granting jurisdiction over water supply for the purpose of providing a municipal water system). The statutory provisions that grant powers to municipalities in other areas of water indicate the legislature did not intend to grant exclusive authority regarding domestic wells to the state engineer.

III. CONCLUSION

[26] We reverse the judgment of the district court on the issue regarding municipal authority. We hold that under the City’s home rule powers, it had authority to prohibit the drilling of a domestic well within the municipal boundaries and that this authority was not preempted by existing state law.

[27] IT IS SO ORDERED.

CEILIA FOY CASTILLO, Judge

I CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

(specially concurring and dissenting).

VIGIL, Judge (specially concurring and dissenting).

[28] I dissent from the proposition that we may assume without deciding that the district court had jurisdiction to entertain Plaintiffs’ declaratory judgment action. “Subject matter jurisdiction gives a court power and authority to act. Without it, the court has no power or authority to act.” Amica Mut. Ins. Co. v. McRostie, 2006-NMCA-___, ¶ 17, ___ N.M. ___, ___ P.3d ___ [No. 25,432 (N.M. Ct. App. Feb. 3, 2006), cert. denied, No. 29,723.]. However, because existing precedent leads me to conclude that the district court lacked jurisdiction, I agree with the conclusion of the majority to reverse the judgment of the district court. My reasoning follows.

[29] Smiths filed applications for well permits from the City. The City Manager denied the applications and Smiths appealed as provided in the City’s appeal process. On September 19, 2001, the City Council rendered the final decision upholding the decision of the City Manager to deny the permits. Trusts never applied for a permit. (30) The sole method of obtaining judicial review of the City’s final administrative decision is by way of a writ of certiorari because no appeal or other mode of review is allowed or provided for the district court to review the decision of the City Council. Article VI, Section 13 of the New Mexico Constitution authorizes district courts to issue writs of certiorari to an inferior court or tribunal. “A writ of certiorari . . . lies when it is shown that an inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally, and no appeal or other mode of review is allowed or provided.” Rainaldi v. Pub. Employees Ret. Bd., 115 N.M. 650, 654, 857 P.2d 761, 765 (1993). Masterman v. State Taxation & Revenue Department, 1998-NMCA-126, 125 N.M. 705, 964 P.2d 869, specifically states that since the applicable statute in that case did not provide for a right to appeal the administrative decision, “a writ of certiorari provided the only mode of review.” Id. ¶ 11. (31) Rule 1-075 governs writs of certiorari when there is no statutory right to an appeal or other statutory right of review. Under Subsection (D) of the Rule, a petition for writ of certiorari “shall” be filed in the district court within thirty days after the date of the filed decision or order of the agency. The City Council issued the final order on September 19, 2001. The deadline for filing a petition for writ of certiorari in the district court to review the administrative decision was thirty days later on October 19, 2001. No petition was filed by that date. Instead, well after the deadline expired on January 7, 2002, Smiths and Trusts filed a complaint for declaratory judgment. The complaint for declaratory judgment appears to be an attempt to circumvent the time requirement for filing a petition for writ of certiorari. (32) I therefore respectfully submit that under well-settled precedent, the district court lacked jurisdiction to rule on the complaint for declaratory judgment. In Masterman, a “Petition for Judicial Review” was filed seeking judicial review of an administrative decision when no statutory right to appeal the administrative decision was provided for. 1998-NMCA-126, ¶ 1, 10. This Court analyzed the petition as a writ of certiorari. Since the petition for judicial review failed to allege the necessary jurisdictional prerequisites as provided in Rule 1-075, we held that the district court’s jurisdiction was not properly invoked and we sua sponte reversed the order of the district court on grounds it had no jurisdiction to issue the order in the first place. Masterman, 1998-NMCA-126, ¶¶ 12-14. Similarly, in City of Albuquerque v. Ryon, 106 N.M. 600, 747 P.2d 246 (1987), the City of Albuquerque failed to timely appeal a final administrative decision to the district court as provided in the applicable ordinance. Instead, “the City attempted to reach by a declaratory judgment suit what it had waived by failure to timely appeal.” Id. at 603, 747 P.2d at 249. Our Supreme Court first said that, “declaratory judgment actions are not intended to provide a substitute for other available actions.” Id. Then, our Supreme Court specifically held that since the right to appeal had expired, the time for filing a declaratory judgment likewise had expired because “declaratory judgment actions are subject to the same limitations as the nature of the action sued upon in the underlying case.” Id. In coming to this conclusion, the Supreme Court cited Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967), in which the Court affirmed dismissal of a declaratory judgment action because the statute of limitations had run on the underlying action. Id. at 461, 432 P.2d at 817. Therefore, held the Supreme Court, since the city’s right to appeal had expired, so did its right to seek a declaratory judgment to obtain the identical relief that it could have obtained in an appeal. Ryon, 106 N.M. at 603, 747 P.2d at 249. The foregoing decisions are directly applicable here.

[33] If there is a basis for concluding that the district court did have jurisdiction over the declaratory judgment action, then we should say what that basis is. The majority cites Pan American Petroleum Corp., Moriarty Municipal Schools, Grand Lodge of Ancient & Accepted Masons of New Mexico, and Taos Municipal Schools Charter School, together with Sections 44-6-2, 44-6-4, and 44-6-14, in paragraph 5 to suggest that the district court had jurisdiction. Without belaboring the point, the cases are distinguishable and do not resolve the jurisdictional question presented. The majority acknowledges this fact by not answering whether there was jurisdiction, choosing instead to assume without deciding that the district court had jurisdiction. The majority does so for the purpose of reaching the merits of the case. However, no standards are provided for determining when and under what circumstances any court, including this Court, may properly do so.

[34] The City vigorously argued in the
District court and on appeal that there was no jurisdiction in the district court to hear the declaratory judgment action. However, since the majority has ruled in favor of the City on the merits, it has no incentive to seek a determination from the Supreme Court about whether the district court had jurisdiction in the first place. Therefore, the jurisdictional issue remains unresolved. This leaves the impression that our courts are able to pick and choose when they have jurisdiction over an administrative appeal depending on whether they wish to address the merits. I am unwilling to leave this impression.

For the foregoing reasons, I concur only in the result reached to reverse the judgment of the district court, and I dissent from assuming without deciding that the district court had jurisdiction to entertain the declaratory judgment action. I therefore express no opinion about the merits.

MICHAEL E. VIGIL, Judge

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**Certiorari Granted, No. 29,725, April 20, 2006**

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-049

RORY A. McMINTN, Plaintiff-Appellant/Cross-Appellee, versus MBF OPERATING, INC., a New Mexico Corporation, Defendant-Appellee/Cross-Appellant. No. 25,006 (filed: March 1, 2006)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY DON MADDOX, DISTRICT JUDGE

CLAY H. PAULOS IAN D. MCKELVY SANDERS, BRUIN, COLL & WORLEY, P.A. Roswell, New Mexico for Appellant/Cross-Appellee

STEVEN L. TUCKER TUCKER LAW FIRM, P.C. Santa Fe, New Mexico for Appellee/Cross-Appellant

**OPINION**

JAMES J. WECHSLER, JUDGE

1. This case involves the contested merger and reformation of a small, closely held corporation, MBF Operating, Inc. (MBF), pursuant to a cash out of a minority shareholder, Plaintiff Rory A. McMinn. After a jury trial, judgment was entered in favor of Plaintiff. Plaintiff appeals the trial court’s refusal to award attorney fees and counsel fees and costs to MBF cross appeals, arguing that it was entitled to summary judgment because Plaintiff failed to avail himself of the exclusive appraisal remedy set forth in NMSA 1978, §§ 53-15-3 to -4 (1983), for dissenting shareholders. We agree with MBF and reverse the judgment. In light of our disposition, we do not reach the issues raised in Plaintiff’s appeal.

**BACKGROUND**

2. The three founding shareholders and directors of MBF, a New Mexico corporation engaged in the business of rendering pipeline inspection services, were Plaintiff, Frank L. Sturges, and Mark W. Daniels. They formed the corporation in 1992. All three shareholders devoted significant time to MBF and agreed to use their “best efforts to make the company successful” so that all of them could share in the profits. The shares were divided equally among the three shareholders. Until 2001, the shareholders received equal salaries, bonuses, and benefits and, when voting as directors, made all decisions unanimously. MBF never declared dividends because to do so would result in double taxation.

3. In 2001, Plaintiff applied for, and was granted, an order from the Public Regulation Commission (PRC) to engage in the business of rendering pipeline inspection services to MBF. The PRC regulates pipelines and thereby regulates MBF. Due to the potential conflict of interest between the PRC and MBF, Plaintiff resigned his employment with MBF effective April 30, 2001. For the same reason, Plaintiff placed his MBF shares into a blind trust effective April 30, 2001. He chose Bruce Ritter as the trustee of the blind trust (Trustee).

4. After his resignation, Plaintiff never performed any services for MBF. He could no longer be employed by MBF and could no longer be on the Board of Directors. Trustee requested that Sturges and Daniels buy out Plaintiff’s interest in MBF; Trustee also requested that the corporation institute a dividend policy now that it had a passive shareholder, but such a policy was never adopted.

5. Trustee informed Sturges and Daniels that, if they did not want to make a fair offer for the stock, liquidation of the company might be an alternative. On September 19 and November 14, 2001, Trustee’s counsel informed MBF that he was still considering liquidation if an agreement could not be reached as to a fair price and that he had begun to prepare pleadings to institute such an action. If MBF was liquidated, Plaintiff was likely to receive less than $20,000.

6. MBF, acting through its directors, Sturges and Daniels, decided to effect a cash-out merger in order to resolve the stalemate with Plaintiff. A second corporation, MBF Operating Acquisition Corporation (Acquisition), was created solely for the purpose of reorganizing the ownership of MBF and paying Plaintiff the value of his MBF shares. Sturges and Daniels were the sole shareholders and directors of Acquisition. Under the merger, Plaintiff’s shares would be cancelled and Acquisition would cease to exist. After merger, the new company, still named MBF Operating, Inc., would be owned by Daniels and Sturges alone. MBF determined that Plaintiff’s one-third share of the company was $247,605.48 and, after subtracting one-third of the shareholder debt, MBF agreed to purchase Plaintiff’s shares for $134,411.38.

7. On March 29, 2002, Trustee received written notice from MBF of the special meeting of shareholders for a vote on the merger set for April 18, 2002, along with the plan of merger and the agreement of directors in lieu of special meeting. The plan of merger included a price of $743.56 per share less shareholder debt.
strike the jury demand on the ground that there is no right to a jury trial in an appraisal proceeding. After Defendants filed the second motion for summary judgment and a motion to dismiss, the trial court dismissed the complaint against Sturges, Daniels, and Acquisition. Although Plaintiff attempted to appeal the dismissal of Sturges and Daniels, that appeal was dismissed for untimely filing.

(12) The trial court denied summary judgment as to MBF and denied the motion to strike the jury demand. The claims against MBF were tried to a jury on the overarching claim of breach of fiduciary duty. The jury awarded Plaintiff $864,000 in compensatory damages and $20,000 in punitive damages.

**STANDARD OF REVIEW**

(13) The issue of whether Section 53-15-4 provides the exclusive remedy for dissenting shareholders against a corporation is one of statutory interpretation that we review de novo. See *N.M. Dep’t of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 8, 125 N.M. 779, 965 P.2d 363; *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. If the appraisal remedy excludes some, but not all, potential claims of a dissenting shareholder, the issue of whether all of the claims asserted fall within the exclusivity of the appraisal remedy requires an application of law to the facts, which is also subject to de novo review. *Crutchfield v. N.M. Dep’t of Taxation & Revenue*, 2005-NMCA-022, ¶ 16, 137 N.M. 26, 106 P.3d 1273 (holding that “[i]nterpretation of statutes and their application to facts require[s] de novo review”).

(14) We begin by reviewing the rights of minority shareholders and then discuss the exclusivity of the relevant statutes by examining their language and intent and by considering how other jurisdictions with similar statutes have applied exclusivity. We then discuss how allegations of fraud or unlawful conduct relate to exclusivity.

**STATUTORY REMEDIES OF MINORITY SHAREHOLDERS**

(15) “At common law, the unanimous consent of shareholders was required to effect a corporate merger.” *Smith v. First Alamogordo Bancorp, Inc.*, 114 N.M. 340, 342, 838 P.2d 494, 496 (Ct. App. 1992). The common law was changed by statutes allowing shareholders to approve mergers by less than unanimous vote. *Id.; see Stringer v. Car Data Sys., Inc.*, 841 P.2d 1183, 1184 (Or. 1992) (en banc) (“The general rule today is that decision-making by the majority must take precedence over the objection of a lone dissenter.”). Statutes have conferred upon the dissenting minority the right to force the corporation to buy out the minority interest in the corporation in order to avoid oppression of the dissenting minority shareholder and to compensate the minority for the loss of its traditional common law veto power. *Smith*, 114 N.M. at 342-43, 838 P.2d at 496-97. Appraisal statutes allow a dissenting shareholder to obtain the fair value of the shareholder’s stock. *See id.; Stringer*, 841 P.2d at 1184 (“The linchpin of a dissenter’s protection in merger cases is found in the statutory appraisal remedy.”).

(16) Section 53-15-3 affords a shareholder the right to dissent from a proposed merger. It provides, in part, that “[a]ny shareholder of a corporation may dissent from, and obtain payment for the shareholder’s shares in the event of, . . . any plan of merger or consolidation to which the corporation is a party.” Section 53-15-3(A)(1). A shareholder wishing to dissent from a proposed merger must comply with the provisions set forth in Section 53-15-4(A) by filing, “prior to or at the meeting of shareholders at which the proposed corporate action is submitted to a vote, a written objection to the proposed corporate action.” *Id.* If, despite the dissenting votes, a requisite majority approves the merger, a dissenting shareholder may pursue a right to appraisal under the provisions of Section 53-15-4(A), which require the shareholder to “within ten days after the date on which the vote [is] taken . . . make written demand on the corporation . . . for payment of the fair value of the shareholder’s shares.” *Id.* If a shareholder makes such a demand, the corporation must make a written offer to the shareholder to pay for the shares at a “price deemed by the corporation to be the fair value thereof.” Section 53-15-4(C). If the fair value is contested after thirty days, either the corporation or the shareholder may institute an appraisal proceeding. Section 53-15-4(E).

(17) A shareholder who fails to make the requisite statutory demand within the prescribed period is “bound by the terms of the proposed corporate action.” Section 53-15-4(A). Further, [a] shareholder of a corporation who has a right under this section to obtain payment for his shares shall have no right at law or in equity to attack the validity of the corporate action that gives rise to his right to obtain pay-
ment, nor to have the action set aside or rescinded, except when the corporate action is unlawful or fraudulent with regard to the complaining shareholder or to the corporation.

Section 53-15-3(D).

EXCLUSIVITY OF THE STATUTORY APPRAISAL REMEDY

{18} “The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent.” Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69. “To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.” Id. The plain language of Sections 53-15-3 and 53-15-4 allows a shareholder to dissent and obtain the fair value of his or her stock, but the dissenters cannot prevent or undo the merger in the absence of fraud or illegality. Cf. Lett v. Westland Dev. Co., 112 N.M. 327, 330 n.4, 815 P.2d 623, 626 n.4 (1991) (noting that “the [appraisal] remedy was intended to be exclusive” and therefore a dissenting shareholder “has no right at law or in equity to attack the validity of the corporate action”). In this case, it is undisputed that Plaintiff never made the statutory demand required by Section 53-15-4(A) but instead “elected not to go under the appraisal remedy.” As we discuss below, we conclude that Plaintiff’s failure to proceed under Section 53-15-4 would normally bar any additional litigation. However, Plaintiff is contending that the exception for fraud or unlawful action applies. We consider the intent of the legislature in adopting Sections 53-15-3 and 53-15-4, because the exception for fraud or unlawful action renders the statute less than perfectly clear. See Cummings v. X-Ray Assoc. of N.M., P.C., 1996-NMSC-035, ¶¶ 44-45, 121 N.M. 821, 918 P.2d 1321 (indicating that it is rare for any statute to be utterly free from ambiguity and that the task of the courts is always to search for and give effect to legislative intent).

LEGISLATIVE INTENT

{19} In determining whether a statute should be interpreted as providing an exclusive remedy, we consider whether the statute provides new rights and duties from those existing at common law and whether there is any indication in the statute that the legislature intended the statutory remedy to be exclusive, thus preempting common law remedies. See Gutierrez v. Sundancer Indian Jewelry, Inc., 117 N.M. 41, 46-47, 868 P.2d 1266, 1271-72 (Ct. App. 1993). Whenever a statute creates a new right and remedy not provided at common law, there is a presumption that the remedy is exclusive. See Hovet, 2004-NMSC-010, ¶ 28 (“[I]f a statute creates a new right for protection of the public where none existed before and at the same time provides an adequate remedy for enforcement of the right created, the remedy thus afforded is exclusive.”) (internal quotation marks and citation omitted); Gutierrez, 117 N.M. at 46, 868 P.2d at 1271 (“When a statute creates a new right or imposes a new duty, having no counterpart in common law, the remedies provided in the statute are generally deemed to be exclusive and not cumulative.”). The application of these considerations leads us to a presumption of exclusivity. Sections 53-15-3 and 53-15-4 provide a dissenting shareholder with a new right and create an appraisal remedy that was not recognized at common law. See Smith, 114 N.M. at 343, 838 P.2d at 497 (holding that “[t]he right to dissent from a merger . . . and be paid fair value is a new right that did not exist at common law”). Plaintiff admits that the appraisal “statute limits a dissenting shareholder to that remedy, except if the action is unlawful or fraudulent.” Although Plaintiff suggests that New Mexico’s appraisal remedy should not be exclusive because it does not provide the full panoply of remedies available at common law for breach of fiduciary duty, he does not cite, and we are not aware of, contrary evidence of legislative intent that would rebut the presumption of exclusivity. We therefore conclude that the legislature did intend the appraisal remedy to be exclusive.

CONSISTENCY WITH OTHER JURISDICTIONS

{20} Because the question of the exclusivity of the remedy set forth in Section 53-15-4 is an issue of first impression in New Mexico, we test this conclusion against the holding of cases in other jurisdictions. E.g., Kimura v. Wauford, 104 N.M. 3, 6, 715 P.2d 451, 454 (1986) (“Since this is a case of first impression, we look to jurisdictions with similar provisions . . . .”). The Business Corporation Act, NMSA 1978, §§ 53-11-1 to -18-12 (1967, as amended through 2003), was adopted from the Model Business Corporation Act, and many other states have similar provisions. Smith, 114 N.M. at 342, 838 P.2d at 496 (describing the pedigree of the New Mexico Business Corporation Act as adopted from the Model Act).

{21} Plaintiff admits that most appraisal statutes are exclusive remedies for a claim by a dissenting shareholder in the absence of fraud or illegality. However, he argues that there is disagreement and ambiguity regarding the extent to which a claim for breach of fiduciary duty is included in the fraud or illegality exception to exclusivity. We agree that breach of fiduciary duty may sometimes rise to the level of fraud or illegality, but we decline to extend the statutory exception to all claims of breach of fiduciary duty. Other jurisdictions hold similarly. E.g., Rosenstein v. CMC Real Estate Corp., 522 N.E.2d 221, 223, 226 (Ill. App. Ct. 1988) (holding that Wisconsin’s appraisal remedy excluded the plaintiff’s claim for breach of fiduciary duty based on an improper purpose for the merger and an undervaluation of the shares because that claim did not fit within the statutory exception for fraud or illegal conduct); Osher v. Ridinger, 589 S.E.2d 905, 907-08 (N.C. Ct. App. 2004) (holding that North Carolina’s appraisal remedy excluded plaintiff’s claim for breach of fiduciary duty because that claim was “essentially about the price received in a merger” and therefore no fraud or unlawful action had been alleged); Am. Network Group, Inc. v. Kostyk, 834 S.W.2d 296, 298-99 (Tenn. Ct. App. 1991) (holding that Tennessee’s appraisal remedy does not exclude all claims for breach of fiduciary duty, but that the plaintiff’s claim was excluded because he had an appraisal right and sought compensation only for loss of economic advantage). But see, e.g., Krieger v. Gast, 122 F. Supp. 2d 836, 846 (W.D. Mich. 2000) (characterizing breach of fiduciary duty as “other unlawful action”).

{22} We need not attempt to catalog all the types of conduct that might fall within the statutory exception for fraud or unlawful conduct. However, for future litigants, we suggest that the Delaware Supreme Court’s list in Weinberger might be helpful in defining the types of claims that are not adequately remedied by the statutory appraisal proceeding: “fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching.” Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

{23} Plaintiff argues that two of MBF’s key authorities are distinguishable. Specifically, he argues that Szulczi v. John R. Behrmann Revocable Trust, 90 P.3d 835 (Colo. 2004) (en banc), and Steinberg v. Amplica, Inc., 729 P.2d 683 (Col. 1986) (en banc), should not inform our decision. We agree that these cases are not directly on point but nonetheless find their reasoning persuasive.
{24} We turn first to Szaloczi in which the minority shareholder alleged that, in connection with the sale of the assets of a closely held corporation, the officers withheld information, granted themselves advantageous stock options, negotiated personal employment contracts, and arranged to take improper amounts from the sale of assets, thus adversely affecting the value of the dissenters' shares in the corporation. Szaloczi, 90 P.3d at 837-38. The Colorado Supreme Court held that the action for compensatory damages was properly dismissed because the minority shareholder was bound by the exclusivity provision found in the appraisal statute. Id. at 838.

{25} Plaintiff argues that this Court should not consider Szaloczi as persuasive authority because the Colorado statute at issue in that case required that all shareholders be provided with notice of the right to dissent, the right to demand payment, and the deadline for filing the requisite appraisal demand. See id. at 839. We consider this distinction to be without import because, in this case, Plaintiff makes no claim as to lack of notice of his appraisal rights. To the contrary, evidence shows that Plaintiff had ample notice regarding his rights to dissent and appraisal. Before the merger, MBF's counsel advised Trustee's counsel that it considered Section 53-14-1 to be the statutory authority for the merger. Plaintiff acknowledges that neither he nor Trustee made a written demand "for payment of the fair value" as required by Section 53-15-4(A) "because the Trust elected not to go under the appraisal remedy," not because they were unaware of the remedy. See Steinberg, 729 P.2d at 689 (noting that the plaintiff admitted having "discussed his right to appraisal with his attorney before the merger [and having] decided not to seek that remedy").

{26} Plaintiff additionally seeks to distinguish Szaloczi because the Colorado Court limited the dissenting shareholder to the statutory appraisal remedy to avoid duplicate recovery. Szaloczi, 90 P.3d at 841. The Colorado court's recognition that any recovery on a claim for breach of fiduciary duty would duplicate the recovery available under the appraisal remedy supports MBF's contention that the recovery sought by Plaintiff in his claim for breach of fiduciary duty could have been considered, and possibly awarded, in an appraisal proceeding. See Steinberg, 729 P.2d at 690 (observing that the appraisal statute does not "prevent vindication of a shareholder's claim of misconduct in an appraisal proceeding"). Moreover, Szaloczi interpreted the Colorado statute's exceptions for fraud or illegality very narrowly and excluded all but equitable proceedings. Szaloczi, 90 P.3d at 840.

{27} Plaintiff seeks to distinguish Steinberg based on differences in the underlying facts and the applicable law. Again, we are unpersuaded. In Steinberg, the minority shareholder alleged fraud and breach of fiduciary duty, as well as an unlawful merger, based on misrepresentations made by corporate officers. Id. at 686. The Supreme Court of California held that the action was barred by California's appraisal remedy because the plaintiff knew all of the relevant facts prior to the merger but "deliberately opted to sue for damages instead of seeking appraisal." Id. at 694. For his factual argument, Plaintiff notes that Steinberg involved an offering price that exceeded the price the plaintiff paid for his stock. Id. at 686. However, the evidence in this case also shows that, in light of the lack of any cash contribution made by Plaintiff, MBF offered to purchase Plaintiff's stock for much more than he paid.

{28} We also disagree that the differences in the law render Steinberg irrelevant. First, for the same reasons discussed above as to Szaloczi, we disagree that Steinberg is unreliable authority merely because the statute in that case required specific notice that is not required in this case. Second, we recognize that the court in Steinberg limited its holding to mergers of two separate corporations, not under common control or controlled by each other. Steinberg, 729 P.2d at 685 n.3, 694. Despite these differences, the California court's interpretation of the general exclusivity provision set forth in Cal. Corp. Code § 1312(a) (1990), see Steinberg, 729 P.2d at 689-94, is relevant authority on the issue of determining whether New Mexico's similarly-worded appraisal remedy is exclusive, even though the New Mexico legislature has chosen not to enact the more specific provisions contained in the California Code.

ABSENCE OF FRAUD OR UNLAWFUL CONDUCT

{29} We next consider whether Plaintiff's claims fall within the exception to exclusivity for fraud or unlawful conduct. Ordinarily, a plaintiff's claims may be examined at the pleading stage, and a court may determine that the plaintiff has failed to plead a legally cognizable claim for fraud or unlawful conduct so as to escape the exclusive remedy of appraisal. See, e.g., Weinberger, 457 A.2d at 703 (affirming lower court's ruling that "[a] plaintiff in a suit challenging a cash-out merger must allege specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority"); Werner v. Alexander, 502 S.E.2d 897, 901-02 (N.C. Ct. App. 1998) (affirming dismissal of minority shareholders' complaint because the complaint did not allege "circumstances constituting unlawful or fraudulent conduct," so that exclusive remedy for minority shareholders' claims about undervalued shares in a cash-out merger was the appraisal statute); Walk v. Balt. & Ohio R.R., 847 F.2d 1100, 1107-08 (4th Cir. 1989) (noting that, under Maryland law, allegations of fraud in the context of corporate mergers should be carefully scrutinized to determine whether the plaintiff was complaining only about the valuation of minority shares, in which case the plaintiff's claim would be a matter that could be resolved in a statutory appraisal proceeding), vacated on other grounds, 492 U.S. 914 (1989). However, in this case, the trial court denied Defendant's motion to dismiss and the matter went to trial. We therefore review the evidence to determine whether Plaintiff proved fraud or unlawful conduct.

{30} Plaintiff has not established any fraud or illegality in the form of dishonesty or misrepresentation on the part of Sturges and Daniels while acting on behalf of the corporation that would allow Plaintiff to assert his claim outside of the appraisal remedy. The record establishes that Trustee received all of MBF's financial statements. Furthermore, although Plaintiff contends that valuations were not disclosed to Trustee, the record shows that these calculations were disclosed to Plaintiff at the time. In fact, the memoranda at issue are directed to Plaintiff.

{31} Likewise, no fraud or illegal conduct was established based upon the shareholders' individual financial statements prepared by Sturges and Daniels in 1998 through 2000 showing their respective one-third corporate interests at $700,000. Before trial, the trial court held that any alleged failure to disclose personal financial statements to the other shareholders would not support a claim of failure to disclose because there was no authority requiring shareholders in a closely held corporation to exchange personal financial statements. Plaintiff cites no authority to contradict the trial court's finding on this issue. Furthermore, Plaintiff admitted that he was
aware of these figures and that he reported the same amounts on his own financial statements.

{32} Plaintiff further argues that the majority shareholders acted fraudulently or unlawfully by using the voting mechanism to cash out Plaintiff for no reason other than to eliminate him. When there is disagreement in the corporate decision-making process, the majority may vote to eliminate the minority shareholders by implementing a cash-out or “freeze-out” merger. Stringer, 841 P.2d at 1184. In a “freeze-out” merger, like the one in this case, the minority ownership is forced to give up its shares in the corporation in exchange for cash while the controlling interest is allowed to retain its equity. Sifferle v. Micom Corp., 384 N.W.2d 503, 506 n.1 (Minn. Ct. App. 1986). Even if the majority sought to freeze out Plaintiff for no legitimate reason, claims that the majority instituted the merger only to freeze out the minority do not state a claim for fraud or illegal conduct that is recognized outside of the appraisal remedy. See id. at 531-32 (granting partial summary judgment in favor of the dissenting shareholders on their claim for breach of fiduciary duty against the directors, not the corporation, because the directors had deprived the shareholders of information that was necessary to make an informed decision as to whether to accept the price offered in the merger or whether to seek an appraisal).

CONCLUSION

{34} We conclude that this is a case, at its core, about a freeze out of the minority shareholder and the fairness of the price per share paid to him. These are matters for an appraisal proceeding, and Plaintiff has not proved any fraudulent or unlawful conduct. Therefore, Plaintiff had no ability to sue outside the statutory appraisal process. {35} Moreover, in this case, we are only considering whether the appraisal remedy is the exclusive remedy in a suit against the corporation for breach of fiduciary duty. Because the trial court dismissed Defendants Sturges and Daniels, we need not decide whether and under what circumstances a dissenting shareholder may have a common law claim against the majority shareholders or the officers and directors.

{36} We reverse the judgment in favor of Plaintiff because he failed to avail himself of his exclusive appraisal remedy pursuant to Sections 53-15-3 and 53-15-4. Because Plaintiff failed to take advantage of his statutory right to appraisal, he took the risk of being held to the amount offered in the merger and is now bound by the terms of the corporate action. See §§ 53-15-3(D), -4(A). In light of our decision to reverse the judgment, we do not reach the issues raised by Plaintiff in his appeal. See Srader v. Verant, 1998-NMSC-025, ¶ 40, 125 N.M. 521, 964 P.2d 82 (noting that reviewing court will not determine academic or moot questions); State ex rel. Battershell v. City of Albuquerque, 108 N.M. 658, 664, 777 P.2d 386, 392 (Ct. App. 1989) (declining to address issues raised on appeal that are not necessary to disposition of the case).

{37} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
LYNN PICKARD, Judge
CYNTHIA A. FRY, Judge
Certiorari Denied, No. 29,740, May 1, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-050

CHEVRON U.S.A., INC.,
Plaintiff-Appellant,
versus
STATE OF NEW MEXICO ex rel.
DEPARTMENT OF TAXATION AND
REVENUE,
Defendant-Appellee.
No. 24,518 (filed: March 9, 2006)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
CAROL J. VIGIL,
District Judge

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OPINION

CELVIA FOY CASTILLO, Judge

[1] In this case, we determine whether the New Mexico Department of Taxation and Revenue (Department) properly assessed a gas severance tax deficiency, plus interest and penalties, in the total amount of $1,781,690.35 against Chevron U.S.A., Inc., (Chevron) on gas produced and processed at the Eunice Gas Plant (Eunice Plant) and the Indian Basin Gas Plant (Indian Basin Plant) in New Mexico for the period beginning November 1, 1995, and ending October 1, 1998. Chevron is part owner of these processing plants. Chevron appeals from the order denying its motion for summary judgment and granting the Department’s two motions for partial summary judgment. After entering the order, the district court granted Chevron’s subsequent motion to dismiss Chevron’s remaining claims with prejudice and entered final judgment on the order.

[2] Severance taxes on natural gas production are subject to various allowances, including deductions for the cost of processing the natural gas to remove liquid hydrocarbons and impurities. See 3.18.6.10 NMAC (2000) (describing the processing adjustment for natural gas). However, a number of gas producers own all or part of or are otherwise affiliated with the operators of the plants that process their natural gas. Because this relationship might result in an artificial valuation of processing costs, New Mexico has enacted various statutes and regulations to ensure fair valuation of natural gas in imposing severance taxes. See, e.g., NMSA 1978, § 7-29-4.2 (1989) (providing for valuation by the Department under certain circumstances). These statutes and regulations are at issue here.

[3] Chevron has between a 10 percent and a 50 percent ownership interest in both the Eunice Plant and the Indian Basin Plant. Based on this interest and other facts, the Department found that Chevron was affiliated with the operators of these two plants. See 3.18.1.7(B)(2) NMAC (2000) (defining the term “affiliated persons”). Chevron does not raise the question of whether the Department correctly determined that Chevron owns this percentage in each of the processing plants. Instead, Chevron contends that 3.18.1.7(B)(2)(b) NMAC, which presumes that one company controls another when the first company owns 10 through 50 percent of the other company’s stock, is irrational and hence invalid on its face. We first hold that Chevron did not meet its burden of showing that this regulation is invalid.

[4] Chevron’s next argument relates to the interpretation of Section 7-29-4.2. Chevron contends that when the Department determines the value of a taxpayer’s processing costs under the statute, the Department must compare the taxpayer’s processing costs with the processing costs of other producers of “products of like quality, character and use which are severed in the same field or area.” Id. Section 7-29-4.2 states that when two parties are affiliated or have engaged in non-arm’s length transactions, the value that the Department sets for the products must be commensurate with “the actual price received” for similar products “severed in the same field or area.” Id. This section then states that when there are no such sales, the Department must establish a “reasonable value.” Id. We hold that the plain language of Section 7-29-4.2 does
not mandate the way in which the Department must calculate processing costs—i.e.,
whether by a comparable value or by some other method. Rather, the final value of
natural gas calculated by the Department must be commensurate with similar prod-
ucts. See id. We therefore affirm the district court’s denial of summary judgment on
this issue.

[5] We next move to the issues surrounding
the district court’s grant of summary judgment to the Department and denial of
summary judgment to Chevron on whether Chevron was affiliated with the operators
of the Eunice Plant and the Indian Basin Plant. We hold that there is no genuine
issue of material fact as to Chevron’s af-
filiation with the operators at issue, and we
therefore affirm the district court’s grant of
summary judgment to the Department and
the denial of Chevron’s motion for sum-
mary judgment on the issues of affiliation and the absence of arm’s length contracts
with Chevron’s processors.

I. BACKGROUND

[6] Under New Mexico statutes, Chevron’s
production of natural gas and/or extracted
liquids within New Mexico is taxed under
two different taxation schemes: the Oil and
Gas Severance Tax Act, NMSA 1978, §§
7-29-1 to -23 (1959, as amended through
2005); the Oil and Gas Conservation Tax
Act, NMSA 1978, §§ 7-30-1 to -27 (1959,
as amended through 2005); the Oil and
Gas Emergency School Tax Act, NMSA
1978, §§ 7-31-1 to -27 (1959, as amended
through 2005); and the Oil and Gas Ad
Valorem Production Tax Act, NMSA 1978,
§§ 7-32-1 to -28 (1959, as amended through
2005). Since the statutory framework of
these four acts is substantially the same,
they are collectively referred to herein as
the “taxes” and collectively cited with
reference to the applicable sections of the
Oil and Gas Severance Tax Act (Act). See
Blackwood & Nichols Co. v. N.M. Taxation
& Revenue Dept’, 1998-NMCA-113, ¶ 12,
125 N.M. 576, 964 P.2d 137 (stating that
these four statutes are to be interpreted as
“a consistent statutory scheme”).

[7] Severance taxes are imposed on the value of oil and gas at or near the produc-
tion unit, i.e., at the well or near the well
where oil and gas exits the ground. Feerer
v. Amoco Prod. Co., 242 F.3d 1259, 1262-
63 (10th Cir. 2001); accord Flynn, Welch
& Yates, Inc. v. State Tax Comm’n, 38 N.M.
131, 136, 28 P.2d 889, 892 (1934) (stating
that “[t]he tax is tied absolutely to the act
or privilege of producing or severing”).
Although severance taxes are to be paid
on the value of oil and gas at the well or produc-
tion unit, natural gas is often sold
at locations away from the production
unit after the gas has been transported
to a processing plant, where liquefiable
hydrocarbons are removed from the gas
stream. See Blackwood & Nichols Co.,
1998-NMCA-113, ¶ 9; see also Sternberger
v Marathon Oil Co., 894 P.2d 788, 792
(Kan. 1995) (discussing the necessity of a
pipeline to carry gas from the well to the
market, as well as the associated transpor-
tation costs). Because costs are incurred
in transporting and processing the gas,
natural gas producers (like Chevron) are
generally allowed to deduct transportation
and processing costs from the sales price of
the gas when the producers are establishing
the value at the production unit on which
severance taxes are paid. See 3.18.6.9
NMAC (2000) (describing transportation
adjustments); 3.18.6.10 NMAC (describing
processing adjustments); Feerer, 242 F.3d
at 1262-63 (observing that New Mexico
allows operators to calculate taxable value
by deducting costs for compression, dehy-
dration, gathering, and transportation from
the sales price).

[8] Chevron’s southeastern New Mexico
gas production consists primarily of “wet
gas,” which contains various entrained liq-
uid hydrocarbons, such as propane and bu-
tane. See 8 Howard R. Williams & Charles
J. Meyers, Oil and Gas Law 1181 (Patrick
H. Martin & Bruce M. Kramer eds., 2004).
The gas is “processed” at natural gas plants
in order to remove the valuable liquid
hydrocarbons from the gas stream. Id. at
831-832, 1181. Typically, the natural gas
liquids (NGLs) that are removed and the
“dry” gas stream are sold separately at a
price that, after the producer nets out the
processing fee, is higher than the price for
which the unprocessed gas could be sold. See id. at 313.

[9] In 1999, the Department conducted an
audit of Chevron’s payment of severance
taxes for the period beginning November
1, 1995, and ending October 1, 1998. On
May 22, 2000, the Department issued
an assessment to Chevron for additional
taxes, penalties, and interest in the amount
of $1,781,690.35 (Assessment). The Asses-
sessment was based on the Department’s
contention that Chevron had claimed exces-
sive processing allowances for gas Chevron
had processed at the Eunice Plant and the
Indian Basin Plant. The Department con-
tended that the processing allowances were
excessive because Chevron’s processing
agreements at those plants were not arm’s
length and because Chevron maintained
an “affiliate” relationship with the plant
operators, Dynegy, Inc., (Dynegy) at the
Eunice Plant and Marathon Oil Company
(Marathon) at the Indian Basin Plant.

[10] Chevron paid the Assessment under
protest. Chevron filed a refund application
with the Department for the full amount of
the Assessment or, alternatively, some less-
er amount. See NMSA 1978, § 7-1-26(A)
(2003) (specifying the requirements for
seeking a refund of taxes paid). The Depart-
ment denied Chevron’s refund application.
On December 7, 2001, Chevron elected to
file a complaint in district court for money
owing, instead of proceeding within the
agency before a Department hearing officer.
See § 7-1-26(C)(2) (providing that one of
the remedies for denial of a claim for refund
is a civil action in district court).

the parties engaged in discovery. Even
after the district court appointed a special
discovery master to assist with discovery
disputes, intense litigation continued over
the proper scope of discovery in inter-
rogatories, document production requests,
and depositions. In late August 2003, the
Department filed two motions for partial
summary judgment regarding Chevron’s
affiliation with the Indian Basin Plant and
Chevron’s transactions at the Eunice Plant.
In response, Chevron filed its own motion
for summary judgment, arguing that the
Assessment should be dismissed and a
refund issued because the Department had
failed to compare Chevron’s taxable values
to others of like quality, character, and use,
pursuant to statute. Each of the parties then
filed a motion to strike the affidavit of the
other’s expert.

[12] The district court orally announced
its rulings and entered a written order
denying Chevron’s motion for summary
judgment, as well as Chevron’s motion
to strike the affidavit of the Department’s
expert. The district court also granted the
Department’s partial motions for summary
judgment and its motion to strike the
affidavit of Chevron’s expert. After Chevron
moved to dismiss its remaining claims with
prejudice, the district court entered final
judgment. This appeal followed.

II. DISCUSSION

A. Standard of Review

[13] Our review of the district court’s
order granting summary judgment to the
Department and denying summary judg-
ment to Chevron is de novo. Fikes v. Furst,
2003-NMSC-033, ¶ 11, 134 N.M. 602, 81
P.3d 545. Moreover, legal conclusions and
Section 7-29-4.2 states the following:

B. Provisions at Issue

708 (Ct. App. 1981). Therefore, on appeal, the burden of proof is on the party who won summary judgment to demonstrate the absence of a genuine issue. See also Rule 1-056(C) NMRA. In reviewing summary judgment, we look at the whole record in the light most favorable to the nonmoving party. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977); Reinhart v. Rauscher Pierce Sec. Corp., 83 N.M. 194, 196, 490 P.2d 240, 242 (Ct. App. 1971); see also C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 156, 597 P.2d 1190, 1196 (Ct. App. 1979) (“In deciding whether summary judgment is proper, an appellate court must view the matters presented in the light most favorable to support the right to trial on the issues.”). Therefore, on appeal, the burden is on the party who won summary judgment to demonstrate the absence of a genuine issue of material fact. Reinhart, 83 N.M. at 196, 490 P.2d at 242. “If the evidence is sufficient to create a reasonable doubt as to the existence of a genuine issue, summary judgment cannot be granted.” Poorbaugh v. Mullen, 96 N.M. 598, 600, 633 P.2d 706, 708 (Ct. App. 1981).

B. Provisions at Issue

15 At issue in this case are Section 7-29-4.2 and several Department regulations. Section 7-29-4.2 states the following:

The Department may determine the value of products severed from a production unit when:

A. the operator and purchaser are affiliated persons;

B. the sale and purchase of products is not an arm’s length transaction; or when

C. products are severed and removed from a production unit and a value as defined in the . . . Act . . . is not established for such products.

The value determined by the Department shall be commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area. If there are no sales of products of like quality, character and use severed in the same field or area, then the Department shall establish a reasonable value.

Id. Department regulations provide definitions for Section 7-29-4.2(A), (B). Pursuant to Department regulations, “[t]wo persons are affiliated if one of the persons either directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the other person.” 3.18.1.7(B)(2) NMAC. The Department may use evidence that a party owns 10 through 50 percent of another company’s voting stock to presume that the party directly or indirectly controls and is hence affiliated with that company under Section 7-29-4.2(A) (hereinafter referred to as the “presumption of control”). 3.18.1.7(B)(2) NMAC. Furthermore, “arm’s-length” is defined as a “transaction, contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that transaction, contract or agreement.” 3.18.1.7(B)(1) NMAC. If the operator and the purchaser are affiliated, there can be no arm’s length transaction. Id. Therefore, the issue of affiliation affects the application of both Section 7-29-4.2(A) and Section 7-29-4.2(B). Because the issue of affiliation is pivotal in this case, we will address this issue, together with how value should be determined in Section 7-29-4.2, in the context of our review of the parties’ motions for summary judgment.

C. Chevron’s Motion for Summary Judgment

1. The Department’s Presumption of Control Regulation Is Neither Irrational Nor Invalid

16 Chevron argues that the district court erred in not granting Chevron’s motion for summary judgment. Chevron does not contest the Department’s underlying calculation of its ownership interests in the Eunice Plant and the Indian Basin Plant, which triggered the presumption of control regulation. See 3.18.1.7(B)(2) NMAC. Instead, Chevron seeks to have the Department regulation regarding presumption of control declared irrational and hence invalid on its face. Agency regulations that interpret statutes and are promulgated under statutory authority are presumed proper, “[a]nd, of course, it is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight.” Regents of the Univ. of N.M. v. Hughes, 114 N.M. 304, 311-12, 838 P.2d 458, 465-66 (1992). At issue is the Department regulation that states the following:

(2) Two persons are affiliated if one of the persons either directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the other person. Based on the ownership of the voting securities of a person or based on other forms of ownership:

(a) ownership in excess of fifty percent constitutes control;

(b) ownership of 10 through 50 percent creates a presumption of control; and

(c) ownership of less than ten percent creates a presumption of noncontrol which the department may rebut if it demonstrates actual or legal control, including the existence of interlocking directorates.

3.18.1.7(B)(2) NMAC.

17 Chevron relies solely upon National Mining Ass’n v. United States Department of the Interior, 177 F.3d 1 (D.C. Cir. 1999). There, the Circuit Court of Appeals invalidated an agency regulation that presumed control based on 10 through 50 percent ownership. Id. at 5-7. The Circuit Court of Appeals acknowledged that this presumption was rebuttable. Id. at 5. The sole basis for invalidating this provision was that the agency had not offered any basis to support [the provision’s] presumption that an owner of as little as ten percent of a company’s stock controls it. While ten percent ownership may, under specific circumstances, confer control, [the agency] has cited no authority for the proposition that it is ordinarily likely to do so.

Id. at 6-7 (footnote omitted).

18 We agree with the Department that, contrary to New Mexico law, National Mining Ass’n puts the burden on the administrative agency to show that its regulation was proper. Compare id., with Regents of the Univ. of N.M., 114 N.M. at 311-12, 838 P.2d at 465-66 (holding that a regulation promulgated pursuant to statutory authority is “presumed to be a proper implementation of the provisions” of the statute in question). We therefore hold that the reasoning of National Mining Ass’n is insufficiently forceful to invalidate
2. Section 7-29-4.2 Does Not Require a Commensurate Analysis

{19} Chevron asserts that the district court incorrectly held that Chevron had waived its commensurate arguments because it did not raise such arguments in its refund application. We agree with Chevron. After the Department denied Chevron’s request for refund, Chevron filed an action for money damages before the district court, rather than instituting a proceeding before a Department hearing officer, pursuant to Section 7-1-26(C)(1). This Court’s review encompasses the record developed at the district court level, including discovery and pleadings. Following discovery, during which Chevron obtained information regarding the calculation of processing costs, Chevron raised the issue of the Department’s compliance with Section 7-29-4.2. We are thus not persuaded that Chevron was barred from district court or appellate review on this issue. We reverse the district court’s order on this matter and consider Chevron’s argument.

{20} The final paragraph of Section 7-29-4.2 has two sentences. The first sentence specifically requires that when the taxable product value is determined pursuant to the three circumstances listed in Section 7-29-4.2(A)-(C), the set value “shall be commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area.” Section 7-29-4.2. The last sentence then provides that the Department may set a reasonable value “[i]f there are no sales of products of like quality, character and use severed in the same field or area.” Id. In this case, the Department utilized the actual processing costs that Chevron had reported as part of its federal royalty obligations, rather than Chevron’s contractual processing deductions. Chevron contends that the Department’s approach does not meet the requirements of Section 7-29-4.2. Chevron would require the Department to compare the taxpayer’s processing charges to “the processing fees paid by other operators who processed gas at the Indian Basin and Eucine Plants.” We do not agree that Section 7-29-4.2 requires the Department to make such comparisons when it determines the value of a taxpayer’s processing fees.

{21} Section 7-29-4.2 states that the final value, or end figure as determined by the Department, must be commensurate with the “actual price received for products of like quality, character and use which are severed in the same field or area.” Id. Section 7-29-4.2 does not mention the commensurate value of processing charges. In fact, this section does not mention processing deductions at all. Neither does this section mention, let alone mandate, a certain methodology for calculating final value. The complete absence of any language in Section 7-29-4.2 regarding methodology, let alone one as specific as commensurate analysis, leads us to hold that Section 7-29-4.2 does not compel the Department to use a particular analysis in arriving at the determination of commensurate value. Cf. BP Am. Prod. Co. v. Dep’t of Revenue, 2005 WY 60, ¶ 5, 112 P.3d 596 (Wyo. 2005) (describing how the “Wyoming Legislature has provided the Department with specific guidance on how it should determine the fair market value of natural gas production . . . that is not sold at or prior to the point of valuation by bona-fide arm’s-length sale pursuant to one of four methods: 1) comparable sales; 2) comparable value; 3) netback; and 4) proportionate profits” (internal citation omitted)). The question is not “which of various appraisal methods is best or most accurately estimates [fair market value]; rather, it is to determine whether substantial evidence exists to support usage of the [chosen] method of appraisal.” State Dep’t of Revenue v. Amoco Prod. Co., 7 P.3d 35, 38 (Wyo. 2000) (internal quotation marks and citations omitted). While the Department’s methodology is presumed correct, “[o]nce the presumption is successfully overcome, the burden of going forward shifts to the Department to defend its valuation.” BP Am. Prod. Co., 2005 WY 60, ¶ 26 (internal quotation marks and citation omitted). Further, Chevron has not raised the question of whether the Department’s methodology was correct but only the very narrow question of whether the Department’s methodology was impermissible under Section 7-29-4.2.

{22} The Department’s methodology emanated from regulations providing that in transactions between affiliated persons, the Department calculates processing costs according to one of two “benchmark[s].” 3.18.6.10(F)-(H) NMAC. Under the benchmark applicable here, where “less than fifty percent of the natural gas processed during the reporting period is processed for non-affiliated persons in arm’s-length transactions,” the Department makes allowance for actual, allowable processing costs, see 3.18.6.10(H) NMAC, as opposed to contractual processing costs, see 3.18.6.10(G) NMAC. In this case, the Department used the actual processing costs that Chevron reported as part of its federal royalty obligations.

{23} Chevron asserts that Section 7-29-4.2 “require[s] the Department to ensure that the value upon which it assesses natural gas producers is commensurate with the actual price received for petroleum products of like quality, character and use in the same field or area.” Section 7-29-4.2 does not mandate that the Department perform an analysis that compares any particular factor. The meaning of this language lies apart from methodology. Once the Department arrives at a value by applying its regulations, the burden is on the taxpayer to show that the assessment does not comply with Section 7-29-4.2. See Hawthorne v. Div. of Revenue Div. Taxation & Revenue Dep’t, 94 N.M. 480, 481, 612 P.2d 710, 711 (Ct. App. 1980). This burden is based on the presumption of correctness in the Department’s assessments. See NMSA 1978, § 7-1-17(C) (1992) (“Any assessment of taxes or demand for payment made by the [Department] is presumed to be correct.”). If the taxpayer meets its burden of demonstrating that the Department value is not “commensurate with the actual price received for products of like quality, character and use which are severed in the same field or area” under Section 7-29-4.2, then the assessment must be recalculated. See Regents of N.M. Coll. of Agric. & Mech. Arts v. Acad. of Aviation, Inc., 83 N.M. 86, 89, 488 P.2d 343, 346 (1971) (stating that the presumption of correctness may be overcome if the taxpayer shows that the Department failed to comply with the relevant statute). The Department’s use of relevant values that Chevron had reported for other purposes was therefore not improper. The taxpayer still has the right to challenge the value but also has the burden of showing noncompliance with the statute. If the taxpayer cannot meet this burden, then the final sentence of Section 7-29-4.2 is triggered, and the Department may simply set a reasonable value on the products. Here, Chevron did not even attempt to show that the Department’s value was not commensurate with the actual price received for similar products. We therefore affirm the district court in this regard.

D. The Department’s Motions for Partial Summary Judgment

1. Cooper’s Affidavit

{24} Chevron argues that the district
court should not have struck the affidavit of Chevron’s expert, Stephen S. Cooper, because in doing so, the court compromised its decision on the parties’ summary judgment motions. Chevron submitted the Cooper affidavit in support of its own motion for summary judgment. In his affidavit, Cooper generally asserted that the terms of Chevron’s processing agreements were similar to the terms of the other producers’ agreements. Cooper also asserted that Chevron’s processing agreement with Marathon at the Indian Basin Plant was “quite favorable to Chevron.” These assertions go to whether or not Chevron’s processing agreements were arm’s length (i.e., that the parties had opposing economic interests) and to support Chevron’s position that the Department should have conducted a commensurate analysis to determine value. In the district court, Chevron claimed that Cooper’s affidavit only applied to the commensurateness of Chevron’s processing fees and that any alleged conflict between Cooper’s deposition testimony and his affidavit did not relate to the issue of commensurateness.

(25) On appeal, however, Chevron changes its approach. It no longer argues that the affidavit provides evidence of and creates genuine issues of material fact regarding the method used to determine value. Rather, Chevron seems to be arguing that the contents of the affidavit establish the arm’s length nature of Chevron’s processing agreements and, accordingly, the absence of any affiliation between Chevron and the plant operators. We disagree with Chevron’s recharacterization of the affidavit.

(26) Put another way, the only evidence that could arguably oppose the Department’s motions for partial summary judgment is the Cooper affidavit. These motions, however, go to the interpretation of Section 7-29-4.2 as to when the Department can determine value and how. If the producer and the operator are affiliated, the Department is allowed to determine value. Cooper’s affidavit does describe the parties’ opposing economic interests and thus supports the arm’s length nature of the transactions. However, Cooper’s affidavit does not address affiliation. Because Chevron is presumptively an affiliate, and nonaffiliation is required for an arm’s length contract, see § 7-29-4.2(A), the Cooper affidavit does not overcome the presumption regarding affiliation. As to the method of determining value, Chevron does not argue on appeal that the contents of the affidavit relate to this issue. Thus, we conclude that even if the affidavit had been allowed in, its contents would have been irrelevant to Chevron’s argument on appeal that the affidavit rebuts the presumption of affiliation. See State Farm Mut. Auto. Ins. Co. v. Fennema, 2005-NMSC-010, ¶¶ 14-15, 137 N.M. 275, 110 P.3d 491 (holding that a legal presumption on which summary judgment was based was not rebutted by the plaintiff’s submission of evidence that did not address the presumption). Accordingly, any error in striking the Cooper affidavit would be harmless. See Cooper v. Curry, 92 N.M. 417, 420-21, 589 P.2d 201, 204-05 (Ct. App. 1978) (holding that preclusion of irrelevant evidence is not error).

2. The Parties’ Arguments

(27) As described above, the Department may properly presume, pursuant to its regulations, that Chevron directly or indirectly controlled and is therefore affiliated with both Marathon at the Indian Basin Plant and Dynegy at the Eunice Plant. See 3.18.1.7(B)(2) NMAC. Chevron contends that the district court erred in granting summary judgment on the issues of affiliation and arm’s length contracts at the Eunice and Indian Basin plants. Chevron does not argue that it owns less than 10 percent at either plant or that the regulatory presumption of control (discussed above) does not apply. Instead, Chevron argues that it rebutted this presumption with facts sufficient to create a genuine issue of material fact as to its affiliation with the plant operators at the Eunice and Indian Basin plants. We do note that while Chevron has the burden of production on this issue, the Department has the burden to show the nonexistence of a genuine issue of material fact. See Reinhardt, 83 N.M. at 196, 490 P.2d at 242. In this case, the Department met that burden, and we affirm summary judgment on the issues of nonaffiliation and the absence of arm’s length contracts between Dynegy and Chevron at the Eunice Plant and between Marathon and Chevron at the Indian Basin Plant. We explain below.

a. Eunice Plant

(28) Prior to September 1, 1996, Warren was an operating division of Chevron and sole owner of the Eunice Plant. This was during part of the assessed period. Chevron processed its gas at the Eunice Plant, pursuant to a memorandum of understanding (MOU) with the Warren operating division.

(29) After September 1, 1996, Chevron sold Warren to Natural Gas Clearinghouse (NGC), which immediately became Dynegy. (Both companies are hereinafter referred to as Dynegy). In exchange, Chevron received 28 percent of Dynegy’s voting stock. Chevron also had the authority to appoint three of Dynegy’s board members. Chevron conceded that at this time, it entered into a long-term strategic alliance wherein Dynegy, through yet another of its subsidiaries, purchased “substantially all” of Chevron’s residue gas and NGLs in the United States. Chevron thus listed Dynegy as an “affiliate” in its SEC filings.

(30) At the Eunice Plant, Chevron’s gas was processed by Dynegy Midstream Services (DMS), a wholly owned Dynegy subsidiary. Companies other than Chevron had their gas processed at the Eunice Plant. The terms that Chevron had with Warren (i.e., Chevron itself) under the MOU remained the same when Dynegy took over. Chevron did not have the option under the terms of the MOU to process Chevron’s gas anywhere else. Another company, Versado Gas Processors (Versado), took over these processing obligations at some point. Dynegy owned 63 percent of Versado. It was created via a Dynegy and Texaco deal, which brought the two companies’ assets under one “umbrella.” Versado kept as its processing fee 25 percent of Chevron’s residue gas and NGLs processed at the Eunice Plant. Chevron was required to sell the remaining 75 percent of these products to Dynegy.

b. Indian Basin Plant

(31) The Dynegy-Chevron relationship is also extant at the Indian Basin Plant, in which Chevron had a 14 percent ownership interest prior to September 1, 1996. After this date, Chevron sold not only Warren and the Eunice Plant to Dynegy but also this 14 percent interest in the Indian Basin Plant. Again, Chevron retained 28 percent of Dynegy’s stock.

(32) Marathon owned the largest interest and served as the operator at the Indian Basin Plant. In negotiating with Chevron,
Marathon was acting on its own behalf and on behalf of the Indian Basin Plant owners (including Chevron). Under a tiered agreement, Marathon retained 75 percent of the NGLs produced in a day. When the month’s average was more than 25 mmcf \(^2\) NGLs produced per day, Marathon would retain a lower percentage of the NGLs. Chevron retained all of its residue gas under this agreement.

**c. Discussion**

{33} The question is whether, as a matter of law, Chevron is affiliated with Dynegy at the Eunice Plant and with Marathon at the Indian Basin Plant. Department regulations create a rebuttable presumption that Chevron was affiliated with the operators of the Indian Basin and Eunice plants, due to Chevron’s ownership interests in those plants. See 3.18.1.7(B)(2) NMAC. Because nonaffiliation is also required for a processing agreement to be arm’s length, we only address affiliation. See § 7-29-4.2(A), (B); 3.18.1.7(B)(1) NMAC (stating that an arm’s length transaction is one between “nonaffiliated persons”).

{34} In favor of its motions for summary judgment, the Department submitted an affidavit from Roger Riddlehoover. He asserted that when a producer (like Chevron) uses an affiliated company to provide services or purchase production, this “circumstance warrants special treatment because of the potential that intra-company transfers may mask, or bias, the true economic value of the resource in such a way as to reduce payments to ill-informed passive claimants” (like the Department). In analyzing Chevron’s production at the Eunice Plant, Riddlehoover agreed that the terms of the 1996 processing agreement between Chevron and Dynegy were more favorable to Dynegy. He asserted that despite this fact, these less favorable terms did not necessarily harm Chevron because giving more to Dynegy was part of the consideration for the sale of Warren and the Eunice Plant to Dynegy. {35} As far as the Indian Basin Plant was concerned, Riddlehoover noted that the Plant was actually built by a group of producers, which included Chevron and Marathon. The largest producer, Marathon, was appointed operator. He concluded that the terms between Marathon as plant operator and the plant owners were not meaningfully negotiated. Because Chevron was on both sides of the transaction (as a producer and as a part owner of the plant that was processing Chevron’s products), what Chevron paid for processing did not have much meaning.

{36} Through the presumption of control (based on 10 through 50 percent ownership interests) and the other evidence of Chevron’s relationships at the Indian Basin and Eunice plants, the Department met its burden of demonstrating that there is no genuine issue of material fact as to Chevron’s affiliation with Marathon and Dynegy. Relying on its legal theory that the Department’s regulation was irrational and invalid, Chevron provided no evidence to rebut the presumption of affiliation. In addition, Chevron’s assertions that the Department was biased and pre-judged the affiliation issue in an arbitrary and capricious fashion are equally without merit. To the extent that this argument is based upon testimony from a Department witness that it is impossible for a company like Chevron, which is both a producer and a plant owner, to have an arm’s length contract, we again point out that Chevron is presupsumently an affiliate and that nonaffiliation is required for an arm’s length contract. See id. Further, to the extent that Chevron seeks by its arguments to create a genuine issue of material fact, the “arguments of counsel are not evidence.” In re Application of Metro. Inv., Inc., 110 N.M. 436, 441, 796 P.2d 1132, 1137 (Ct. App. 1990). We therefore affirm the district court’s grant of summary judgment to the Department on this issue and the court’s denial of Chevron’s motion for summary judgment.

**III. CONCLUSION**

{37} In this case, we hold that Chevron has not shown a sufficient basis for invalidating the Department’s regulation that presumes control based on 10 through 50 percent ownership; therefore, we also hold that the presumption of control applies in this case. See 3.18.1.7(B)(2) NMAC. Further, we hold that Section 7-29-4.2 requires that the value of natural gas assessed by the Department must be commensurate with “the actual price received for products of like quality, character and use which are severed in the same field or area” and that the burden is on the taxpayer to demonstrate that the Department’s assessment does not conform to this requirement. Also in this context, while Section 7-29-4.2 requires that the value be commensurate, we hold that this statute does not mandate a particular analysis the Department must use in order to arrive at that value. We therefore affirm the district court on this point. Finally, we hold that there is no genuine issue of material fact as to Chevron’s affiliation with the operators at issue, and we therefore affirm the district court’s grant of summary judgment to the Department and the denial of Chevron’s motion for summary judgment on this issue. The affidavit of Chevron’s expert, even if improperly struck, was insufficient to create an issue on this point.

{38} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

CYNTHIA A. FRY, Judge

\(^2\)One million cubic feet. 8 Williams & Meyers, *supra*, at 632.
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In accordance with the State of New Mexico Procurement Code, the First Judicial District Court requests proposals from licensed New Mexico attorneys or firms to provide professional services as described below: 1) Attorneys to act as Guardian Ad Litem; 2) Attorneys for Primary Custodian(s); 3) Attorneys for Juveniles or Adults; and 4) Attorneys for Respondents. Order of Appointment is being considered for Fiscal Year 2007. Please submit a proposal no later than 5:00 p.m. on Friday, June 2, 2006, to the following address: Stephen T. Pacheco, Court Administrator, First Judicial District Court, P.O. Box 2268, Santa Fe, NM 87504-2268.

Attorney Position
The REALTORS® Association of New Mexico (RANM) seeks part-time Contract Attorney to: 1) operate Legal Hotline (20 hours/week) and use info to provide Q&A for website; 2) provide copy for monthly and weekly publications; 3) ensure that RANM’s existing real estate forms and contracts comply with new laws/regulations; draft new forms/contracts as needed; attend Forms Committee meetings; 4) conduct periodic training in forms usage and provide periodic legal updates at conferences and meetings; 5) review legislative bills enacted into law and provide report on measures that affect the industry or members’ businesses; and 6) when requested, review pending and approved regulations of the Real Estate Commission and other regulatory bodies to determine industry impact. May consider in-house counsel with enhanced scope of work to include: 1) reviewing decisions of hearing panels for compliance with the National Association of REALTORS® (NAR) Code of Ethics and Arbitration Manual; 2) conducting professional standards training; 3) reviewing association governing documents and providing legal advice about corporate governance matters; 4) giving advice on Robert’s Rules of Order; 5) reviewing NAR policies and assisting with their implementation; 6) assisting in review of legislation during session to determine impact on the industry; members’ businesses or private property rights. Submit letter of interest, resume, and cost proposal/salary requirements by close of business on June 9th to: Peggy Comeau, RANM Executive Vice President, 2201 Brothers Road, Santa Fe, NM 87505. [505-983-8809 (fax); 505-982-2442, ext. 8 (phone); pcomeau@msn.com (email)].

Experienced Santa Fe Paralegal
Small established Santa Fe firm needs a bright, energetic, mature, meticulous and experienced (3+ years) paralegal. Very substantial client contact. Excellent communication and organizational skills required. Computer intensive, informal non-smoking office. Paralegal degree or Certificate desirable. Recent law firm experience required. Firm offers a fun small office work pace, very competitive compensation and benefits. Monthly performance bonus; 100% paid Medical/Hospital; parking; paid holidays; sick and personal leave. All responses are confidential. Please submit resume to: 1) operate Legal Hotline (20 hours/week) and use info to provide Q&A for website; 2) provide copy for monthly and weekly publications; 3) ensure that RANM’s existing real estate forms and contracts comply with new laws/regulations; draft new forms/contracts as needed; attend Forms Committee meetings; 4) conduct periodic training in forms usage and provide periodic legal updates at conferences and meetings; 5) review legislative bills enacted into law and provide report on measures that affect the industry or members’ businesses; and 6) when requested, review pending and approved regulations of the Real Estate Commission and other regulatory bodies to determine industry impact. May consider in-house counsel with enhanced scope of work to include: 1) reviewing decisions of hearing panels for compliance with the National Association of REALTORS® (NAR) Code of Ethics and Arbitration Manual; 2) conducting professional standards training; 3) reviewing association governing documents and providing legal advice about corporate governance matters; 4) giving advice on Robert’s Rules of Order; 5) reviewing NAR policies and assisting with their implementation; 6) assisting in review of legislation during session to determine impact on the industry; members’ businesses or private property rights. Submit letter of interest, resume, and cost proposal/salary requirements by close of business on June 9th to: Peggy Comeau, RANM Executive Vice President, 2201 Brothers Road, Santa Fe, NM 87505. [505-983-8809 (fax); 505-982-2442, ext. 8 (phone); pcomeau@msn.com (email)].

Secretary/Legal Assistant
Firm offers a fun small office work pace, very competitive compensation and benefits. Monthly performance bonus; 100% paid Medical/Hospital; parking; paid holidays; sick and personal leave. All responses are confidential. Please submit resume to: 1) operate Legal Hotline (20 hours/week) and use info to provide Q&A for website; 2) provide copy for monthly and weekly publications; 3) ensure that RANM’s existing real estate forms and contracts comply with new laws/regulations; draft new forms/contracts as needed; attend Forms Committee meetings; 4) conduct periodic training in forms usage and provide periodic legal updates at conferences and meetings; 5) review legislative bills enacted into law and provide report on measures that affect the industry or members’ businesses; and 6) when requested, review pending and approved regulations of the Real Estate Commission and other regulatory bodies to determine industry impact. May consider in-house counsel with enhanced scope of work to include: 1) reviewing decisions of hearing panels for compliance with the National Association of REALTORS® (NAR) Code of Ethics and Arbitration Manual; 2) conducting professional standards training; 3) reviewing association governing documents and providing legal advice about corporate governance matters; 4) giving advice on Robert’s Rules of Order; 5) reviewing NAR policies and assisting with their implementation; 6) assisting in review of legislation during session to determine impact on the industry; members’ businesses or private property rights. Submit letter of interest, resume, and cost proposal/salary requirements by close of business on June 9th to: Peggy Comeau, RANM Executive Vice President, 2201 Brothers Road, Santa Fe, NM 87505. [505-983-8809 (fax); 505-982-2442, ext. 8 (phone); pcomeau@msn.com (email)].

Secretary/Legal Assistant
Part-time, flexible hours. Applicants should have 3 years experience in civil litigation and Workers Compensation. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd. NE, Albuquerque, NM 87113 or email to jruiz@ylawfirm.com. No phone calls please.

Full Time Legal Secretary
Established medium-sized law firm seeks full time legal secretary. Applicants should have 3 years experience in civil litigation and corporate finance and other transactional work. Strong word processing skills a must, as well as organizational and follow-up skills, proofreading, and communication skills. Competitive salary and benefits package. Please submit resume to: 1) operate Legal Hotline (20 hours/week) and use info to provide Q&A for website; 2) provide copy for monthly and weekly publications; 3) ensure that RANM’s existing real estate forms and contracts comply with new laws/regulations; draft new forms/contracts as needed; attend Forms Committee meetings; 4) conduct periodic training in forms usage and provide periodic legal updates at conferences and meetings; 5) review legislative bills enacted into law and provide report on measures that affect the industry or members’ businesses; and 6) when requested, review pending and approved regulations of the Real Estate Commission and other regulatory bodies to determine industry impact. May consider in-house counsel with enhanced scope of work to include: 1) reviewing decisions of hearing panels for compliance with the National Association of REALTORS® (NAR) Code of Ethics and Arbitration Manual; 2) conducting professional standards training; 3) reviewing association governing documents and providing legal advice about corporate governance matters; 4) giving advice on Robert’s Rules of Order; 5) reviewing NAR policies and assisting with their implementation; 6) assisting in review of legislation during session to determine impact on the industry; members’ businesses or private property rights. Submit letter of interest, resume, and cost proposal/salary requirements by close of business on June 9th to: Peggy Comeau, RANM Executive Vice President, 2201 Brothers Road, Santa Fe, NM 87505. [505-983-8809 (fax); 505-982-2442, ext. 8 (phone); pcomeau@msn.com (email)].

Office Space
For Sale:
4800 1/2 sq. ft. building in desirable Uptown District. 2 stories; 8 large offices; 6 secretarial bays; break room; 2 conference rooms. Building can be subdivided for tenant lease options. Ample public and private parking. All new amenities including generous use of exotic woods. Full conversion of bldng including HVAC (Ref: Air); electrical & plumbing. Ideal for Law Office; Mortgage or Real Estate Company or any professional business. Offered @ $165 sq. ft. Showing by appointment only. Contact Tony @ (505) 884-9300.

First Judicial District Court Request for Proposals
In accordance with the State of New Mexico Procurement Code, the First Judicial District Court requests proposals from licensed New Mexico attorneys or firms to provide professional services as described below: 1) Attorneys to act as Guardian Ad Litem; 2) Attorneys for Primary Custodian(s); 3) Attorneys for Juveniles or Adults; and 4) Attorneys for Respondents. Order of Appointment is being considered for Fiscal Year 2007 beginning July 1, 2006, through June 30, 2007. Resumes are to be included with proposals. The First Judicial District Court reserves the right to reject any or all proposals. The following will be taken into consideration in awarding the contracts: related case experience; experience working with social services agencies in the community; contract amount proposed; and current Children’s Court and Family Court practice. For more information, please call 827-1280. All proposals must be received by 5:00 p.m. on Friday, June 2, 2006, at the following address: Stephen T. Pacheco, Court Administrator, First Judicial District Court, P.O. Box 2268, Santa Fe, NM 87504-2268.

Bar Bulletin - May 22, 2006 - Volume 45, No. 21 53

www.nmbar.org
Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $300 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

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

Attractive Office Space
Uptown Area - Wyoming near Menaul. 3 Room Suite. Good parking. $550/mo. 296-4821 / 294-5533.

Executive Office Suites
Conference room, reception area, break room, built-in staff stations. Corner of Louisiana and Candelaria. 889-3899.

Uptown
Nice. 1000 square feet, 3 offices, reception, conference room. Centrally located for clients, 10 minutes to courts for you. 12 month min. lease, $1470.00/month includes daily custodial. Great for 2-3 attorneys. 830-2020.

Albuquerque Offices For Rent
Albuquerque offices for rent 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1,000 monthly. Call Ramona @ 243-7170 for appointment.

Office Space Available
ATTENTION ENTREPRENEURIAL ATTORNEYS!!! Newly renovated office space near San Pedro & Constitution. One fully furnished office with phone/intercom system along with a paralegal/assistant workstation. Amenities include: receptionist to take calls, use of fax & copy machines, conference room, DSL, Large kitchen. Utilities paid & janitorial services included. Great working environment with referrals and possible contract work. $800.00/month. For more information, call David Standridge 880-8737.

Executive Office Suites
Newly renovated office space near San Pedro & Constitution. One fully furnished office with phone/intercom system along with a paralegal/assistant workstation. Amenities include: receptionist to take calls, use of fax & copy machines, conference room, DSL, Large kitchen. Utilities paid & janitorial services included. Great working environment with referrals and possible contract work. $800.00/month. For more information, call David Standridge 880-8737.

Uptown Square Office Building
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 850SF and 1475SF (divisible into approximately 2272SF and 1475SF spaces). Buildouts for larger suite include reception counter/desk, separate kitchen area, storage and 6-7 windowed offices. Competitive Rates. Available Now. Single attorney space available. One-third of 1300SF (approx. 450SF), shared conference room, reception area, coffee bar, etc. w/building owners. $600/month. One (1) year lease. Call Ron Nelson or John Whisenant 883-9662.

Misellaneous
Copier
Excellent condition. $500 or best offer. 889-3899.

For Sale
Executive office desk; large bookcase and file cabinet. Solid oak - handmade by expert craftsman. Must sell, make offer. Call 275-7299.

Depression, Alcohol or Drug Problems?
Help is as close as your phone.

The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. They do not report attorneys or judges to law enforcement, the Disciplinary Board or the Judicial Standards Commission. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

Free Confidential* 24-Hour Hotline
Albuquerque (505) 228-1948
(800) 860-4914

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
2006 TAX SYMPOSIUM:
MATTERS AFFECTING FEDERAL AND STATE TAX PRACTICE
State Bar Center, Albuquerque, NM
Friday, June 16, 2006
6.5 General CLE Credits

8:00 a.m.  Registration
8:30 a.m.  The IRS New Circular 230 Rules: What Lawyers and Accountants Must Know to Remain in Compliance
Professor Joseph Walsh, Golden Gate University, San Francisco, California

Joe Walsh will take apart the new Circular 230 Rules governing written tax advice provided by accountants and attorneys to their clients and to other practitioners. He will explain how failure to follow the rules can result in imposition of severe penalties on practitioners providing advice on subjects ranging from choice of business entity to structuring divorces.

9:30 a.m.  Recent Developments in Federal Income Taxation: A Comprehensive Examination of Statutory, Regulatory and Judicial Rulings Affecting Tax Law in the Past Year
Professor Ira B. Shepard, University of Houston Law Center, Houston, Texas

Ira Shepard, a nationally known tax commentator, will present an in-depth examination of regulatory and court decisions in the past year that affect federal tax practice. The decisions they summarize define the parameters within which attorneys and accountants advise their clients on federal tax matters.

10:30 a.m.  Break
10:45 a.m.  Recent Developments in Federal Income Taxation (cont)
Professor Ira B. Shepard

11:45 a.m.  Lunch (provided at the State Bar Center)
1:15 p.m.  The Tax Fraud Investigations Division Gets Equipped to Fight Tax Fraud
Alvan Romero, Director of the Tax Fraud Investigations Division, NM Taxation and Revenue Department

Alvan Romero presents an insider’s description of the newly revitalized Tax Fraud Division and its investigative activities. The New Mexico Agency charged with fighting tax fraud is becoming increasingly active. He will provide practitioners with insight about what practitioners need to know how to competently represent clients involved in such investigations.

2:15 p.m.  The Top Ten Tax Scams
James H. Maes, Esq., CPA, CFE, Special Agent, NM Taxation and Revenue Dept.

Clients regularly are taken advantage of by those who make money by selling schemes to avoid tax to gullible taxpayers. James Maes will describe the most popular scams used in New Mexico and the sometimes dire consequences attending those who fall prey to them.

3:15 p.m.  State Tax Issues Affecting New Mexico Taxpayers: The Impact of the K-Mart and the Wal-Mart Decisions on New Mexico Tax Law
Curtis W. Schwartz, Esq., Modrall Sperling Roehl Harris & Sisk and Bruce Fort, Esq., Staff Attorney, NM Taxation and Revenue Dept.

Two leading New Mexico tax experts will discuss recent legislative and judicial decisions affecting tax practice as well as relevant decisions from other jurisdictions affecting state taxation of interstate business activity.

3:45 p.m.  Break
4:00 p.m.  State Tax Issues Affecting New Mexico Taxpayers (cont)
Curtis W. Schwartz, Esq.
Bruce Fort, Esq.

5:00 p.m.  Adjourn and Reception

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- □ Purchase Order (Must be attached to be registered)
- □ Check enclosed $ ____________
- □ VISA □ MC □ American Express □ Discover
- □ Make check payable to: CLE
- □ Credit Card #  
- □ Exp. Date  

Authorized Signature

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071
Register Online at www.nmbar.org
UNM SCHOOL OF LAW ALUMNI ASSOCIATION

Presents

THE 5TH ANNUAL SUMMER GOLF CLASSIC

Miller Stratvert PA - Tournament Sponsor
Friday, July 7, 2006
University South Course

11:30 - Lunch
12:30 p.m. - Shotgun start (18 holes) Best Ball Scramble

Cost: $110 per player/$425 per foursome

Player(s) Name __________________________________________
Player(s) Name __________________________________________
Player(s) Name __________________________________________
Player(s) Name __________________________________________
Company Name ____________________________________________
Address ___________________________________________________
City ___________________________ State __________ Zip ________
Phone Number ___________________ Fax Number ________________

_____ Check enclosed in the amount of $_______ for _____ players
_____ Please charge the following credit card:  Visa _____ Master Card _____
Card Number ___________________________ Exp. Date _____________

_____ Please send an invoice

To register over the phone or to answer any questions,
please contact Carmen Rawls at (505) 277-8184

Fill-out and return this form to: UNM School of Law, MSC11-6070,
1 University of New Mexico,
Albuquerque, NM 87131