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Acequia Madre, Albuquerque, 1881
Courtesy Palace of the Governors (NMNM/DCA)
www.palaceofthegovernors.org/photoarchives

JUNE 19, 2006  •  VOLUME 45,  NO. 25
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NATIONAL SATELLITE

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Via satellite at the State Bar Center, Albuquerque
Thursday, June 29, 2006 • 10 a.m. - 2 p.m.
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This presentation offers a framework for understanding ERISA, HIPAA, COBRA, and tax law aspects of health plans and their administration. The advanced instruction in this program is for anyone who is, wants to be, or does not want to be considered a health plan fiduciary. It is for those who deal with managed care plans and want to understand the employee benefit laws.

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State Bar of New Mexico’s 2006 Annual Meeting

Reaching for Excellence

Taos Convention Center
Taos, NM • July 20-22, 2006
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Contributions and announcements to the Bar Bulletin are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

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**Professionalism Tip**

With respect to the courts and other tribunals:
I will refrain from filing frivolous motions.

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**Meetings**

**June**

- 20 Solo and Small Firm Practitioners Section Board of Directors Meeting, 11:20 a.m., State Bar Center
- **Section Meeting**, 11:45 a.m., State Bar Center
- **21 Bankruptcy Law Section Board of Directors**, noon, U.S. Bankruptcy Court, 10th floor conference room
- **22 Real Property, Probate and Trust Section Board of Directors**, 4 p.m., Law Offices of Charles Seibert
- **22 Technology Committee Workshop**, 5 p.m., State Bar Center
- **28 Membership Services Committee**, noon, State Bar Center
- **29 Senior Lawyers Division Board of Directors**, 4:30 p.m., State Bar Center

**State Bar Workshops**

**June**

- **21 Consumer Debt/Bankruptcy Workshop** 6 p.m., Clovis-Carver Library, Clovis
- **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
- **29 Lawyer Referral for the Elderly Workshop** Topic: Consumer Rights 1:15 p.m., Meadowlark Senior Center, Rio Rancho
- **29 Advanced Health Care Decision Making** 6 p.m., Alamogordo Public Library, Alamogordo

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

COURT NEWS

NM Supreme Court Judicial Performance Evaluation Commission

Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., June 23, at the State Bar Center. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:

Monday-Friday, 8 a.m.-5:30 p.m.
Saturday, 10 a.m.-3 p.m.
Closed holiday weekends

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

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

Proposed Revisions to the Children’s Court Rules and Forms

The Supreme Court is considering proposed revisions to the Children’s Court Rules and Forms. 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. Comments must be received by the clerk on or before July 3 to be considered by the Court.

For reference, see the June 12, (Vol. 45, No. 24) 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

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1977 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 cases for years 1984 to 1989 and LR (Metro Court cases) for years 1987 to 1996, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through July 27. Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in criminal cases for years 1984 to 1989 and LR (Metro Court cases) for years 1987 to 1996, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through July 27. Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Family Court Open Judges Meeting

The July 10 meeting of the Family Court Open Judges, scheduled for noon, has been cancelled. The next meeting will be held at noon, Sept. 12, at the 2nd Judicial District Court, 3rd Floor Conference Center, 400 Lomas NW, Albuquerque. We apologize for
any inconvenience and look forward to seeing interested participants in September.

**Judicial Appointment**
Governor Bill Richardson appointed Stan Whitaker to serve as a Family Court judge on the 2nd Judicial District Court in Bernalillo County.

Whitaker is a graduate of Sandia High School, the University of Kansas and the UNM School of Law. He has been an assistant attorney with the U.S. Department of Justice since 2002. He previously served as special commissioner for Domestic Violence/Family Court from 1996 to 2002 and as assistant district attorney for the prior four years. Whitaker is a member of the UNM School of Law Alumni Board, New Mexico Bar Association, the NAACP and a past president of the New Mexico Black Lawyers Association.

Whitaker was one of two candidates recommended to Governor Richardson by the Judicial Nominating Commission. He fills the vacancy left by the retirement of Judge James F. Blackmer. Whitaker stands for election in 2006.

**Retirement Reception for Judge James F. Blackmer**
A retirement reception in honor of Judge James F. Blackmer will be held from 2 to 4 p.m., June 29, at the Bernalillo County Courthouse, Frank H. Allen, Jr., Ceremonial Courtroom #338, 400 Lomas Blvd. NW, Albuquerque. All are invited to attend.

**Third Judicial District Court Reassignment of Children’s (Division III) Court Cases**
Due to the resignation of Judge Larry Ramirez, all cases previously assigned to Judge Ramirez will be assigned to a judge pro tempore effective June 8. For further information, call Court Administrator Nadine Sanchez, (505) 523-8201.

**Eleventh Judicial District Court Destruction of Exhibits**
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 11th Judicial District Court, McKinley County, will destroy exhibits filed with the Court in the civil and criminal cases for the years of 1986 through 2003, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning June 8 to August 17. Counsel who have cases with exhibits should verify exhibit information with the judicial lead worker, (505) 863-6816, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

**Santa Fe Municipal Court Brown Bag Lunch**
Santa Fe Municipal Judge Ann Yalman invites all attorneys who practice in the Santa Fe Municipal Court to meet with her at noon, June 21, at Municipal Court for a discussion of practice and procedures in the Municipal Court.

**U. S. District Court for the District of New Mexico CM/ECF and PACER Presentation**
The U.S. District Court will hold presentations regarding the Court’s transition from the current e-filing system, Advanced Court Engineering (ACE), to the Case Management/Electronic Case File (CM/ECF) system. The presentations will cover information about the changes, what new procedures will be in effect and features of the new system. The first presentation will be held from 10:30 to 11:30 a.m., June 23, in Albuquerque at the Pete V. Domenici United States Courthouse, 333 Lomas Blvd NW, in the Jury Assembly Room on the second floor. The second presentation will be held from 11 a.m. to noon, June 26, in Las Cruces at the Harold Runnels Federal Building and United States Courthouse, 200 E. Griggs, in the Jury Assembly Room on the second floor. For additional information, visit www.nmdistcourt.us/cmemcf or contact the CM/ECF Help Desk, (505) 348-2075.

**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.

**Attorney Support Group**
The next Attorney Support Group meeting will be held at 5:30 p.m., July 3, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

**Bankruptcy Law Section Fair Credit Reporting Act Training**
The Bankruptcy Law Section will present a free training on the Fair Credit Reporting Act from 10 a.m. to noon, Aug. 11, at the State Bar Center. This training is open to all attorneys. Bankruptcy attorneys nationwide have discovered that post-discharge debtors often face problems that can be remedied through a Fair Credit Reporting Act claim. Consumer law attorneys Richard N. Feferman and Rob Treinen, of Feferman & Warren, along with consumer bankruptcy attorney Alfred M. Sanchez, will present. For further information, call Alfred M. Sanchez, (505) 242-1979. Materials will be provided.

**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 Veronica Cordova, vcordova@nmbar.org, or (505) 797-6039, with questions.
**ENews Launched June 8**

ENews is a weekly e-mail newsletter that will be sent every Thursday to active State Bar members and Paralegal Division members. ENews was designed to curtail the amount of e-mail that members receive from the State Bar with one weekly communication that compiles information, news and resources. Members who have not received ENews and wish to do so must submit their e-mail address to the State Bar at address@nmbar.org.

**Senior Lawyers Division Annual Meeting**

The Senior Lawyers Division will hold its annual meeting at 2:30 p.m., July 21, during the State Bar's annual meeting in Taos. Agenda items include discussion of the 2007 budget request and the oral history project. Other agenda items should be sent to Chair Barbara Everage, EverageLawFirm@aol.com or (505) 842-1248.

**Proposed Bylaws Amendments**

At their April 21 meeting, the Board of Bar Commissioners reviewed the proposed amendments to the Senior Lawyers Division bylaws. The Board removed the requirement that amendments be made only at annual meetings. Visit www.nmbar.org, select Divisions/Sections/Committees and navigate to the Senior Lawyers Division page and review the proposed amendments that will be on the Board of Bar Commissioner’s July 20 agenda. Send comments by July 7 to Christine Morganti at the State Bar, cmorganti@nmbar.org, or by fax to (505) 828-3765.

**Solo and Small Firm Practitioners Section Meeting and CLE**

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.

Board members should arrive at 11:20 a.m. for a meeting. The primary agenda item will be to determine whether to hold meetings during the summer or resume in September.

**Technology Committee Tag Up–Free Workshop**

The State Bar Technology Committee is presenting a free one-hour workshop from 5 to 6 p.m., June 22, at the State Bar Center. The presentation will demonstrate social bookmarking through http://del.icio.us, a free Web-based tool that provides storage of bookmarks and retrieval from any location at which an Internet connection exists. People who use computers in multiple locations (e.g., one at home and one at work), or receive repeated requests from colleagues to provide Web site URLs, will find a social bookmarking service very beneficial. Paralegals, attorneys and support staff are welcome, but the class is limited to 11 attendees. Make reservations by June 20 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

**Young Lawyers Division Annual Meeting**

The Young Lawyers Division will hold its annual meeting at 10 a.m., July 22, during the State Bar's annual meeting in Taos. Agenda items should be sent to Chair Carolyn Ramos, scramos@btblaw.com or (505) 884-0777.

**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:

- **13th Judicial District Attorneys Office, Cibola County** 515 High Street, Grants
- **Cuddy, Kennedy, Albetta & Ives, L.L.P.** 1701 Old Pecos Trail, Santa Fe
- **State Bar of New Mexico** 5121 Masthead NE, Albuquerque
- **The Romero Law Firm** 1001 5th Street NW, Albuquerque
- **Butt, Thornton & Baehr, PC.** 4101 Indian School Road NE, Albuquerque

**State 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.

**OTHER BARS**

**Albuquerque Bar Association**

**Monthly Luncheon and CLE**

The Albuquerque Bar Association's monthly luncheon will be held at noon, July 11, at the Albuquerque Petroleum Club. Everything You Wanted to Know about the ACLU But Were Afraid to Ask will be presented by George Bach, staff attorney, and Peter Simonson, executive director for the American Civil Liberties Union of New Mexico (ACLU-NM).

From 1:30 to 2:30 p.m., the CLE, Update on Lesbian, Gay, Bisexual and Transgender Law, will be presented by George Bach, ACLU-NM staff attorney, and will qualify for 1.0 general CLE credits. This short CLE will provide a historical overview and general update on legal issues, including employment discrimination, same sex marriage and domestic partnerships. The CLE should be of particular interest to counsel for employers, personnel directors or any practitioner in the areas of civil rights and employment law.

Lunch only: $20 members/$25 non-members; lunch and CLE: $40 members/$60 non-members; CLE only: $20 members/$30 non-members.

Register for lunch by noon, July 10. 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 nmcsladir@aol.com, or call (505) 992-0050. Discounts and partial scholarships are available for NMCDLA members.

NM Women’s Bar Association
Bi-Monthly Networking Lunch

The next networking luncheon of the New Mexico Women’s Bar Association will be held from noon to 1:30 p.m., July 12, at NYPD Pizza, 215 Central Avenue, NW, Albuquerque. Guest speakers are judicial candidates: The Honorable Ken Martinez (2nd Judicial District Court), The Honorable Julie Atiwies (Metropolitan Court, Division 18) and attorney Sanford Siegel. Each candidate will give a brief presentation and respond to questions from the floor.

Lunch is ordered off the restaurant menu with payment made directly to NYPD Pizza. Register for the luncheon no later than July 6 with Rendie Baker-Moore, nmcsladmst@msn.com or Sue Chappell, sgc@sutinfirm.com. The luncheons are open to all interested persons.

OTHER NEWS
American Inns of Court Foundation
Nominations Solicited for National Award

In October, the American Inns of Court Foundation will hold its Celebration of Excellence in Washington, D.C., for the purpose of publicly recognizing those judges and lawyers that have demonstrated exemplary service to the profession, the public and the American Inns of Court movement. Three national awards will be presented. The Lewis F. Powell, Jr., Award for Professionalism and Ethics, the A. Sherman Christensen Award and the Sandra Day O’Connor Award for Professional Service.

Nominations of one or more colleagues must be received by June 30 by letter, with supporting materials and other justification. Visit www.innssofcourt.org and click on the awards box for complete information. Nominations and questions should be directed to Cindy Dennis, Awards and Scholarships Coordinator, cedenis@innssofcourt.org, or (800) 233-3590, ext. 104.

Business and Employer Workshops

The New Mexico Taxation and Revenue Department and the Internal Revenue Service are offering free, one-day workshops in Albuquerque for businesses with or without employees. These workshops are designed to address the tax requirements for new businesses and existing businesses.

The New Business Workshops are for all new business owners. Items to be covered include New Mexico gross receipts tax, IRS filing requirements and a brief summary of other new business issues. New Business Workshops are offered the first, second and third Tuesday of every month.

The New Employer Workshops are for small businesses that have employees or plan to have employees. Regulatory and tax filing requirements from six different federal and state agencies will be covered. New Employer Workshops are offered the fourth Tuesday of every month.

All workshops will be held at the New Mexico Taxation and Revenue Department, 5301 Central, NE (Bank of the West building), 10th Floor, Conference Room A, 8:15 a.m. to 3:45 p.m., with a one-hour lunch break. The workshops are free of charge and no advance registration is required.

Workshops scheduled for new businesses are: June 20; July 11 and 18; Aug. 1, 8 and 15; Sept. 5, 12 and 19; Oct. 3, 10 and 17; Nov. 7, 14 and 21; Dec. 5, 12 and 19.

Workshops scheduled for new employers are: June 27; July 25; Aug. 22; Sept. 26; Oct. 24; Nov. 22; and Dec. 26.

For additional information, contact the State of New Mexico Taxation and Revenue Department, (505) 841-6200.

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.

National Legal Fiction Writing Competition for Lawyers

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

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

By Judith L. Wood, Esq.

The American Immigration Lawyers’ Association (AILA) published the second edition of the Immigration Litigation Toolbox in 2005 (http://www.ailapubs.org/ail-littool.html) in order to give practitioners a working guide. The book is not only about litigation, but includes some preliminary topics—such as FOIA requests and release of medical records—that can be helpful in cases that may never need litigation. I would recommend the Toolbox for anyone who practices immigration law and who will not abandon a client at the first sign of frustration or trouble with a government agency. It is also a good buy for those who already have the first edition. The 2005 edition not only keeps up with changes in immigration law affecting administrative and judicial remedies, but adds sample pleadings and motions for procedures that were not covered in the first edition. The cost of the book is $139 for AILA members and $205 for non-members.

Immigration lawyers have typically been reluctant to litigate against the federal agencies with which they interact. Even for those not reluctant to litigate, practically no solo practitioner and few small firms have experience broad and current enough to move confidently in all the areas that this book covers. With 647 pages of text, the book is 51 percent bigger than the 2001 edition. The number of contributors has increased from 23 to 40, adding documents and practice pointers that can benefit even highly skilled practitioners and can put the less experienced quickly on the right path.

The book includes valuable and well organized practice advisories in every area of litigation practice and gives 131 samples of pleadings, motions and similar functional documents. The pleadings and motions (but not descriptive material such as practice advisories, instructions for using the documents and official memos) are provided on a CD in MS Word format. The sample documents include descriptive cover sheets plus informative practice advisories on such topics as filing a mandamus action, requesting fees under the Equal Access to Justice Act (EAJA) and how to file a petition for review in the circuit court.

The CD documents are named only with three-digit numbers corresponding to the documents in the book; users may want to copy them to their hard disk and give them mnemonic names as they are used. The documents all seem to be formatted with automatic hyphenation, with a very narrow hyphenation zone which can be quite annoying in Word Perfect. All the documents I opened caused WP 12 to report precarious instability but not actually to crash. I needed to delete the hyphenation code from documents as soon as possible. After I turned off all hyphenation prompts, loading documents in WP worked much better.

Judith L. Wood, Esq., serves on the board of the Immigration Law Section.

(Editor’s Note: It is very unclear, given the current procedural posture of both the U.S. House and U.S. Senate bills, what effects comprehensive immigration reform will have on any immigration law book. However, updates to the Litigation Toolbox ultimately arising from the pending legislation can 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. The Bar Bulletin’s 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.)
CONGRATULATIONS TO THE
2006 STATE BAR OF NEW MEXICO
ANNUAL AWARD RECIPIENTS

COURAGEOUS ADVOCACY AWARD
Gary C. Mitchell

OUTSTANDING CONTRIBUTION AWARD
Mary Ann Romero

OUTSTANDING JUDICIAL SERVICE AWARD
Judge James W. Counts

OUTSTANDING PROGRAM AWARD
State Bar of New Mexico
Consumer Issues Workshops

OUTSTANDING YOUNG LAWYER OF THE YEAR AWARD
Hector H. Balderas

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Graham Browne (Posthumously)
Alice Tomlinson-Lorenz

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QUALITY OF LIFE–LAWYER AWARD
B. Paul Briones

QUALITY OF LIFE–LEGAL EMPLOYER AWARD
Little & Gilman-Tepper, P.A.

FIFTY-YEAR PRACTITIONERS
Anthony F. Avallone
Paul A. Cooter
James G. Chakeres
Louis J. Vener
Eliu E. Romero
Elvin Kanter

The State Bar of New Mexico will present the awards during the Friday, July 21, luncheon in Taos. To register for the luncheon and annual meeting and for a detailed list of programs/events for the annual meeting, see the May 15 Bar Bulletin insert or visit the State Bar’s Web site at www.nmbar.org.
To raise funds, Equal Access to Justice is holding a Silent Auction during the State Bar’s Annual Meeting in Taos on July 21 at the Taos Convention Center.

The Equal Access to Justice Campaign is a program that helps New Mexico families and individuals get the civil legal service help they need.

We are looking for items such as:
- beauty/spa services
- sporting goods
- theatre and entertainment
- artwork
- food and wine
- travel
- jewelry
- clothes
- home decorating items
- or anything you think would be of interest

You may also make a money donation and we will buy an auction item on your behalf.

As a contributor to our silent auction, you and/or your organization will be promoted throughout the State Bar’s three-day Annual Meeting, in the event program, and in the State Bar’s weekly Bar Bulletin. Your donation is tax deductible.

If you would like to donate an item or have a lead for us to contact, please contact Wendy Basgall at 797-6051, or wbasgall@nmbar.org.
### Legal Education

#### June

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<td><strong>Lurking Dangers and What Lawyers Should Know about the New Mexico Real Estate Contract</strong></td>
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<td><strong>Step-by-Step Guide to Understanding Easements</strong></td>
<td>Albuquerque National Business Institute 6.0 G (800) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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**Programs have various sponsors; contact appropriate sponsor for more information.**

- **G** = General
- **E** = Ethics
- **P** = Professionalism
- **VR** = Video Replay
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28  Experts: Work Products and Discovery
    Teleconference
    TRT, Inc.
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28  Managing Complex Construction Law Issues
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    National Business Institute
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29  Ethical Dilemmas: How to Solve Them
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    Satellite
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    Center for Legal Education of NMSBF and Small Firm Practitioners Section
    3.6 G
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    www.nmbar.org

30  Professionalism and Ethics Issues Regarding Addictive Behaviors
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JULY

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7  Sarbanes-Oxley: Does Privilege Still Exist?
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11  Circular 230 & Estate Planners:
    One Year Developments
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    (505) 797-6020
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11  Do You Really Want This Case?
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    Santa Fe
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    (505) 982-3873

12  Investment Strategies: A Financial Product Primer
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    Edward Jones
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    (800) 441-2018
    www.edwardjones.com

12  Preparing for the Expert Witness Deposition
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    Paralegal Division of New Mexico
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12  Recent Trends Involving the Law of Arrest, Search and Seizure
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    Lorman Education Services
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13  2006 UCC Article 9 (Secured Transactions) Update
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    (505) 797-6020
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13  Employment Law Update
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    Sterling Education Services
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13  Medicaid and Medicaid Planning in New Mexico
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### Writs of Certiorari

**Effective June 19, 2006**

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<td>29,841</td>
<td>Lujan v. NM Probation &amp; Parole</td>
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<td>29,840</td>
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<td>COA 26,259</td>
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<td>29,839</td>
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<td>COA 24,849</td>
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**WRITS OF CERTIORARI**

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

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

**EFFECTIVE JUNE 19, 2006**

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Slip Opinions for Published Opinions may be read on the Court’s website:

{1} This case requires us to determine whether the admission of preliminary hearing testimony of an unavailable witness at Defendant’s trial violated the Confrontation Clause of the Sixth Amendment under Crawford v. Washington, 541 U.S. 36 (2004), and whether Defendant was entitled to a mistrial when a witness invoked his Fifth Amendment privilege before the conclusion of the preliminary hearing. We hold that Defendant was afforded his Confrontation Clause rights and that no abuse of discretion was committed in denying his motion for a mistrial. The remaining issues raised by Defendant were abandoned. State v. Aragon, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct. App. 1990) (“All issues raised in the docketing statement but not argued in the briefs have been abandoned.”). We therefore affirm.

BACKGROUND

{2} Officer Donald Jackson and Detective Walter Coburn of the Hobbs Police Department were dispatched to the home of Tarious Ford to investigate a robbery call in which Ford and a guest, Tracy Eagans, were the alleged victims. As a result of their investigation, a criminal complaint was filed in the magistrate court charging Defendant with aggravated burglary, armed robbery, and conspiracy to commit armed robbery. Defendant was arrested and counsel was appointed to represent him. The same attorney continued to represent Defendant throughout the case.

{3} A preliminary hearing was then held in the magistrate court at which Ford and Eagans testified about the incident at Ford’s home. Their testimony was under oath and was tape recorded. Defendant was present during the entire hearing and his attorney cross-examined both witnesses about their testimony without any limitations being imposed by the magistrate judge on the scope or content of the cross-examination. At the conclusion of the preliminary hearing the magistrate judge made a finding of probable cause and Defendant was bound over for trial in district court on all charges.

{4} At trial the evidence was as follows. Officer Jackson and Detective Coburn were dispatched to a robbery complaint at Ford’s home. Eagans, a friend who was visiting Ford, told the officers that a mutual acquaintance of theirs, Fabian Marshall, had entered Ford’s home without knocking as was his custom. Three other men, Chuck Green, Keylie Martin, and Defendant followed Marshall into Ford’s home. Once inside, Martin used a gun and Green a screwdriver to force Eagans and Marshall to remove their clothing. In the meantime, Defendant hit Ford on the shoulder with a gun and forced him to lie down on the floor. The three men then took Ford’s pager, at least one of his girlfriend’s cellular telephones, an X Box video game player and $547 in cash belonging to Eagans and left. After the police officers arrived, Ford’s telephone rang and his caller identification showed that the call originated from his girlfriend’s stolen cellular telephone. Ford recognized the caller as Defendant. Ford held the receiver away from his ear to allow Detective Coburn to hear, and Coburn heard the caller inform Ford that he took the items from Ford’s home because someone owed him $400. Detective Coburn listened to a second call a few minutes later in the same manner in which the caller said that if Ford gave him $400 he would return the stolen property.

{5} Defendant rested without presenting any evidence on his own behalf. In closing arguments, he asked the jury to disregard Ford’s testimony entirely because he was not able to confront him on all the issues. He also argued that the elusiveness and reluctance of the victim witnesses Eagans and Marshall to testify made them unbelievable. Defendant was convicted of all the charges.

DISCUSSION

ADMISSION OF THE PRELIMINARY HEARING TESTIMONY UNDER CRAWFORD

{6} Defendant’s argument that Ford’s preliminary hearing testimony was admitted in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution under Crawford presents a question of law which we review de novo. State v. Dedman, 2004-NMSC-037, ¶ 23, 136 N.M. 561, 102 P.3d 628.

{7} Prior to trial the State filed a motion to admit into evidence the tapes of the preliminary hearing testimony of Ford and Eagans pursuant to Rule 11-804(B)(1) NMRA as the testimony of unavailable witnesses. Following two evidentiary hearings in which the State demonstrated its extensive efforts to attempt locating and producing Ford and Eagans to testify at trial, the trial court granted the motion. In doing so, the
trial court acknowledged that Defendant could not have cross-examined them at the preliminary hearing on all issues that were relevant to his defense because all the issues were not known at that time. Admission of the testimony was not unqualified. The trial court ruled that Defendant would be able to argue to the jury that these witnesses were not credible because when they could not be located, the charges against the co-defendants Keylie Martin and Chuck Green were dismissed. Nevertheless, Defendant objected, arguing that admitting the preliminary hearing tapes at trial would violate his constitutional right to confront the witnesses against him. Eagans was ultimately located and subpoenaed to testify at the trial, so only Ford’s preliminary hearing testimony was admitted.

[8] We first determine whether the preliminary hearing testimony was properly admitted under the Rules of Evidence because if the hearsay testimony was improperly admitted to Defendant’s prejudice, we are not required to decide the Crawford constitutional issue. The admissibility of evidence as an exception to the hearsay rule is separate from the objection based on confrontation grounds, and its admission is reviewed for an abuse of discretion. Dedman, 2004-NMSC-037, ¶ 23.

[9] The admissibility of hearsay testimony of an “unavailable” witness who testifies in a preliminary hearing is governed by Rule 11-804(B)(1). Ford satisfies the definition of an “unavailable” witness because the State was unable to procure his attendance at the trial. See Rule 11-804(A)(5) (defining “[u]navailability as a witness” in part to mean “the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means”). Rule 11-804(B)(1) provides, “[t]estimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination[,]” is not excluded by the hearsay rule. (Emphasis added.) We must therefore determine whether Defendant had an “opportunity and similar motive” to develop Ford’s testimony at the preliminary hearing as contemplated by the Rule.

[10] In State v. Massengill, 99 N.M. 283, 657 P.2d 139 (Ct. App. 1983), the defendant argued that the preliminary hearing testimony of an unavailable witness was erroneously admitted, contending he did not have the same motive to cross-examine the witness at trial as at the preliminary hearing. Id. at 284, 657 P.2d at 140. His argument was rejected on the rationale that the defendant had an opportunity and motive to develop the testimony given by the witness at the preliminary hearing concerning whether a crime had been committed and whether the defendant committed the crime. His motive to develop the testimony at trial was similar—to ask questions concerning the commission of a crime and the defendant’s involvement. Id. at 285, 657 P.2d at 141. Further, the fact that the defendant chose not to further cross-examine the witness was a matter of tactics, not motive. Id. In coming to this conclusion the court emphasized that a defendant has a due process right to confront the witness at trial as at the preliminary hearing and that witnesses may be cross-examined and their credibility and character tested. Id. at 284-85, 657 P.2d at 140-41.

[11] The Massengill reasoning was subsequently approved by our Supreme Court in State v. Gonzales, 113 N.M. 221, 226, 824 P.2d 1023, 1028 (1992). However, Gonzales also recognized that “if the circumstances and facts of a particular case indicate that there was a real difference in motive or other limitation on meaningful cross-examination, the [prior] testimony should not be admitted.” Id. Examples cited were where defense counsel had no motive to cross-examine a witness at the first trial because of an agreement with the prosecutor that a judgment of not guilty by reason of insanity would be entered, the witness later died, and his recorded testimony was admitted. (1) See also State v. Baca, 99 N.M. 221, 657 P.2d 139 (Ct. App. 1983); (2) where objections of the prosecutor were sustained effectively limited the defendant’s involvement in the scope and nature of his cross-examination (State v. Maguire, 539 So. 2d 50 (La. Ct. App. 1988), withdrawn in part, 561 So. 2d 801 (La. Ct. App. 1990)); and where the testimony from an earlier trial of a co-defendant was determined not admissible because the motive to develop the testimony as to the defendant did not exist (State v. Deskins, 380 S.E.2d 676 (W. Va. 1989)). Gonzales, 113 N.M. at 226-27 & n.3, 824 P.2d at 1028-29 & n.3. Another exception that was later recognized was where the State had no reason to challenge a witness’ grand jury testimony when medical evidence that contradicted the witness was unknown at the time the witness testified before the grand jury. See State v. Baca, 1997-NMSC-045, ¶ 26, 124 N.M. 55, 946 P.2d 1066.

[12] Applying the foregoing authorities, we conclude it was not an abuse of discretion to admit Ford’s preliminary hearing testimony at Defendant’s trial as an exception to the hearsay rule under Rule 11-804(B)(1). Defendant was freely allowed to cross-examine Ford without any restrictions at the preliminary hearing about whether any crime was committed and whether Defendant was involved. He therefore had an “opportunity and similar motive” to cross-examine Ford at the preliminary hearing as he would have at trial, and there are no circumstances showing a real difference in Defendant’s motive to cross-examine Ford differently at the preliminary hearing than at trial. When Ford later became unavailable to testify at the trial, his recorded preliminary hearing testimony became admissible as an exception to the hearsay rule.

[13] In Crawford, the United States Supreme Court revised the framework for determining when the admission of hearsay evidence violates the Confrontation Clause of the Sixth Amendment. Under Ohio v. Roberts, 448 U.S. 56 (1980), the admission of hearsay evidence did not violate the Confrontation Clause where: (1) the prosecutor demonstrated that the declarant whose statements it wished to use against the defendant was unavailable; and (2) after the witness was shown to be unavailable, the trial court found that the statement possessed adequate “indicia of reliability.” Id. at 65-66. A hearsay statement was deemed sufficiently reliable to satisfy the Confrontation Clause when it: (1) fell within a “firmly rooted hearsay exception”; or (2) possessed “particularized guarantees of trustworthiness.” Id. at 66. Our Supreme Court has concluded that Crawford did not change this approach for “nontestimonial” evidence. Dedman, 2004-NMSC-037, ¶¶ 32-33; see also Crawford, 541 U.S. at 68. However, as to “testimonial” evidence the Confrontation Clause is violated unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine. Specifically, the Supreme Court held:
Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. Crawford, 541 U.S. at 68. (emphasis added) (footnote omitted).

14 The evidence that was admitted against Defendant was “prior testimony at a preliminary hearing.” It is therefore “testimonial” evidence as defined by the Supreme Court, and subject to the Crawford requirements. Defendant does not argue that the State made an insufficient attempt to locate Ford or that he was not unavailable. The question therefore posed in this case is whether Defendant had a sufficient “prior opportunity for cross-examination” of Ford to satisfy Crawford. If he did, no Confrontation Clause violation occurred.

15 Whether admission of the preliminary hearing testimony violates the Confrontation Clause under the standard articulated by Crawford is an issue of first impression in New Mexico. However, our courts have decided other cases under Crawford that guide our decision in this case. In State v. Duarte, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054, we construed Crawford as holding that an accomplice’s testimonial statement was inadmissible under the Confrontation Clause “unless the accomplice was unavailable and the defendant had a prior opportunity to cross-examine the accomplice concerning the statement.” Id. ¶ 10 (emphasis added). State v. Alvarez-Lopez, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699, and State v. Johnson, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, followed. In both cases our Supreme Court held that the admission of a statement made by an accomplice in a custodial police interview violated Crawford. In Alvarez-Lopez, the court said that the “[d]efendant had no opportunity to cross-examine [the accomplice] at a preliminary hearing, grand jury proceeding, or otherwise on these testimonial statements.” Alvarez-Lopez, 2004-NMSC-030, ¶ 24 (emphasis added). Similarly, the defendant in Johnson did not “at any time have an opportunity to cross-examine [the accomplice] on his statement.” Johnson, 2004-NMSC-029, ¶ 6 (emphasis added).

16 In line with the reasoning of the foregoing cases, we conclude that the admission of a “testimonial” statement given by a witness under oath in a preliminary hearing does not violate the Confrontation Clause under Crawford where: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the statement that is now being offered into evidence against him. We note that our Rules of Evidence conceivably provide greater protection than Crawford. While Rule 11-804(B)(1) requires the defendant to have had both an “opportunity and similar motive” to cross-examine the statement for it to be admissible, Crawford only requires that the defendant had an “opportunity for cross-examination” of the statement.

17 Our conclusion is consistent with the result reached in cases from other states. See State v. Young, 87 P.3d 308, 316-17 (Kan. 2004) (holding that the preliminary hearing testimony of an unavailable witness was admissible at trial under Crawford because counsel who represented the defendant at the preliminary hearing had an opportunity to cross-examine the witness); Primeaux v. State, 2004 OK CR 16, ¶ 64, 88 P.3d 893, 905 (allowing use of preliminary hearing testimony of unavailable witness at trial, stating that when a defendant is afforded the opportunity to cross-examine the witness and avails himself of that right, Crawford is satisfied); see also State v. Hannon, 703 N.W.2d 498, 507-08 (Minn. 2005) (holding that the admission in a second trial of testimony given by an unavailable witness in the first trial did not violate Crawford where counsel had a full opportunity to cross-examine the witness at the first trial, embracing credibility and all other issues, noting that Crawford only requires that the defendant had a prior opportunity to cross-examine the witness).

18 Two cases hold that admitting preliminary hearing testimony violated Crawford: State v. Stuart, 2005 WI 47, 695 N.W.2d 259, and People v. Fry, 92 P.3d 970 (Colo. 2004) (en banc). However, those cases are not contrary to our holding here because both relied on the fact that the applicable procedural rules governing preliminary hearings barred the defendant from fully cross-examining the witness, particularly on matters of credibility. Stuart, 695 N.W.2d at 265-67; Fry, 2005 WI 47, ¶¶ 29-38. These two cases are therefore consistent with the exceptions for admitting prior testimony set forth by our own Supreme Court in Gonzales.

19 Defendant argues that because “there was a real difference in motive and ability to cross-examine between the preliminary hearing and the trial” he was “unable to adequately present his theory of the case” at trial. We disagree. At the preliminary hearing and trial, Defendant was charged with the same crimes, he had the same defense counsel, and the same opportunity and motive to cross-examine Ford. Defendant was given an unrestricted right to cross-examine the statements Ford gave at the preliminary hearing which were later admitted at trial. This satisfied Crawford. The fact that Defendant might have engaged in additional cross-examination if Ford testified at trial does not require a contrary result.

20 A comparison of Eagans’ live trial testimony with Ford’s tape recorded preliminary hearing testimony demonstrates that while Ford’s testimony is not word-for-word identical, the testimony interlocks, and the core evidence that supports Defendant’s convictions is uncontested and consistent. Eagles and Ford both testified that they were at Ford’s home on April 20, 2003, when Marshall arrived with three other individuals, including Defendant. They differed as to whether Marshall had permission to enter the house but both stated that the three men who entered the house after Marshall were not acquaintances who had authorization to enter without knocking. Both witnesses testified that Defendant and another man drew guns once inside while the third brandished a screwdriver. They both testified that Defendant held a gun to Ford’s head and hit him on the shoulder with a gun while...
giving orders to the other two men. Both witnesses identified Defendant’s gun as a .09 millimeter “highpoint.” They also both testified that two of the men demanded that Eagans and Marshall remove their clothing and sit on the couch while the two men went through their clothes and that Defendant forced Ford to lay on the floor. Both witnesses testified that the three men took an X Box, X Box games, a cell phone, and the cash. Finally, both witnesses testified that the three men attempted to force Ford to go with them when they departed but that Ford refused.

[21] We therefore hold that the admission of Ford’s preliminary hearing testimony was consistent with Crawford and not in violation of the Confrontation Clause of the Sixth Amendment.

DENIAL OF MOTION FOR MISTRIAL

[22] Defendant argues that he should have been granted a mistrial because Marshall exercised his Fifth Amendment privilege not to testify in the presence of the jury. We review the refusal of the trial court to grant Defendant’s motion for a mistrial for an abuse of discretion. See State v. Gutierrez, 2005-NMCA-093, ¶ 9, 138 N.M. 147, 117 P.3d 953, cert. granted, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 954. Finding no abuse of discretion by the trial court in this case, we affirm.

[23] Marshall began his testimony by confirming he did not want to testify and acknowledging he was incarcerated and awaiting trial on drug charges. Marshall said he knew Eagans and Ford, having gone to junior college with both of them. He also knew Defendant and identified him. After then confirming that he went to Fords’ house on the date in question, he invoked his Fifth Amendment privilege against self-incrimination, whereupon the prosecutor said he had no further questions. When asked if he had any cross-examination, defense counsel requested a bench conference. At the bench conference, defense counsel said Marshall had been in custody and asserted he should have been advised that Marshall was going to invoke his Fifth Amendment privilege. Since Marshall had invoked the privilege in the presence of the jury, defense counsel made a motion for a mistrial.

[24] The prosecutor responded:

“I talked to [Marshall] previously. He told me more than what he said today, and then he said he didn’t want to testify and we didn’t get any further. Our conversation, he never mentioned invoking a Fifth Amendment privilege to me, and I do not know of any reason that he has a Fifth Amendment privilege, although I can certainly see some scenarios where he might.

Defense counsel then argued that invoking the Fifth Amendment privilege in the presence of the jury had “all kinds of implications” that were prejudicial. The prosecutor responded that Marshall’s invocation of the privilege in the jury’s presence was more prejudicial to the State than Defendant under the circumstances, and the trial court agreed.

[25] The motion for a mistrial was denied, and defense counsel asked that Marshall’s testimony be stricken and the jury was advised to disregard his testimony. At the conclusion of the bench conference, Marshall was excused after defense counsel announced in open court in the presence of the jury he had no questions to ask him. At the conclusion of the case, and without any objection from the State, the trial court instructed the jury, “You will recall that [Marshall] took the benefit of the Fifth Amendment on his testimony and refused to testify. Based on his doing that, you should disregard his testimony entirely.”

[26] In State v. Vega, 85 N.M. 269, 511 P.2d 755 (1973), the record established that the prosecution knew witnesses it intended to call would invoke the Fifth Amendment. Nevertheless, the prosecutor called the witnesses, and they invoked their privilege in the presence of the jury. The defendant’s motions for mistrial were denied. Id. at 270, 511 P.2d at 756. We did not ascribe any particular motive to the prosecutor, but focused our attention on the issue of prejudice to the defendant. Id.

We have since held that it is not permissible to call witnesses before the jury, knowing that they will invoke the Fifth Amendment privilege before the jury, for the purpose of having them do so. State v. Crislip, 110 N.M. 412, 417, 796 P.2d 1108, 1113 (Ct. App. 1990), overruled on other grounds by Santillanes v. State, 115 N.M. 215-20, 849 P.2d 358-63 (1993). To determine if prejudice occurred in Vega, we examined the surrounding circumstances, focusing on two factors, each of which would suggest a distinct ground for finding prejudice: (1) error could be based “upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege”; and (2) error could “rest upon the conclusion that, in the circumstances of a given case, inferences from a witness’ refusal to answer added critical weight to the prosecution’s case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.” Vega, 85 N.M. at 271, 511 P.2d at 757 (internal quotation marks omitted) (citing Namet v. United States, 373 U.S. 179, 186-87 (1963)). In Vega, invocation of the privilege by the witnesses in the presence of the jury created an unfair inference of guilt against the defendant in favor of the State. 85 N.M. at 271-72, 511 P.2d at 757-58. Therefore, we reversed.

[27] In State v. Worley, 100 N.M. 720, 676 P.2d 247 (1984), the witness was granted immunity but still refused to answer certain questions, asserting he had a right not to answer the questions under the Fifth Amendment in the presence of the jury. Id. at 723-24; 676 P.2d at 250-51. Our Supreme Court held that no reversible error occurred because the prosecutor had a right to assume that the witness would testify or that his testimony would be compelled; the prosecutor did not build his case from inferences supplied by the witness’ silence; and the presentation of testimony untested by cross-examination did not result when the witness refused to testify. Id. at 725, 676 P.2d at 252.

[28] This case does not reflect a conscious case of prosecutorial misconduct in which the prosecutor attempted to build his case out of inferences arising from the use of Marshall’s testimonial privilege. The State explained at trial that while Marshall had indicated earlier that he did not want to testify, he did not mention invoking his Fifth Amendment privilege nor did the State know of any reason why Marshall chose to invoke his right. Further, Marshall’s invocation of his Fifth Amendment privilege in the jury’s presence did not result in the addition of critical weight to the State’s case in a form not subject to cross-examination. His testimony encompassed only (1) an acknowledgment that he knew Eagans, Ford, and Defendant, (2) an in-court identification of Defendant, and (3) an admission that he used to go to Ford’s house on occasion. This testimony can hardly be deemed to be adding “critical weight” to the State’s case given the other evidence in the case. See State v. Polsky, 82 N.M. 393, 402, 482 P.2d 257, 266 (Ct. App. 1971) (concluding that under the circumstances, no impermissible inference as to the defendant’s guilt was likely to have been drawn by the jury from the refusal of the witness to answer
the questions asked of her). Any possible prejudice created by Marshall’s invocation of his Fifth Amendment right was remedied by the curative instruction given by the trial court. See Worley, 100 N.M. at 724, 676 P.2d at 251 (noting that the trial court instructed the jury not to consider prior statements made by the witness or the fact that the witness refused to answer certain questions).

{29} Finally, we note that the guidelines contained in our Rules of Evidence concerning the claim of a privilege were satisfied. Rule 11-513 NMRA is entitled, “Comment upon or inference from claim of privilege; instruction,” and it provides:

A. Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

B. Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

C. Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

{30} For the foregoing reasons it was not an abuse of discretion for the trial court to deny Defendant’s motion for a mistrial.

CONCLUSION

{31} The judgment and sentence are affirmed.

{32} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

JAMES J. WECHSLER, Judge

Certiorari Denied, No. 29,779 and No. 29,781, May 25, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-060

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellee, versus MARY BETH JONES, Defendant-Appellant. No. 25,507 (filed: March 8, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

LINDA M. VANZI, District Judge

RUDOLPH A. LUCERO
TOCCO A. SCHWARZ
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Appellee

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Albuquerque, New Mexico

WILLIAM H. LAZAR
Tesuque, New Mexico
for Appellant

BACKGROUND

{2} Mary Beth Jones was injured when the car in which she was a passenger, driven by Kathy Williams, was struck by a car driven by Ethel Dorand. The accident was entirely the fault of Dorand, who had automobile liability insurance with limits of $100,000. Williams carried $100,000 of uninsured motorist (UM) coverage with State Farm Mutual Automobile Insurance Company. Jones carried UM insurance with Twin City Fire Insurance Company, with policy limits of $500,000. Jones settled her liability claim with Dorand’s insurance company for the policy limits of $100,000, and then made claims against State Farm and Twin City for the payment of the policy limits of uninsured (UIM) motorist benefits. The parties do not dispute that Jones’s damages are at least equal to the aggregate of all uninsured motorist coverage, or $600,000. Twin City is not a party to this dispute.

{3} State Farm filed an action for a declaratory judgment denying any liability to Jones under its UIM policy covering Williams’s car. In its complaint and motion for summary judgment, State Farm asked the district court to determine as a matter of law that Dorand’s vehicle did not meet State Farm policy’s definition of an underinsured vehicle or, alternatively, that State Farm was entitled to a contractual offset of its Class II UIM coverage by the payment of the tortfeasor’s $100,000 policy limits, effectively reducing its liability to zero. The district court held that although the State Farm policy did cover Jones (as Williams’s passenger), State Farm ultimately had no liability since its $100,000 coverage could be offset by the $100,000 paid by the tortfeasor. Thus, the district court granted summary judgment in favor of State Farm, and Jones appeals. As we discuss below, we agree that Jones was covered by the State Farm policy. We more fully address the contractual language of that policy and its nature in connection with our discussion of the issues.

DISCUSSION

{4} We address the following issue: Where an injured passenger stacks Class II primary coverage and Class I secondary UIM coverage, and the amount of damages exceed the available aggregate coverage, how is the statutory offset for liability payments received from a third-party tortfeasor applied? In deciding who gets the statutory offset, we must necessarily address State
Farm’s contention that it is entitled to a contractual offset for the liability payments. We hold that State Farm is not entitled to a contractual offset, and that the statutory offset for liability payments applies to the primary insurer, which in this case is State Farm. We therefore affirm.

5. To effectively understand the parties’ arguments about contractual and statutory offsets, we must first lay out the basic rules of UM/UIM coverage. These rules allow us to evaluate the extent to which Jones is entitled to a contractual liability offset, and State Farm’s contention that it is entitled to a contractual liability offset, and then address the application of the statutory situation facing Jones in this case. We therefore affirm.

STANDARD OF REVIEW

6. “Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Martinez v. All-state Ins. Co., 1997-NMCA-100, ¶ 5, 124 N.M. 36, 946 P.2d 240 (internal quotation marks and citation omitted). This is an appeal from an order granting a motion for summary judgment based only on issues of law without any issues of fact. When the parties agree that the material facts are not disputed, this Court reviews the question of law presented de novo. State Farm Fire & Cas. Co. v. Farmers Alliance Mut. Ins. Co., 2004-NMCA-101, ¶ 5, 136 N.M. 259, 96 P.3d 1179.

ANALYSIS

7. As a starting point, we note that our courts have not yet had an occasion to directly address the issue presented in this case. Therefore, as context for our discussion, we begin with a brief overview of the UM statute and case law interpreting the statute. In light of these rules, we describe the situation facing Jones in this case. We then address the application of the statutory liability offset, and State Farm’s contention that it is entitled to a contractual liability offset.

1. Underinsured Motorist Coverage

8. An UIM is defined by the New Mexico Uninsured Motorist statute, NMSA 1978, § 66-5-301(B) (1983) as follows:

[An] “underinsured motorist” means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured’s uninsured motorist coverage.

(Internal quotation marks omitted). The underlying policy of the UM/UIM statute is “to compensate persons injured through no fault of their own,” by uninsured or inadequately insured motorists. Konnick v. Farmers Ins. Co., 103 N.M. 112, 114, 703 P.2d 889, 891 (1985). “[T]he intent of the Legislature was to put an insured injured in the same position he would have been in had the tortfeasor had liability coverage in an amount equal to the uninsured/uninsured motorist protection purchased for the insured’s benefit.” Schmick v. State Farm Mut. Auto. Ins. Co., 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). New Mexico cases interpreting the statute are guided by the intent of the Legislature and the strong public policy of protecting injured insureds.

2. Class I and Class II Insureds and Stacking

9. In order to effectuate the intent of the Legislature, our Supreme Court has created different categories of insureds and insurers: Class I and Class II insureds, and primary and secondary insurers. “New Mexico recognizes two classes of insureds, each with attendant rights for purposes of stacking [(combining)] uninsured motorist coverage benefits.” Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶ 22, 129 N.M. 698, 12 P.3d 960. A Class I insured is “the named insured . . . [on] the policy, the spouse, and [those] relatives” that reside in the household. Konnick, 103 N.M. at 115, 703 P.2d at 892. A Class II insured is insured by virtue of his or her presence in “an insured . . . vehicle.” Id.

Class I insureds may stack all uninsured motorist policies purchased by the named insured because those policies were purchased to benefit the named insured and his or her family, but Class II insureds may only recover under the policy on the car in which they rode because the purchaser only intended occupants to benefit from that particular policy.

Ponder, 2000-NMSC-033, ¶ 22 (citations omitted). The law in New Mexico is clear that “when an insured injured is the beneficiary of a policy and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverages under which [the] injured insured is a beneficiary may be stacked.” Jimenez v. Found. Reserve Ins. Co., 107 N.M. 322, 325, 757 P.2d 792, 795 (1988) (citation omitted). The term “coverage” in the UIM statute is liberally construed to include coverage from one or more policies purchased for the injured insured’s benefit, including Class I policies, and the Class II policy on the car in which the insured was a passenger. Schmick, 103 N.M. at 219-20, 704 P.2d at 1095-96. The “only limitations to be placed on uninsured/underinsured motorist coverage are that the insured legally be entitled to recover damages and that the negligent driver be either uninsured or underinsured.” Morro v. Farmers Ins. Group, 106 N.M. 669, 671, 748 P.2d 512, 514 (1988) (internal quotation marks and citation omitted).

10. Thus, the amount of coverage available to an injured insured is determined by the aggregate of their Class II and Class I coverage. See Jimenez, 107 N.M. at 325, 757 P.2d at 795 (stating that the law in New Mexico is clear that when an injured insured is the beneficiary of a policy, and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverage under which the injured insured is a beneficiary may be stacked); Morro, 106 N.M. at 671-72, 748 P.2d at 514-15 (holding that an injured insured may stack Class I and Class II coverage to determine a tortfeasor’s underinsured status).

11. Therefore, in this case, Jones is a Class II insured under the State Farm policy, with a limit of $100,000 in UIM coverage. Jones is a Class I insured under the Twin City policy, with a limit of $500,000 in available UIM coverage. Stacking the Class II and the Class I coverages, Jones has a total of $600,000 aggregate UIM coverage. We next turn to the distinction between primary and secondary insurers.

3. Primary Versus Secondary Liability for UIM Payments

12. In addition to Class I and Class II insured status, New Mexico cases also distinguish between a primary and secondary UM/UIM insurer. A primary insurer is the insurer of the vehicle involved in the accident, and owes primary coverage to the limits of its policy if less than the loss suffered. Branchal v. Safeco Ins. Co., 106 N.M. 70, 71, 738 P.2d 1315, 1316 (1987). Any other available insurance becomes secondary to the extent of the injured insured’s injuries and the limits of the secondary insurer’s UIM coverage. Id. In making the distinction between primary and secondary insurers, our Supreme Court in Branchal reasoned that the automobile policy “closest to the risk” ranks ahead of other policies insofar as priority for payment is concerned, and thus is the primary insurer. Id. (internal
quotation marks omitted).
{13} In this case State Farm, as the insurer of the vehicle involved in the accident, is the primary insurer. Twin City is the secondary insurer. Thus, to summarize the classifications, Jones has Class II, primary UIM coverage through State Farm in the amount of $100,000, and Class I, secondary UIM coverage through Twin City in the amount of $500,000. Applying the foregoing rules, we conclude that aggregate UIM coverage available to Jones is $600,000. As we describe below, the primary/secondary classification is central to the statutory offset while the Class I/Class II distinction is relevant to the contractual offset.

4. Statutory Offset for Liability Payments

{14} The UIM statute contemplates that any applicable UIM coverage will be offset by the amount of liability coverage recovered by the insured. Schmick, 103 N.M. at 220, 704 P.2d at 1096. The Court in Schmick stated that “[w]hile our statute does not specifically provide that the insured’s underinsured motorist liability insurance is to be offset by the tortfeasor’s liability coverage. . . such an offset is inherent in our statutory definition of underinsured motorist.” Id. at 223, 704 P.2d at 1099. The Court reasoned that it is apparent from the language of the statute that the amount of the insured’s recovery is limited to the amount of uninsured motorist coverage purchased for the insured’s benefit and “that amount will be paid in part by the tortfeasor’s liability carrier and the remainder by the insured’s uninsured motorist insurance carrier.” Id. Thus, an offset in the amount of the tortfeasor’s liability is required. Id. The issue of which insurer gets the benefit of the statutory offset has not been directly decided in New Mexico, though two cases with similar facts to the present case have indirectly addressed the issue.

{15} In Morro, the issue presented to our Supreme Court was whether an injured passenger could stack Class I and Class II coverage. 106 N.M. at 70, 704 P.2d at 1315. The Court reasoned that the Class II insurer was the primary insurer; its policy was written to cover passengers in its insured’s vehicle, and premiums were paid specifically for that coverage. Tarango, 115 N.M. at 227, 849 P.2d at 370. The Court held that the amount of damages not covered by the liability payment must be paid by the primary, Class II insurer. However, unlike the present case, it was not necessary in Tarango to stack coverage with the secondary, Class I insurer because the amount of UIM benefits required was less than the limit of the Class II insurers’ UIM coverage benefit.

{16} Another variation of the issue arose in Tarango v. Farmers Ins. Co., 115 N.M. 225, 849 P.2d 368 (1993). The plaintiff in Tarango sustained damages of $40,000 when she was hit by a third party while standing near the trunk of a car in which she was a passenger. The plaintiff received a $25,000 liability payment from the third-party tortfeasor. The issue presented was whether the Class II insurer was responsible for paying the entire $15,000 of UIM benefits due to the plaintiff, or whether the Class II and Class I insurers must each pay on a pro rata basis. Our Supreme Court adopted the following reasoning from Branchal:

[It] is the better and more reasonable rule to require the insurer of the vehicle in which the injured party was riding as a passenger, rather than as an owner or driver, to first pay uninsured motorist benefits before the injured party’s insurer may be required to pay under its uninsured motorist coverage.

106 N.M. at 70, 738 P.2d at 1315. The Court reasoned that the Class II insurer was the primary insurer; its policy was written to cover passengers in its insured’s vehicle, and premiums were paid specifically for that coverage. Tarango, 115 N.M. at 227, 849 P.2d at 370. The Court held that the amount of damages not covered by the liability payment must be paid by the primary, Class II insurer. However, unlike the present case, it was not necessary in Tarango to stack coverage with the secondary, Class I insurer because the amount of UIM benefits required was less than the limit of the Class II insurers’ UIM coverage benefit.

{17} Although the facts in Tarango are distinguishable, we find the reasoning persuasive. Specifically, we agree that the insurer closest to the risk, that is the one insuring the vehicle involved in the accident, is primary. The primary insurer should first provide UIM coverage up to the limits of coverage as stated in the policy. After the primary coverage is exhausted, the secondary coverage kicks in to pay the remaining UIM benefit. In the present case, unlike in Tarango, the damages exceed the amount of available UIM coverage, and therefore the primary Class II and secondary Class I coverage may be stacked.

{18} Consistent with the rule that the primary insurer is the first responsible to pay UIM benefits, we believe that the primary insurer should be the first to receive the benefit of the statutory offset. We agree with the district court’s reasoning that since the primary insurer bears the greatest risk, it is also entitled to offset the full amount of liability proceeds recovered before any remaining liability is assessed. We conclude that this rule is clear and easy to apply, consistent with existing case law, and consistent with the intent of the Legislature. See Schmick, 103 N.M. at 219, 704 P.2d at 1095 (“[T]he intent of the Legislature was to put an injured insured in the same position he would have been in had the tortfeasor had liability coverage in an amount equal to the uninsured/underinsured motorist protection purchased for the insured’s benefit.”). Coverage under the primary insurer must be exhausted before any excess coverage from the secondary insurer applies; however, the primary insurer is entitled to the full benefit of the statutory offset for any liability payments received.

{19} Jones purchased $500,000 of UIM coverage for herself through Twin City. Williams purchased $100,000 of UIM coverage from State Farm for passengers in her vehicle, such as Jones. Therefore, the total UIM protection purchased for the benefit of Jones is $600,000. The total UIM benefit Jones can expect to receive, assuming damages exceed the amount of available coverage, is $600,000. Jones settled her liability claim with the tortfeasor for $100,000. State Farm, as the primary insurer, is entitled to offset the entire $100,000 in liability proceeds, thereby reducing State Farm’s liability to zero. However, Twin City’s UIM coverage applies as the excess, secondary insurer, in the amount of $500,000. Applying this method of stacking and the statutory offset, Jones receives a perfectly expected UIM
coverage benefit of $600,000; $100,000 from the tortfeasor’s liability payment, and $500,000 from Twin City.

[20] We emphasize that the holding in this case is specific to the facts presented. Where a passenger is injured by a third-party tortfeasor who is entirely at fault and the damages exceed the amount of available UIM coverage from both the primary Class II insurer and the secondary Class I insurer, the primary insurer, who is required to pay first, is entitled to the statutory liability offset. Under a different set of facts, a different result may be warranted. We do not decide how the offset would be applied, for example, if both the driver of the vehicle in which the insured is a passenger and a third-party tortfeasor have a degree of fault in causing the accident or where, as in Valencia, there are multiple claimants. See State Farm Mut. Auto. Ins. Co. v. Valencia, 120 N.M. 662, 665, 905 P.2d 202, 205 (Ct. App. 1995) (holding that in the case of multiple claimants, the statutory offset is the amount of the tortfeasor’s liability coverage paid to the injured insured, which is not necessarily equal to the amount of liability coverage available). Additionally, we are not deciding a case like Samora v. State Farm Mutual Automobile Insurance Co., 119 N.M. 467, 892 P.2d 600 (1995), or Mountain States Mutual Casualty Co. v. Martinez, 115 N.M. 141, 848 P.2d 527 (1993) (hereinafter Martinez), where there is no third-party tortfeasor, and the driver is solely at fault.

[21] We now turn to Samora and Martinez, and State Farm’s argument that it is entitled to a contractual liability offset based on the language of the State Farm policy.

5. Contractual Offset

[22] State Farm argues that the district court reached the correct decision, but misapprehended the law. State Farm contends that its policy clearly and unambiguously provides for an offset of UIM coverage equal to the insured’s liability recovery. Therefore, State Farm argues that it is entitled to a contractual offset of $100,000, and Twin City is entitled to a statutory offset of $100,000. We have already determined that State Farm, not Twin City, is the party entitled to the statutory offset. We now turn to the language of the policy. The State Farm policy contains the following contractual offset provision:

3. a. the most we will pay any one insured is the least of:

(1) the amount by which the insured’s damages for bodily injury exceed the amount paid to the insured by or for any person or organization who is or may be held legally liable for the bodily injury; or

(2) the amount by which the insured’s damages for bodily injury exceed the sum of the “each person” limits of liability of all bodily injury liability insurance coverages that apply to the accident; or

(3) the amount by which the “each person” limit of this coverage exceeds the sum of the “each person” limits of liability of all bodily injury liability insurance coverages that apply to the accident. (Emphasis in original).

State Farm contends that since the “each person” limits of the liability insurance recovered by Jones and State Farm’s UM coverage are both $100,000, there is a total offset of coverage. The amount of liability coverage received by Jones, the insured, is $100,000. The “each person” limit of UM/UIM coverage under the State Farm policy is $100,000. Therefore, according to State Farm, since the “each person” limit of $100,000 does not exceed the amount of liability insurance coverage that applies to the accident, which is $100,000, State Farm’s net liability is zero. State Farm relies on Samora and Martinez to support its position that Class II coverage is governed by the terms of the insurance contract, thus the offset provision in the policy must be upheld. We disagree.

[23] The district court found, and we agree, that this policy language “simply follows the statutory language and confirms that as a primary insurer, [State Farm] is entitled to offset its coverage with any recoverable liability proceeds.” The district court further found that Martinez and Samora are unpersuasive as applied to the facts of this case, and distinguishable from the present case. The district court held that State Farm was not entitled to a contractual offset. We agree that Martinez and Samora are distinguishable.

[24] The issue presented in Martinez was “whether a guest passenger should be allowed to recover . . . under both the liability and [UIM] provisions of a negligent host driver’s insurance policy, even though a provision in the policy would prevent [such a] double recovery.” Martinez, 115 N.M. at 141, 848 P.2d at 527. Rejecting a public policy argument to the contrary, our Supreme Court allowed the contractual limitation in the policy to stand, thus preventing Martinez from recovering under both the liability and UIM provisions of the host driver’s policy. Id. at 143, 848 P.2d at 529. In upholding the contractual offset, the Court reasoned that Class II insured passengers are insured by virtue of their host driver’s UIM provision, not by mandate of the statute, thus a Class II insured’s coverage may be limited by the terms of an insurance contract without thwarting public policy. Id. at 142, 848 P.2d at 528. Martinez, as a Class II insured, did not pay a premium to the insurer of the vehicle in which she was a passenger, and thus she had no personal expectation of UIM coverage on that policy. Id. at 143, 848 P.2d at 529. The Court in Martinez found persuasive that to disallow a limitation on coverage that prevents a Class II injured passenger from collecting both liability and UIM coverage under the same policy would transform UIM insurance into liability insurance and thus create a duplication of liability benefits. Id.

[25] This distinction is important to our decision in the present case. In this case, unlike Martinez, the injured insured collected liability payments from a third-party tortfeasor, not the driver’s Class II coverage. Jones is not attempting to collect both liability and UIM coverage from a Class II insurer, as was the case in Martinez. Thus, by declining to allow the contractual offset, there is no danger of turning UIM coverage into a secondary type of liability coverage, as the Court feared in Martinez. The policy reasons relied on by the Court in allowing the contractual offset in Martinez are simply not present in this case.

[26] Samora presented the issue of “whether an injured passenger’s Class I coverage is reduced by a liability payment made by a Class II insurer when the same liability payment also reduced the Class II insurer’s [UIM] coverage for the same injured passenger.” Samora, 119 N.M. at 468, 892 P.2d at 601 (internal quotation marks and citation omitted). The parties in Samora did not dispute that based on the language of the Class II policy, the amount of liability coverage provided offset the entire amount of UIM coverage. Id. at 469, 892 P.2d at 602. Our Supreme Court in Samora determined that since the contractual offset in the Class II policy reduced the UIM coverage to zero, there was no Class II coverage to “stack” with Class I coverage. Id. at 469-70, 892 P.2d at 602-03. Samora, like Martinez, involved a situation where the driver of the vehicle was at fault
for the accident, and the driver’s insurer provided Class II liability coverage for the passenger. The Court allowed the Class II insurer to take a contractual offset based on the policy language, and then allowed the Class I insurer to take the statutory offset for liability payments. Samora, 119 N.M. at 470, 892 P.2d at 603. The Court reasoned that the second part of Section 66-5-301(B), which refers to the “insureds” UIM coverage, necessarily refers to the injured party’s insurance company, the Class I insurer. Furthermore, the Court reasoned that allowing the contractual offset to the Class II insurer and the statutory offset to the Class I insurer does not result in a “double” offset because the two types of offsets are distinct; the contractual offset affects the recovery of a Class II insured, whereas the mandatory statutory offset applies to the Class I insurer. Samora, 119 N.M. at 471, 892 P.2d at 604. The Court noted that no double offset occurred because the insured did not recover an amount less than his UIM coverage under his own Class I policy, and in fact ended up recovering liability coverage in an amount in excess of his UIM coverage. Id.

{27} It is with some difficulty that we reconcile the holdings in Martinez and Samora with the holdings of the earlier cases such as Morro, Tarango, Schmick, Jimenez, and Branchal. We therefore address the distinguishing factors in these cases in detail. First, Martinez and Samora, two cases that allow a contractual offset on a Class II policy, do not involve liability payments from third-party tortfeasors. Since Morro and Tarango involve liability payments from a third-party tortfeasor, as in the present case, there is no danger of UIM coverage by the Class II insurer becoming another type of liability coverage. We believe this is a significant distinguishing feature because the policy reasons for supporting the contractual offset in Martinez and Samora are not present in Morro or Tarango. Jimenez, Schmick, and Morro all express a public policy to liberally construe the UIM statue to include coverage from one or more policies, specifically stating that coverage should include all policies purchased by the insured, or by another for the insured’s benefit. These cases are consistent with the general policy of UM/UIM coverage, which is to protect persons injured through no fault of their own. Martinez and Samora however rely on the different status of Class II insureds to determine that a Class II insured is subject to the terms of the insurance contract, even if that means UIM coverage is entirely offset by policy language. The Court reasons that this does not violate public policy because Class II insured’s have no contractual expectation of UIM coverage. Samora, 119 N.M. at 470, 892 P.2d at 603; Martinez, 115 N.M. at 143, 848 P.2d at 529. This rationale on its face seems contrary to earlier cases holding that coverage should include all policies purchased by the insured or another for the insured’s benefit. See, e.g., Jimenez, 107 N.M. at 325, 757 P.2d at 795; Morro, 106 N.M. at 671, 748 P.2d at 514; Schmick, 103 N.M. at 219-20, 704 P.2d at 1095-96. Furthermore, Martinez and Samora are silent on the effect of primary versus secondary insurer status, which the Supreme Court relied on in the cases of Branchal and Tarango.

{28} Finally, there is a strong public policy in New Mexico favoring full compensation of injured insureds. Fickbohm v. St. Paul Ins. Co., 2003-NMCA-040, ¶ 21, 133 N.M. 414, 63 P.3d 517. “[O]ther insurance clauses may not be construed to prohibit recovery from more than one policy, at least to the extent of the injured’s loss and the second policy’s limits[.]” Morro, 106 N.M. at 672, 748 P.2d at 515 (internal quotation marks and citation omitted). In Fickbohm, we stated that “[w]here application of the offset would result in a limitation of UM/UIM coverage, the offset would not be enforceable.” 2003-NMCA-040, ¶ 24. We further stated, “[w]henever insureds have UM/UIM coverage less than the amount of their damages, the offset cannot be enforced.” Id. This Court stated it is “improper to allow an offset against UM/UIM payment which itself did not necessarily represent a full remedy.” Id. ¶ 17 (citation omitted). We find this reasoning persuasive.

{29} A final reason for not allowing State Farm the contractual offset, and a statutory offset for Twin City, is that to do so would lead to an anomalous result. If we allow State Farm a contractual offset in the amount of liability coverage, $100,000, and allow Twin City the benefit of the statutory offset of $100,000, Jones would be left with a total payment of $500,000, which is less than the amount of UIM purchased for her benefit. Furthermore, allowing the two offsets in this case also leads to the absurd result that Jones would have had a greater recovery if she had been hit by a totally uninsured driver, rather than by an underinsured driver. If she had been hit by an uninsured driver, Jones would receive the entire $100,000 from State Farm in UIM coverage because there would be no offset, plus $500,000 from Twin City’s UIM coverage. We doubt the legislature intended such a result when it enacted the UM statute, and we doubt that our case law interpreting the statute anticipated or would allow such an anomaly. See Schmick, 103 N.M. at 221, 704 P.2d at 1097 (striking down an exclusionary clause that would have resulted in the injured insured having a greater recovery if she was hit as a pedestrian, rather than being hit while driving her own insured vehicle.) For the foregoing reasons, we hold that State Farm is not entitled to a contractual offset.

CONCLUSION

{30} We summarize our holding as follows: Where a passenger is injured by a third-party tortfeasor who is entirely at fault, and the damages exceed the amount of available UIM coverage from both the primary Class II insurer and the secondary Class I insurer, the primary insurer is entitled to the benefit of the statutory offset for liability payments received. We further hold that State Farm is not entitled to a contractual offset based on the language of the policy, but, as the primary insurer in this case, is entitled to the statutory offset. Therefore, State Farm’s net liability to Jones under its UIM provision is zero. We affirm.

{31} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
IRA ROBINSON, Judge (concurring in result only)
MICHAEL E. VIGIL, Judge

26 BAR BULLETIN - JUNE 19, 2006 - VOLUME 45, NO. 25
In this case, we must determine whether a tip provided by a named informant was sufficiently complete and reliable to provide reasonable suspicion for an investigatory stop regarding drugs. We also examine the scope of the resulting detention of the vehicle for thirty-five to forty minutes while officers awaited the arrival of a canine unit. We conclude that the tip was sufficiently reliable to provide reasonable suspicion because the informant was identified, the tip predicted the future movement of Defendant, and other significant facts provided in the tip were corroborated by the officers. We also conclude that detention of the vehicle was reasonable in light of the circumstances. Accordingly, we affirm.

I. BACKGROUND

[2] Detective Dan Aguilar of the Clovis Police Department received a tip from an individual who provided identification but requested that the identification be kept confidential. This informant told Detective Aguilar that Defendant and her husband would be delivering fourteen grams of methamphetamine to an address on Tom Watson Street in Clovis, New Mexico. The informant described their vehicle as a silver and white pickup with a personalized license plate, “GLR.” Detective Aguilar contacted officers in the Region V Drug Task Force to report the details of the tip.

[3] The officers went to Pile Street for the second time, where they saw the pickup with the personalized license plate, as described in the tip. They saw the vehicle’s lights come on; it then proceeded south toward the Tom Watson address. The officers followed the vehicle until it was within two or two and a half blocks from the destination described in the tip. They stopped the vehicle as Defendant was about to turn from a four-lane road onto a narrow, poorly lit, two-lane road with no shoulder. The officers testified that for safety and investigative reasons, they did not want Defendant to reach the designated destination.

[4] The officers further testified as follows: They stopped Defendant to investigate whether she was in possession of methamphetamine, as reported in the tip; they did not stop Defendant for a traffic violation. Defendant and another woman were the occupants of the pickup. The officers told Defendant that they had been informed that Defendant was “carrying some dope.” He identified the informant and notified the officers of the informant’s request that his identity remain confidential. Detective Aguilar contacted the officers later in the day to report that he had completed a registration check on the vehicle and that it was located in the 1400 block of Pile Street. When the officers first went to Pile Street, the truck was not there. Later, at about 6:45 p.m., Detective Aguilar again called the officers to report that the vehicle was on the 1400 block of Pile Street.

[5] The initial search revealed, in Defendant’s purse, a crystal substance that field-tested positive for methamphetamine and, in a briefcase, glass pipes used to consume methamphetamine. Chemicals used to produce methamphetamine were found in the bed of the truck, which was covered by a camper shell. For safety reasons, the officers obtained a second search warrant for the bed of the truck so that any chemicals could be immediately destroyed. Subsequently, Defendant was charged with one count of trafficking by manufacturing of methamphetamine, a second-degree felony, NMSA 1978, § 30-31-20(A)(1) (1990), and one count of possession of a controlled substance, methamphetamine, a fourth-degree felony, NMSA 1978, § 30-31-23(A), (D) (2005).

[6] The district court denied Defendant’s motion to suppress. Defendant pled no contest to two counts of possession of a controlled substance with intent to distribute, a third-degree felony, NMSA 1978, § 30-31-22(A)(2)(a) (2005), and one count of possession of a controlled substance, methamphetamine, § 30-31-23(A), (D). The plea was conditional and reserved Defendant’s right to appeal the denial of her motion to suppress.

[7] Defendant argues that the evidence from the search should have been suppressed (1) because the tip was neither reliable nor sufficient to create reasonable suspicion for the investigatory stop and (2) because the scope of the investigatory stop was unreasonable and resulted in the improper seizure of Defendant’s pickup without probable cause. Agreeing with the State, the district court found the tip to be sufficiently reliable to create reasonable suspicion. As to the scope of the stop, the district court determined that the length of detention was not an impermissible delay because the search was contemporaneous with an arrest. The State does not contend that the search was contemporaneous with an arrest; rather, it asserts that the stop did not exceed the permissible scope of the investigation. See State v. Rector, 2005-
NMCA-014, ¶ 9, 136 N.M. 788, 105 P.3d 341 (stating that this Court “will affirm the trial court if it is right for any reason” (internal quotation marks and citation omitted)). The relevant facts are undisputed.

II. DISCUSSION

A. Standard of Review

{8} Reviewing a motion to suppress concerns mixed questions of fact and law. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 904. When substantial evidence exists to support the district court’s findings of fact, we ask “whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Werner, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994) (internal quotation marks and citation omitted); see Urioste, 2002-NMSC-023, ¶ 6. When we are asked to determine whether there is reasonable suspicion to detain and question an individual about drugs, we look at the evidence “in the light most favorable to the district court ruling.” State v. Van Dong, 2005-NMSC-033, ¶ 14, 138 N.M. 408, 120 P.3d 830. “[A]ll reasonable inferences in support of the court’s decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.” Werner, 117 N.M. at 317, 871 P.2d at 973 (internal quotation marks and citation omitted).

{9} Questions of reasonable suspicion are reviewed de novo by looking at the totality of the circumstances to determine whether the detention was justified. Van Dong, 2005-NMSC-033, ¶ 14; Urioste, 2002-NMSC-023, ¶ 6. “[A] determination of whether the officer . . . made an illegal de facto [seizure], or simply conducted a permissible detention,” is a question of reasonableness, an issue of law, which “requires the balancing of legitimate law enforcement interests against a defendant’s privacy rights, a policy decision which the trial court is in no better position to make than an appellate court.” Werner, 117 N.M. at 316-17, 871 P.2d at 972-73.

B. Constitutional Protections

{10} Defendant generally asserts that the investigatory stop was a violation of both the United States Constitution and the New Mexico Constitution. She relies on Aguilar v. Texas, 378 U.S. 108, 114 (1964), abrogated by Illinois v. Gates, 462 U.S. 213, 238 (1983) (reaffirming “the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations”), and the two-pronged test for probable cause in her argument that the New Mexico Constitution was violated. See State v. Cordova, 109 N.M. 211, 212, 217, 784 P.2d 30, 31, 36 (1989) (holding that the Aguilar-Spinelli test is properly used, under Article II, Section 10, of the New Mexico Constitution, to determine whether probable cause exists to obtain a search warrant that is based on affidavits containing hearsay). Defendant also argues that seizure of the truck was unreasonable because no exception to the warrant requirement was applicable. See State v. Gomez, 1997-NMSC-006, ¶¶ 1-2, 122 N.M. 777, 932 P.2d 1 (holding that under Article II, Section 10, of the New Mexico Constitution, the State must show reasonable grounds for the belief that exigent circumstances existed to justify a warrantless search of an automobile). Because we decide that the issue presented is one of reasonable suspicion rather than probable cause, we analyze the circumstances here only under the Fourth Amendment of the United States Constitution. Defendant provides no argument that the New Mexico Constitution provides greater protections for issues involving reasonable suspicion.

{11} By prohibiting unreasonable searches and seizures, the Fourth Amendment protects “[t]he right of the people to be secure in their persons . . . and effects.” U.S. Const. amend. IV; State v. Morales, 2005-NMCA-027, ¶ 9, 137 N.M. 73, 107 P.3d 513. The central inquiry is reasonableness. Terry v. Ohio, 392 U.S. 1, 19-20 (1968); State v. Attaway, 117 N.M. 141, 149, 870 P.2d 103, 111 (1994) (stating that the “ultimate question in all cases . . . is whether the search and seizure was reasonable”). Determining whether a seizure or search is reasonable involves two questions: “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” Terry, 392 U.S. at 19-20.

C. Investigatory Stop

{12} A police officer may make an investigatory stop if, under the totality of the circumstances, he has a reasonable and objective basis for suspecting a particular person has committed or is committing a crime. Werner, 117 N.M. at 317, 871 P.2d at 973; see also Urioste, 2002-NMSC-023, ¶ 10 (“[T]he officer must look at . . . the whole picture.” (internal quotation marks and citation omitted))). The officer’s suspicion must rest on specific, articulable facts, “which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21 (footnote omitted). “The level of suspicion required for an investigatory stop is considerably less than proof of wrongdoing by a preponderance of the evidence.” Urioste, 2002-NMSC-023, ¶ 10 (internal quotation marks and citation omitted).

{13} Reasonable suspicion depends on the reliability and content of the information possessed by the officers. State v. Contreras, 2003-NMCA-129, ¶ 5, 134 N.M. 503, 79 P.3d 1111. In our case, reasonable suspicion for the investigatory stop of Defendant rested on a tip provided by a named source who wanted his identity kept confidential. The reliability of a tip from a named source can be gauged more readily than a tip from an anonymous source because the veracity of the anonymous person is “unknown and unknowable.” Urioste, 2002-NMSC-023, ¶ 7 (internal quotation marks and citations omitted). In Urioste, our Supreme Court analyzed the tip as anonymous because the state presented no evidence that the information came from a known source whose reputation could be examined and who could be held responsible if the information was false. Id. ¶ 8. Here, however, an officer testified that the informant identified himself to Detective Aguilar and that Detective Aguilar identified the informant to the Clovis police when Detective Aguilar relayed the tip. Thus, we analyze the tip’s reliability in light of the fact that the officers knew the identity of the informant at the time the officers stopped Defendant. The informant, because he identified himself to Detective Aguilar, could have been held accountable if the information was false. We conclude that the tip regarding Defendant was more reliable than an anonymous tip.

{14} Moreover, an informant’s ability to predict a person’s future behavior demonstrates a “special familiarity” with that individual’s affairs. Id. ¶ 11 (internal quotation marks and citation omitted). This familiarity is an indication that the informant has access to reliable information about a person’s illegal activities. Id. When significant aspects of the information are verified, an officer can reasonably believe in both the reliability of the information and the informant’s veracity. Id. Thus, the defendant’s movement through time is the most important factor in assessing whether an officer’s suspicion based on an informant’s tip is reasonable. Id. ¶ 14.

If the tipster can be said to be in on an action that is taken by the suspect in the future, from the point of view of the time the tip is given, then as a matter of law, the asserted illegality can be associated with the prediction so as to increase the reliability of the tip.
Finally, in determining "whether enough facts were corroborated beyond the basic and important future movement factor," we compare the number and type of corroborated facts to those in previous cases in which courts have held that the corroborated facts rose to the level of reasonable suspicion. Id. ¶ 15.

{15} The tip in the case here is more reliable than the tip in Urioste. In Urioste, the police received a tip at approximately 4:30 p.m. Id. ¶ 2. The informant described the vehicle, driver, route, and time of the defendant’s movement in the future. Id. Our Supreme Court concluded that the accurate prediction of the defendant’s future movement in time and place, combined with the other facts in the tip that were corroborated by the officer, was sufficient to provide reasonable suspicion. Id. ¶¶ 14-15.

{16} Our case is very similar to Urioste. The tip correctly predicted Defendant’s future movement. The officers corroborated Defendant’s future movement when they followed the vehicle that she was driving to within two and a half blocks of the destination provided by informant. The officers also corroborated the description of the vehicle, including the personalized license plate. Defendant argues that the absence of her husband from the vehicle was an indication that the tip was not reliable. However, it was reasonable for the officers to believe that the husband was present in the vehicle prior to the stop because they were following a vehicle that had two occupants. See Florida v. J.L., 529 U.S. 266, 271 (2000) (“The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.”).

{17} Defendant argues that the tip in her case is more like the tip found to be insufficient in J.L. than the tip found to be sufficient in Urioste. See J.L. at 268 (concluding that an anonymous tip, which merely identified the defendant as a young African-American male who was wearing a plaid shirt, standing at a specific bus stop, and carrying a gun, was insufficient to create reasonable suspicion); see also Morales, 2005-NMCA-027, ¶¶ 1-2 (holding that an anonymous tip was unreliable when it reported that two individuals, in a blue vehicle at a specific intersection, were acting suspiciously and were possibly armed). We disagree. The tip in J.L. merely described a “status quo,” and the officers in that case did not observe the defendant moving in accordance with the tip. Urioste, 2002-NMSC-023, ¶ 13 (“It is much more difficult to form a reasonable suspicion when only a status quo is reported to police and that is all they see.”); see also J.L., 529 U.S. at 271-72. The officers in our case observed the future movements of Defendant in accordance with the tip when they followed the specifically described vehicle to within two and a half blocks of the reported destination.

{18} Defendant also alleges that the tip was inherently unreliable because the informant was an acquaintance of Defendant’s and, seeking revenge, set her up. Defendant presents no evidence that the officers were aware of any relationship between the informant and Defendant at the time of the tip and the subsequent investigatory stop. Thus, even if these allegations are true, the reasonableness of the stop and detention is not affected. See J.L., 529 U.S. at 271.

{19} We conclude that the tip was sufficiently reliable and complete because the identity of the informant was known to the officers and because significant aspects of the tip, including Defendant’s future movement, were corroborated by the officers prior to the stop. Under the totality of these circumstances, the tip provided specific articulable facts, corroborated by the officers, that were sufficient to give the officers reasonable suspicion that Defendant was in possession of narcotics. See State v. Flores, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038 (“Reasonable suspicion must be based on specific articulable facts and the rational inferences that may be drawn from those facts.”); cf. Contreras, 2003-NMCA-129, ¶ 5 (“Because the facts surrounding the anonymous tip and investigatory stop are viewed in light of the totality of the circumstances, a deficiency in one consideration can be compensated for by the strength in another consideration or by some indicia of reliability.”). Our resolution of the first issue leads us to the second question regarding an investigatory stop: “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” Terry, 392 U.S. at 20.

D. Scope of the Stop

{20} Defendant argues that detaining the vehicle was an unreasonable seizure that required probable cause. Existing law provides no support for Defendant’s position. “An officer who makes a valid investigatory stop may briefly detain those he suspects of criminal activity to verify or quell that suspicion.” Werner, 117 N.M. at 317, 871 P.2d at 973 (using Terry and subsequent related cases to examine a de facto arrest). The United States Supreme Court applied the principles of Terry to the seizure of property in United States v. Place, 462 U.S. 696, 706 (1983) (“[T]he principles of Terry and its progeny . . . permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.”). If the nature and extent of the detention minimally intrude on an individual’s Fourth Amendment interests, “opposing law enforcement interests can support a seizure based on less than probable cause.” Id. at 703. Only when a detention exceeds the limits of a permissible investigatory stop does the detention require probable cause. Flores, 1996-NMCA-059, ¶ 15. We use “common sense and ordinary human experience” to determine whether the detention violates Fourth Amendment protections. Werner, 117 N.M. at 317-18, 871 P.2d at 973-74 (internal quotation marks and citation omitted).

{21} There are several factors that must be considered when we determine whether the scope of an investigatory stop is permissible: the government’s justification for the detention, the character of the intrusion on the individual, the diligence of the police in conducting the investigation, and the length of the detention. First, in determining whether there is a reasonable justification for the detention, we balance the government’s justification for the official intrusion against the character of the intrusion on a person’s right to be free from police interference. Id. at 318, 871 P.2d at 974; see also Contreras, 2003-NMCA-129, ¶ 13 (weighing “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty”). Thus, we balance the government’s interest in preventing the use and distribution of methamphetamine against Defendant’s right to be free from official investigation through the use of a drug dog. Cf. Contreras, 2003-NMCA-129, ¶ 13 (balancing “the possible threat of drunk driving to the safety of the public with [the d]efendant’s right to be free from unreasonable seizure”).

{22} The government has a significant interest in preventing the use and distribution of an illegal substance, such as methamphetamine. See Place, 462 U.S. at 703 (discussing the government’s substantial interest in seizing luggage to investigate a reasonable belief that the luggage contains narcotics). As to the type of intrusion, use of
a drug dog to conduct a narcotics investigation is a minimal intrusion. Id. at 707 (“We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”); see also Illinois v. Caballes, 543 U.S. 405, 409 (2005) (stating that the use of a drug dog during a lawful stop “generally does not implicate legitimate privacy interests”). Thus, the government’s interest in deterring methamphetamine use, coupled with its general interest in effective crime prevention and detection, substantially outweighs the minimal intrusion on Defendant’s liberty through the use of a drug dog.

{23} Second, the scope of the search and seizure must be justified by and limited to the circumstances that created reasonable suspicion for the stop. Terry, 392 U.S. at 17-19. “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983). Relying on State v. Prince, 2004-NMCA-127, 136 N.M. 521, 101 P.3d 332, Defendant argues that the scope of the stop was impermissibly expanded because “[o]fficers may not use a lawful stop to fish for evidence of other crimes where there is insufficient reason to detain a defendant beyond the purpose of the initial detention.” See id. ¶ 19. We emphasize the fact that the officers did not make a traffic stop; rather, they made a stop to investigate their reasonable suspicion with respect to the possession and distribution of methamphetamine. Thus, Defendant’s reliance on Prince is misplaced because the stop in Prince was for a traffic violation. See id. ¶ 11. As discussed earlier, the officers in our case had reasonable suspicion to make an investigatory stop regarding Defendant’s possession of methamphetamine. Further, the vehicle was detained to effectuate the purpose of the stop—to quickly confirm or dispel the officers’ suspicions, regarding methamphetamine, by using a drug dog. See Carter v. State, 795 A.2d 790, 801 (Md. Ct. Spec. App. 2002) (“The Terry-stop in this case was from the outset an investigation into a suspected narcotics violation. The use of a drug-sniffing canine was in the direct service of that purpose and was not a gratuitous investigative technique hoping to piggyback on an unrelated traffic stop.”).

{24} Defendant further argues that her detention was unlawful, in light of Flores, because the investigatory stop must come to an end when the initial suspicion of illegal conduct is dispelled. See Flores, 1996-NMCA-059, ¶ 13 (“Once the officers failed to uncover any drugs at the roadside stop, the very rationale for the stop, to verify or quell . . . suspicion, was exhausted.” (internal quotation marks and citation omitted)). Flores is distinguishable from the case at hand. There were two seizures in Flores. Id. ¶ 12. At the initial stop, the roadside search took about an hour. Id. ¶ 4. During that time, the defendant consented to a search of his vehicle. Id. ¶ 3. In the resulting search, officers failed to find any drugs, and a narcotics dog failed to alert to the presence of any drugs. Id. This Court concluded that the initial detention was lawful because “the methods used by the officers at the roadside were designed to verify or dispel their suspicions.” Id. ¶ 11 (internal quotation marks and citation omitted). After the roadside search, the police moved the vehicles and drivers to a warehouse for an exhaustive search, lasting two to three hours. Id. ¶ 12. Because the officers’ suspicions had been quelled at the roadside stop, the reasonableness of the investigatory stop ended after the first search. Id. ¶ 13.

{25} In the roadside stop in our case, the officers’ suspicions were not dispelled after the initial questioning of Defendant; thus, additional articulable facts were not necessary to justify the detention of the vehicle. Defendant was extremely nervous during the initial questioning. After she denied consent to search, the officers requested a drug dog to quickly confirm or dispel their continuing suspicions. Within forty minutes after the officers stopped the vehicle and tried to obtain consent, the canine unit arrived, and the dog alerted to the illegal substances within Defendant’s vehicle. It was only after the dog arrived and alerted to the illegal substances that there was any resolution to the officers’ suspicions.

{26} Moreover, Defendant asserts that she exhibited no unlawful conduct that would justify detention of the vehicle. This argument also fails. Notwithstanding the fact that reasonable suspicion already existed, based on the tip, we note that reasonable suspicion “can arise from wholly lawful conduct.” Urioste, 2002-NMSC-023, ¶ 10 (internal quotation marks and citations omitted).

{27} Although the State contends that Defendant did not clearly address the temporal scope of the stop, we read her brief to challenge the length of the detention. Because the duration of a stop is a factor in determining reasonableness, we consider Defendant’s argument. See Van Dong, 2005-NMSC-033, ¶¶ 14-16 (reviewing the totality of the circumstances, including duration and scope of questioning, to determine whether the detention was justified). “[T]he brevity of the invasion . . . is an important factor . . . [and] in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.” Place, 462 U.S. at 709 (concluding that the police “had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent’s Fourth Amendment interests”); Werner, 117 N.M. at 319, 871 P.2d at 975 (“Diligence in the investigation is key.”).

{28} In Werner, the scope of the detention violated the defendant’s Fourth Amendment rights when, fifteen to twenty minutes after the initial stop, he was moved to the back seat of a locked patrol car, where he remained for more than forty-five minutes. 117 N.M. at 318, 871 P.2d at 974. The officer told the defendant that he could not leave or move his car. Id. His freedom of movement was thereby severely limited. Id. (“A reasonable person in Werner’s position would have felt deprived of his freedom in a significant way.”). Our Supreme Court concluded that this was a significant intrusion, which outweighed the government’s interest in preventing flight and destruction of evidence. Id. at 318-19, 871 P.2d at 974-75. Moreover, the Court concluded that the police did not act with diligence because they detained the defendant while “awaiting the development of circumstances off the scene.” Id. at 319, 871 P.2d at 975 (“If authorities, acting without probable cause, can seize a person, hold him in a locked police car for over forty-five minutes while gathering witnesses, and keep him available for arrest in case probable cause is later developed, the requirement for probable cause for arrest has been turned upside down.”).

{29} The investigatory stop in our case is decidedly different from that in Werner. First, Defendant’s freedom of movement was not severely restricted. Defendant was told she was free to leave, and she did so. Second, as discussed earlier, the government’s substantial interest in preventing the use and distribution of methamphetamine outweighs the minimal intrusion that occurs with the use of a drug dog. Finally, the officers clearly acted with diligence. The record reveals that after Defendant refused consent to search, the officers immediately
requested the assistance of a drug dog. The canine unit arrived within thirty-five to forty minutes after the officers stopped the vehicle and tried to obtain consent. A delay of this duration is not unreasonable when the off-duty officer on call with the drug dog lived approximately ten miles, seventeen minutes travel time, from the stop. See United States v. Bloomfield, 40 F.3d 910, 917 (8th Cir. 1994) (“When police need the assistance of a drug dog in roadside Terry stops, it will in general take time to obtain one; local government police forces and the state highway patrol cannot be expected to have drug dogs immediately available to all officers in the field at all times.”); Van Dang, 2005-NMSC-033, ¶¶ 3, 15, 16 (concluding that the duration of the detention was proper because it resulted from the officer’s legitimate attempts to contact the rental agency and took no longer than necessary). Finally, the officers’ use of a drug dog was a means of investigation that would dispel or confirm their suspicions quickly. State v. Graves, 119 N.M. 89, 94, 888 P.2d 971, 976 (Ct. App. 1994) (“In examining whether a detention is reasonable under the circumstances, a court must determine . . . whether the officers diligently pursued a means of investigation that would dispel or confirm their suspicions quickly.”) (internal quotation marks and citation omitted).

[30] Other jurisdictions have concluded that similar detentions of people or property are reasonable when an off-site drug dog has been summoned to investigate reasonable suspicion of drug crimes. See United States v. White, 42 F.3d 457, 460 (8th Cir. 1994) (an hour-and-twenty-minute stop); Bloomfield, 40 F.3d at 917 (a one-hour stop); United States v. French, 974 F.2d 687, 690, 692 (6th Cir. 1992) (drug dog called from fifty miles away); United States v. Mondello, 927 F.2d 1463, 1471 (9th Cir. 1991) (a thirty-minute stop); United States v. Sterling, 909 F.2d 1078, 1081 (7th Cir. 1990) (an hour-and-fifteen-minute detention of property); United States v. Harden, 855 F.2d 753, 761 (11th Cir. 1988) (a fifty-five-minute stop); Cresswell v. State, 564 So. 2d 480, 481, 483 (Fla. 1990) (a fifty-minute stop); State v. Brunfield, 42 P.3d 706, 710 (Idaho Ct. App. 2001) (a forty-nine-minute stop); State v. Gant, 637 So. 2d 396, 397 (La. 1994) (per curiam) (a thirty-minute stop); Carter, 795 A.2d at 805 (a thirty-five-minute stop).

III. CONCLUSION
[31] Based on the tip provided by a named informant, the officers had reasonable suspicion that Defendant had or was engaged in criminal conduct because the tip accurately predicted the future movement of Defendant and because other significant aspects of the tip were corroborated by the officers. Moreover, detention of the vehicle for thirty-five to forty minutes to await a canine unit was within the permissible scope of the investigatory stop; the officers acted diligently, with minimal intrusion, to verify or dispel their reasonable suspicion that Defendant was in possession of methamphetamine with the intent to distribute. Therefore, we affirm the district court’s denial of Defendant’s motion to suppress evidence.

[32] IT IS SO ORDERED.
CElia FOy CAstillo, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge

OPINION

CElia FOy CAstillo, Judge

[1] In this case, we must determine if an individual’s Fourth Amendment rights are implicated when a law enforcement officer requests a driver’s license from the driver of a parked car. Because a reasonable person, in these circumstances, would not feel free to disregard the police officer’s request for a driver’s license, we conclude that Defendant was detained and that the detention must be justified by individualized reasonable suspicion. We also conclude that before requesting the driver’s license, the officer did not have specific, articulable facts to create an individualized reasonable suspicion of criminal activity on the part of Defendant. Accordingly, we reverse the district court’s denial of Defendant’s motion to suppress.

I. BACKGROUND
[2] Officer Brad Riley, the arresting officer, was the only witness presented at the hearing on the motion to suppress; the following facts derive primarily from his testimony. At about 10 p.m., Officer Riley was driving down Avenue L, in the usual manner of patrol during his shift. As he approached the residence at 402 West

| Certiorari Denied, No. 29,785, June 2, 2006 |
| From the New Mexico Court of Appeals |
| Opinion Number: 2006-NMCA-062 |
| STATE OF NEW MEXICO, Plaintiff-Appellee, versus VIRGIL WILLIAMS, Defendant-Appellant. No. 25,031 (filed: April 10, 2006) |
| APPEAL FROM THE DISTRICT COURT OF LEA COUNTY |
| DON MADDOX, District Judge |
| PATRICIA A. MADRID, Attorney General |
| ANITA CARLSON, Assistant Attorney General |
| for Appellee |
| JOHN BIGELOW, Chief Public Defender |
| JENNIFER BYRNS, Assistant Appellate Defender |
| for Appellant |

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Avenue L, he observed the vehicle in which Defendant was sitting, a black Suburban, parked on the side of the street in front of the residence. This residence was the home of Pedro Contreras, an individual who had outstanding felony warrants. Officer Riley, in previous attempts to locate Mr. Contreras, had been to this residence several times before. On this particular evening, Officer Riley observed Defendant’s vehicle and saw “someone leaning in from the passenger side into the vehicle.” Officer Riley could not see who was driving the vehicle or determine the gender of the individual leaning into the vehicle from the passenger side.

(3) When Officer Riley saw the vehicle, he turned around and pulled in behind it without engaging his overhead emergency lights. The vehicle was not illegally parked. Officer Riley saw no illegal activity. He saw what he considered to be suspicious activity because someone was “leaning into a vehicle in front of the residence” of Mr. Contreras. Officer Riley concluded that this activity, coupled with the hour, about 10 p.m., was suspicious. After he notified the dispatcher, Officer Riley got out of his patrol car and approached the vehicle to see if Mr. Contreras was the driver. Officer Riley knew as soon as he saw Defendant, prior to the request for a driver’s license, that Defendant was not Mr. Contreras because Officer Riley knew Mr. Contreras by sight. Nevertheless, Officer Riley “went up and made contact with the driver, asked for his driver’s license, some type of identification to identify him.” After asking Defendant for his driver’s license, Officer Riley recognized the person leaning into the vehicle as Cheryl Montgomery, an individual who, according to Officer Riley, was “a known user of illegal drugs” and was usually in possession of drugs or paraphernalia.

(4) When Defendant was unable to provide Officer Riley with a driver’s license, Defendant identified himself verbally by name and date of birth. Officer Riley then used that information to “run a driver’s license check to make sure [Defendant] could operate a motor vehicle,” since he “was in operation and control of the vehicle and said he had driven there.” Officer Riley also ran a warrant check on Defendant and Ms. Montgomery. Defendant overheard the radio dispatcher notifying Officer Riley that a possible warrant existed. At that point, Defendant began to move around in the vehicle, and Officer Riley told him not to reach for anything. Officer Riley then asked Defendant to get out of the vehicle and advised him that he was being detained until it was determined whether the warrant did exist. Officer Riley placed Defendant in handcuffs and seated him in the patrol car. Defendant was placed under arrest when the warrant was confirmed; Officer Riley completed a search incident to arrest and found drugs in the car.

[5] Defendant was charged with violations of NMSA 1978, § 30-31-22 (2005), distribution of a controlled substance, and NMSA 1978, § 30-31-25.1 (2001), possession of drug paraphernalia. At the pretrial conference, Defendant questioned the validity of the stop in an oral motion to suppress. The district court, ruling from the bench, denied the motion:

In this particular case, I believe that the officer was able to articulate at each juncture the reasoning that was justifiable and constitutionally permitted for his contact with the car. Upon given [sic] his description of the area, the time, the address, his extensive experience both with the occupant, allegedly, of a residence and then with the woman that was there, I think he took proper steps.

Once he determined that there was no driver’s license and these other issues were present, the outstanding warrant, I think he made an appropriate constitutionally permitted search, and the motion to suppress is denied. Defendant reserved his right to appeal the denial of his motion to suppress when he entered a conditional guilty plea.

II. DISCUSSION
A. Standard of Review
(6) Appellate review of a motion to suppress is a mixed question of fact and law. State v. Reynolds, 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995). We review the facts under a substantial evidence standard, in a manner most favorable to the prevailing party, and we review de novo the application of law to the facts. Id.; State v. Boeglin, 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct. App. 1983). Since the facts here are undisputed, we review only the district court’s application of law to those facts. State v. Gutierrez, 2004-NMCA-081, ¶ 4, 136 N.M. 18, 94 P.3d 18. We review de novo whether reasonable suspicion existed to justify Defendant’s initial detention. State v. Lackey, 2005-NMCA-038, ¶ 6, 137 N.M. 296, 110 P.3d 512.

B. Fourth Amendment Protections
[7] Defendant argues that his rights under the Fourth Amendment of the United States Constitution were violated; he does not argue that the New Mexico Constitution provides greater protection. Thus, we examine the circumstances presented here only under Fourth Amendment standards. Lackey, 2005-NMCA-038, ¶ 7.

[8] The Fourth Amendment protects an individual from unreasonable seizures and searches. U.S. Const. amend. IV. Reasonableness is determined by balancing the intrusion on an individual’s Fourth Amendment rights against the government’s legitimate interests. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); Reynolds, 119 N.M. at 385, 890 P.2d at 1317. The facts used to justify an intrusion must be measurable by an objective standard because an individual’s reasonable expectation of privacy cannot be at the mercy of a field officer’s discretion. Brown v. Texas, 443 U.S. 47, 51 (1979) (noting that the protection of an individual’s Fourth Amendment rights from an officer’s “unfettered discretion” is a central concern in balancing the competing interests of government and individual liberty); Prouse, 440 U.S. at 654-55.

[9] Not all police-citizen encounters are seizures subject to the Fourth Amendment. State v. Javier M., 2001-NMSC-030, ¶ 36, 131 N.M. 1, 33 P.3d 1. Consensual encounters, those in which a citizen feels free to leave, generally do not implicate constitutional protections. Id.; State v. Morales, 2005-NMCA-027, ¶ 10, 137 N.M. 73, 107 P.3d 513. The State contends that Officer Riley’s encounter with Defendant was consensual. We disagree.

C. Consensual Encounter Versus Seizure

The test for determining if a police-citizen encounter is consensual depends on whether, under the totality of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter. The test is an objective one based upon a reasonable person standard, not the subjective perceptions of the particular individual. The test pre-
sues an innocent reasonable person. In making this determination, the court should consider the sequence of the officer’s actions and how a reasonable person would perceive those actions. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred.

1. Totality of the Circumstances

Generally, a court examines the officer’s actions, in the totality of the circumstances, to ascertain whether the officer used physical restraint or exhibited a show of authority that would prevent a reasonable person from feeling free to leave. See State v. Baldomado, 115 N.M. 106, 108, 110, 847 P.2d 751, 753, 755 (Ct. App. 1992).

The determination of a seizure has two discrete parts: (1) what were the circumstances surrounding the stop, including whether the officers used a show of authority; and (2) did the circumstances reach such a level of accosting and restraint that a reasonable person would have believed he or she was not free to leave? The first part is a factual inquiry, which we review for substantial evidence. The second part is a legal inquiry, which we review de novo.


13 In evaluating whether a reasonable person would feel free to leave, we look to three factors: (1) the police conduct, (2) the person of the individual citizen, and (3) the physical surroundings existing at the time of the encounter. Id. ¶ 15.

a. The Officer’s Conduct

In our case, Officer Riley, while in the course of his regular patrol, observed Defendant’s vehicle legally parked on the side of the street. Officer Riley saw “someone leaning in from the passenger side into the vehicle.” He did not observe any illegal activity, but he was suspicious because it was late, about 10 p.m., and a person was leaning into a vehicle that was parked in front of a residence belonging to an individual with outstanding warrants. After passing Defendant’s vehicle, Officer Riley turned around in the street and pulled up behind the vehicle, without engaging his emergency lights. He notified dispatch that he was going to be out with a vehicle; then he “got out of [his] car, went up and made contact with the driver, [and] asked for [Defendant’s] driver’s license.” There were no preliminary questions; Defendant did not initiate the encounter, and the officer did not begin the encounter “in a conversational manner.” See 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(a), at 426 (4th ed. 2004) (internal quotation marks and citation omitted).

b. The Defendant’s Person

15 Defendant is clearly a “driver” under New Mexico law. NMSA 1978, § 66-1-4.4(K) (1999), defines “driver” as “every person who drives or is in actual physical control of a motor vehicle, including a motorcycle, upon a highway, who is exercising control over or steering a vehicle being towed by a motor vehicle or who operates or is in actual physical control of an off-highway motor vehicle.” An individual is in actual physical control of a vehicle when he has direct influence over the vehicle. State v. Johnson, 2001-NMSC-001, ¶ 19, 130 N.M. 6, 15 P.3d 1233. In other words, a person has actual physical control over the vehicle when he is in a situation in which he can directly begin to operate the vehicle. Id. Moreover, a person who is in actual physical control of a moving or nonmoving vehicle is “operating” a motor vehicle. UJI 14-4511 NMRA; see State v. Laney, 2003-NMCA-144, ¶ 40, 134 N.M. 648, 81 P.3d 591 (discussing the UJI 14-4511 “operating” instruction, which relies on the definition of “driver” used in Section 66-1-4.4(K)). Further, “[e]very licensee shall have his driver’s license in his immediate possession . . . when operating a motor vehicle and shall display the license upon demand of [an] officer.” NMSA 1978, § 66-5-16 (1985). Finally, the definitions of “operating” and “driver” do not distinguish between a moving vehicle and a nonmoving vehicle; the driver of a nonmoving vehicle, one who is in actual physical control, is operating a vehicle and is required to display a license on demand, just as the driver of a moving vehicle is required to produce a license when he has been validly stopped. See id.; § 66-1-4.4(K); UJI 14-4511; see also NMSA 1978, § 66-1-4.13(E) (1990) (“‘Operator’ means driver, as defined in Section 66-1-4.4.”). Thus, Defendant was a driver who was required to produce a driver’s license if an officer made such a request.

1. Drivers of Moving Vehicles

16 New Mexico courts have previously held that the driver of a moving vehicle, detained by a valid stop, is not free to leave when asked to produce a driver’s license. Reynolds, 119 N.M. at 385, 890 P.2d at 1317 (asking “whether [the officer’s] request for identification was justified at its inception” (internal quotation marks and citation omitted)); see State v. Affsprung, 2004-NMCA-038, ¶ 15, 135 N.M. 306, 87 P.3d 1088 (holding that a passenger is not free to leave and refuse an officer’s request for identification in the context of an ordinary traffic stop because the driver is not free to refuse an officer’s request for identification and documentation). Thus, a request for license, registration, and documents of the driver of a moving vehicle is a seizure. Reynolds, 119 N.M. at 384-85, 890 P.2d at 1316-17 (using a seizure analysis to determine whether the officer could ask for a driver’s license); Affsprung, 2004-NMCA-038, ¶ 15 (“[T]he driver is not free to refuse an officer’s request for identification and documentation[,]”). Although the circumstances in Reynolds and Affsprung involve stops of moving vehicles, we believe that these cases provide guidance in the circumstances of our case. Under New Mexico law, Defendant is a driver and is subject to the same laws as a driver of a moving vehicle. We conclude that Defendant in this case, a driver of a nonmoving vehicle, was not free to leave when the officer, without preamble, requested a driver’s license because a driver of a vehicle, moving or nonmoving, is required by law to produce a driver’s license on demand.

ii. Drivers of Nonmoving Vehicles

17 Section 66-5-16 does not distinguish between a driver of a moving vehicle and a driver of a nonmoving vehicle. If an individual is in the driver’s seat of a vehicle, he is subject to Section 66-5-16; thus, when an officer, without more, requests a driver’s license, the driver is not free to leave, and the encounter is not consensual. It would be incongruous for us to hold that the Fourth Amendment provides greater protections for an individual in a moving vehicle than
it provides for an individual in a nonmoving vehicle. This would encourage drivers of parked cars to start driving when they see an officer approaching because only then would the officer be required to have reasonable suspicion to request a driver’s license. To hold that a driver of a nonmoving vehicle, who must produce a driver’s license and registration upon request and await the officer’s completion of a check to ensure those documents are valid, is in a consensual encounter would be to take the concept of consensual encounters into the realm of a legal fiction. See Affsprung, 2004-NMCA-038, ¶ 17 (“We think it more fiction than fact to call this encounter consensual.”). A driver, whether in a moving vehicle or a nonmoving vehicle, is not free to leave when an officer requests a driver’s license or a registration certificate in these circumstances.

c. Physical Surroundings of the Encounter

{18} It was around 10 p.m., and Officer Riley did not see any illegal activity. He did not testify about any other persons or vehicles that were present in the area at the time of the initial encounter. Thus, we conclude that there were no other persons or vehicles of interest in the near vicinity.

2. Evaluation of Totality of the Circumstances

{19} Considering the totality of the circumstances—including Officer Riley’s conduct, Defendant’s status as a driver, and the lack of other persons or vehicles of interest in the vicinity at the time—we conclude that an innocent, reasonable person would believe that Officer Riley had stopped to ask for Defendant’s driver’s license pursuant to Officer Riley’s statutory authority. See Walters, 1997-NMCA-013, ¶ 12. Although the State relies on the fact that Officer Riley did not engage his lights, we do not find this dispositive. Cf. Baldonado, 115 N.M. at 109, 847 P.2d at 754 (stating that the use of emergency lights does not preclude a consensual encounter). We believe that the circumstances here fall closer to the seizure side of the spectrum described by this Court in Baldonado:

By way of example, we believe that a trial court should ordinarily find a stop that must be justified by reasonable suspicion whenever officers pull up behind a stopped car, activate their lights, and approach the car in an accusatory manner, asking for license and registration and an account of the occupants’ activities. On the other hand, a trial court should ordinarily find no stop whenever officers pull up behind a stopped car, activate their lights, and approach the car in a deferential manner asking first whether the occupants need help. Id. at 110, 847 P.2d at 755.

{20} In our case, Officer Riley did not engage his lights because he had no need to use them; Defendant was already stopped, and there were no safety concerns reported by Officer Riley. Defendant did not initiate the encounter, and Officer Riley asked no preliminary questions. His first statement to Defendant was a request for a driver’s license. Based on the facts of this case, we believe that Officer Riley approached Defendant as if Officer Riley were conducting a traffic stop and asked for his driver’s license pursuant to his statutory authority; a reasonable person would not feel free to leave, even though Officer Riley had not engaged his emergency lights. Cf. id. at 108, 847 P.2d at 753 (“[A] trial court could find, based on what is on an officer’s mind together with surrounding circumstances, that if the officer believes that the defendants are not free to leave it may be more likely that the defendants would feel that they are not free to leave.”). Moreover, Section 66-5-16 does not include language that limits the driver’s responsibility to produce a driver’s license to those incidents in which an officer is using his emergency lights. As a driver, Defendant was not free to terminate the encounter by refusing the officer’s request under these circumstances.

{21} The State also argues that Defendant was free to leave because the officer was not holding Defendant’s license and that there was no evidence presented that the officer was holding any other documents. See United States v. Elliott, 107 F.3d 810, 814 (10th Cir. 1997) (concluding that an encounter, which was initially a traffic stop, became consensual after the officer returned the defendant’s documents). We disagree. Such a driver would not feel free to leave because the driver is not free to refuse to respond to an inquiry about his driver’s license. Affsprung, 2004-NMCA-038, ¶ 14 (“The law with respect to ordinary traffic stops and concomitant de minimus [sic] investigatory detention is fairly well settled in New Mexico. A driver should not, and, we believe, does not feel free to refuse to respond to an officer’s inquiry about license, registration, and insurance.”). Moreover, a failure to provide a driver’s license in response to the officer’s request would result in a statutory violation. See § 66-5-16. We now turn to the facts surrounding the incident in order to determine whether there was reasonable suspicion justifying the request for Defendant’s driver’s license.

D. Reasonable Suspicion

{22} A reasonableness standard governs the exercise of discretion by law enforcement in order to protect an individual’s privacy and security against arbitrary invasions. Prouse, 440 U.S. at 653-54. The two-part test in Terry v. Ohio, 392 U.S. 1, 19-20 (1968), is used to determine the reasonableness of a traffic stop or an investigatory stop. State v. Duran, 2005-NMSC-034, ¶ 23, 138 N.M. 414, 120 P.3d 836; Morales, 2005-NMCA-027, ¶ 14. Here, we are concerned with the first question presented by Terry: Was the detention justified at its inception? See Reynolds, 119 N.M. at 385, 890 P.2d at 1317. To detain a driver for the purpose of checking his license and registration, the officer must have articulable and reasonable suspicion. Prouse, 440 U.S. at 663.

{23} Reasonable suspicion must be based on objective facts that indicate an individual is, or will be in the immediate future, engaged in criminal activity. State v. Urioste, 2002-NMSC-023, ¶ 10, 132 N.M. 592, 52 P.3d 964; State v. Werner, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). These facts must be specific, articulable, and particular to the individual who is detained. Jason L., 2000-NMCA-018, ¶ 20; State v. Patterson, 2006-NMCA-037, ¶¶ 16, 17, ___ N.M. ___, 131 P.3d 1286 (using the term “individualized suspicion” to refer to articulated, particular reasonable suspicion); Morales, 2005-NMCA-027, ¶ 14. In examining the reasonableness of an officer’s suspicion, we objectively consider the totality of the circumstances, including all the information the officer possessed at the time. Morales, 2005-NMCA-027, ¶ 14.

{24} In our case, the State appears to argue that Officer Riley was reasonably called upon to make contact with Defendant because there were outstanding warrants for Mr. Contreras; because Mr. Contreras could have been driving Defendant’s vehicle, since it was parked in front of Mr. Contreras’s residence; and because there was an individual who was leaning into the passenger side of Defendant’s vehicle and talking with the driver. These specific, articulated facts relied upon by the State are not particular to Defendant and thus cannot support the detention of Defendant that occurred when Officer Riley requested a driver’s license.
The State presented no specific, articulable facts that Defendant or an occupant of the vehicle was or was about to be engaging in criminal activity at the time Officer Riley requested Defendant’s driver’s license. See Prouse, 440 U.S. at 663 (stating that reasonable suspicion of an occupant in violation of a law is sufficient to justify the stop of a vehicle); Lackey, 2005-NMCA-038, ¶¶ 3, 9 (concluding that a lack of specific, articulable facts regarding the defendant’s wrongdoing precluded reasonable suspicion when the officer stopped a truck in which the defendant was a passenger because the truck drove slowly past an accident scene two times). Officer Riley observed no traffic violation. His suspicions concerned Mr. Contreras and not Defendant. Although Officer Riley testified that he recognized the individual talking to Defendant from outside of the passenger window as a known user ordinarily in possession of illegal drugs or paraphernalia, Officer Riley testified that he recognized her after asking Defendant for a driver’s license. We also note that Officer Riley did not testify to specific, articulable facts regarding Ms. Montgomery’s activities that would provide reasonable suspicion to detain her; nor did he testify as to her status as a possible occupant of Defendant’s vehicle, which could have justified his detention. See State v. Prince, 2004-NMCA-127, ¶ 9, 136 N.M. 521, 101 P.3d 332 (“Generalized suspicions or unparticularized hunches that a person has been or is engaged in criminal activity do not suffice to justify a detention.”). Because Officer Riley did not have individualized reasonable suspicion regarding Defendant, the detention was prohibited by the Fourth Amendment.

The State argues that Officer Riley’s request for identification from Defendant was constitutionally permissible because Officer Riley was “reasonably called upon to make contact with Defendant” in order to determine whether another individual, Mr. Contreras, was driving the vehicle. See Reynolds, 119 N.M. at 388, 890 P.2d at 1320. In making this argument, the State relies on Reynolds and In re Forfeiture of ($28,000.00), 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93. Both cases are distinguishable. In each case, the Court concluded that the initial stop was valid because the officer, at the time the stop was initiated, had specific, articulable facts that the particular defendant was in violation of a specific law or was engaged in activity that created a safety concern.

In the case In re Forfeiture of ($28,000.00), the officer had specific, articulable facts about the driver’s vehicle that justified the initial stop. The vehicle was in violation of state law, which requires vehicle registration to be clearly visible; the vehicle had no license plate and did not appear to have a temporary tag. 1998-NMCA-029, ¶¶ 11, 12; see NMSA 1978, § 66-3-18(A) (2005); NMSA 1978, § 66-3-6 (1998). Even though the officer could see that the temporary tag was in place after the stop was initiated but before he asked the driver for identification, this Court held that the initial traffic stop was not arbitrary; thus, the officer’s request for identification was constitutionally permissible. In re Forfeiture of ($28,000.00), 1998-NMCA-029, ¶¶ 12, 13. At the time the stop was initiated, the officer possessed information that supported his reasonable suspicion that the defendant was driving in violation of the law. Id.; see Florida v. J.L., 529 U.S. 266, 271 (2000) (“The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.”).

Similarly, in Reynolds, the officer had specific, articulable facts about the driver’s vehicle that justified the initial stop. The vehicle, a small pickup, was traveling at night on the interstate with three occupants who were sitting on an open tailgate, their feet hanging close to the road. Reynolds, 119 N.M. at 384, 890 P.2d at 1316. Because the officer stopped the vehicle for these specific safety reasons, the stop was not arbitrary. Id. at 384, 386, 890 P.2d at 1316, 1318. Our Supreme Court held that this was a valid stop, one in which the officer was “reasonably called upon to make contact with a driver”; thus, the request for the driver’s identification was permissible. Id. at 388, 890 P.2d at 1320.

The State urges us to conclude that here, as with the stop in Reynolds, the officer was reasonably called upon to make contact with the driver and that the officer was therefore entitled to check Defendant’s license and registration. We decline to extend this general language as a justification for Defendant’s detention. As discussed earlier, the test for reasonableness requires, at a minimum, individualized reasonable suspicion. See Prouse, 440 U.S. at 663; Terry, 392 U.S. at 19-20.

We believe the circumstances in this case are more like those presented in Brown v. Texas, 443 U.S. at 48-49. We recognize that unlike in our situation, the defendant in Brown v. Texas was a pedestrian, id. at 48; however, the specific facts relied on by the officers in Brown v. Texas are very similar to those relied on by Officer Riley in our case. In Brown v. Texas, the officers observed the defendant and another man a few feet apart, walking away from each other in an alley located in an area with a high incidence of drug traffic. Id. at 48-49. The officers believed the two men had been together or were about to meet when the officers arrived at the scene. Id. at 48. The officers did not suspect the defendant of any specific misconduct. Id. at 49. The United States Supreme Court held that these circumstances did not create reasonable suspicion to believe that the defendant was engaged or had engaged in criminal activity. Id. at 53. Like the defendant in Brown v. Texas, Defendant in our case was in an area in which, arguably, criminal activity sometimes occurs. Defendant was communicating with an individual whose identity was unknown by Officer Riley when he requested Defendant’s driver’s license. Prior to requesting the driver’s license, Officer Riley did not suspect Defendant of any specific misconduct. We conclude that these circumstances, like those in Brown v. Texas, “simply do not amount to reasonable suspicion” regarding Defendant. See Lackey, 2005-NMCA-038, ¶ 9; see also Patterson, 2006-NMCA-037, ¶ 28 (“The difficulty with the [s]tate’s argument is that it does not point to any facts particular to [the defendant] that would lead to individualized suspicion that he was violating a law. The only fact concerning [the defendant] was that he was present in the car.” (citation omitted)).

The State argues that even if Defendant had been detained when he failed to produce a driver’s license, Officer Riley was justified in running a check to see whether Defendant had a valid driver’s license. This argument fails because reasonable suspicion must exist to justify the stop at its inception and because, as discussed earlier, the detention of Defendant began when Officer Riley asked for his driver’s license. See Terry, 392 U.S. at 19-20; Jason L., 2000-NMSC-018, ¶ 20 (“The officer cannot rely on facts which arise as a result of the encounter.”). The State ignores the distinguishing fact in each case cited to support this proposition—the initial stop in each case was valid. See United States v. Holt, 264 F.3d 1215, 1218 (10th Cir. 2001) (en banc) (per curiam) (“[The defendant was not wearing a seatbelt.”); United States v. Caro, 248 F.3d 1240, 1244 (10th Cir. 2001) (“[The defendant] has not challenged [the officer’s] initial stop. . . . for
a window tint violation.”); Duran, 2005-NMSC-034, ¶ 24 (“Defendant does not challenge that [the officer] was justified in making the initial stop[].”); Reynolds, 119 N.M. at 388, 890 P.2d at 1320 (“The initial stop in this case was lawful[].”); Affsprung, 2004-NMCA-038, ¶ 10 (“Following a valid stop, for a traffic violation, an officer may . . . check out license, registration, and insurance.”); State v. Romero, 2002-NMCA-064, ¶ 9, 132 N.M. 364, 48 P.3d 102 (“Certain points are fixed in the legal landscape. After stopping [the defendant] for speeding, [the officer] . . . could lawfully detain [the defendant] to inspect his license[].”).

III. CONCLUSION

{32} We reverse the denial of Defendant’s motion to suppress, and we remand for further proceedings in accordance with this opinion.

{33} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-063

NORA PIña Individually and as Temporary Administratrix of the Estate of Daniel H. Piña, Deceased, and as Next Friend of Santiago Piña, Daniel A. Piña, and Daniel Ray Piña, Plaintiffs, and
BANTA OILFIELD SERVICES, INC., Plaintiff in Intervention-Appellee,
BITUMINOUS INSURANCE COMPANIES, Plaintiff in Intervention-Appellee,
versus
GRUY PETROLEUM MANAGEMENT COMPANY, Defendant-Appellant,
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Intervenor-Appellant.
Nos. 25,219 & 24,960 (consolidated) (filed: April 12, 2006)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
JAMES A. HALL, District Judge

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JOSE R. BLANTON
BEALL & BIEHLER
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Banta Oilfield Services

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THOMAS C. BIRD
KELEHER & MCLEOD, P.A.
Albuquerque, New Mexico for Appellee
Bituminous Insurance Companies

EDWARD RICCO
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico

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STRASBURGER & PRICE, L.L.P.
Houston, Texas

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ANDREWS KURTH, L.L.P.
Dallas, Texas for Appellants
Gruy Petroleum Management Co. and
National Union Fire Ins. Co. of Pittsburgh, PA

OPINION

A. JOSEPH ALARID, JUDGE

{1} This case turns upon the interpretation of NMSA 1978, § 56-7-2 (1999), commonly known as the Oilfield Anti-Indemnity Statute. We hold that Section 56-7-2, as amended in 1999, is an expression of a “fundamental principle of justice,” which is to insure the safety of persons and property at well sites within New Mexico, and that a choice of law provision applying Texas law, by which an indemnitee may be indemnified against its own negligence, is void as violative of the public policy of New Mexico. Recognizing that previously we may have underestimated the force of the public policy expressed by Section 56-7-2, we limit our decision in Reagan v. McGee Drilling Corp., 1997-NMCA-014, 123 N.M. 68, 933 P.2d 867, to the pre-1999 version of Section 56-7-2.

BACKGROUND

{2} Appellant, Gruy Petroleum Management Co. (Gruy), is a Texas Corporation. Appellee, Banta Oilfield Services, Inc. (Banta), is a New Mexico Corporation. Appellee, Bituminous Insurance Companies (Bituminous), is a foreign insurer authorized to conduct business in New Mexico. {3} In July 2000, Banta and Gruy entered into a Master Service Contract (MSC) under which Banta agreed to perform work at an oil well site operated by Gruy in Lea County, New Mexico. Article 10 of the MSC provided that [t]o the fullest extent permitted by law, [Banta] shall indemnify, defend and hold harmless GRUY . . . from and against all claims, damages, losses, liens, causes of action, suits, judgments, fines and expenses, including, but not limited to reasonable attorneys’ fees (collectively referred to and defined as “Liabilities”), of any person or entity arising out of, caused by or resulting directly or indirectly from the performance of the work under this Contract,
... regardless of whether the Li-
abilities are caused in part by the
negligence of any Indemnitee.

Article 11 of the MSC required Banta to
maintain a $1,000,000 commercial general
liability policy adding Gruy as an “ad-
tional insured” and to waive any rights
of subrogation that Banta and its insurer
otherwise would have against Gruy. Article
24 of the MSC provided that it “shall be
construed and interpreted in accordance
with the laws of the state of Texas.” Gruy
drafted the MSC and signed it in Texas;
Banta signed the MSC in New Mexico.

[4] Banta purchased liability insurance
from Bituminous. The policy insured Banta
against tort liability assumed by contract
and named Gruy as an additional insured.

[5] In March 2003, Nora Piña filed a
wrongful death action against Gruy, alleg-
ing that her husband, Daniel, suffered fatal
burns in 2002 while employed by Banta
at a well site located in Lea County, New
Mexico, and owned and operated by Gruy.
Piña alleged that her husband’s injuries
were caused by the wrongful conduct of
Gruy’s agents or employees. Piña sought
compensatory and punitive damages.

[6] Banta intervened in the wrongful death
action. Banta alleged that Gruy had invoked
Article 10 of the MSC, demanding that
Banta defend and indemnify Gruy. Banta
sought a declaratory judgment invalidat-
ing the indemnity provision as violative of
Section 56-7-2. Gruy cross-claimed against
Banta, seeking enforcement of the indem-
nity provision and a declaratory judgment
validating the provision. Banta and Gruy
filed cross-motions for summary judgment.
The district court granted Banta’s motion
and denied Gruy’s motion. Gruy appealed.

[8] We consolidated the two appeals.

DISCUSSION

[9] The Oilfield Anti-Indemnity Statute
was enacted in 1971. 1971 N.M. Laws, ch.
205, § 1. In its original form, Section 56-7-
2 then codified as NMSA 1953, § 28-2-2] provided as follows:

A. Any agreement, covenant or promise
contained in, collateral to or affecting
any agreement pertaining to any well for
oil, gas or water . . . which purports to
indemnify the indemnitee against loss or
liability for damages, for:

(1) death or bodily injury to persons;
or
(2) injury to property; or
(3) any other loss, damage or expense
arising under either Paragraph (1) or (2)
or both; or
(4) any combination of these, arising
from the sole or concurrent negligence of
the indemnitee or the agents or employees
of the indemnitee . . . is against public
policy and is void and unenforceable.
This provision shall not affect the validity
of any insurance contract or any benefit
conferred by the Workmen’s Compensa-
tion Act . . . .

[10] We construed Section 56-7-2 in Gui-
tard v. Gulf Oil Co., 100 N.M. 358, 670
P.2d 969 (Ct. App. 1983). In Guitard,
we recognized that the public policy underly-
ing Section 56-7-2 is to promote safety.
Guitard, 100 N.M. at 361, 670 P.2d at 972.
We construed Section 56-7-2 to permit
indemnity agreements that do not purport
to relieve the indemnitee from liability for
its own negligence, since in the case of such
agreements, “[b]oth the operator [inde-
mittee] and the subcontractor [indemnitor]
will have incentive to monitor the safety
of the operation knowing that they will be
responsible for their respective percentage
of negligence.” Guitard, 100 N.M. at 362,
670 P.2d at 973. We upheld the indemnity
agreement at issue in Guitard because we
interpreted it to require the indemnitor
to indemnify the indemnitee only for the
indemnitee’s own negligence.

[11] Our Supreme Court construed Sec-
tion 56-7-2 in Amoco Production Co. v.
Action Well Service, Inc., 107 N.M. 208,
the clause “this provision shall not affect
the validity of any insurance contract”
contained in the final sentence of Section
at 210, 755 P.2d at 54 (internal quotation
marks and citation omitted). The Supreme
Court held that this language allows a
party to obtain insurance against its own
negligence, but that it does not permit
indemnification agreements whereby the
indemnitor is required to obtain insurance
that insures an indemnitee from liability for
the indemnitee’s own negligence.

[12] Subsequently, in Reagan, we con-
considered Section 56-7-2 in a conflict-of-
laws context. In Reagan, a Texas drilling
contractor sought indemnification from the
Texas operator of an oil well located in Lea
County, New Mexico, against liability for
injuries to a third-party’s employee caused
by a defective platform belonging to the
drilling contractor and under the drilling
contractor’s sole control and custody. The
indemnity agreement at issue in Reagan
provided that it was “governed and inter-
preted under the laws of TEXAS.” Reagan,
1997-NMCA-014, ¶ 4. We observed that
Texas’ anti-indemnity statute allowed in-
demnity agreements indemnifying a party
against its own negligence where the in-
demnitor’s obligation is covered by liability
insurance, an arrangement nevertheless un-
lawful under Section 56-7-2 as interpreted
by our Supreme Court in Amoco. Reagan,
1997-NMCA-014, ¶ 11. We acknowledged
that New Mexico policy of not enforcing
indemnity agreements was stricter than that
of Texas and that under New Mexico law
the indemnity agreement would be void and
unenforceable. Id. ¶ 12.

[13] Examining conflict-of-laws prin-
ciples, we observed that New Mexico
courts may decline to enforce a choice-of-
law provision in a contract incorporating
foreign law if application of foreign law
would offend New Mexico public policy.
Id. ¶ 8. We immediately qualified this ap-
parently broad public policy exception to
freedom of contract:

It is said that courts should invoke
this public policy exception only in
“extremely limited” circumstances. Mere differences among
state laws should not be enough
to invoke the public policy ex-
ception. Otherwise, since every
law is an expression of a state’s
public policy, the forum law
would always prevail unless the
foreign law were identical, and
the exception would swallow the
rule. The threshold, under Justice

1The order in which the parties signed the MSC is not clear from the record.
Cardozo’s classic articulation, is whether giving effect to another state’s policies would “violate
some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted
tradition of the common weal” of the forum state.

Id. ¶ 9 (citations omitted). We concluded that the diametrically opposed outcomes that would obtain under New Mexico law versus Texas law merely established that the laws of the two states are “different” and that application of Texas law to uphold an indemnity agreement that was unlawful under Section 56-7-2, as construed by our Supreme Court, would not violate “some fundamental public policy of the State of New Mexico.” Reagan, 1997-NMCA-014, ¶ 14. Relying on public policy favoring freedom of contract, and what we perceived as the absence of a serious policy conflict between New Mexico and Texas law, we upheld the parties’ choice of Texas law, which validated the indemnification provision:

In the present case, the indemnity provisions are valid under Texas law, whose public policy is consistent with New Mexico’s. Furthermore, the indemnity provisions [in the contract] do not touch upon any rule of public morals. They do not rise to the level of violating “some fundamental principle of justice, some prevalent conception of good morals . . . .” The parties negotiated and signed the contract in Texas. Both parties were free to choose Texas law to govern their contract, and under that law the provisions are valid. Our conflict of laws rules require us to recognize that law and enforce the contract.

Id. ¶ 16 (citation omitted). [14] In 1999, the Legislature substantially revised Section 56-7-2: A. An agreement, covenant or promise contained in . . . an agreement pertaining to a well for oil . . . within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph[1] (1) . . . is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee . . . ;

C. A provision in an insurance contract... or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement [indemnifying a party against its own negligence], be void, is against public policy and void.


[15] In 2003, the Legislature amended Section 56-7-2, inserting the words “foreign or domestic” and “within New Mexico” in Subsection A:

A. An agreement, covenant or promise, foreign or domestic, contained in . . . an agreement pertaining to a well for oil . . . within New Mexico, that purports to indemnify the indemnitee against loss or liability for damages arising from the circumstances specified in Paragraph (1) . . . is against public policy and is void:

(1) the sole or concurrent negligence of the indemnitee . . . .[1]


[16] Gruy concedes that the 2003 version of Section 56-7-2 would invalidate the indemnification provisions of the MSC. Gruy argues that

[w]hile the district court correctly recognized that the 1999 version of the statute applies to the present case and the 2003 version is not retroactive, the court in essence gave the 2003 amendment retroactive effect by erroneously ascribing to the 1999 statute a legislative intent that was not manifest until 2003.

Gruy argues that the district court’s interpretation of the 1999 version of Section 56-7-2 frustrates a legitimate expectation that its indemnity agreement would be enforceable under New Mexico law.

[17] Section 56-7-2 is an example of an extraordinarily limited class of statutes whose very subject is the enforceability of contracts that contravene a specific public policy. In 1971, when the Legislature enacted the original version of Section 56-7-2, it was well settled that freedom of contract is a “paramount” public policy “not to be interfered with lightly.” Tharp v. Allis-Chalmers Mfg. Co., 42 N.M. 443, 449, 81 P.2d 703, 706 (1938). In enacting Section 56-7-2, our Legislature directly addressed the conflict between the policies generally favoring freedom of contract and the policy favoring safety at well sites and mines located in New Mexico. The Legislature expressly determined that in this particular context, freedom of contract was to be subordinated to the policies furthered by the Oilfield Anti-Indemnity Statute. Where the Legislature has directly addressed the question of unenforceability on grounds of public policy “the court is bound to carry out the legislative mandate with respect to the enforceability of the term.” Restatement (Second) of Contracts § 178 (2) cmt. a (1981).

[18] The Legislature’s decision to expressly subordinate freedom of contract to well site safety is a persuasive indicator that the Legislature believed promoting safety at well sites to be an especially important public policy. The Legislature, which we presume was familiar with the strong public policy favoring freedom of contract, nevertheless, chose to elevate the public policy favoring safety at well sites over the public policies underlying freedom of contract. In Reagan, we failed to appreciate that a public policy embodied in a statute that expressly overrides freedom of contract is necessarily an unusually important public policy in its statutory context. See Restatement (Second) of Conflict of Laws § 187 cmt. g (1971) (discussing public policy exception to parties’ ability to contractually designate which state’s law will apply to their transaction; observing that “fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal”).

[19] In deciding Reagan, we also failed to appreciate that safety concerns underlying Section 56-7-2 are not limited to the immediate parties to an indemnity agreement. By requiring an indemnitee to remain responsible for its own negligence, Section 56-7-2 protects third parties whose person or property would be placed at risk by the indemnitee’s indifference to safety. Because Section 56-7-2 promotes the safety of third parties, an indemnity agreement prohibited by Section 56-7-2 is not a purely private matter.

[20] In Reagan, we assumed that “while a Texas indemnity contract covered by insurance is contrary to the letter of New Mexico law, it does not promote a policy at odds with New Mexico [public] policy.” Reagan, 1997-NMCA-014, ¶ 13. Bituminous points out that the 1999 amendment to Section 56-7-2 directly responded to this observation by expressly providing

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2In Reagan itself, the injured party was not an employee of either of the parties to the indemnity agreement.
in Subsection (C) that indemnity agreements covered by insurance are “against public policy and void.” Subsequent to the 1999 amendment, it is no longer reasonable to state, as we did in Reagan, that enforcement of an indemnity agreement indemnifying the indemnitee against its own negligence supported by insurance “does not promote a policy at odds with New Mexico policy.” 1997-NMCA-014, ¶ 13. By expressly declaring that prohibited indemnity agreements covered by insurance also are “against public policy,” the 1999 amendment severely undercut our analysis in Reagan, which proceeded on the assumption that the choice-of-law clause at issue implicated “mere differences” between New Mexico and Texas law.

[21] We hold that the Texas anti-indemnity statute is fundamentally inconsistent with important New Mexico public policy as expressed in Section 56-7-2 as amended in 1999. Accordingly, a choice-of-law provision contained in a contract executed subsequent to the effective date of Section 56-7-2 as amended by the 1999 Legislature that purports to apply Texas’ anti-indemnity statute to validate an otherwise prohibited indemnification agreement pertaining to work to be performed at a New Mexico oil well site is itself void as against public policy.

[22] “[W]e presume that the legislature does not intend to enact useless statutes[.]” City of Albuquerque v. State Mun. Boundary Comm’n, 2002-NMCA-024, ¶ 11, 131 N.M. 665, 41 P.3d 933. “[T]he legislature can[] amend an existing law for clarification purposes just as effectively and certainly as for purposes of change.” State ex rel. Dickson v. Aldridge, 66 N.M. 390, 396, 348 P.2d 1002, 1005 (1960). The 2003 amendments merely make clearer what was already implicit in the 1999 amendments to Section 56-7-2: indemnification agreements that undermine the indemnitee’s incentive to promote safety at New Mexico well sites violate a fundamental public policy of New Mexico and are void and unenforceable; and further, agreements that purport to escape the effect of Section 56-7-2 by invoking foreign law, likewise, are against public policy and are void and unenforceable in New Mexico courts.

[23] We affirm the judgments of the district court.

[24] IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Chief Judge
RODERICK T. KENNEDY, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-064

ARLO and JOYCE MURKEN, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

versus

SOLV-EX CORPORATION, JOHN S. RENDALL, W. JACK BUTLER,

Defendants,

and

DEUTSCHE MORGAN GRENFELL, INC.,

Defendant-Appellee,

and

BERNARD C. BAIER (including shares held by Pension and Profit sharing Plan FBO Bernard C. Baier with Suburban Radiology, Patricia A. Baier, Mary Kathleen Baier, and Susan Baier); HAROLD S. CARPENTER (including shares held by Marilyn N. Carpenter, Heartland Systems Company, and Carpenter Investment Company); LEE S. CHAPMAN; CLARK A. COLBY (including shares held by Thomas Colby, Kimberly Colby, Clark A. Colby, Jr., Melinda Colby, Clark A. Colby III, Vicki Colby, Robert Vogel, Mr. and Mrs. Kenneth Brooke, Lloyd Clarke, Peggy Williams, Stephanie Kempf, Jeff Lamson, Charles I. Colby and Ruth Colby Trust Number One, Ruth Colby Trust 'A', Charles I. Colby and Ruth Colby Nation Development Trust, Charles I. Colby and Ruth Colby Trust, and The Six Incorporated Trust); KEITH DENNER; JOEY FESTE; JOE FIELDER; WILLIAM R. and VIRGINIA R. FIELDER; JERRY V. FLATT; SAMUEL A. FRANCIS; KENNETH L. HAACK; ARMON J. HELVIG; STEVE LINDELL; EDWARD J. MICHAEL; TOBY MICHAEL; CLIFF PHELPS; KELLY WENTZEL; and DON WHITE,

Proposed Intervenors-Appellants,

and

TOBY MICHAEL,

Objector-Appellant,

and

BERNARD BAIER, LEE CHAPMAN, WILLIAM FELDER, VIRGINIA FELDER, JERRY FLATT, CLIFF PHELPS, KELLY WENTZEL, DON WHITE, JOEY FESTE, EDWARD J. MICHAEL, TOBY MICHAEL, DAVID RENDALL, JOE ROCK, MARK RICHARDS, JOHN LIPORANTE, MANNY ARAGON, DENNIS SCHLEGEL, KENT BARGHOLS, NORMAN ANDERSON, SAJAD JANMOHAMMED, MILTON E. DAVEY, CHARLES QUENNEVILLE, ROBERT RETZ, MATTHEW L.T. WALDOR, and MARY ANN MICHAEL,

Movants-Appellants.

No. 25,459 (filed: April 25, 2006

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

LINDA M. VANZI, District Judge

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Deutsche Morgan Grenfell, Inc.
IN THIS CLASS ACTION APPEAL, WE DECIDE WHETHER THE DISTRICT COURT WAS DIVESTED OF JURISDICTION OVER THE MERITS OF THE CASE DUE TO A PENDING APPEAL OF THE DENIAL OF A MOTION TO INTERVENE BROUGHT BY NONNAMED CLASS MEMBERS. WE ALSO CONSIDER ISSUES CONTENDING THE DISTRICT COURT ABUSED ITS DISCRETION IN CERTIFYING A CLASS FOR PURPOSES OF SETTLEMENT, IN DECIDING THAT NOTICE TO ABSENT CLASS MEMBERS WAS ADEQUATE, AND IN APPROVING THE SETTLEMENT, ALL WITHOUT CONDUCTING AN EVIDENTIARY HEARING. HOLDING THAT THE DISTRICT COURT HAD JURISDICTION TO CERTIFY THE CLASS AND DID NOT ABUSE ITS DISCRETION IN FINDING THAT A CLASS ACTION WAS THE SUPERIOR MEANS OF ADJUDICATION, AND THAT THE OTHER ISSUES ARE NOT PROPERLY BEFORE US, WE AFFIRM.

BACKGROUND

This is another appeal involving the demise of the Solv-Ex Corporation. See


Appellants' briefing indicates that the district court approved the settlement agreement. The court did not allow the presentation of oral testimony at the hearing, but it did allow argument by all parties who asked to be heard, and it considered extensive documentary evidence, affidavits, and pleadings contained in the record. Over Appellants' objection, the district court certified the class for purposes of settlement only and approved the settlement. Appellants filed an application for appeal of this order under Rule 1-023(F) NMRA, which we granted.

Appellants' briefing indicates that the individuals appealing the district court's order fall into three distinct groups: (1) those individuals who unsuccessfully attempted to intervene in the class action; (2) Toby Michael, a class member who filed a timely objection to the settlement; and (3) "movants," a group of Solv-Ex shareholders who objected to the settlement. However, the same arguments are advanced with respect to all three groups, and the briefing does not indicate if or why the groups should be treated differently. Thus, we will not distinguish between the groups, referring to them collectively hereafter as Appellants.

DISCUSSION

As an initial matter, Plaintiffs argue that Appellants lack standing to challenge the district court's order because they are not "parties" to the litigation. However, Plaintiffs acknowledge that one of the appellants was a party, and they do not explain why or argue that he would not have standing. In addition, Plaintiffs have not cited any authority whatsoever in support of their position. We will not address contentions not supported by argument and authority. See, e.g., Smith v. Village of Ruidoso, 1999-NMCA-151, ¶ 36, 128 N.M. 470, 994 P.2d 50.

Appellants advance three arguments on appeal: (1) because of the pending appeal of the intervention denial, the district court lacked jurisdiction to certify the class and approve the settlement; (2) the district court abused its discretion in failing to "rigorously analyze" the superiority and notice requirements of Rule 1-023 because it failed to hold an evidentiary hearing, and it abused its discretion in failing to place the burden on Plaintiffs to show that the rule's requirements were met; and (3) the district court's decisions to certify the class, approve the notice procedures, and approve the settlement are not supported by substantial evidence because the court did not allow the presentation of any evidence. We address these arguments in turn, rejecting each of them.

1. THE DISTRICT COURT HAD JURISDICTION TO CERTIFY THE CLASS AND APPROVE THE SETTLEMENT

Appellants first argue that the district court lacked jurisdiction to certify the class and approve the settlement due to the pending appeal of the denial of Appellants' motion to intervene. We review the subject matter jurisdiction of the district court de novo. See Sanchez v. Santa Ana Golf Club, Inc., 2005-NMCA-003, ¶ 4, 136 N.M. 682, 104 P.3d 548.

Appellants rely on Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992), limited on other grounds by Trajillo v. Hilton of Santa Fe, 115 N.M. 397, 851 P.2d 1064 (1993). In Kelly Inn, our Supreme Court clarified the well-known rule that if the filing of a proper notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court. See 113 N.M. at 241-43, 824 P.2d at 1043-45. The Court noted that the rule is not absolute, as it does not prevent the district court from taking actions to "carry out or enforce the judgment." Id. at 241, 824 P.2d at 1043. The Court then listed examples of such permissible actions. Id. (determination of amount of costs); id. at 242, 824 P.2d at 1044 (motion to enter deficiency judgment; enforcement of declaratory judgment; stay of execution of judgment). However, the Court ultimately reiterated the general rule that when an appeal is pending, the district court retains jurisdiction only to determine "collateral matters not involved in the appeal." Id. at 243, 824 P.2d at 1045.
were not “collateral matters” that would not “affect the judgment on appeal.” Appellants assert that the judgment on appeal could have been affected by the district court’s actions of certifying the class and approving the settlement because if this Court had reversed the district court and allowed Appellants to intervene, there would have been no lawsuit remaining for them to join on remand. We are not persuaded by these arguments.

[11] Kelly Inn makes clear that the policy behind the rule is judicial economy—as a practical matter, it would be inefficient to have two courts working on the same substantive matter at the same time. Id. at 242, 824 P.2d at 1044 (noting that the rule is “designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time” (internal quotation marks and citation omitted)). To avoid such waste, when substantive issues have been properly put before the appellate court, the district court may no longer take any action that could change the issues pending in the appellate court. As the United States Supreme Court has written: “The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam) (emphasis added), superseded by rule on other grounds as stated in Hatfield v. Bd. of County Comm’rs, 52 F.3d 858, 861 (10th Cir. 1995). Thus, application of the Kelly Inn rule necessarily assumes a final, appealable order on the merits that is under consideration by an appellate court and could be affected by further action of the district court.

[12] Here, the situation is different. The only relevant final order issued by the district court prior to the certification and settlement order was the denial of intervention. Our cases deem such orders “final” so that they can be immediately appealed, not because they conclude the case pursuant to ordinary notions of finality. See Apodaca v. Town of Tome Land Grant, 86 N.M. 132, 133, 520 P.2d 552, 553 (1974) (discussing whether denial of intervention is appealable as of right and concluding that orders denying intervention are final to allow them to be appealable); Kelly Inn, 113 N.M. at 236, 824 P.2d at 1038 (“The general rule in New Mexico for determining the finality of a judgment is that ‘an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible.’” (internal citation omitted)); cf. Rule 1-054(B)(2) NMRA (deeming judgment determining all issues as to one party to be final unless the court otherwise provides). Thus, the order denying intervention can be viewed as interlocutory, although immediately appealable. There was no final order on the merits of the underlying class action. We certainly agree that the Kelly Inn rule would have prevented the district court from altering its ruling on the intervention motion, the substantive matter that was pending before this Court. But because no substantive issues involving the certification or settlement were before this Court at the time the district court made its ruling on those issues, the dangers sought to be avoided by the Kelly Inn rule were not implicated. Therefore, we hold that the Kelly Inn rule was not applicable and the district court retained jurisdiction to certify the class and approve the settlement.

[13] Authority from other jurisdictions also provides support for our decision. We note that Appellants have provided us with no authority that directly supports their position, and we are thus entitled to assume there is none. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (“We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.”). However, our research has revealed a few cases that are on point. Two of those cases reach the same conclusion we do, while the other, with little analysis and no citation to direct authority, reaches the opposite conclusion. See Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 831 n.1 (N.D. Cal. 1973) (noting that intervenor’s interlocutory appeal involving scope of intervention did not deprive court of jurisdiction over “other matters in the case which are not on appeal”), abrogated on other grounds as noted in Patrick v. Miller, 953 F.2d 1240, 1250 & n.5 (10th Cir. 1992); Olson v. Hopkins, 75 Cal. Rptr. 33, 37-38 (Ct. App. 1969) (rejecting argument, based on statute similar to Kelly Inn rule, that appeal of denial of intervention motion divested district court of jurisdiction to rule on merits); cf. County of Alameda v. Carlyon, 488 P.2d 953, 958 n.7 (Cal. 1971) (en banc) (citing Olson for the proposition that district court retained jurisdiction to rule on proposed intervenors’ motion to vacate judgment where the denial of their motion to intervene was on appeal).

But see Maine v. Norton, 148 F. Supp. 2d 81, 83 (D. Me. 2001) (citing no direct authority but stating that the lower court lacked jurisdiction to proceed on the merits while denial of intervention was pending in court of appeals).

[14] We are also unpersuaded by Appellants’ reliance on the Kelly Inn Court’s statement that the district court is not divested of jurisdiction when the action it takes “will not affect the judgment on appeal.” 113 N.M. at 241, 824 P.2d at 1043 (emphasis omitted). Appellants take this phrase out of context. The complete sentence reads as follows: “It is clear, though, that a pending appeal does not divest the trial court of jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment.” Id. (emphasis omitted). The complete sentence makes clear that the Court was not attempting to set forth a comprehensive definition of actions that are impermissible. Rather, it was stating what actions are permissible—those actions that are taken to “carry out or enforce the judgment.” Thus, this statement does not aid Appellants. See Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (“[C]ases are not authority for propositions not considered.” (internal quotation marks and citations omitted)).

[15] We have also considered the policy arguments raised by Plaintiffs and Defendant DMG. They point out that if we were to rule in Appellants’ favor on this question, we would be creating the possibility that an appeal of any intervention motion, no matter how frivolous, could be used to delay proceedings in the district court indefinitely. We agree that this possibility further counsels against a holding that the district court lacked jurisdiction in this case.

[16] In fact, as we noted above, the order denying intervention is fundamentally interlocutory, although it is deemed final for purposes of allowing it to be immediately appealed. It is precisely to prevent a litigant from depriving a district court of jurisdiction that we have held that an attempted “appeal from a manifestly non-final order cannot divest a court of jurisdiction.” In re Byrnes, 2002-NMCA-102, ¶ 39, 132 N.M. 718, 54 P.3d 996.

[17] Importantly, too, Appellants did not pursue other options that were potentially available to protect their rights. First, they could have asked the district court to stay its decision on the merits pending resolution
of the appeal. See Belser v. O’Cleireachain, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 114 P.3d 303 (noting that the district court, in the exercise of its inherent power to manage the cases before it, has discretion to grant and lift stays). If they were dissatisfied with the district court’s exercise of discretion, Rule 12-207 NMRA provides general authority for this Court’s review of district court decisions dealing with stays.

Second, they could have opted out of the action so as not to be bound by any judgment rendered. See Rule 1-023(C)(2)(a) (referenceing the ability of class members to timely request exclusion from the class). Appellants also fault the notice procedures used by Plaintiffs, alleging that some class members did not receive actual notice of the action in time to opt out. However, the opt-out deadline was November 3, 2003, and the motion to intervene was filed on August 13, 2003. Thus, at least those Appellants who were party to the motion to intervene had actual notice of the action in time to opt out. Because Appellants declined to protect their rights by requesting a stay or opting out of the class, they ran the risk of the situation in which they now find themselves.

We acknowledge that there appear to be some Movant-Appellants who were not party to the motion to intervene, and thus we cannot tell whether they would have had actual notice in time to opt out. However, while Appellants have made a general allegation that some class members received notice after the opt-out deadline, they have not indicated whether any of the parties to this appeal fall into that category. See City of Albuquerque v. Westland Dev. Co., 121 N.M. 144, 155, 909 P.2d 25, 36 (Ct. App. 1995) (“The appellant has the burden to point out clearly and specifically the error it asserts on appeal.”).

[20] We reiterate that because there was no final judgment on the merits of the underlying class action, the Kelly Inn rule was not applicable and the district court acted within its jurisdiction in certifying the class and approving the settlement.

2. The District Court Adequately Analyzed the Rule 1-023 Factor of Superiority and Did Not Abuse Its Discretion in Certifying the Class

We utilize a two-step process in reviewing a district court’s class action certification decision. First, we review de novo whether the district court applied the correct law. See Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39. If the district court has applied the correct law, we then review its certification decision to see whether the court abused its discretion in certifying or refusing to certify the class. Id.

[22] Appellants first argue that the district court “misapplied” the law in “neglect[ing]” to undertake the rigorous analysis required by law of whether Plaintiffs met all the requirements of Rule [1-023].” Appellants’ primary argument is that the district court erred in failing to hold an evidentiary hearing prior to certifying the class. This is a threshold question of whether the district court applied the correct law, and we review it de novo. See Brooks, 2004-NMCA-134, ¶ 7. After making that determination, we review the remainder of Appellants’ contentions under the abuse of discretion standard because Appellants do not make any other allegations that the court failed to apply or misconstrued the requirements of Rule 1-023. We hold that the district court was not required to hold an evidentiary hearing and that the court did not abuse its discretion in certifying the class.

[23] Appellants specifically argue that the district court failed to “rigorously analyze” the requirement of Rule 1-023(B)(3) that a class action must be superior to other methods of adjudication. See Brooks, 2004-NMCA-134, ¶ 9 (directing district courts to engage in a “rigorous analysis” of the Rule 1-023 requirements in order to ensure that the process is fair to both defendants and absent class members). This requirement mandates that before certifying a Rule 1-023(B)(3) class action, the district court must find that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The rule then directs the court to consider the following four factors in deciding whether a class action is the superior method of adjudication: (1) “the interest of members of the class in individually controlling the prosecution or defense of separate actions,” (2) “the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,” (3) “the desirability or undesirability of concentrating the litigation of the claims in the particular forum,” and (4) “the difficulties likely to be encountered in the management of a class action.” Rule 1-023(B)(3).

[24] Appellants argue only that the first of the superiority factors, the interest of individual class members in bringing their own actions, weighs against certification in this case. Appellants correctly point out that one of the primary considerations with regard to this factor is the potential size of individual members’ claims, because larger claims are more likely to be worth adjudicating individually instead of in a class action. See Amchem Prods., 521 U.S. at 616.

[25] Appellants have not demonstrated to us that the district court failed to conduct a rigorous analysis of this factor. As we have stated, Appellants’ argument essentially boils down to dissatisfaction with the district court’s refusal to hold an evidentiary hearing before certifying the class. Appellants argue that the size of potential individual claims is a question of fact that the court cannot have considered because it refused to allow the presentation of evidence.

[26] Courts around the country have concluded that a district court need not conduct an evidentiary hearing prior to certifying a class. See, e.g., Grayson v. K Mart Corp., 79 F.3d 1086, 1099 (11th Cir. 1996) (“A court may hold an evidentiary hearing prior to certifying a class. The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially.” (internal citations omitted)); Hartman v. Duffy, 19 F.3d 1459, 1473 (D.C. Cir. 1994) (remanding for re-consideration of certification decision but stating that “[w]e emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing . . . on the issue of class certification in every case”). But see Merrill v. S. Methodist Univ., 806 F.2d 600, 608 (5th Cir. 1986) (“[W]e have stated on numerous occasions that the district court should ordinarily conduct an evidentiary hearing on [the certification] question. Only in cases free from doubt, where clear grounds exist[,] for denial of class certification may a district court escape this obligation.” (internal quotation marks and citations omitted)). We agree with the majority of these courts and hold that a district court is not required to hold an evidentiary hearing prior to making a certification decision, particularly in cases like the present one, where the district court reviewed a mass of documentary evidence and heard argument of counsel, and where Appellants have not specifically shown any prejudice from the failure to hold an evidentiary hearing.

[27] We now examine whether the district court abused its discretion in finding that the superiority requirement was met. We note that despite the district court’s refusal to take “evidence,” the court was well aware
of Appellants’ contention that a class action was not the superior method of adjudication due to the allegation of large claims belonging to individual class members. Counsel for Appellants cogently made this point at the certification hearing, and Mr. Michael (the Appellant who was a class member and timely objected) also submitted an affidavit indicating that he alone owned approximately 600,000 shares of Solv-Ex stock. Appellants have not demonstrated to us that the district court failed to consider their argument. Thus, we presume that the district court properly considered the possibility that individual class members might have large claims that would not be well suited to class action adjudication and nonetheless determined that a class action was the superior method of adjudication. See State v. Rojo, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (noting that where record is unclear, we presume regularity and correctness of the district court’s actions).

{28} Further, the district court’s determination that a class action was the superior vehicle in this case is supported by the fact that the other three superiority factors weigh in favor of certification. First, there is no other pending litigation brought by Solv-Ex stockholders. See Rule 1-023(B)(3)(b) (directing court to consider related pending litigation). Second, New Mexico appears to be a desirable forum because Solv-Ex was a New Mexico corporation and Defendant Rendall is still a New Mexico citizen. See Rule 1-023(B)(3)(c) (directing court to consider whether forum is desirable). Finally, manageability issues are not relevant to the superiority determination because this class was certified for purposes of settlement only. See Rule 1-023(B)(3)(d) (directing court to consider whether class action will be manageable); see also Amchem Prods., 521 U.S. at 620 (noting that while other Rule 23 factors should still be analyzed vigilantly, manageability need not be considered if certification is for purposes of settlement only). Because we assume that the district court properly considered Appellants’ argument with regard to the size of individual claims, and because the other three Rule 1-023(B)(3) factors weigh in favor of certification, we cannot say that the district court abused its discretion in determining that a class action was the superior method of adjudicating this conflict.

{29} Because we have decided that the district court did not err in finding that a class action was the superior method of adjudication, we also reject Appellants’ cursory argument that the district court failed to put the burden of showing that the Rule 1-023 requirements were met on Plaintiffs.

3. Appellants’ Other Arguments Are Not Properly Before Us

{30} We now turn to Appellants’ contention that the district court erred in approving Plaintiffs’ procedures for disseminating notice to the class. Defendant DMG argues that we should not consider Appellants’ notice arguments because Appellants brought this appeal under Rule 1-023(F). Rule 1-023(F) allows for discretionary appeal of “an order of a district court granting or denying class action certification.” We agree with DMG that notice issues are not properly addressed in a Rule 1-023(F) appeal because notice is a separate issue that is not part of the certification decision. See Rule 1-023(A)-(B) (setting forth the requirements for certification); Rule 1-023(C) (setting forth notice requirements). We also note that the federal courts have construed the analogous federal rule narrowly. See, e.g., McKowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380, 390 (3d Cir. 2002) (noting that circuit courts have been “scrupulous about limiting [Fed. R. Civ. P.] 23(f) inquiries to class certification issues”).

{31} In this case, Appellants did not directly appeal from the order approving the settlement. No notice of appeal was ever filed by them, and Appellants did not file or serve their application for interlocutory appeal on the district court clerk, as contemplated by a later-enacted rule governing appeals of class action certification decisions. See Rule 12-203(A)(A) NMRA. It remains the rule that time and place filing requirements for the notice of appeal are mandatory preconditions to this Court’s exercise of jurisdiction over an appeal. See Govich v. N. Am. Sys., Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Thus, we cannot construe their application as a notice of appeal. Accordingly, we do not address their issues concerning the procedures for disseminating notice to the class.

{32} Appellants also make a cursory argument that the district court’s decision to approve the settlement was not supported by substantial evidence. We will not address this argument for the same reasons we do not address the notice issue—such issues are not properly raised in an interlocutory appeal of a class action certification decision and there was no timely appeal taken from the settlement order.

CONCLUSION

{33} We affirm.

{34} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge
Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-065

ARLO and JOYCE MURKEN, on behalf of themselves and all others similarly situated,
Plaintiffs,
versus
SOLV-EX CORPORATION, W. JACK BUTLER, Defendants,
and
JOHN S. RENDALL, Defendant-Appellant,
and
DEUTSCHE MORGAN GRENFELL, INC., Defendant-Appellee.

No. 25,468 (filed: April 25, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
LINDA M. VANZI, District Judge

JOHN S. RENDALL
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Pro Se Appellant

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Washington, D.C.
for Appellee

OPINION
LYNN PICKARD, JUDGE

{1} This case requires us to decide whether a non-settling defendant in a class action has standing to object to a court-approved settlement entered into by the class plaintiffs and another defendant. We hold that, while there may be instances in which a non-settling defendant may have such standing, the case at bar is not one of them. We therefore reject all of the non-settling defendant’s arguments seeking to nullify the order approving the settlement. We affirm the district court’s order approving the settlement.

FACTS AND PROCEEDINGS

{2} This appeal is yet another arising from the demise of the Solv-Ex Corporation. See Murken v. Solv-Ex Corp., 2006-NMCA-064, ___ N.M. ___, ___ P.3d ___ (No. 25,459, filed April 25, 2006); Butler v. Deutsche Morgan Grenfell, Inc., ___-NMCA-___, ___ N.M. ___, ___ P.3d ___ (Nos. 25,556; 25,557; 25,558 filed April 25, 2006); Murken v. Solv-Ex Corp., 2005-NMCA-137, 138 N.M. 653, 124 P.3d 1192; Murken v. Suncor Energy, Inc., 2005-NMCA-102, 138 N.M. 179, 117 P.3d 985. The basic facts are that Defendant Rendall was the founder and CEO of Solv-Ex. Solv-Ex was a corporation that purported to have technology that could extract oil from tar sands without producing the toxic tailings that conventional methods produce. In the mid-1990s, Solv-Ex’s stock was doing well. In 1996, however, the price of it plunged, and the company ultimately went bankrupt in 1997.

{3} According to the class plaintiffs, the problems with Solv-Ex’s stock were caused by the fact that the technology was a fraud. In 1996, they sued the company, Rendall, Butler (another officer and large shareholder in the company), and Deutsche Morgan Grenfell (DMG), a financial company that was allegedly involved in financing the company, as well as marketing its shares through misleading reports. According to Rendall, the problems with the stock were caused by Solv-Ex’s competitors in the oil extraction business, who conspired with DMG and its parent corporation to pull the financing from Solv-Ex so that Solv-Ex would fail and the competitors would not have to compete with a corporation that could extract oil from tar sands without the severe environmental consequences that were caused by the competitors’ processes.

{4} In 2003, the class plaintiffs and DMG settled their differences and the class plaintiffs presented the settlement plan to the district court. On the same day that the motion to preliminarily approve the plan was filed, the district court signed the preliminary approval. Rendall moved to vacate it, but the district court denied his motion on the ground that he lacked standing to object to the settlement. Rendall’s basic objections were that (1) the class plaintiffs could not settle with DMG without affording Rendall an opportunity to litigate the issue of who and what caused Solv-Ex’s demise and (2) the entry of the preliminary approval without notice to Rendall or his being involved in a hearing leading to that approval was a denial of his due process rights.

{5} At the time of the final approval of the settlement, Rendall also appeared and objected. At this time, he argued that (1) he was a member of the plaintiff class inasmuch as his shares of Solv-Ex were damaged also, (2) he had an outstanding malicious prosecution counterclaim against the class representatives that disqualified them from representing the class, and (3) he was prejudiced by the settlement because a jury should determine whether he and the other original defendants were responsible for the fall in stock price or whether the international conspiracy among competitors and others was responsible for it. The dis-
The district court again ruled that Rendall lacked standing to object. The district court entered a final judgment certifying the class and approving the settlement between the class plaintiffs and DMG. Rendall filed a timely notice of appeal in the district court in which he asked “leave” of this Court to appeal the class certification. DMG then filed a response, opposing Rendall’s “application for appeal,” and Rendall filed a reply asking this Court to consider his appeal an appeal as of right. This Court assigned the case to its general calendar without granting any application, thereby treating Rendall’s appeal as an appeal as of right and permitting him to raise any issues he wished that arose from the final judgment approving the settlement between the class plaintiffs and DMG.

**DISCUSSION**

[7] Rendall raises seven issues on appeal, which roughly correspond to the objections he made in the district court. It would unduly lengthen this opinion to lay out his arguments on each issue. If the district court was correct that Rendall did not have standing to raise any objection to the settlement, we should affirm. We review de novo the question of whether Rendall had standing to object to a settlement to which he was not a party. See *In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990); *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130 N.M. 368, 24 P.3d 803.

[8] It is well established that non-settling parties usually have no standing to object to a settlement agreement into which other parties have entered. See 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:55, at 178 (4th ed. 2002) [hereinafter Newberg]. “[N]on-settling defendants generally have no standing to complain about a settlement, since they are not members of the settling class.” *Transamerican Ref. Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992). Among the reasons for this rule is the policy favoring settlements, especially in complex class-action cases. Newberg, supra; *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001).

[9] There is a limited exception to this rule, and it applies when a non-settling party can demonstrate prejudice caused by the settlement. *In re Integra Realty Res., Inc.*, 262 F.3d at 1102. However, the type of prejudice must be “plain legal prejudice.” *Id.* (internal quotation marks and citation omitted). “Plain legal prejudice” has been defined as including the situation where there is legal interference with a party’s right to seek contribution or indemnification or where the settlement “strips the party of a legal claim or cause of action.” *Id.* at 1102-03 (quoting *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992)). “Mere allegations by a nonsettling party that prejudice exists because there is a loss of ‘resource sharing,’ ‘broader discovery,’ or ‘bargaining power,’ is insufficient.” Newberg, supra. A mere allegation of injury is also insufficient. See *In re Integra Realty Res., Inc.*, 262 F.3d at 1103.

[10] Measured by these standards, Rendall’s claims of prejudice are insufficient. First, he claims that the class action alleged a conspiracy between him and DMG that would result in joint and several liability. He implies that the settlement agreement cut off his rights to contribution or indemnification. However, as pointed out by DMG, there is nothing in the settlement agreement that bears on any of Rendall’s rights. In particular, there is no attempt in the settlement agreement to cut off any rights to contribution or indemnification, nor is there any attempt to enjoin Rendall’s actions in connection with these lawsuits in any way. Thus, *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972), on which Rendall relies, is wholly inapposite. In that case, the proposed settlement contained a provision barring the non-settling defendants from making any claims against the settling defendants. *Id.* at 622. Because there is no comparable provision in this case, Rendall’s argument is without merit. See *Zupnick v. Fogel*, 989 F.2d 93, 98-99 (2d Cir. 1993) (upholding settlement agreement because it was not binding on non-settling defendants).

[11] Second, Rendall appears to claim prejudice in that the settlement with DMG leaves him “holding the baby on a claim which I dispute.” However, this is the sort of general prejudice that the cases hold is insufficient to confer standing. Instead of general prejudice, Rendall must show plain legal prejudice, which requires some legal right or claim to be cut off. None of Rendall’s rights or claims has been cut off by the settlement agreement between the class plaintiffs and DMG.

[12] Third, Rendall alleges prejudice because of his still-pending malicious prosecution claim against the representatives of the plaintiff class. However, this allegation is just another objection to the settlement, not a claim of legal prejudice such as would give Rendall standing. Moreover, instead of showing that such a claim has been cut off by the settlement, Rendall’s allegation proves that his claim is still viable, or at least is not cut off by the settlement. Thus, this assertion of prejudice is unavailing to Rendall.

[13] Fourth, Rendall claims that he is in fact a member of the plaintiff class because his stock has been adversely affected. A class member would have standing to object and would not need to show legal prejudice. However, Rendall is not a member of the class. Both the class-action complaint and the settlement agreement expressly excluded the original defendants from the class, and thus Rendall’s claim is not supported by the record.

[14] In short, none of Rendall’s claims of prejudice rise to the level of legal prejudice such as are required to give him standing to object to the settlement. The policy favoring the voluntary settlement of legal disputes would be undermined were claims such as Rendall’s allowed to scuttle a settlement between other parties that does not affect the non-settling party’s legal rights.

**CONCLUSION**

[15] The entry of the final judgment approving the settlement between the class plaintiffs and DMG is affirmed as against Rendall’s objections to it.

[16] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge
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The REDW Trust Company has people who take a personal interest in your clients. Confidentiality, history and goals for the future are respected and honored. As custodians and investment advisors, we hold assets and manage investments. As trustees, we carry out the terms of your clients’ trusts, manage investments and all their personal affairs.

REDW Trust Company
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ASSOCIATE or ASSISTANT UNIVERSITY COUNSEL

Requisition #M44352 & #M44353

The University of New Mexico is seeking candidates for its University Counsel Office to advise on research activities and intellectual property. Hiring would be at Assistant or Associate University Counsel level depending on experience. Desired qualifications include experience as counsel to an institution of higher education or to a similarly complex organization with multiple constituencies; knowledge of statutory and regulatory framework in which a university operates; experience in collaborative problem-solving; experience and knowledge of intellectual property or other complex areas of law; experience in contract review, drafting, and negotiation preferably with research contract; experience supporting compliance programs; and experience in providing legal/education training to support clients’ needs. Most important are strong analysis and communication skills, and a demonstrated ability to master complex areas of law.

Complete position description and instructions on how to apply are available on the UNM Human Resources website: http://jobs.unm.edu/jobopenings.cfm (see job requisitions M44352 and M44353)

The University of New Mexico is an Equal Opportunity/Affirmative Action Employer and Educator. Women and Minorities are encouraged to apply.

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SCHOOL OF LAW
Calendar of Events
July
7 The 5th Annual Summer Golf Classic
University South Course
11:30 a.m.

October
20 Distinguished Achievement Awards Banquet
6 p.m.
26 Ramo Lecture on International Justice

For more information please call
Claire Conrad
505.277.0080

David Stotts
Attorney at Law

• Business Litigation
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NEW MEXICO LEGAL AID

Staff Attorney
Las Vegas Office

New Mexico Legal Aid (NMLA) seeks attorneys to provide advice, brief service, and representation in domestic relations proceedings focusing on domestic violence to low income persons. Work: in addition to family law, handling cases in other areas of general poverty law including housing, public benefits, and consumer; utilizing a computerized case management system; handling telephone intake; participating in community education and outreach to domestic violence victims and providers; participating in recruitment of pro bono attorneys. Qualifications: Dedication and commitment to serving the needs of domestic violence victims and persons living in poverty, excellent research, writing and interviewing skills. Proficiency in Spanish is a plus. New Mexico bar license required. Note: State of the art communication technology. Excellent supervision, training, mentoring and oversight provided by firm experts across the state through use of technology. Excellent fringe benefits (health, dental, life, and long-term disability insurance), paid holidays, generous personal and sick leave. Send resume and writing sample to: Gloria A. Molinar, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001, email: gloriam@nmlegalaid.org Salary: DOE, NMLA is an EEO/AA Employer. Deadline: June 30, 2006.

Managing Attorney
Roswell, New Mexico

Position: New Mexico Legal Aid has an opening for a Regional Managing Attorney in the Roswell Office. NMLA represents low-income individuals and families in a wide variety of poverty law areas including domestic violence, housing, public benefits and consumer issues. Duties include day to day management of five person office. Expectation that attorney will be active in local bar and community activities. Requirements: Candidates must have two years of experience including supervisory experience. They must also possess excellent written and oral communication skills, the ability to manage multiple tasks, the ability to oversee litigation conducted by staff and manage a caseload. Proficiency in Spanish is a plus. Licensed to practice law in New Mexico; at least two years of experience in civil litigation. Note: New Mexico Legal Aid is a statewide program with 11 offices. State of the art communication technology. Excellent supervision, training, mentoring and oversight provided by firm experts across the state through use of technology. Excellent fringe benefits (health, dental, life, and long-term disability insurance), paid holidays, generous personal and sick leave. Send resume and writing sample to: Gloria A. Molinar, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001, email: gloriam@nmlegalaid.org Salary: DOE, NMLA is an EEO/AA Employer. Deadline: June 30, 2006.

Public Defenders

The Public Defender Department is seeking entry and mid-level attorneys for positions throughout the state. Competitive salaries: excellent benefits” additional compensation for assignment to an outlying district office. Please contact John Stapleton at (505) 827-3900, x102, or e-mail at john.stapleton@state.nm.us.

New Mexico Legal Aid

Assistant District Attorney
Las Vegas Office

The Second Judicial District Attorney’s office in Bernalillo County is looking for both entry-level and experienced prosecutors. Qualified applicants may be considered for positions in Violent Crimes, Crimes Against Children, Metropolitan Court, and other divisions in the office. Salary and job assignments will be based upon experience and the District Attorney Personnel and Compensation Plan. If interested please mail/fax/e-mail a resume and letter of interest to Jeff Peters, Human Resources Director, District Attorney’s Office, 520 Lomas Blvd., N.W., Albuquerque, NM 87102. Fax: 505-841-7245, E-mail: jtpeters@da2nd.state.nm.us. Resumes must be received no later than 5:00 pm on Friday June 30, 2006 to be considered.

Third Judicial District

Assistant And Senior Trial Attorney

The Third Judicial District Attorney’s Office has vacancies for Assistant Trial Attorney and Senior Trial Attorney. Qualifications and salary are pursuant to the New Mexico District Attorney’s Personnel & Compensation Plan. Resumes can be faxed to Kelly Kuenstler at (505) 524-6379, or mailed to the Third Judicial District Attorney’s Office, ATTN: Kelly Kuenstler, District Office Manager, 845 N. Motel Blvd., 2nd Floor, Suite D, Las Cruces, NM 88007.

Attorney


Attorney

Immediate opening for Associate Attorney to do civil and criminal work in Silver City, New Mexico. Call (505) 538-2925 or send resume to Lopez & Associates, P. C., P. O. Box 1289, Silver City, New Mexico 88062. Fax (505) 388-9228.

JANE YOHALEM

Appeals Specialist
(505) 988-2826

NOTE

SUBMISSION DEADLINES

All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ad to ads@nmbar.org or fax 505.797.6075.

BAR BULLETIN - JUNE 19, 2006 - VOLUME 45, NO. 25 51
Children’s Court Attorney  
Child Protective Services

CYFD is accepting applications for "Lawyer-O (Perm) in Hobbs, NM. Attorney will represent CYFD in abuse/neglect and termination proceedings and matters related thereto. Some APS work as well. Lawyer-O must be a graduate of an accredited school of law and licensed by the Supreme Court of New Mexico. Benefits can include medical, dental, vision, paid vacation and good retirement package. Starting salary: $38-53K yearly, DOE and qualifications. For information on obtaining and returning applications, call Managing Attorney, (505)-763-0014, or e-mail nick.kennedy@state.nm.us. EOE.

Associate Attorney

Scott & Kienzle, P.A. seeks associate attorney with 0 to 5 years of experience. Practice areas include civil litigation and creditor bankruptcy. Strong academic record, writing skills, and interpersonal skills required. Please email a letter of interest, salary requirements, and resume to Paul Kienzle at PaulKienzle@aol.com or fax to (505)246-8682.

Assistant District Attorney

The 11th Judicial District Attorney’s office, Division I, in Farmington, NM is accepting resumes for positions of Assistant District Attorney. Salary is $34,000 to $46,000 DOE. New Mexico has a 1 year temporary license available until you have taken the New Mexico bar either in July or February. Please send resume to: Kim Welch, Chief Financial Officer, 710 E. 20th St., Farmington, NM 87401. Equal Opportunity Employer.

Access to Justice Coordinator

FT coordinator to assist with delivery of civil legal services to persons of limited means. Duties include coordination of access to justice efforts among interested parties within the scope of a comprehensive statewide Access to Justice Plan; assisting in the formation of district court pro bono committees; providing reports and liaison with project funders. Education and Experience: Juris Doctor and current license to practice law in NM is preferred. In lieu of a JD Degree, the person may possess a degree and prior work experience in progressively more responsible management positions; a legal background and desire to advocate for access to justice issues. Salary: $37,000 - $45,000 DOE with benefits. Interested persons should review the Access to Justice Commission Report to the Supreme Court available at www.nmbar.org and send a letter of interest along with a resume to HR-ATJ, PO Box 92860, Albuquerque, NM 87199 or by email to kazar@wwwlaw.us. All inquiries will be kept confidential.

Deputy General Counsel  
New Mexico Corrections Department

The New Mexico Corrections Department is accepting applications for the position of Deputy General Counsel at its Central Office in Santa Fe. Applicants must have at least one (1) year of experience in criminal, employment, civil rights and/or tort law. The position is responsible for representing the Department in defense of inmate pro se civil suits, in employee disciplinary actions and in miscellaneous civil and criminal matters. The position is also responsible for reviewing and approving contracts and policies. Some interaction with inmates is required. Starting salary will range from approximately $43,000 to $68,000 per year, depending upon experience and qualifications. Maximum possible salary for this position is approximately $76,550 per year. Please send a copy of your resume or your State Personnel Application to JoAnne Parish, Office of General Counsel, NMCD, PO Box 27116, Santa Fe, NM 87502-0116 or by e-mail to JoAnne.Parish@state.nm.us. The deadline for submitting application/resume is July 14, 2006.

Lawyer

The firm of Wiggins, Williams & Wiggins, P.C. is seeking a lawyer with one to four years of experience in general practice with an emphasis on transactional work. Applicants with a strong academic background are preferred. The firm offers excellent benefits and a flexible work schedule. Please send a resume, references and a writing sample to Kathy Azar, Firm Administrator, P.O. Box 1308, Albuquerque, New Mexico 87103-1308 or by email to kazar@wwwlaw.us. All inquiries will be kept confidential.

Secretary Needed

Experienced Legal Secretary

Friedman, P.A., Attn: Amelia J. Maritnez, 530-B Hinkle Road, Santa Fe, NM 87103-1308 or by email to mlf@mfgdsl.com.

Paralegal

The Santa Fe office of Hinkle, Hensley, Shanor & Martin, L.L.P. is seeking a paralegal. Experience in general civil practice, including employment, environmental, insurance defense, professional malpractice defense, regulatory and commercial law is preferred. Candidates should have excellent writing and research skills, and the ability to work with little supervision. A paralegal certificate or degree is necessary. All inquiries kept confidential. Resume can be faxed to Office Manager, 505-982-8623 or mailed to P.O. Box 2068, Santa Fe, NM 87504-2068.

Legal Secretary/Paralegal

Santa Fe sole practitioner seeks legal secretary/paralegal for 35 hours per week long-term. Prior 1st Judicial District and family law experience preferred. Applicant must be proficient in MS Word, Outlook, dictation, and drafting. Detail oriented, self starter able to work independently. Health insurance paid. Salary DOE. Please send resume, references and salary requirements to McDevitt Law Firm, P.A. at mlf@mfgdsl.com.

Receptionist

Full time receptionist needed for front desk. Light secretarial, and courier duties required. Salary DOE. Send resume to Cassutt, Hays & Friedman, P.A., Attn: Amelia J. Maritnez, 530-B Hinkle Road, Santa Fe, New Mexico 87505.

Experienced Legal Secretary Needed

Sole practitioner west side/Corrales. Knowledge of Word Perfect, Word & Timeslips. Good organizational skills. Send resume to PO Box 1980, Corrales 87048 or Fax: 243-0819.
Request For Applications
City Of Albuquerque
Assistant City Attorney Position
Assistant City Attorney: Assistant City Attorney position available with the Safe City Strike Force Division. This position will be assigned to the Nuisance Abatement area and be on a rotating schedule at the Metropolitan Court Traffic Arraignment Division. This is an entry level position. Applicants must have a minimum of one (1) year to three (3) years experience including knowledge of civil practice and procedures in state and metropolitan court and trial and writing skills required. Salary commensurate with experience. Please submit resume to: Robert M. White, City Attorney, P. O. Box 2248, Albuquerque, NM 87103. Application deadline is June 30, 2006.

Paralegal
The Second Judicial District Court is accepting applications for a full-time Paralegal in the Domestic Violence Division. Education/Experience: Shall meet one or more the following educational or work experience: (A) Graduation from a paralegal program that is (1) approved by the ABA; (2) an associate degree program; (3) a post-baccalaureate certificate in paralegal studies; or (4) a bachelor’s degree program. (B) Graduation from a post-secondary legal assistant program which consists of a minimum of 60 semester hours or equivalent, as defined by the ABA guidelines for the Approval of Paralegal Education Program. (C) A bachelor’s degree in any field plus 2 years of substantive law-related experience under the supervision of a licensed attorney. Successful completion of at least 15 semester hours of substantive paralegal course may be substituted for one year of law-related experience. (D) Graduation from an accredited law school and not disbarred or suspended from the practice of law by the State of New Mexico or any other jurisdiction. (E) Certification by the National Association of Legal Assistants, Incorporated, the National Federation of Paralegal Associations, Incorporated or other equivalent national or state competency examination plus at least one year of substantive law-related experience under the supervision of a licensed attorney. (F) A high school diploma or equivalent plus 7 years of substantive law-related experience under the supervision of a licensed attorney. Salary: $16,414 hourly (80% compa-ratio) to $17,173 (83.7% compa-ratio) DOE plus benefits. A complete Job Announcement may be viewed at www.nmcourts.com. Apply at or send application and proof of education to the Second Judicial District Court, Human Resource Office, P.O. Box 2248, Albuquerque, NM 87103. Application not including copies of information requested on the employment application will be rejected. CLOSING DATE: June 27, 2006 at 5:00 p.m. EOE.

POSITIONS WANTED

Part-time or Contract Work
New Mexico attorney, who is currently working on a certificate in Public Health, seeking part-time or contract work -- or flexible associate position -- for one year or less. Enjoy research and writing. Interests include but not limited to: health law, HIPAA, medical malpractice, elder law, employment, gaming, Federal / Indian law; administrative law. Would be interested in supporting civil trial work. Background includes: Federal/Indian law; administrative hearings; employment law; recent course in Indian gaming. Very flexible in compensation needs. Contact: attorney@contract-legal-services.com.

Contract or Permanent PT - Paralegal
Contract or Permanent PT - Paralegal 16 years experience - Specializing in Trial Prep./Lit. Support - Doc. Indexing & Organization. Efficient & Professional. (505) 459-6166 or mpatalegal@aol.com.

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Executive Offices Downtown
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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.

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. Three different suite sizes, 850SF, 1008SF, and 3747SF (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.

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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.

Downtown Albuquerque
620 Roma Avenue N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

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*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

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Address

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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 _______________

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We are pleased to announce

Frank T. Apodaca

Has joined the firm as an Associate in the Santa Fe office.*

Mr. Apodaca formerly served as a clerk for the Honorable Michael D. Hawkins, United States Court of Appeals for the Ninth Circuit, and as an associate in the Houston office of Susman Godfrey L.L.P. He received his B.A., m.c.l., from Harvard University in 1997, and J.D. from Yale Law School in 2001. Mr. Apodaca will practice in the area of complex civil and commercial litigation.

* Mr. Apodaca currently is licensed in Texas only 

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