Legal Education Calendar
Writs of Certiorari
List of Court of Appeals' Opinions
Clerk Certificates

In the Matter of the Suspension of Active Members of the State Bar of New Mexico for Noncompliance with Rule 18-301 NMRA, Governing Minimum Continuing Legal Education For Compliance Year 2005

2006-NMSC-028, No. 28,816: The Estate of Rudy Romero v. City of Santa Fe
2006-NMSC-029, No. 28,823: Payne v. Hall
2006-NMCA-074, No. 24,883/25,488: Lopez v. Las Cruces Police Department

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The Honorable Robert H. Henry

Special Insert: CLE AT-A-GLANCE

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**Professionalism Tip**

With respect to the courts and other tribunals:

In civil matters, I will stipulate to facts when there is no genuine dispute.

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### Meetings

**July**

18 Solo and Small Firm Practitioners Section and Board of Directors Meeting, noon, State Bar Center

19 Committee on Women and the Legal Profession, noon, State Bar Center

20 Board of Bar Commissioners Meeting, 10:30 a.m., Taos Convention Center

20 Health Law Section Board of Directors, 3 p.m., Taos Convention Center

20-22 2006 Annual Meeting

21 Senior Lawyers Division Annual Meeting, 2:30 p.m., Taos Convention Center

22 Young Lawyers Division Annual Meeting, 10 a.m., Taos Convention Center

25 Technology Committee Meeting

6 p.m., State Bar Center

---

### State Bar Workshops

**July**

26 Consumer Debt/Bankruptcy Workshop

6 p.m., State Bar Center, Albuquerque

27 Consumer Debt/Bankruptcy Workshop

5:30 p.m., Branigan Library, Las Cruces

**August**

9 Immigration Workshop

6 p.m., State Bar Center, Albuquerque

23 Consumer Debt/Bankruptcy Workshop

6 p.m., State Bar Center, Albuquerque

24 Consumer Debt/Bankruptcy Workshop

5:30 p.m., Branigan Library, Las Cruces

**September**

27 Consumer Debt/Bankruptcy Workshop

6 p.m., State Bar Center, Albuquerque

Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 707-6048 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., July 28, 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

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.

First Judicial District Court

Criminal Bench and Bar Brownbag

The 1st Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, July 18, in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to Sally Kim, (505) 827-5047.

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, Civil, Children’s Court, domestic, incompetency/mental health, adoption and probate cases for years 1977 to 1988, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Aug. 18. Attorneys who have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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.

Fifth Judicial District Court

Eddy County, Nominees

The District Court Judicial Nominating Commission convened July 6 in Carlsbad and completed its evaluation of the four applicants for the vacancies on the 5th Judicial District Court. The commission recommends the following two applicants (in alphabetical order) to Governor Bill Richardson:

James Richard Brown
Thomas A. Rutledge

Ninth Judicial District Court

Nominees

The District Court Judicial Nominating Commission convened July 7 in Clovis and completed its evaluation of the three applicants for the vacancies on the 9th Judicial District Court. The commission recommends the following two applicants (in alphabetical order) to Governor Bill Richardson:

Albert Julian Mitchell, Jr.
David P. Reeb, Jr.

Judicial Nominating Commission information is available at http://lawschool.unm.edu/judsel/commissions/index.php. The links will only be viable when a vacancy exists and a commission meeting is pending in the respective court. Information will be updated on the Web site as it becomes available.

Eleventh Judicial District Court

Address Change

Effective July 17, all correspondence for the Honorable John A. Dean, Jr. should be sent to 920 Municipal Dr., Ste. 1, Farmington, NM 87401.

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.
Twelfth Judicial District Court
Destruction of Tapes—Civil

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition schedules, the 12th Judicial District Court (Otero County) will destroy tapes filed with the court in civil cases for years 1995–1996. Cases still pending are excluded. Attorneys who have cases with tapes and wish to have duplicates made, should verify tape information with Karen Duprey, Judicial Manager. (505) 437-7310, ext. 122, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed by August 15.

U. S. Tenth Circuit Bench & Bar Conference 2006

Registration is now open for judges and attorneys to register for the 2006 10th Circuit Bench & Bar Conference at The Broadmoor Hotel in Colorado Springs, Colorado. Conference dates are September 7–9. The complimentary opening reception will take place at the nearby historic Penrose House where participants can meet and greet the circuit, district, bankruptcy and magistrate judges of the 10th Circuit.

Speakers and panelists include retired Associate Justice Sandra Day O’Connor, Associate Justices Stephen Breyer and Samuel Alito, Solicitor General Paul Clement, Erwin Chemerinsky, Robert Nagel and the “master of charisma,” Richard Greene, one of the leading communication coaches in the world. Legal media and blogging panelists include Linda Greenhouse, Byron York, Nina Totenberg, Eugene Volokh, John Hinderaker and Lyle Denniston. Breakout sessions will include topics on evidence, sentencing, technology, discrimination law, bankruptcy, religion and ethics.

The general registration fee is $250. Special registration rates are available for new attorneys (less than five years of practice) and law school students. The registration deadline is July 31. For additional information, visit http://www.ca10.uscourts.gov/judconf/index.php. For questions, e-mail ca10_judicialconference@ca10.uscourts.gov, or call (303) 844-2067.

STATE BAR NEWS
Appellate Practice Section
Scholarships Available for Annual Institute

The Appellate Practice Section will present the 2006 Appellate Practice Institute Aug. 18 at the State Bar Center. The standard fee is $189, $179 for section members, and will provide 5.8 general and 1.0 ethics CLE credits. A limited number of scholarships are available for section members who would like to attend the CLE. E-mail requests for scholarships by Aug. 4 to Tom Bird, tcb@keleher-law.com. Applications should contain a short statement of interest in the seminar and an explanation of need for financial assistance.

To register for the CLE, 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.

The section’s annual meeting will also be held Aug. 18 during the lunch break at 12:45 p.m. Agenda items should be sent to Chair Bryan Biedscheid, bryan@swbpc.com or (505) 988-1668.

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., Aug. 7, 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.

Childrens Law Section

The Childrens Law Section is sponsoring a “Noon Knowledge” program from noon to 1:30 p.m., Aug. 18, on Gangs 101, a basic course on gangs in New Mexico. The presentation will take place at the John E. Brown Juvenile Justice Center, 5100 Second Street NW, Albuquerque, in conference rooms A & B. The guest speaker will be Nick Costales, a juvenile probation and parole officer who has extensive knowledge of the subject. In order for Costales to focus his presentation and address the issues of interest to the attendees, questions are being solicited from section members and others who plan to attend. Send questions by July 30 to Mary Lawendowski, mlawendowski@da2nd.state.nm.us, or mail to Office of the District Attorney, 5100 Second St. NW, Albuquerque, NM 87107.

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.

Solo and Small Firm Practitioners Section
Brownbag Meeting

The Solo and Small Firm Practitioners Section and board of directors will hold a brownbag meeting at noon, July 18, at the State Bar Center. The meeting will include a full review and vote on a questionnaire that will be sent to members and published in the fall. R.S.V.P to Christine Morganti,
will be a valuable resource, Taos Convention Center.

Table of ten (includes program recognition).

• Sheraton Old Town.
• Albuquerque Bar
• 5121 Masthead NE, Albuquerque
• 1701 Old Pecos Trail, Santa Fe
• State Bar of New Mexico
• The Romero Law Firm
• 1001 5th Street NW, Albuquerque
• Butt, Thornton & Bæk, PC.
• 4101 Indian School Road NE, Albuquerque
• State Bar of New Mexico Annual Meeting, Taos Convention Center July 22-23, 2006
Contact Briana Zamora, bhzamora@btbllaw.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 locations:

- 13th Judicial District Attorneys Office, Cibola County
  515 High Street, Grants
- Cuddy, Kennedy,アルバータ & 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 & Bæk, PC.
  4101 Indian School Road NE
- State Bar of New Mexico Annual Meeting, Taos Convention Center
  July 22-23, 2006

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

OTHER BARS
Albuquerque Bar Association

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.

National Center For State Courts
State of the States Survey
The State of the States Survey (SOS) is the first step that the National Center for State Courts is taking in order to launch the National Program to Increase Citizen Participation in Jury Service Through Jury Innovations. The Judges and Lawyers Survey is designed to obtain data about what is being done in individual courtrooms. Initial indicators are showing that the final publication of the State of the States Compendium will be a valuable resource tool to court administrators and judicial branch policy makers across the country to help all state courts improve their jury trial systems. Interested attorneys may complete the survey online at http://www.ncsconline.org/d_research/practitionersurvey. The survey will take approximately seven minutes to complete and must be done by July 30. Responses will be combined with thousands of others from around the country. The final product will show judicial policy makers and bar leaders in every state how jury trials are managed and conducted.

OTHER NEWS
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 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.

New Business Workshops: July 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.

New Employers Workshops: July 25; Aug. 22; Sept. 26; Oct. 24; Nov. 28; and Dec. 26.

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

Christian Legal Aid
Fellowship Luncheon
Christian Legal Aid (CLA) will host a fellowship luncheon open to all of the professional community from 11:45 a.m. to 1:15 p.m., July 28, at the Chama River Brewing Company in Albuquerque (located off Pan American Fwy). Guest speaker Scott Cameron, Esq., will discuss legal issues that affect the homeless community. Contact Denise Trujillo, (505) 243-4419 with questions.
The Simple Majesty of the Rule of Law

By The Honorable Robert H. Henry
U.S. Court of Appeals for the 10th Circuit

Today we take a moment to celebrate legal themes. And although we do this every year, for judges at least the themes rarely change. What are these recurrent themes? How about professionalism and civility, independence of the judiciary, pride in being a lawyer, ethics, and most rarely because it is so difficult, the relationship of law to justice—and if one is really daring, the relationship of mercy to both law and justice. Today, I intend to talk about all of these, and finally in a brief discussion of the history and morality behind Law Day and its progenitor, that wonderfully amorphous phrase “the rule of law.”

Some Favorite, Some Critical, All Perennial Themes

Professionalism and civility are surely concerns, especially of judges, who work very hard on both of these virtues. The press of cases stresses us, but by and large I think our work is quite professional, and incivility of lawyers to each other is our personal bane. I cannot tolerate this, and it ruins my day when I see it in briefs or hear it at arguments. It is not necessary, regardless of the times, clients’ desires or whatever, and here is my proof. Our circuit is composed of ten active and ten senior judges, and there is not a wallflower amongst them. Each has strong opinions, strong abilities and the inclination to present them. Yet we are nationally celebrated as the most collegial and civil court. We work at liking and knowing each other, and we are dedicated to remaining this way. Our goal for improvement must be to treat lawyers as well as we treat colleagues.

Independence of the judiciary is, truly, my favorite topic. Pride in being a lawyer I shall return to, and “ethics” offers me the chance to make my obligatory quote of Will Rogers, the greatest Oklahoman. Commenting on a bill that sought to promote the ethics of lawyer members of the California Assembly, Will noted that the measure would not work. “To work on a person’s ethics, you got to work on his conscience, and it’s his lack of conscience that makes him a lawyer in the first place.” Of course, Will was not completely serious, but as in all of his humor, there is a lesson. It says something about your ethics and idealism, by the way, that you are willing to give a long lunch hour to even come here today to celebrate what we set out to do.

Finally, in my list of perennial Law Day concerns, I noted the relationship of law and justice and even mercy. This is really a great topic, and I don’t have time to even tangentially discuss it, so I shall just give the answer. In his important book, The Nature of the Judicial Process, fabled judge and Justice Benjamin Nathan Cardozo cited a Talmudic tradition that almost says it all for me. He noted that the tradition said that God prayed one day, and this was his prayer: “Be it my will that my justice be ruled by my mercy.”

The History of Law Day or How the Soviets Inspired a Proclamation

Today, I want to remind you of the history of the creation of Law Day and why that was done. My research has revealed two prominent lawyers as the major force behind the creation of this day, one from Oklahoma, Hicks Epton, and the other from New York, Charles S. Rhyne. Epton later became president of the American College of Trial Lawyers, and Rhyne became president of the American Bar Association. The impetus of the idea came from the Cold War and the Soviet Union’s prominent May Day parade, which always presented the Soviet gerontocracy in full military regalia, watching a parade of old and new weapons systems and celebrating Soviet accomplishments in science and warfare, which were many. In a speech at the Library of Congress in 2000, Rhyne revealed his motives (back in 1958) when he approached President Eisenhower with the concept:

My idea was to contrast the United States’ reliance on the rule of law with the Soviet Union’s rule by force. To that end, I drafted a U.S. Presidential Proclamation, which made its way from John Foster Dulles, Secretary of State, to Sherman Adams, Chief of Staff to President Eisenhower, and stopped there.

Rhyne decided that he had better make a call on Sherman Adams. The story takes a bit of a nasty turn here. Rhyne arrived and informed Adams of his quest; but Adams pulled the unsigned proclamation out of his desk and returned it to Rhyne saying, “The President will not sign a proclamation praising lawyers.” Rhyne excused himself and, in those different times, simply walked down to the Oval Office and handed the proclamation to Ike. While the President was reading it, Adams burst into the office yelling, “Do not sign that paper praising lawyers.” Well, the good news is that Ike signed it, but it’s not quite as good as we might like. Here is what he said: “Sherm, this proclamation does not contain one word praising lawyers. It praises our constitutional system of government, our great heritage under the rule of law, and asks our people to stand up and praise what they have created. I like it, and I am going to sign it.”

Well, I’m glad that the President signed the proclamation, although I am disappointed that he seemed to fear praising the profession of Hamilton and Jefferson, of Marshall and Webster, of Lincoln and Holmes. But the President did recognize and emphasize that key phrase “rule of law.” We basically had it. The Soviets didn’t. What did the Proclamation say? It called for remembrance with pride, but guarding with vigilance, the bequest we have received of liberty, justice, and equality under the law; it evoked our moral and civil obligation to preserve this heritage; it proclaimed that fundamental rights of individuals under the law trump a government that rules by power alone; it noted that our government had served as an inspiration for oppressed peoples of the World; it called for resolution of international disputes by the rule of law; and finally it called for a day of national dedication to the principle of government under law—a
day that would be celebrated “with appropriate ceremonies and activities,” especially by the legal profession, but also by the press, the radio and television industries, and even the motion picture industry.

We went on to see the collapse of the Soviet Union and the rest of the 20th century was, in many ways, an American century. Our rule of law played a huge part in this. It turned out that Soviet science, burdened by the lack of free inquiry and top-down imposed orthodoxy, could not advance as it should. The Soviet failure to protect property led to inefficient economies. The failure to respect fundamental rights, especially religious rights, led to resistance so strong that when a Polish Pope indicated he would return to Poland should it be invaded, the Soviet leadership gave in and also learned that Stalin was, once again, wrong, for he had once snidely observed, “How many divisions does the Pope have?”

Thomas Jefferson picks up the theme in his First Inaugural. Hear his words because many have forgotten them:

Equal and exact justice to all men, of whatever state or persuasion, religious or political; peace, commerce, and honest friendship with all nations, entangling alliances with none. … Freedom of religion; freedom of the press, and freedom of person under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error or alarm let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

A prominent Rabbi, Bradley Shavit Artson, in a meditation on the part of the Torah called the Parashat Mishpin, or the Judgments, recalls America’s commitment, though it sometimes waivers, to the rule of law;

At its deepest core, America prides itself on the rule of law—the insistence that no individual, however wealthy, influential, popular or powerful, is superior to the rules which govern human conduct. Above any individual—even the President of the United States—is a body of laws that translate general principles into legal guidelines for harmonious living. … That priority was not always the case in America. The West, with its frontier ethic, the South with its racial hatred, and the Northeast with its violence against labor unions often acted against this general commitment to the rule of law. … In our own age as well, we are accustomed to various presidents claiming immunity from various laws because of their high office. For all the times that Americans don’t live up to the principle of law, that idea still remains a potent force for justice and equality in our society.

Wonderful, Amorphous Rule of Law

I may have learned the most about the simple majesty of the rule of law from a tragedy that occurred when I was attorney general of Oklahoma. One day in my office in the State Capitol, I received a call from the president of the Temple B’Nai Israel, one of our two Jewish congregations in Oklahoma City. He related to me the discouraging details of a story that I had seen in the paper. His reform temple had been desecrated in the most egregious manner: it had been broken into at night, painted with hateful epithets (including “take a shower, Jew”), and items decorated with swastikas, including a pair of brass knuckles, were found in the holy places near where the Torah is kept. The Emanuel Synagogue had been similarly attacked and desecrated. The president of the temple asked to bring both rabbis and various members of the community to meet me so that we could decide on a response. We set up a statewide “Say No to Hate” coalition and organized lectures, prayer meetings, essays and articles. Later, when African-American churches were desecrated, one of the rabbis led our coalition’s response. I will never forget seeing him on his knees with turpentine cleaning off the epithets on the small church. Our coalition came out with bumper stickers and signs, religious newsletters and services; we raised the awareness of the state markedly, I believe.

The culmination of our campaign was our last important town meeting in Tulsa, Oklahoma. The penultimate speaker was a local African-American minister who was a powerful rhetorician and greatly respected civic and religious leader. He was an orator in the mighty rhetorical tradition of Dr. Martin Luther King, blending his powerful voice with a remarkable rhythm, alliteration, and Biblical reference, surging to his peroration that ended, “We have just got to learn to love each other; we must learn to love each other; we must learn to love each other.” I wondered how my friend Rabbi Charles Shalman, who was to end the meeting, would be able to follow such a speech, for Rabbi Shalman was not an orator. I noticed he walked to the podium with his hand on his chin, obviously still deep in thought about what he had just heard. Then, he raised his voice and addressed the audience: “Hmmm. That’s a wonderful aspiration. But it won’t work. I, for one, would be satisfied if we would just follow the law.” There was a gasp of recognition as the crowd completely understood his most timely and important lesson.

There is a plaque in the plaza of Andrew Coats Hall at the University of Oklahoma College of Law. It talks of what Rabbi Shalman was saying. The plaque borrows from a statement I made in a speech before the dedication, the full text of which was this:

The law is not the rage of the moment, but the reason of the ages; it is not the Peoples’ will, but their collective wisdom through generations. Its sources are holy texts, and reasoned dialogues, aspirations of leaders, and contemplations of philosophers and scientists. Its historical progression, though uneven and grueling, has been constant. At its best Law is informed by Justice, and shaped by Mercy. In some traditions, even God must study the law. No more important field of study is committed to a great University.

Nor is there a more important field entrusted to you, the lawyers who today are idealistic enough to celebrate Law Day and the rule of law behind it. Even if President Eisenhower was reluctant to praise you, I am not. Thank you for struggling daily to promote America’s signal contributions to the world of ideas—our government of laws and not of men, our due process, our equal protection, our version of fundamental rights—these will be the greatest legacies that history will credit to the United States of America.

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
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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. Use the form on page 11 of the July 3 (Vol. 45, No. 27) Bar Bulletin to register for the luncheon and annual meeting. 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.
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**Notes:**
- **G** = General
- **E** = Ethics
- **P** = Professionalism
- **VR** = Video Replay
- Programs have various sponsors; contact appropriate sponsor for more information.
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**AUGUST**

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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 JULY 17, 2006

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

<table>
<thead>
<tr>
<th>NO.</th>
<th>Case</th>
<th>Date Petition Filed</th>
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<tr>
<td>29,913</td>
<td>State v. Marin (COA 26,365)</td>
<td>7/10/06</td>
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<tr>
<td>29,912</td>
<td>Smith v. Baca (COA 25,575)</td>
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<td>29,911</td>
<td>State v. Proctor (COA 26,321)</td>
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<td>29,910</td>
<td>State v. Gutierrez (COA 26,314)</td>
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<td>29,909</td>
<td>State v. Quintana (COA 25,107)</td>
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<td>29,908</td>
<td>State v. Adame (COA 25,238)</td>
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<td>29,907</td>
<td>Saucedo v. Janecka (12-501)</td>
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<td>Lopez v. State (12-501)</td>
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<td>State v. Leyba (COA 25,148)</td>
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<td>29,902</td>
<td>Eaves v. Finn (COA 25,498/25,499/25,500/25,501)</td>
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<td>State v. Martin (COA 25,578)</td>
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<td>29,897</td>
<td>Grygorwicz v. Trujillo (COA 25,317)</td>
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<td>Davis v. Farmers Ins. Co. of AZ (COA 25,312)</td>
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<td>State v. Curley (COA 26,440)</td>
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<td>State v. Granville (COA 25,005)</td>
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<td>Hunt v. Ulibarri (12-501)</td>
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<td>State v. Greenlee (COA 26,130)</td>
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<td>State v. Gallardo (COA 26,358)</td>
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<td>Trujillo v. Moya (12-501)</td>
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<td>Campos v. Boyden (COA 25,228)</td>
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<td>Land Investment v. City of Albuquerque (COA 24,600)</td>
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<td>29,838</td>
<td>Ripley v. Las Cruces Assn of Realtors (COA 26,458)</td>
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CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

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<tr>
<th>NO.</th>
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<tr>
<td>29,835</td>
<td>State v. Rogers (COA 25,950/25,968)</td>
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<td>29,811</td>
<td>Starko, Inc. v. Gallegos (COA 25,042)</td>
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<td>29,799</td>
<td>Albuquerque Commons v. City of Albuquerque (COA 24,425)</td>
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<td>29,761</td>
<td>Sedillo v. Jenecka (12-501)</td>
<td>4/17/06</td>
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(Parties preparing briefs)
WRITS OF CERTIORARI

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

EFFECTIVE JULY 17, 2006

NO. 29,699 Wood v. Educational Retirement Board (COA 24,819) 4/3/06
NO. 29,715 Weber v. RT Lodge (COA 24,942) 4/10/06
NO. 29,690 State v. Romero (COA 24,389) 4/10/06
NO. 29,735 Allen v. Edelman (COA 26,024) 4/18/06
NO. 29,725 McMinn v. MBF Operating Acquisition Corp. (COA 25,006) 4/20/06
NO. 29,689 Garcia v. Dorsey (12-501) 4/20/06
NO. 29,724 NM Dept. of Labor v. Echostar (COA 25,777) 4/20/06
NO. 29,751 State v. Bricker (COA 24,719) 5/1/06
NO. 29,752 Campos v. Bravo (12-501) 5/3/06
NO. 29,763 Rehders v. Allstate Insurance Company (COA 25,284) 5/23/06
NO. 29,717 Rael v. Blair (12-501) 5/31/06
NO. 29,760 Swanton v. Ortiz (COA 25,201) 6/2/06
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NO. 29,745 State v. Salazar (COA 24,468) 6/2/06
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NO. 29,806 State v. Walters (COA 24,585) 6/14/06
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NO. 29,441 State v. Jojola (COA 24,148) 8/28/06
NO. 29,507 State v. Noriega (COA 25,593) 8/28/06
NO. 29,831 State v. Maynard (COA 26,464) 7/6/06
NO. 29,840 Tesso v. State Farm Insurance Co. (COA 26,549) 7/6/06
NO. 29,826 S & D Ranch v. Chesapeake (COA 26,534) 7/7/06
NO. 29,537 State v. Rodarte (COA 25,273) 7/3/06
NO. 29,411 State v. McClure (COA 25,436) 7/3/06

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:
(Submission = date of oral argument or briefs-only submission)

Submission Date
NO. 28,660 State v. Johnson (COA 23,463) 3/11/05
NO. 28,997 Maestas v. Zager (COA 24,200) 6/14/05
NO. 29,058 Sanchez v. Pellicer (COA 25,082) 9/29/05
NO. 29,134 State v. Kathleen D.C. (COA 24,540) 11/14/05
NO. 29,202 Montgomery v. Lomos Altos (COA 24,297) 11/16/05
NO. 29,246 Chavarria v. Fleetwood (COA 23,874/24,444) 12/12/05
NO. 29,178 State v. Maestas (COA 24,507) 12/13/05
NO. 29,160 Benavidez v. City of Gallup (COA 25,373) 12/13/05
NO. 29,158 State v. Otto (COA 23,280) 2/13/06
NO. 29,385 State Farm v. Luebbers (COA 23,556) 2/15/06
NO. 29,351 Lopez v. San Felipe Pueblo (COA 25,884) 3/27/06
NO. 29,218 Montoya v. Ulibarri (12-501) 4/10/06
NO. 29,476 Salazar v. Torres (COA 23,841) 4/11/06
NO. 29,484 State v. Wilson (COA 25,017) 5/22/06
NO. 29,286 State v. Gutierrez (COA 25,279) 5/22/06

PETITION FOR WRIT OF CERTIORARI DENIED:
NO. 29,831 State v. Maynard (COA 26,464) 7/6/06
NO. 29,840 Tesso v. State Farm Insurance Co. (COA 26,549) 7/6/06
NO. 29,826 S & D Ranch v. Chesapeake (COA 26,534) 7/7/06

WRIT OF CERTIORARI QUASHED:
NO. 29,537 State v. Rodarte (COA 25,273) 7/3/06
NO. 29,411 State v. McClure (COA 25,436) 7/3/06
OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fé, NM 87504-2008 • (505) 827-4925
EFFECTIVE JULY 6, 2006

PUBLISHED OPINIONS

No. 26515 1st Jud Dist Santa Fe CV-04-75, J MONTOYA v CITY OF SANTA FE (affirm) 7/6/2006

UNPUBLISHED OPINIONS

None

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

## From the New Mexico Supreme Court

### Clerk’s Certificate of Name, Address, and/or Telephone Changes

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Telephone Numbers</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
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</tr>
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</tr>
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<tr>
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</tr>
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This three-hour update offers practitioners whose experience is at an intermediate (or higher) level an opportunity to explore the most current and important issues in estate planning and wealth transfer taxation. The roundtable discussion utilized will stress how to examine alternatives, bring about desired results, and why as well as which particular procedures of choices are appropriate. Learn how to improve practice opportunities and skills and adopt new drafting approaches.

10:00 a.m. • $109

1.0 General, 1.0 Professionalism and 1.0 Ethics CLE Credits

Avoiding and Resolving Fee Disputes: What You Must Do; What You Should Do

1 p.m. • $119

1.0 General, 1.0 Professionalism and 1.0 Ethics CLE Credits

Divorce Practice with Larry Rice

9 a.m. • $189

6.0 General CLE Credits

Tuesday, August 15

Pro Se Can You See: Navigating the Fog of the Pro Se Litigant

9 a.m. • $79

1.0 Professionalism and 1.0 Ethics CLE Credits

Diversity – Why Both? Can We Find Answers in Ethics and Professionalism?

1 p.m. • $79

1.0 Professionalism and 1.0 Ethics CLE Credits

Immigration Fundamentals: Keeping Families Together

9 a.m. • $109

3.0 General CLE Credits

This seminar will cover the nuts and bolts of appellate practice. It will include information about how to present a persuasive appeal, how to write effective briefs, memoranda, and petitions for certiorari, and how to deliver powerful oral argument. It will also include information about the Court of Appeals’ calendaring process and mediation program. Attendees will receive one hour of ethics credit.

8:00 a.m. Registration

8:25 a.m. Introductory Remarks

Bryan Biedscheid, Chair, Appellate Practice Section

Sawtell, Wirth and Biedscheid

8:30 a.m. Recent Developments in Appellate Practice

Edward Rico, Rodey, Dickason, Sloan, Akin, Aldrich & Bobb

9:00 a.m. Getting On The Right Foot: The Dockering Statement and Calendar

Bridget Gavahan, Chief Staff Attorney, Prehearing Division, NM Court of Appeals

C. Shannon Bacon, Satin, Thayer and Browne

10:15 a.m. Break

10:30 a.m. Friendly Persuasion: The Art of Successful Brief-Writing

Steven L. Tucker, Tucker Law Firm

11:15 a.m. Perseverance: Rehearing and Certiorari

Caren J. Friedman

11:45 a.m. Lunch (provided at the State Bar Center)

12:45 p.m. Annual Meeting of Appellate Practice Section (all members welcome)

1:15 p.m. Appellate Mediation: It’s Never Too Late

Robert Rambo, NM Court of Appeals Mediator

1:45 p.m. Oral Argument: A Final Conversation

Hon. Michael Bastamante, Chief Judge, New Mexico Court of Appeals

Kerry Kiernan, Satin, Thayer and Browne

2:30 p.m. Break

2:45 p.m. Have You Got What It Takes? Ethics, Advocacy & Second Chances

Jonathan Sperber, Office of the New Mexico State Engineer

Caren Friedman

Robert Rambo

3:45 p.m. Judges’ Panel

Moderator: Bryan Biedscheid

Hon. Harris Hurtz, Tenth Circuit Court of Appeals

Hon. Richard Bosson, Chief Justice, NM Supreme Court

Hon. Roderick Kennedy, NM Court of Appeals

Hon. Jonathan Satin, NM Court of Appeals

4:45 p.m. Adjourn
SEPTEMBER

22 or 23 SETTLEMENT FACILITATION AND MEDIATION WORKSHOP SERIES

A Limited Enrollment Discussion-Based Program with Leading Experts

Workshop #2
TWO DATES, TWO CITIES – YOUR CHOICE
Tuesday, August 22, 2006 • State Bar Center, Albuquerque
Wednesday, August 23, 2006 • State Library, Archives and Record Center
Pinon Room, 1205 Camino Carlos Rey, Santa Fe
3.0 General CLE Credits

Co-Sponsors: First Judicial District Court and Second Judicial District Court
Standard Fee $95 • Government/Paralegal $85

The second workshop will cover several difficult areas identified in the first workshops held during the spring - how to handle open conflict, entrenched impasses, and hardened combative stances – how to use mediation skills, including joint sessions, to enhance the settlement facilitation process. This workshop will confirm basic techniques and procedures for neutrals and advocates together with presentation of advanced skills and problem solving.

Cynthia Olson will be the special guest and ADR expert in both locations. Cynthia trains mediators and designs ADR programs, practices, and policies for the judiciary, state government, and private sector.

For further information, please contact:
Celia Ludi
ADR Program Director
First Judicial District Court
(505) 827-5072
tfeldca@nmcourts.com

Noon Registration
12:15 p.m. Lunch (provided)
12:45 p.m. CLE
2:15 p.m. Break
2:30 p.m. CLE (continued)
4:00 p.m. Adjourn

SEPTEMBER

New Mexico Administrative Law Institute
Friday, September 22, 2006 • State Bar Center, Albuquerque
5.2 General & 1.5 Ethics CLE Credits

Co-Sponsor: Public Law Section
Standard Fee $189 • Public Law Section Member, Government, Paralegal $179

Join the Public Law Section as we discuss the various complexities of administrative law in New Mexico. In this full-day seminar, an overview will be presented followed by a panel discussion on adjudicatory and rulemaking proceedings before small and large state agencies, a dialogue on the need for a central panel of judges and hearing officers in New Mexico, as well as seminars on administrative appeals, emerging issues, and a look at administrative proceedings and the application of ethical rules.

8:00 a.m. Registration
8:25 a.m. Welcome
8:30 a.m. Overview of New Mexico Administrative Law:
Constitutional, Statutory, Case Law Framework
Professor Michael B. Browde, UNM School of Law
Panel Discussion: Adjudicatory and Rulemaking Proceedings Before Different Agencies
Moderator: James C. Martin, NM Public Regulation Comm.
Panelists: Bob White, City of Albuquerque
Felicia Orth, New Mexico Environment Department
10:00 a.m. Break
10:15 a.m. Panel Discussion (continued)
11:00 a.m. New Mexico ALJs and Hearing Officers: Is There a Need for a Central Panel?
Hon. Edwin L. Felter Jr., Senior Judge, Colorado Office of Administrative Courts
Hon. Michael S. Williams, Director and Chief Judge, Colorado Office of Administrative Courts
12:00 p.m. Lunch (provided at the State Bar Center)
1:00 p.m. Appeals of Administrative Decisions:
Judicial Perspective
Moderator: Bill Bruncard
District Court Judge: TBA
Hon. Richard Boxon, Chief Justice, NM Supreme Court
3:00 p.m. Break
3:15 p.m. Application of Ethical Rules to Administrative Proceedings (1.5 E)
Moderator: Maureen A. Sanders, Sanders & Westbrook, PC
Paul L. Bidnerman, UNM Institute of Public Law
4:45 p.m. Adjourn

NATIONAL TELESEMINARS
11 a.m. via telephone

AUGUST

1 2006 Land Use Update
A year after the U.S. Supreme Court’s blockbuster decisions on the Takings Clause, lower courts, legislators, developers, property owners and others continue to come to grips with their implications. This program will provide a broad-based update on case law and legislative developments affecting land development. 1.0 General CLE Credit • $67

8 Basics of Advertising Law
Virtually all businesses advertise to grow their businesses. Although advertising using old and new media is commonplace, the law applicable to advertising is less so. This program is intended as a primer for counsel advising businesses on regulatory restrictions on advertising and potential sources of liability. 1.0 General CLE Credit • $67

SEPTEMBER

5 Age Discrimination in Employment Law and Litigation
With a rapid aging population and better health care, more people are staying in the workforce longer than before. This raises a series of issues for recruitment, hiring and training. This program will focus on trends in litigation in this area and developing best practices for employers to avoid age-based discrimination claims. 1.0 General CLE Credit • $67

12 FAQ on Trusts Used in Charitable Giving and Estate Planning
This program will provide a guide to the dense world of trust law in the context of charitable giving, including an overview of the types of trusts, their advantages and disadvantages, and techniques for using them in charitable giving plans. 1.0 General CLE Credit • $67

CLE AT-A-GLANCE - 2

CLE AT-A-GLANCE - 3
NO. 29,681
IN THE MATTER OF THE SUSPENSION OF ACTIVE MEMBERS OF THE STATE BAR OF NEW MEXICO FOR NONCOMPLIANCE WITH RULE 18-301 NMRA, GOVERNING MINIMUM CONTINUING LEGAL EDUCATION FOR COMPLIANCE YEAR 2005

ORDER OF SUSPENSION

WHEREAS, this matter came on for consideration by the Court upon the certification filed herein by the Minimum Continuing Legal Education Board that certain active members of the State Bar of New Mexico failed to comply with MCLE requirements for the 2005 reporting year; and

WHEREAS, the Clerk of this Court, on May 12, 2006, having issued or attempted to serve by first-class mail to the last known address shown on the official roll of attorneys a “Citation and Order to Show Cause” and “Order” to each delinquent attorney, and the time within which to comply having expired, and said delinquent attorney having remained in noncompliance with MCLE requirements for the 2005 reporting year, and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that effective July 7, 2006, the following named members of the State Bar of New Mexico be and hereby are SUSPENDED from the practice of law in the courts of this state by reason of noncompliance with MCLE requirements for the 2005 reporting year.

IT IS FURTHER ORDERED that the Clerk of this Court shall change the status of membership in the bar for each attorney listed below as shown on the official roll of attorneys, and that notice thereof be given to each judge in the state of New Mexico and be published in the Bar Bulletin:

James W. Anthony
400 8th St. NE
Rio Rancho, NM 87124-0501

Julia Louise Armstrong
3807 KSK Lane
Santa Fe, NM 87507-3357

Shawn Allen Brown
10300 Golf Course Rd NW #113
Albuquerque, NM 87114-3919

David S. Christensen
One Federal Dr. #3600
Saint Paul, MN 55111-4045

William Joel Cooley
507 Roma Ave NW
Albuquerque, NM 87102-2124

Katy C. Fain
6700 Jefferson St NE Bldg B # 18
Albuquerque, NM 87109-4381
or
4801 Lang Ave., NE, #110
Albuquerque, NM 87109-4381

Nathaniel Roger Freeman
5478 S. Ingleside
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Herman Chico Gallegos
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Rose Mary Walker
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San Antonio, TX 78245-9140

Emily A. Williams
1818 Marble Ave. NW
Albuquerque, NM 87104-1354
or
PO Box 25543
Albuquerque, NM 87125-0543

IT IS SO ORDERED.

WITNESS, Honorable Richard C. Bosson,
Chief Justice of the Supreme Court of the
State of New Mexico, and the seal of said
Court this 7th day of July, 2006.

(SEAL) Kathleen Jo Gibson,
Chief Clerk of the Supreme Court
of the State of New Mexico
OPINION

EDWARD L. CHÁVEZ, JUSTICE

[1] The question in this case is whether documents and other information in an ongoing criminal investigation are discoverable in related civil litigation. This litigation arises out of the disappearance of Robbie Romero, who was seven years old when he was last seen near his home in Santa Fe on June 7, 2000. Plaintiffs are the parents of Robbie Romero,1 who sued the City of Santa Fe, the Santa Fe Police Department (City Defendants), and Jerry Archuleta, a former Santa Fe police lieutenant, for alleged negligence in the handling of the investigation into Robbie’s disappearance. This tragic backdrop makes the conflicting interests in this case, between the parents’ natural desire to know the fate of their son and a police department’s understandable need to protect confidential materials gathered in the course of a criminal investigation, all the more compelling and of substantial public interest.

[2] During litigation Plaintiffs sought to discover the police department’s investigation files. Although City Defendants provided Plaintiffs with approximately one thousand three hundred and seventy-seven pages of documents related to their internal investigation, City Defendants objected to producing material related to its on-going criminal investigation. The district court declined to compel production of the entire criminal investigation file, concluding the materials are privileged. A majority of the Court of Appeals reversed the district court, holding that City Defendants cannot claim executive or public interest privilege. Although our rules and constitution do not presently recognize an executive or public interest privilege in the Santa Fe Police Department, we believe portions of the criminal investigation files may still be immune from discovery. Whether the documents are discoverable requires the district court to balance the competing interests between plaintiffs’ legitimate discovery requests and law enforcement’s need to protect on-going criminal investigations. Accordingly, we remand to the district court for proceedings consistent with this opinion. Because we

1Since the complaint was originally filed, Plaintiff Rudy Romero passed away and his estate, through personal representative Evelyn Romero, was substituted as plaintiff.
believe the public interest in New Mexico requires a comprehensive law enforcement privilege which provides some protection against unfettered disclosure of materials obtained by law enforcement during a criminal investigation, we also take this opportunity to refer this matter to our Rules of Evidence Committee to recommend such a privilege.

I. BACKGROUND AND PROCEDURE

[3] During discovery, City Defendants objected to some of Plaintiffs’ discovery requests on the grounds that the requested information and materials were part of the on-going criminal investigation into Robbie’s disappearance, and disclosure would compromise and prejudice the investigation. Plaintiffs filed a motion to compel disclosure. The district court denied the motion to compel based on executive privilege, public policy, and the factors outlined in Frankenhausser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973) (describing “executive privilege” and the factors to consider in determining whether a privilege exists for requested materials), partially superseded by rule on other grounds as stated in Crawford v. Dominic, 469 F. Supp. 260 (E.D. Pa. 1979). Recognizing that its order “involves a controlling question of law for which there are substantial grounds for difference of opinion,” the district court certified the matter for interlocutory appeal as provided under NMSA 1978, § 39-3-4 (1971).

[4] The Court of Appeals accepted the interlocutory appeal and in an unpublished opinion, a two-judge majority of the Court of Appeals reversed the denial of the motion to compel, holding that the City Defendants could not invoke executive privilege because the executive department, as defined by the state constitution, did not include municipalities. The Court of Appeals rejected a “public interest” privilege, because although federal courts have recognized the privilege, “our Supreme Court has not recognized such a privilege and we cannot anticipate that they will do so.” The dissenting opinion expressed concern that “the trial court was too quick to completely uphold Defendants’ assertion of privilege and the majority is too quick to completely reject it.”

[5] City Defendants petitioned this Court to reverse the Court of Appeals, advancing two main arguments. First, they urge us to recognize a “common law public interest privilege” that would preclude the production of police investigatory materials during civil litigation. Second, and as an alternative theory, City Defendants contend that public policy demands that the records of an on-going criminal investigation be confidential and subject only to limited disclosure. Plaintiffs argue that no law enforcement privilege exists, and if this Court deems some of the police files to be confidential, a balancing of interests should apply in determining whether the requested materials are discoverable.

II. DISCUSSION


A. OUR CONSTITUTION AND COURT RULES DO NOT RECOGNIZE A LOCAL LAW ENFORCEMENT PRIVILEGE

[7] Generally, a person is required to “disclose any information which he may possess that is relevant to a case pending before a court of justice.” State ex rel. Att’y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981) (citing Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976)). There are exceptions to this general rule, found in the privilege against self-incrimination in the United States and New Mexico constitutions as well as other evidentiary privileges. State ex rel. Att’y Gen., 96 N.M. at 257, 629 P.2d at 333. This court’s “constitutional power under N.M. Const. art. III, section 1 and art. VI, section 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.” Id. (quoting State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975)).

“Pursuant to the exercise of this power, we have adopted a comprehensive set of rules of evidence which govern proceedings before the courts,” including evidentiary privileges. Id.


Except as otherwise required by the Constitution of the United States or provided by Act of Congress or . . . statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.

In contrast, New Mexico Rules of Evidence 11-501 states:

Except as otherwise required by the constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:

A. refuse to be a witness; or
B. refuse to disclose any matter; or
C. refuse to produce any object or writing; or
D. prevent another from being a witness or disclosing any matter or producing any object or writing.

Based on the difference between the New Mexico rule and the federal rule, we have held “[t]he fact that New Mexico did not follow the approach of Congress but instead limited the privileges available to those recognized by the Constitution, the Rules of Evidence, or other rules of this Court manifests the abrogation and inapplicability of the common law evidentiary privileges.” State ex rel. Att’y Gen., 96 N.M. at 260, 629 P.2d at 337.

[9] In questioning the wisdom of our case law that precludes the adoption of common law privileges, City Defendants suggest we follow the reasoning of the dissent in State ex rel. Attorney General. There, two justices concluded that common law privileges are still available to the court when the subject matter is not otherwise covered in the Constitution or court rules. Id. at 263, 629 P.2d at 339 (Easley, C.J., and Federici, J., dissenting). City Defendants urge us to agree that we retain the authority to adopt common law privileges, and further, that we should overrule State ex rel. Attorney General to the extent it declines to recognize a public interest privilege, which defendants assert is similar to a law enforcement privilege. The reasons supporting their request seem compelling. They assert that the privilege is necessary to protect important public interests such as bringing perpetrators of serious crimes to justice and “to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement
personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.” In re Dep’t of Investigation of the City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988).

{10} With respect to this case, City Defendants claim that disclosure of police investigatory materials would jeopardize Robbie’s safe return if he is still alive, as well as jeopardize the Santa Fe Police Department’s efforts to solve the case and irreparably jeopardize the eventual prosecution of the perpetrator(s). Jeopardy is likely, they contend, because disclosure of investigatory information could assist the perpetrator(s) to destroy critical evidence and threaten the safety of confidential informants who provided evidence to the Santa Fe Police Department. As an example of information that should be protected, City Defendants presented testimony describing an investigatory report containing identities of confidential informants, confidential investigative methods, information about individuals accused but not charged with a crime, and information only the perpetrator(s) would know.

{11} There is no question that City Defendants have raised an issue of pressing public concern, and that there is great force to their need to protect confidential police investigatory materials in an active criminal investigation from discovery in civil litigation. However, given the clear directive of Rule 11-501, we remain compelled to decline to recognize common law privileges. Until we decide to change the rule to more closely resemble Federal Rule of Evidence 501, we must follow the framework provided in New Mexico’s Rule 11-501 to determine whether a public interest or law enforcement privilege exists. Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, ¶ 8, 138 N.M. 398, 120 P.3d 820. Unless such privileges are required by the constitution, or provided for in the rules of evidence or other court rules, these privileges do not exist. State ex rel. Att’y Gen., 96 N.M. at 257, 629 P.2d at 333.

{12} The New Mexico Constitution does not expressly describe any privileges other than the right against self-incrimination in Article II, Section 15. A “public interest” or “law enforcement” privilege would have to be implicit from language in the Constitution. See State ex rel. Att’y Gen., 96 N.M. at 257-58, 629 P.2d at 333-34. In that case we recognized the existence of an executive privilege based on Article III of the New Mexico Constitution, which describes the separation of powers among the three departments of state government. Because “[c]ertain rights are implied as being inherently necessary to foster and give meaning to the intent of the Constitution,” id. at 257, 629 P.2d at 333, we concluded that “[i]nherent in the successful functioning of an independent executive is the valid need for protection of communications between its members.” Id. at 258. Thus, we characterized executive privilege as “a recognition by one branch of government, the judiciary, that another co-equal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant.” Id. In the same case, however, we rejected the concept of a “public interest” privilege that would protect from disclosure communications between government officials and private individuals since we could find no basis for such a privilege in the Constitution or the Rules of Evidence. Id. at 260, 629 P.2d at 336.

{13} Similarly, we can find no implied privilege in the Constitution for the protection of local law enforcement investigatory materials. The City Defendants are a municipality and a branch of a municipality, and municipalities were not contemplated in the Constitution as part of the executive branch. State ex rel. Chapman v. Trader, 35 N.M. 49, 52, 289 P. 594, 596 (1930) (ruling that the New Mexico constitutional provisions for separation of powers apply only to state offices, not municipalities). Even after New Mexico amended its Constitution in 1970 to provide for “home rule” municipalities having broad legislative powers, we have consistently held that traditional separation-of-powers doctrine does not apply to municipalities. Bd. of County Comm’rs of Bernalillo v. Padilla, 111 N.M. 278, 283, 804 P.2d 1097, 1102 (Ct. App. 1990) (stating that the dangers of tyranny when one branch of government assumes the powers of another are diminished for a subordinate level of government, and therefore Article III, Section 1 of New Mexico Constitution does not apply to local governments). Since the theory of separation of powers led to the recognition of the executive privilege, we are not persuaded our Constitution permits us to conclude a similar privilege is inherently necessary to the successful functioning of city law enforcement agencies. Thus, we do not recognize an express or implied law enforcement privilege in the New Mexico Constitution.

{14} With no relevant privilege in the New Mexico Constitution, we examine our Rules of Evidence for a law enforcement privilege. See Lyons, 2000-NMCA-077, ¶ 13; see Rules 11-502 to 11-514 NMRA. We note that two of the privileges are similar to a “public interest” or “law enforcement” privilege. Rule 11-502 may privilege some of the investigative materials in this case, since it provides a privilege for reports required to be made by law. Rule 11-510 provides a privilege from disclosing the identity of an informant. Rule 11-510 “is a recognition by the judiciary that certain privileges are necessary to aid law enforcement officers and the Legislature in obtaining information through investigations. . . without having to be concerned with being subpoenaed into court.” State ex rel. Att’y Gen., 96 N.M. at 259, 629 P.2d at 335. However, as City Defendants point out, this rule does not privilege the investigative materials themselves. Thus, while our Rules of Evidence do provide some protection for individual pieces of investigatory materials and information, these rules do not afford complete protection from disclosure of all on-going criminal investigatory materials obtained by law enforcement. Since we do not identify an express or implied law enforcement privilege in the Constitution or our court rules, we are unable to recognize the existence of such a privilege.

B. ALTHOUGH NOT PRIVILEGED, ON-GOING CRIMINAL INVESTIGATIVE MATERIALS MAY BE IMMUNE FROM DISCOVERY

{15} Nevertheless, we do not believe the absence of a law enforcement privilege means confidential police investigatory materials, such as reports containing confidential investigatory methods, information about individuals accused but not charged with a crime, and information only the perpetrator(s) would know, are completely unprotected from disclosure under our rules of evidence and civil procedure. Our case law and Rule 1-026 NMRA require courts to take an active role in determining the proper balance between the conflicting needs of discovery and confidentiality. For example in the case of In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 2, 606 P.2d 539, 540 (1980), we held that where there is a matter of great public concern as expressed by the legislature, we “will not hesitate to exercise [our] power of superintending control to protect the confidentiality of . . . information against unwarranted disclosure.” We believe the legislature has expressed a matter of great public concern when it comes to the disclo-
sue of materials pertaining to an on-going criminal investigation. Therefore, exercising our power of superintending control, we proceed to examine means by which our rules may prohibit the disclosure of confidential information developed by law enforcement during an on-going criminal investigation.

[16] In examining the means by which confidential materials have been entitled to protection from disclosure, Southwest Community Health Services v. Smith is instructive. 107 N.M. 196, 198-99, 755 P.2d 40, 42 (1988). In Southwest Community Health Services we held that a statute making medical peer review organization records immune from discovery did not create an evidentiary privilege and therefore did not conflict with our rules of privilege. Id. In addition, we stressed that the confidentiality created by the statute was not intended by the legislature to apply only to the production of evidence for civil litigation. Id. at 199, 755 P.2d at 43. We recognized the potential conflict between two separate branches of government and sought a way to accommodate the interests of both branches.

While the legislative decision to prohibit notoriety of medical peer review proceedings is a constitutional exercise of the essential legislative function to promote the health and welfare of New Mexico’s citizens, the Court cannot ignore an overbroad implementation of the confidentiality provision which would impinge upon the right of litigants to have their disputes decided on relevant and material evidence. It is not a matter of the statute being unconstitutional but rather a recognition, when litigation is at issue, that conflicting constitutional powers by two separate and independent branches of government are being exercised. Id. at 200, 755 P.2d at 44 (emphasis omitted). We clearly stated that had the statute created an evidentiary privilege, it would be invalid. We then exercised our judicial authority to balance the conflicting constitutional interests by describing the process to be used when invoking the statute that immunized evidence from discovery. Id. [17] We believe the approach used in Southwest Community Health Services is applicable here. While we have superintending control over procedures used in the courts, the legislature describes the public policies of the state through statutes. Just as we held that the statute at issue in Southwest Community Health Services created an immunity from discovery, so too we hold that New Mexico’s Inspection of Public Records Act (IPRA), NMSA 1978 § 14-2-1 (2005), creates a similar immunity from discovery. IPRA announces a broad policy statement that “[e]very person has a right to inspect public records of this state,” but then lists several specific exceptions. § 14-2-1(A). The exception germane to this case precludes the following from public inspection:

- law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph.

§ 14-2-1(A)(4). Within IPRA the legislature has expressed its intent to protect from disclosure police investigatory materials in an on-going criminal investigation.

[18] Clearly, the primary purpose of the IPRA is to provide access to public records rather than “to create an evidentiary shield behind which the government can hide.” In re Marriage of Daniels, 607 N.E.2d 1255, 1263 n.2 (Ill. App. Ct. 1992). IPRA’s exclusion of law enforcement records from public inspection does not purport to create an evidentiary privilege, nor does it contemplate use of law enforcement records in civil litigation. State ex rel. Att’y Gen., 96 N.M. at 260, 629 P.2d at 336 (stating that the Right To Know statute “did not, nor was it intended to, create a new evidentiary privilege applicable to discovery”). Instead, IPRA is used here to guide the court in appraising public policy concerns based on legislation enacted by the legislature pursuant to its general police powers. Using an analysis similar to the approach we employed in Southwest Community Health Services, we conclude that the IPRA exception for law enforcement records in a criminal investigation is illustrative of a vitally important public policy concern, leading to an immunity from discovery for some police investigatory materials in civil litigation.

[19] This immunity is not absolute. Although we will recognize limited immunity from discovery we will not “impinge upon the right of litigants to have their disputes decided on relevant and material evidence.” SouthwestCnty. Health Serv., 107 N.M. at 200, 755 P.2d at 44. Courts will be required to balance the interests at stake. Under the balancing outlined in Southwest Community Health Services, the party seeking to preclude disclosure has the burden of proving the information sought to be protected is confidential under a policy interest which may make the information immune from discovery. Id. at 200, 755 P.2d at 44. In this case, City Defendants have the burden of proving the information requested by Plaintiffs is confidential because such information meets the policy interest expressed in Section 14-2-1(A)(4). An in camera examination of the materials and an evidentiary hearing to determine whether the requested material is immune, may be necessary. However, even if the material is confidential, the party seeking the evidence may be entitled to the information if they satisfy the trial court that “the information constitutes evidence which is critical to the cause of action or defense.” Id. at 201, 755 P.2d at 45. Under this latter inquiry, the trial court must determine whether “the success or failure of a litigant’s cause of action or defense would likely turn on the evidence adjoined to fall within” the immunity. Id. In addition, the trial court should consider whether the evidence is not otherwise available by the exercise of due diligence, as well as whether the public’s interest in preserving confidentiality does not outweigh the specific needs of the litigant. See State ex rel. Att’y Gen., 96 N.M. at 258, 629 P.2d at 334 (citing U.S. v. Nixon, 418 U.S. 683 (1974)).

[20] With respect to assessing whether the public interest outweighs the needs of the litigant, the factors in Frankenhaus, 59 F.R.D. at 344, will aid the trial court in its analysis. These factors are:

(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seek-
ing the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff’s suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff’s case.

Although these factors were articulated in the context of a civil rights action against police, we believe the factors will also be helpful to consider in the context of discovery for other civil litigation involving on-going criminal investigations.

{21} The procedure described above is intended to provide general guidelines for the trial court as it reevaluates whether the discovery requested by Plaintiffs should be produced by City Defendants. We note that Rule 11-510 (privileging the identity of confidential informants) and Rule 11-502 (privileging some reports required to be made by law), may apply to some of the materials requested in this case. In addition, “we do not tell the trial court when it is appropriate to issue protective orders under Rule 26 of the New Mexico Rules of Civil Procedure, N.M.S.A. 1978 to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense.” State ex rel. Att’y Gen., 96 N.M. at 261, 629 P.2d at 337. We note only that the approach described in this case is consistent with the spirit of Rule 1-026(C).

III. CONCLUSION

{22} We anticipate that the balancing guidelines described above address Plaintiffs’ legitimate discovery needs and City Defendants’ need to protect the most sensitive of police investigation materials in the Robbie Romero case. In addition to remanding the discovery requests by Plaintiffs to the district court for proceedings consistent with this opinion, we also refer this matter to our Rules of Evidence Committee for discussion and review of the possible need for a comprehensive law enforcement privilege. We also note that “the application of this statute as construed today by this Court to the case at bar does no violence to Marquez v. Wiley, 78 N.M. 544, 434 P.2d 69 (1967), which held that rules adopted by this Court are not effective to change the procedure in any pending case.” Southwest Cnty. Health Serv., 107 N.M. at 201, 755 P.2d at 45. The IPRA statute was in effect prior to the initiation of this lawsuit, and our opinion merely recognizes the limited immunity from discovery created by that statute. Id. (“Our opinion today merely construes a pre-existing statute; it does not adopt a change in procedural rules.”).

{23} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:

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

Opinion Number: 2006-NMSC-029

KIMBERLY J. PAYNE,
Plaintiff-Petitioner,
versus
THOMAS HALL, M.D., and
CURTIS W. BOYD, M.D., a
professional corporation,
Defendants-Respondents.
No. 28,823 (filed: June 8, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
JAMES A. HALL
District Judge

CLAY H. PAULOS
IAN D. MCKELVY
SANDERS, BRUIN, COLL &
WORLEY, P.A.
Roswell, New Mexico
for Petitioner

MICHAEL W. BRENNAN
BRENNAN & SULLIVAN, P.A.
Santa Fe, New Mexico
for Respondents

KAY CARGILL JENKINS
CARLA ANN NEUSCH WILLIAMS
ATTWOOD, MALONE, TURNER & SABIN, P.A.
Roswell, New Mexico
for Amicus Curiae
New Mexico Defense Lawyers Association

RANDI MCGINN
MCGINN, CARPENTER, CAMPBELL, MONTOYA & LOVE
Albuquerque, New Mexico
for Amicus Curiae
New Mexico Trial Lawyers Association

OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

[1] In the course of an elective abortion, Plaintiff Kimberly Payne twice received medical treatment she alleged to be negligent, which ultimately caused her to suffer substantial physical injuries. She was first treated by Dr. Thomas Hall of the Boyd Clinic (hereinafter collectively referred to as “the Clinic”), and subsequently at the University of New Mexico Hospital (hereinafter referred to as the “Hospital”). Plaintiff sued only the Clinic under a theory of successive tortfeasor liability, and sought compensation for alleged injuries incurred both at the Clinic and the Hospital. The jury returned a verdict of negligence but no causation on the part of the Clinic for any injury, either at the Clinic or the Hospital. On appeal, Plaintiff claims error in that, consistent with successive tortfeasor theory, the trial court should have found causation as a matter of law on the part of the Clinic for the entire extent of her injuries, including those incurred successively at the Hospital.

[2] Both the district court and the Court of Appeals held against Plaintiff on her claim of causation as a matter of law, although the appellate court could not agree on an overarching rationale. Payne v. Hall, 2004-NMCA-113, 136 N.M. 380, 98 P.3d 1030 (Alarid, J., specially concurring, Bustamante, J., dissenting). We granted certiorari to help clarify the evolving state of the law regarding successive tortfeasor liability, particularly as it relates to the requirement that the victim prove a distinct injury caused by the negligence of the original tortfeasor, separate and apart from those injuries later caused by the successive tortfeasor. We agree with the Court of Appeals that the trial court did not err when it refused to decide as a matter of law that the Clinic caused any original injury separate from the injuries suffered at the Hospital. Nonetheless we reverse and remand for a new trial because the jury was not properly instructed on the theory of the case. We also attempt to resolve the questions raised in the separate opinions of the Court of Appeals and provide guidance in respect to this confusing area of the law.

BACKGROUND

[3] In the second trimester of her pregnancy, Plaintiff went to the Clinic to obtain an abortion. Because of the advanced state of her pregnancy, the Clinic chose a procedure that requires two days. On the first day the cervix is dilated through the insertion of laminaria. On the second day, the fetus is extracted.

[4] During the laminaria insertion on the first day, Plaintiff was in some degree of pain. Plaintiff wanted to proceed despite the pain, and Dr. Hall completed the insertion. On the second day, Plaintiff’s pain grew worse. Dr. Hall and members of his staff attempted to start an IV in Plaintiff’s arms to administer pain medication. The attempt was unsuccessful, possibly due to Plaintiff’s alleged prior intravenous drug use. The Clinic staff also attempted to obtain an anesthesiologist for the procedure, but could not. Plaintiff’s pain caused her to move about on the table, forcing the doctor to stop the procedure several times.

[5] Due to the risk of infection or spontaneous abortion, Dr. Hall was too far along in the procedure to remove the laminaria and allow Plaintiff to go home. Dr. Hall advised Plaintiff that one option was to find a doctor at a hospital who would perform the procedure. Although no hospital in New Mexico takes patients directly for elective abortions, Dr. Hall informed Plaintiff that the University of New Mexico Hospital allows for exceptions, such as referral of
patients with complications. Plaintiff opted to continue at the Clinic. Dr. Hall continued for some time using an intramuscular anesthesia for limited pain control, but the doctor ultimately determined he could not complete the procedure. He then contacted Dr. Jamison at the Hospital who agreed to accept Plaintiff’s transfer.

[6] Under the supervision of Dr. Jamison, Dr. Maybach, a second-year resident at the Hospital, attempted to complete the abortion, but with disastrous results. Dr. Maybach entered the uterus and unknowingly extracted Plaintiff’s right ureter, the tube connecting the kidney to the bladder. Continuing on, Dr. Maybach mistakenly extracted Plaintiff’s right ovary. At that point, Dr. Jamison terminated the procedure and began abdominal surgery, during which the doctors realized Plaintiff’s uterus had a large perforation forcing them to perform a hysterectomy. Plaintiff’s kidney was later removed because of the damage caused by the removed ureter. The parties to this appeal do not dispute that Plaintiff suffered significant personal injury as a result of her treatment at the Hospital.

[7] Electing not to sue the Hospital or its doctors, Plaintiff filed a complaint solely against the Clinic. Specifically, Plaintiff alleged that the Clinic negligently perforated Plaintiff’s uterus, among other injuries, which in turn caused Plaintiff to be transferred to the Hospital where she suffered separate, enhanced injuries due to the Hospital’s negligence. Alleging successive, divisible injuries, first at the Clinic and then at the Hospital, Plaintiff sued the Clinic under a theory of successive tortfeasor liability. As will be discussed more fully in this opinion, under successive tortfeasor theory the Clinic could be held jointly and severally liable for both: any original injury caused at the Clinic, and the enhancement of those injuries by separate acts of negligence at the Hospital. For its part, the Clinic denied any negligence or that it caused Plaintiff any injury. The Clinic blamed the Hospital for substantially all of Plaintiff’s injuries.

[8] At the close of all the evidence, the district court agreed that Plaintiff had presented a case for successive tortfeasor liability. Based on this Court’s prior discussion of successive tortfeasor liability in *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 426, 902 P.2d 1025, 1029 (1995), the jury was instructed that: “When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subsequent medical treatment, if any.” At Plaintiff’s request, the jury was also instructed on five possible theories of negligence by the Clinic: (1) that the Clinic was not adequately equipped to perform this type of abortion; (2) the Clinic did not obtain anesthesiologist; (3) the Clinic did not obtain IV access; (4) the Clinic did not stop the procedure when Plaintiff was in pain, and; (5) Dr. Hall did not accurately relay the patient’s medical history to the Hospital.

[9] On Plaintiff’s request, the jury also received an instruction that Plaintiff had the burden of proving that the Clinic’s negligence was a proximate cause of Plaintiff’s injuries and damages, as well as an instruction defining proximate cause. At Plaintiff’s suggestion, the jury was given a special verdict form asking it to decide whether the Clinic was negligent, and if so, to determine if that negligence was a proximate cause of Plaintiff’s injuries and damages. Along with Plaintiff’s instructions, the district court permitted the Clinic to submit to the jury its defense theory that Plaintiff’s injuries were caused solely by the Hospital and not by anything that occurred at the Clinic.

[10] After being instructed, the jury returned a special verdict finding that the Clinic was negligent but not a proximate cause of Plaintiff’s injuries and damages. Plaintiff then filed a motion for judgment as a matter of law (JNOV) and a motion for new trial, asking the district court to find proximate cause as a matter of law.

The district court denied Plaintiff’s motions, and the Court of Appeals affirmed the district court in a split decision. *Payne, 2004-NMCA-113, 136 N.M. 380, 98 P.3d 1030 (Alarid, J., specially concurring, Bustamante, J., dissenting).* We granted certiorari to address successive tortfeasor liability, a subject that has been called the “most intractable problem created by New Mexico’s adoption of several liability.” M.E. Occiahino, *Bartlett Revisited: New Mexico Tort Law Twenty Years After the Abolition of Joint and Several Liability—Part One,* 33 N.M. L. Rev. 1, 20 (2003).

**DISCUSSION**

**Successive Tortfeasor Liability Arises from Separate and Causally-Distinct Injuries Caused by the Original Tortfeasor**

[11] In New Mexico, when concurrent tortfeasors negligently cause a single, *indivisible* injury, the general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault for that injury. See *NMSA 1978, § 41-3A-1(A) (1987)*; *Bartlett v. N.M. Welding Supply, Inc.*, 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App. 1982), *superseded in part on other grounds by § 41-3A-1.* Under several liability, fault is compared among concurrent tortfeasors, limiting the liability of each to the dollar amount that is “equal to the ratio” of each concurrent tortfeasor’s comparative responsibility for the single, indivisible injury. See *§ 41-3A-1(B).* While several liability is the majority rule, however, certain narrow exceptions still allow for joint and several liability. See *§ 41-3A-1(C).* Under the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility.

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1Plaintiff’s counsel stated that the Hospital and its doctors were not sued because Plaintiff felt grateful to the Hospital for saving her life and that suing them would be wrong.

2Recognizing that Plaintiff was pursuing a theory that would hold the Clinic liable for both the injuries caused by the Clinic and by the Hospital, the Clinic filed a third-party complaint seeking indemnification from the Hospital. The third-party complaint was dismissed for failure to comply with the two-year statute of limitations that applied to the Hospital under the New Mexico Tort Claims Act. NMSA 1978, § 41-4-15(A) (1977). That issue has not been appealed to this Court.

Since the time of trial, the Uniform Jury Instruction on causation has been modified to remove the legal term “proximate cause.” UJI 13-305 NMRA 2006. Instead the instruction is now simply titled “causation.” The new instruction labels a “cause” as “[a]n act or omission [that] . . . if unbroken by an independent intervening cause . . . contributes to bringing about the injury.” *Id.* This is modified from the prior instruction that read, “[a] proximate cause of an injury is that which in a natural and continuous sequence . . . produces the injury, and without which the injury would not have occurred.” UJI 13-305 NMRA 2004.
based on theories of proportional indemnification or contribution. See NMSA 1978, § 41-3-2 (1987) (joint and several liability produces a right of contribution); In re Consol. Vista Hills Retaining Wall Litig., 119 N.M. 542, 552-53, 893 P.2d 438, 448-49 (1995) (adopting proportional indemnification “only when contribution or some other form of proration of fault among tortfeasors is not available”).

12 Whereas comparative fault and several liability apply when concurrent tortfeasors cause a single, indivisible injury, our analysis shifts when successive tortfeasors cause separate divisible injuries. Under successive tortfeasor liability, a first injury is caused by an original tortfeasor. That injury then causally leads to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor (hereafter distinguished as the “second injury” or the “enhanced injury”). See Lujan, 120 N.M. at 426, 902 P.2d at 1029; Occhialino, supra, 20.

13 As an exception to the general rule of several liability, the successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of both injuries, those caused by both the original tortfeasor and the successive tortfeasor. Lujan, 120 N.M. at 426, 902 P.2d at 1029. The original tortfeasor is responsible for both injuries because it is foreseeable as a matter of law that the original injury, such as that suffered from a car accident, may lead to a causally-distinct additional injury, such as when the original injury requires subsequent medical treatment, negligently administered at a hospital. Id. The successive tortfeasor is only responsible for the second injury or for the distinct enhancement of the first injury. See Lewis ex rel. Lewis v. Samson, 2001-NMSC-035, ¶ 34, 131 N.M. 317, 35 P.3d 972 (Lewis II).

14 Importantly, because successive tortfeasor liability is an exception to the general rule of several liability among concurrent tortfeasors, the doctrine is limited to a “narrow class of cases,” in which a plaintiff can show more than one distinct injury successively caused by more than one tortfeasor. Lewis II, 2001-NMSC-035, ¶ 32; see also Lujan, 120 N.M. at 425-26, 902 P.2d at 1028-29. See generally RESTATEMENT (THIRD) OF TORTS: APportionment of Liability § 26 (2000); RESTATEMENT (SECOND) OF TORTS § 457 (1965). As a condition to obtaining joint and several liability of the original tortfeasor for both injuries, a plaintiff must show that “the original injury and the subsequent enhancement of that injury [are] separate and causally-distinct injuries.” Lujan, 120 N.M. at 426, 902 P.2d at 1028 (emphasis added). If these elements cannot be shown, then joint and several liability does not obtain.

15 The limiting requirement of causally-distinct injuries can be traced back to early discussions of successive tortfeasor liability in New Mexico. See Occhialino, supra, 20-23. Prior to New Mexico’s adoption of several liability and comparative fault, our caselaw consistently distinguished between successive and concurrent tortfeasors, noting that successive tortfeasor liability involved negligent acts that are not concurrent, “but one succeeds the other by an appreciable interval.” Id. at 21 (citing Lucero v. Harshey, 50 N.M. 1, 156 P.2d 587, 589 (1946)). This temporal distinction between the negligent acts was later dropped in favor of a distinction based on an original injury followed by a successive, enhanced injury. The key to the distinction is that the original injury is caused by the negligence of the original tortfeasor, which is then followed by a second or enhanced injury caused by the second tortfeasor. Id. at 21-25. This Court has consistently held, even after the passage of the Several Liability Act in 1987, that for successive tortfeasor liability to apply, two distinct injuries must exist. Id. at 23-28; Lewis II, 2001-NMSC-035, ¶ 32; Lujan, 120 N.M. at 426-27, 902 P.2d at 1029-30. Thus, under the law of this state only when these elements are found — negligence, causation, and a distinct original injury — may the original tortfeasor be held jointly and severally responsible for the subsequent or enhanced injury as well. See Lujan, 120 N.M. at 426, 902 P.2d at 1029; see also RESTATEMENT (SECOND) OF TORTS, supra, § 457 cmt. a (stating plaintiff must show the original tortfeasor’s negligence was the “legal cause of bodily harm for which, even if nothing more were suffered, the other could recover damages”).

Successive Tortfeasor Liability does not Apply here as Plaintiff Never Proved a Separate and Distinct Injury Caused by the Negligence of the Clinic

16 Plaintiff asserted at trial that her claim fit comfortably into a theory of successive tortfeasor liability. She argued that her original injuries at the Clinic included the perforation of her uterus, internal bleeding, and pain and suffering, all distinctly caused by the Clinic’s negligence. Plaintiff then argued that a second, distinct injury occurred at the Hospital when Dr. Jamison and Dr. Maybach attempted to complete the abortion, and negligently caused Plaintiff to lose her ureter, undergo a hysterectomy, and eventually lose her kidney. Under a theory of successive tortfeasor liability, we agree that the Clinic, if it were a proximate cause of a causally-distinct original injury, such as a perforated uterus, internal bleeding, or pain and suffering, would then become jointly and severally liable as a matter of law for subsequent injuries suffered at the Hospital.

17 However, anticipating its potential liability for all of Plaintiff’s injuries, the Clinic argued at trial that it was not negligent at all, or in the alternative, that its negligence did not cause a separate, discrete original injury at the Clinic. In other words, the Clinic presented evidence that it caused no separate injury to Plaintiff, but that all injuries resulted at the Hospital, for which the Clinic was not jointly and severally liable because successive tortfeasor liability did not apply.

18 Thus, we arrive at the heart of our problem. According to Plaintiff, once the trial court determined that this case properly called for successive tortfeasor liability and the jury found the Clinic negligent, then as with Lujan the trial court should have found the Clinic’s negligence a proximate cause as a matter of law for all the injuries subsequently suffered at the Hospital. Consistent with that theory, Plaintiff urges this Court to find proximate cause as a matter of law and reverse the jury’s verdict in the Clinic’s favor. Unfortunately for Plaintiff, her argument misapprehends the essence of successive tortfeasor liability.

19 Plaintiff met part of her burden by proving negligence, but failed to show the Clinic’s negligence caused any distinct injury. We cannot agree that proximate cause of the original injury (if contested) should be decided as a matter of law by the trial judge. When the claim is brought against the original tortfeasor, it is up to the plaintiff to prove, and the jury to decide, whether the plaintiff suffered a distinct original injury caused by the original tortfeasor’s negligence. Causation for the second injury is determined as a matter of law, but if, and only if, the plaintiff satisfactorily demonstrates that the original tortfeasor negligently caused a distinct, original injury requiring medical treatment. See Lujan, 120 N.M. at 426, 902 P.2d at 1029 (“When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm.”). This original injury must be dis-
tinct from the enhanced injury that occurs subsequently at the hands of the successive tortfeasor. Here the existence of an original injury and causation of that injury were in dispute at trial, and it was for the jury, not the judge, to determine existence and causation of any alleged original injury.

[20] The requirement of an original injury was more apparent in this Court’s two prior opinions dealing with successive tortfeasor theory, Lujan and Lewis II. While both opinions involved actions against the successive tortfeasor, liability of the original tortfeasor was clearer than in the present case, because both existence of, and causation for, the original injury was patent. In Lujan, the original tortfeasor collided with a motorcycle driven by the victim, breaking his leg. 120 N.M. at 423, 902 P.2d at 1026. Then, the leg was refractured during treatment at a rehabilitation center. Id. at 424, 902 P.2d at 1027. The negligence of the driver of the car in the original accident caused a distinct original injury, the broken leg, which led to a distinct second injury, the refracture. Successive tortfeasor liability clearly applied, and if the claim had been brought against the original tortfeasor, the negligent driver would have been found jointly and severally liable for all injuries subsequently occurring.

[21] In Lewis II, 2001-NMSC-035, ¶ 2, the victim was stabbed multiple times by a criminal assailant, the original tortfeasor, and later died at a hospital allegedly due to medical malpractice. The jury found the hospital was not negligent, and thus not a successive tortfeasor, based in part on the hospital’s argument that the original tortfeasor, the assailant, was the sole cause of the death; in essence that the victim would have died regardless of what subsequently happened at the hospital. Id. ¶¶ 2-4. The victim failed to prove that the successive tortfeasor (the hospital) caused any enhanced injury.

[22] In both Lewis II and Lujan, unlike the present case with the Clinic, there was no question that the original tortfeasor’s negligence caused a distinct original injury. While neither case dealt specifically with the responsibility of the original tortfeasor, in both cases, had an action been brought against the original tortfeasor, he would have been liable jointly and severally for both the original and successive injuries.

[23] Contrary to the original tortfeasors in Lujan and Lewis II, the facts surrounding any alleged injury at the Clinic were very much in dispute, and it was up to Plaintiff to prove a distinct original injury caused by the Clinic’s negligence, separate and apart from the injuries later suffered at the Hospital, before the Clinic could be held jointly and severally liable for all subsequent injuries. Based on the evidence presented at trial, the jury found that Plaintiff did not meet her burden when it found no causation. And the jury’s decision had substantial support in the evidentiary record.

[24] During Plaintiff’s trial, the evidence was disputed as to whether the Clinic caused any separate injury, and substantial evidence suggested that the entire extent of Plaintiff’s injuries was caused by the Hospital alone. The injuries Plaintiff claimed were caused by the Clinic, uterine perforation, internal bleeding, or pain and suffering, did not necessarily occur at the Clinic. Evidence showed that Plaintiff was stable at the time she arrived at the Hospital with normal vital signs, and her initial examination by Hospital staff did not reveal any evidence of acute abdominal problems, uterine perforation or internal bleeding.

[25] Similarly, the evidence at trial was in dispute as to whether Plaintiff’s theories of the Clinic’s negligence were linked to any distinct injury occurring at the Clinic. For example, evidence suggested that even if the Clinic did cause uterine perforation, such a complication is not uncommon in late-term abortion procedures and not necessarily the result of negligence. Evidence also suggested that these kinds of procedures are inherently painful, and not necessarily the result of any negligence on the part of the treating physician. Plaintiff presented contrary evidence to be sure, but assuming the Clinic’s view of the evidence, the jury could reasonably have concluded that the Clinic’s negligence, under one of Plaintiff’s proffered theories, did not cause any separate injury, distinct from what occurred subsequently at the Hospital.

Negligence Without Injury does not Qualify for Successive Tortfeasor Liability

[26] Plaintiff further argues that even if there is not a distinct injury, a causal chain of events connects the negligence of the Clinic to the successive injury at the Hospital, and thus successive tortfeasor liability applies. Specifically, she argues that the medical complications at the Clinic necessarily caused her to be transferred to the Hospital. We note it is uncontested that the Hospital would not have taken Plaintiff as a patient had she not been referred from the Clinic, because as a matter of policy the Hospital did not accept patients for abortion procedures. Therefore, Plaintiff asserts there is an indisputable causal relationship between what happened at the Clinic and whatever ultimately happened at the Hospital, because without the Clinic there would have been no Hospital. Based on that empirical and logical connection, Plaintiff concludes that the trial court erred in not finding proximate cause as a matter of law.

[27] We agree that had Plaintiff not sought treatment at the Clinic, regardless of whether the Clinic caused a distinct injury, Plaintiff would not have been subjected to medical care at the Hospital. This is not unlike a car accident victim who, although apparently uninjured, goes to the hospital for a precautionary checkup and is injured by a doctor’s malpractice. See Payne, 2004-NMCA-113, ¶¶ 39-40 (Alarid, J., specially concurring). In such a hypothetical, the negligent driver can be said to be “as much a proximate cause of [the Plaintiff’s] exposure to [the negligent doctor] as in the classic Lujan scenario.” Id. ¶ 41. It is suggested that this causal connection is enough to fall under the successive tortfeasor theory, and that plaintiff need not prove the original tortfeasor caused a distinct injury separate, from the injury caused by “the combined negligence of D1 and D2.” Id. (emphasis added).

[28] This brings us to an important point. There are many scenarios in which a defendant’s negligence does not cause a separate injury, but may lead the victim to seek medical care, and in that case the defendant’s negligence would be a contributing factor to the injury resulting from subsequent medical treatment. However, this argument does not meet the standard for successive tortfeasor liability. While there may be a kind of temporal connection, or a kind of causation in fact, successive tortfeasor liability applies only when an original injury causes subsequent medical treatment, because it is that separate injury which makes subsequent medical treatment foreseeable as a matter of law. See id. ¶¶ 39-40. Without a separate original injury, there is but one injury caused by the combined negligence of two tortfeasors. Id. ¶ 41. This would be a classic comparative negligence case arising from concurrent tortfeasors who together produce one, indivisible injury. The victim can always sue the parties severally as concurrent tortfeasors and claim comparative fault for a single, indivisible injury. This is not, however, a situation in which to claim joint and several liability under a theory of successive tortfeasors. To that extent, we respectfully disagree with any contrary
view offered in Judge Alarid’s thoughtful concurring opinion. Id. ¶¶ 35-48.

{29} We reiterate that successive tortfeasor liability is a narrow theory, and must remain so because it allows joint and several liability for all injuries, rather than following the majority rule in New Mexico of several, proportional liability. See Lewis II, 2001-NMRA-035, ¶ 32; Lujan, 120 N.M. at 425-26, 902 P.2d at 1028-29. To ensure that successive tortfeasor liability continues to be applied appropriately, the parties must prove all the elements, including an original injury caused by the original tortfeasor’s negligence. Merely alleging a causal connection between two alleged tortfeasors who cause a single, indivisible injury does not meet this requirement.

{30} While we require two causally-distinct injuries to qualify under successive tortfeasor theory, we emphasize that the original injury caused by the original tortfeasor’s negligence need not be as obvious as the original injury in Lujan, a broken leg, or in Lewis II, eight stab wounds. For example, New Mexico law allows damages for pain and suffering. See UJI 13-1807 NMRA 2006. Depending on the specific facts and circumstances of a given case, this form of injury might constitute the distinct original injury necessary under successive tortfeasor liability, as long as we can decide it was foreseeable as a matter of law that medical treatment would be sought, consistent with Lujan, 120 N.M. at 426, 902 P.2d at 1029.

The Jury Instructions at Trial

{31} While we do not agree with Plaintiff’s argument that proximate cause of the original injury should have been determined as a matter of law, we must still ascertain if the jury understood, based on the instructions it was given, how to decide the essential issues of a case involving successive tortfeasor liability and its consequences. Plaintiff argues the jury did not understand, but was hopelessly confused by the instructions. Specifically, Plaintiff asserts that the instructions on negligence and causation were misleading in suggesting that the Clinic and the Hospital’s causation for the injuries could be compared, and thus that there could be only one proximate cause for all of Plaintiff’s injuries. Plaintiff argues that this forced the jury to choose between, or compare, the Clinic and the Hospital, which of course is directly contrary to successive tortfeasor theory and joint and several liability.

{32} The jury was instructed on successive tortfeasor liability. Instruction 14, using the language of this Court in Lujan, stated, “When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by the subsequent medical treatment, if any.” This instruction properly set forth successive tortfeasor liability. However, it was coupled with other instructions that appeared to contradict the basic tenets of this form of liability. Cf. Vigil v. Miners Colfax Med. Ctr., 117 N.M. 665, 670, 875 P.2d 1096, 1101 (Ct. App. 1994) (citing Kirk Co. v. Ashcraft, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984)) (jury instructions are not sufficient if, when read in their entirety, they do not “fairly present the issues and the applicable law”).

{33} As we will explain, the jury was asked about the causation of injuries considered as a whole, but was never asked the critical question about causation of a separate, original injury at the Clinic. Instruction 4, based on the Clinic’s theory of the case, advised the jury that, “Dr. Hall also contends that [Plaintiff’s] injuries were caused by the acts or omissions of employees or agents of the University of New Mexico Hospital, and/or the negligence of [Plaintiff].” (Emphasis added.) Instruction 4 also included language that placed the burden on Plaintiff to show that the Clinic’s negligence “was a proximate cause of the injuries and damages.” (Emphasis added.) Then Instruction 13 defined proximate cause without differentiating between the original injury and the successive injury. UJI 13-305 NMRA 2004; see supra note 3.

{34} As emphasized throughout this opinion, the critical question for the jury to decide was whether the Clinic’s negligence caused a discrete injury, separate from injuries inflicted at the Hospital. The jury was never asked that question. Instead, based on generic negligence jury instructions, it was asked about causation of Plaintiff’s “injuries,” possibly all of them considered together, without differentiating between what the Clinic’s negligence caused and what the Hospital’s negligence caused. See Const. Contracting & Mgmt., Inc. v. McConnell, 112 N.M. 371, 374-79, 815 P.2d 1161, 1165-69 (1991) (granting a new trial because the instructions confused the jury on what question it was being asked to determine and what damages it could award).

{35} As in McConnell, the jury was given instructions that were particularly likely to confuse the jury. See also State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134 (in a criminal case “[a] juror may suffer from confusion . . . despite the fact that the juror considers the instruction straightforward . . . [if the] instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law”). Based on the given instructions, the jury could well have concluded that it had to determine whether the Clinic’s negligence caused all the injuries, both those occurring at the Clinic and those occurring at the Hospital. The jury was never asked the critical question: whether the Clinic’s negligence caused a separate injury, causally-distinct from those occurring at the hands of the Hospital.

{36} In sum, the jury was asked the wrong question, causation for “injuries” as a whole, and never asked the right question, causation for an “original injury.” For that reason, we lack confidence in the jury’s verdict, especially when it found negligence but no causation for any of Plaintiff’s injuries. While we acknowledge there was sufficient evidence for the jury’s outcome, we cannot be sure that the jury was addressing the pivotal and determinative issue of the case.

{37} We are also aware that some of the confusing instructions were offered by Plaintiff, and it is not our practice to grant a new trial if the original error was the fault of the complaining party. See McConnell, 112 N.M. at 375 n.3, 815 P.2d at 1166 n.3.

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3 Plaintiff argues in part that the requested instruction allowed the Clinic to introduce evidence of comparative fault. Under the law of this state, the alleged original tortfeasor may argue that another tortfeasor caused the original injury; in other words, that the original tortfeasor’s negligence did not cause an original distinct injury. Cf. Lewis II, 2001-NMSC-035, ¶ 35. Such an argument is not comparative fault but a basic proximate cause defense. However, we wish to make clear that the original tortfeasor can never assert that it was not at fault for the successive injury. If the original tortfeasor causes a distinct original injury requiring medical treatment, then it is also the cause, as a matter of law, for the successive injury.
However, the circumstances of this case present us with a unique challenge. At the time of trial, there were no Uniform Jury Instructions on successive tortfeasor theory, and in fact there was very little caselaw on the subject. *Lujan*, 120 N.M. 426, 902 P.2d 1025; *Lewis I*, 1999-NMCA-145, 128 N.M. 269, 992 P.2d 282. Importantly, none of that caselaw dealt with claims against the original tortfeasor, but rather dealt only with claims against the successive tortfeasor. Also, the law at the time was in flux because *Lewis II* had not yet been decided, leaving *Lewis I* as the applicable law.

{38} These circumstances, along with complicated facts and application of a complex area of law, make this case something of an aberration. We should not penalize any party for not anticipating future developments in the law, including law set forth years later in this opinion. For these reasons we are compelled to remand for a new trial on the merits.

**Guidance on Successive Tortfeasor Theory**

{39} In an attempt to avoid future mistakes, we take this opportunity to provide our courts with guidance regarding how successive tortfeasor cases should be tried.

{40} Initially, the trial court should attempt to determine whether the case potentially involves successive tortfeasor liability. Here, at the close of the evidence the trial judge concluded that the case did involve successive tortfeasor theory because it looked like there were two causally-distinct injuries. Because the existence of two causally-distinct injuries was in dispute, the judge could not make this determination before presentation of all the evidence. This ruling was based on *Lewis I*.

{41} In *Lewis I*, our Court of Appeals concluded that successive tortfeasor liability could be, but did not have to be, determined as a matter of law prior to or after hearing all the evidence. *Lewis I*, 1999-NMCA-145, ¶¶ 38, 41, 55. The Court stated that if the trial court could determine before hearing the evidence that the case involved successive tortfeasor liability, then the parties should be informed not to argue comparative fault. In order to avoid tainting a successive tortfeasor case, the Court of Appeals concluded that even if the judge could not make this determination prior to hearing evidence, the trial judge should inform both sides not to argue comparative fault.

If the evidence is adduced during trial to permit the trial court to make such a determination one way or the other (concurrent tortfeasor liability versus successive tortfeasor liability) as a matter of law, the trial court shall submit the appropriate instructions to the jury on the proper . . . theory founded on the evidence presented and permit counsel to argue the evidence and applicable liability theory accordingly during closing arguments.

*Id.* ¶ 55.

{42} We agree with this assessment in part. If the existence of a causally-distinct injury is undisputed, then the trial court can determine, as a matter of law, that successive tortfeasor theory applies. Such may well be the case when a plaintiff brings a claim against only the successive tortfeasor, as in *Lujan* and *Lewis II*. But if the claim is asserted against the original tortfeasor and causation of an original injury is contested, then it would not be appropriate for the trial judge to make this determination in place of the jury.

{43} As was the case here, when the existence of causally-distinct, divisible injuries is not clear, then the question should be given to the jury to decide. Such a situation may add a certain amount of complexity to such cases. During trial, the parties may have to deal with the possibility that, ultimately, successive tortfeasor theory may not apply at all, depending on how the jury answers certain questions regarding injury and causation. Ultimately, the case may be decided on the basis of several liability and comparative fault among concurrent tortfeasors, as opposed to joint and several liability among successive tortfeasors. Or, the jury may be given a choice of theories to apply, depending on how it answers certain interrogatories. When the evidence is unclear, factual questions are best left to the jury, subject to appropriate instruction from the court.

{44} More to the point in a case such as this one, at the close of evidence the jury may have to be presented with alternative sets of jury instructions, one for concurrent tortfeasors causing a single, indivisible injury, and a second for successive tortfeasors causing separate injuries. Which theory applies will depend on the jury’s answers to factual interrogatories regarding negligence, injury, and causation of a distinct original injury.

{45} The jury should be asked whether defendant was negligent. *See UJI 13-1601 NMRA 2006 (general negligence definition); UJI 13-1101 NMRA 2006 (medical negligence definition)*. If so, the jury should be asked whether the evidence demonstrated causally-distinct injuries, rather than a single, indivisible injury caused by the concurrent actions of two individuals. If the jury finds separate, causally-distinct injuries, it will be instructed to proceed under successive tortfeasor liability. If the jury finds a single, indivisible injury, it will proceed under concurrent tortfeasor liability, based upon principles of comparative fault.

{46} Under successive tortfeasor theory, the jury should then be asked whether the original tortfeasor’s negligence caused plaintiff’s distinct, original injury. If this question is answered in the negative, then plaintiff’s claim will be a nullity. But if answered in the affirmative, the plaintiff has met the burden of a successive tortfeasor liability case. If the claim is against the original tortfeasor, the defendant is then jointly and severally liable for both the original and the successive injury.

{47} The trial court’s successive tortfeasor instruction, utilizing the language of this Court in *Lujan*, will then be appropriate: “When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subse-

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1 We note that we are not attempting to preempt our Committee on Uniform Jury Instructions-Civil, whose job it is to recommend jury instructions for this Court’s review and adoption. Our discussion of jury instructions here is intended as guidance to that Committee.

2 Contrary to our suggestion in *Lewis II*, the Court of Appeals did not hold that the issue had to be determined as a matter of law. *See Lewis II*, 2001-NMSC-035, ¶ 31.

3 If the claim is against the successive tortfeasor, after finding the tortfeasor’s negligence caused the successive injury, the jury must then determine what the degree of enhancement was by examining the injuries that would have occurred absent the negligence. *Lewis II*, 2001-NMSC-035, ¶ 34.
quent medical treatment, if any.” Similar language may be used in future successive tortfeasor cases. See also Judicial Council of California Jury Instruction 3929, 2006 Edition (California successive tortfeasor instructions); Ronald W. Eades, Jury Instructions on Damages in Tort Actions §§ 4.19, 4.20 (2003) (examples of instructions on negligent medical treatment). *

Cases Involving Both Successive and Concurrent Theories

{48} The final issue we address is how to instruct and guide the jury in cases, such as this one, where there are both negligence theories: successive tortfeasor liability and comparative fault. Here, one of Plaintiff’s negligence theories was that the Clinic did not properly relay Plaintiff’s medical history to the Hospital. This theory cannot support a successive tortfeasor claim because it does not indicate a distinct injury at the Clinic followed by a successive injury at the Hospital. Thus, this negligence theory more properly asserts a concurrent liability claim: comparative fault among concurrent tortfeasors causing a single injury at the Hospital.

{49} When the plaintiff is asserting claims that fall under both theories, it will be up to counsel, under review of the trial judge, to divide the claims appropriately and present them to the jury under the proper theory. For example, two of Plaintiff’s claims asserted that the Clinic was negligent in not administering an IV and in not responding properly to Plaintiff’s pain. Both of these theories should be presented to the jury with the above instructions for determining whether they fall under successive tortfeasor liability. Then separately, Plaintiff can present the claim regarding the Clinic’s failure to properly relay the Plaintiff’s medical history, followed by instructions on comparative fault and concurrent tortfeasor liability.

{50} The claims should not be grouped together as was done here. Doing so makes it more confusing to a jury that is attempting to determine whether two causally-distinct injuries have been proven. Thus, dividing each claim and presenting it under the correct theory is the appropriate way to approach multiple claim cases.

CONCLUSION

{51} For the foregoing reasons, we reverse the opinion of the Court of Appeals. We remand the case for a new trial consistent with this opinion.

{52} IT IS SO ORDERED.

RICHARD C. BOSSON, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice

PETRA JIMINEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

JONATHAN B. SUTIN, Judge

(sitting by designation)

*The California jury instruction regarding subsequent medical treatments states: “If you decide that [name of defendant] is legally responsible for [name of plaintiffs]’s harm, [he/she/it] is also responsible for any additional harm resulting from the acts of others in providing aid that [name of plaintiff]’s injury reasonably required, even if those acts were negligently performed.”
OPINION

LYNN PICKARD, JUDGE

[1] These cases present us with the opportunity to resolve the issues of whether the New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2004), requires a plaintiff to name a specific public employee as a defendant to recover damages under the TCA and whether the name of the negligent public employee must be identified in evidence at trial. Because these cases raise similar legal issues, we consolidate them for appellate review. In Lopez, the district court granted Defendant Las Cruces Police Department’s motion to dismiss or for summary judgment for failure to name a negligent employee. In Coleman, the district court entered judgment on the jury verdict in favor of Plaintiff Margaret Coleman notwithstanding Coleman’s not having named a negligent employee. We hold that the TCA does not require the naming of individual public employees as defendants. We also hold that Coleman was not required to produce evidence at trial of the identity of the public employees whom Coleman claimed had been notified of the problem with the City sidewalk, because the issue was not properly preserved. Accordingly, in Coleman, we affirm the judgment in favor of Coleman, and in Lopez, we reverse and remand for reinstatement of Lopez’s claim.

I. BACKGROUND AND FACTS

[2] The cases come before us in different procedural postures, and we set out the background to each appeal below. Additional factual and procedural details will be developed as necessary in the context of the discussion of each case.

A. Lopez

[3] Louie Lopez filed a pro se complaint against the Las Cruces Police Department, alleging assault, battery, and improper arrest. In his complaint, Lopez did not name the police officers who he alleged had assaulted him. The Police Department filed a motion to dismiss or for summary judgment, arguing that under Abalos v. Bernalillo County District Attorney’s Office, 105 N.M. 554, 734 P.2d 794 (Ct. App. 1987), Lopez had failed to state a claim on which relief could be granted because he had not named a specific negligent public employee as a defendant. The district court dismissed Lopez’s complaint with prejudice and entered summary judgment for the Police Department. Lopez appealed to
this Court, still acting pro se, and this Court summarily affirmed the district court. The New Mexico Trial Lawyers Association (NMTLA) filed a motion for rehearing and leave to file an amicus curiae brief, which this Court granted. The Police Department moved to dismiss the appeal and for sanctions, arguing that Lopez had not filed the transcript in a timely manner and that NMTLA, as an amicus, should not be allowed to function as Lopez’s attorney. We denied the motion, but stated that the parties could raise issues relating to proper representation and the role of an amicus in their briefs.

B. Coleman

[4] Margaret Coleman’s complaint alleged that she was injured when she tripped on a section of sidewalk in Las Cruces, which was in disrepair due to the negligence of the City of Las Cruces. Her complaint alleged that the City breached its duty to maintain the sidewalk in a safe condition. Coleman presented evidence at trial that on three occasions, City employees had been notified of a sunken water meter and an uneven sidewalk. The jury was instructed that the City could only act through its officers and employees, and the jury found that the City was negligent and that its negligence was the proximate cause of Coleman’s injuries. After the district court entered judgment on the jury verdict, the City moved for judgment as a matter of law or a new trial, arguing, in part, that identification of a specific negligent City employee was a jurisdictional requirement under the TCA and that Coleman’s failure to identify a specific negligent employee resulted in a lack of notice to the City. The district court denied the City’s motion, and the City appealed from the judgment.

II. DISCUSSION

[5] Both cases require us to address whether the TCA requires the naming of a specific governmental employee, but each case also raises separate questions. Therefore, we first address the issues raised in Lopez and then address those raised in Coleman.

A. Lopez

1. Procedural Issues

[6] As a preliminary matter, we address the Police Department’s arguments concerning preservation and the role of the amicus, NMTLA, in this appeal. The Police Department argues that Lopez, a pro se plaintiff, did not preserve the arguments he now makes through counsel on appeal. Relying on Bruce v. Lester, 1999-NMCA-051, ¶ 4, 127 N.M. 301, 980 P.2d 84 (stating that pro se litigants are not entitled to greater rights than those litigants who employ counsel), the Police Department argues that this Court should not apply a less stringent preservation standard to Lopez simply because he was self-represented in the trial court. “[T]o preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Preservation serves the purposes of (1) allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and (2) creating a record from which the appellate court can make informed decisions. Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332. Our review of the record indicates that the trial court was alerted to the issue of whether Abalos requires a plaintiff to name a specific public employee and decided as a matter of law that there was such a requirement. As Lopez points out in his reply brief, he attempted to respond to the Police Department’s argument that he should have named individual employees. Because the trial court was made aware of the issue and knew that Lopez opposed dismissal, we consider the issue preserved for purposes of appellate review.

[7] The Police Department also argues that the role of an amicus “is to call the court’s attention to facts or situations that may have escaped consideration. [It] is not a party and cannot assume the functions of a party. [It] must accept the case before the court with the issues made by the parties.” State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 590-91, 249 P. 242, 248-49 (1926). Instead of acting within this role, the Police Department argues, NMTLA assumed the functions of a party by advocating for Lopez during the proceedings on rehearing and by securing a transcript. Lopez responds that NMTLA acted appropriately in seeking reconsideration, securing a transcript, obtaining counsel to act in a pro bono capacity on behalf of Lopez, and filing an amicus brief.

[8] Although we agree with the Police Department’s description of the role of an amicus in the appellate process, under the facts of this case, we cannot say that NMTLA acted inappropriately in seeking reconsideration of our summary decision. NMTLA argued in its motion for reconsideration that the issue of whether Lopez was required to name individual public employees had been incorrectly decided in a manner contrary to standard practice throughout the state and without the benefit of briefing or argument by licensed attorneys. NMTLA also points out that at the time it filed the motion for reconsideration, it had attempted to contact Lopez but had been unable to do so. Under these circumstances, we conclude that NMTLA did not act improperly in filing a motion for reconsideration. It was seeking to preserve this Court’s ability to correctly decide an important issue. At the same time, it successfully sought out counsel to represent Lopez in a pro bono capacity. We now have briefing by a properly represented Lopez, as well as amicus briefing by the NMTLA. It would exalt form over substance to dismiss Lopez’s appeal at this point in time. “It is the appellate court policy to construe rules liberally so that an appeal may be decided on the merits whenever possible.” Hester v. Hester, 100 N.M. 773, 775-76, 676 P.2d 1338, 1340-41 (Ct. App. 1984). We therefore reconsider Lopez’s issue of whether a plaintiff is required to name a specific negligent public employee in a TCA complaint.

2. The Tort Claims Act

[9] Lopez challenges the district court’s dismissal of his claim, arguing that the Police Department is the proper defendant and that he is not required by statute or public policy to name an individual public employee as a defendant in order to state a claim under the TCA. In the alternative, he argues that if he is required to name individual law enforcement officers, he should be permitted to amend his complaint. We hold that a TCA plaintiff is not required to name an individual public employee as a defendant. In light of this holding, we do not address Lopez’s additional issue.

[10] Because the court dismissed Lopez’s claim on the Police Department’s motion to dismiss or for summary judgment, we review de novo the legal issue of whether a TCA plaintiff is required to name an individual public employee. See Celaya v. Hall, 2004-NMSC-005, ¶ 7, 135 N.M. 115, 85 P.3d 239 (stating summary judgment is reviewed on appeal de novo); Envtl. Control, Inc. v. City of Santa Fe, 2002-NMCA-003, ¶ 6, 131 N.M. 450, 38 P.3d 891 (stating that when reviewing a trial court’s grant of a motion to dismiss, we accept as true the facts pleaded in the complaint, and we review de novo the trial court’s application of the law to those facts); Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066 (indicating that legal issues are reviewed
The purpose of the TCA is to limit governmental liability for torts to those situations for which immunity is specifically waived. Section 41-4-2(A). Because a governmental entity “can act only through its employees, . . . the act of the offending employee is the act of the public entity under traditional tort concepts.” Silva v. State, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987), limited on other grounds by Archibeque v. Moya, 116 N.M. 616, 621, 866 P.2d 344, 349 (1993). Accordingly, the TCA makes “government responsible for the torts of its employees for which immunity is waived to a similar extent as a private employer would be under the doctrine of respondeat superior” and indemnifies “the employee for acts occurring in the scope of the employee’s duties.” Medina v. Fuller, 1999-NMCA-011, ¶ 12, 126 N.M. 460, 971 P.2d 851.

Although the TCA sets forth the circumstances in which governmental entities are liable for the torts of their employees, it does not specify who should be named as a defendant in a lawsuit. We note that a tort action brought under the TCA, unlike a civil rights action brought pursuant to 42 U.S.C. § 1983, does not require a governmental employee to be sued in his or her individual capacity in order to avoid Eleventh Amendment immunity defenses. See Ford v. N.M. Dep’t of Pub. Safety, 119 N.M. 405, 410-12, 891 P.2d 546, 551-53 (Ct. App. 1994) (discussing the differences in procedure and remedies between TCA claims and civil rights claims and pointing out that sovereign immunity is waived under the TCA for governmental entities sued under a doctrine of respondeat superior). Thus, litigants err to the extent that they import notions of pleading from federal civil rights cases into state TCA actions. Below, we demonstrate that (1) the statutory structure of the TCA indicates that either the entity or the individual can be the sole named defendant, (2) the Rules of Civil Procedure contemplate the same, and (3) the cases on which the Police Department relies do not support its argument.

Various sections of the TCA indicate that the Legislature contemplated suits or judgments against either a governmental entity or a public employee. Section 41-4-19(A) states that “[i]n any action for damages against a governmental entity or public employee,” the liability shall not exceed the stated amounts. Section 41-4-19(B) states that “[t]he interest shall be allowed on judgments against a governmental entity or public employee” at a particular rate. Section 41-4-19(C) states that no judgment “against a governmental entity or public employee” shall include punitive damages or pre-judgment interest. Finally, Section 41-4-17(A) states that the TCA “shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived.” The fact that these provisions are framed in the disjunctive indicates a legislative intent that either the employee or the relevant governmental entity can be sued.

Case law decided under Rule 1-019 NMSA (joiner of persons needed for just adjudication) also supports this view. We are not persuaded that public employees are necessary parties to TCA litigation under Rule 1-019. As this Court discussed in Baer v. Regents of the University of California, 118 N.M. 685, 690, 884 P.2d 841, 846 (Ct. App. 1994), a lawsuit based on the doctrine of respondeat superior does not require an employee to be named as a defendant. In this case, as in Baer, we have been pointed to no authority “for the proposition that, in order to prove agency, the agent must be joined as a party to the action.” Id. We also find persuasive on this issue Lopez’s argument that under Rule 19(a) of the Federal Rules of Civil Procedure, an “employee is not a necessary party to a suit against his employer under respondeat superior.” Hall v. Nat’l Serv. Indus., 172 F.R.D. 157, 159 (E.D. Pa. 1997) (quoting Rieser v. District of Columbia, 563 F.2d 462, 469 n.39 (D.C. Cir. 1977)). Rule 1-019(A) is essentially identical to its federal counterpart. We may therefore look to federal law for guidance in determining the appropriate legal standards to apply under these rules. See Benavidez v. Benavidez, 99 N.M. 535, 539, 660 P.2d 1017, 1021 (1983) (stating that it was appropriate for the district court to look to federal law in construing Rule 1-060(B) NMSA); Eastham v. Pub. Employees’ Ret. Ass’n Bd., 89 N.M. 399, 402-03, 553 P.2d 679, 682-83 (1976) (relying on federal interpretations of Fed. R. Civ. P. 23).

Because the TCA itself does not require the naming of an individual public employee, and because such individuals do not appear to be necessary parties under Rule 1-019, we conclude that a plaintiff may state a claim under the TCA by naming only a governmental entity.

We are also unpersuaded by the Police Department’s argument that New Mexico case law supports its position. The Police Department argues that under Abalos, the public employee is a necessary party to the litigation and a plaintiff must name both the relevant state agency and a negligent employee in order to state a claim under the TCA. The Police Department argues that when this Court wrote that a TCA claim requires a negligent public employee and a governmental entity, we were establishing a rule for who should be named as a defendant in a lawsuit. Contrary to the arguments of the Police Department, however, Abalos does not set forth a rule requiring an employee to be named in the complaint. In Abalos, this Court was specifically asked to address “(1) whether a governmental entity can be a named party defendant; and (2) if the entity can be sued, which entity should be named.” 105 N.M. at 558, 734 P.2d at 798. We observed that “New Mexico’s law is confusing and inconsistent regarding which entity can be sued and when,” and we concluded that “one can sue the public employee and the agency or entity for whom the public employee works.” Id. at 559, 734 P.2d at 799. We did not say that a plaintiff must sue both the employee and the agency. In explaining when a particular governmental entity can be named as a defendant in a TCA claim, this Court wrote, “To name a particular entity in an action under the Tort Claims Act requires two things: (1) a negligent public employee who meets one of the waiver exceptions under Sections 41-4-5 to -12; and (2) an entity that has immediate supervisory responsibilities over the employee.” Abalos, 105 N.M. at 559, 734 P.2d at 799.

However, Abalos never stated that a specific employee must be named. Rather, our discussion focused on which agency should be named in a TCA suit, and it was in the context of determining which employer was responsible for the negligent conduct that we discussed the employee. We simply pointed out that because an entity can only act through its employees, “it follows that one can sue the public employee and the agency or entity for whom the public employee works.” Id. Thus, Abalos does not require both the employee and the entity to be named; it merely clarifies that both can be sued. Id. That is, as our cases illustrate, a plaintiff can sue the employee whose conduct falls within one of the waivers of immunity, and under Section 41-4-4, the governmental entity would pay the award. Alternatively, a plaintiff can sue the governmental entity who has the right to control the employee’s conduct under a theory of respondeat superior. We are not persuaded, therefore, that Abalos stands for the principle that a negligent
employee must be named as a defendant in a TCA case.

{17} Furthermore, we do not read Silva as holding that a public employee is a necessary party in a TCA action, as the Police Department contends. In Silva, our Supreme Court affirmed the principle that the doctrine of respondeat superior applied to TCA claims, explained that direct supervision was not a requirement under that doctrine, and held that the state as well as an individual agency could be named as a party if it had the right to control the employee’s actions. 106 N.M. at 747, 745 P.2d at 385. Thus, the Court determined that the state and the Corrections Department could be named as defendants in a case alleging that negligent failure to provide care to a prisoner resulted in the prisoner’s suicide. Id. at 747-78, 745 P.2d at 385-86. Nothing in Silva indicates that an individual employee must be named.

{18} Just as we are unpersuaded that Abalos and Silva require a negligent public employee to be named as a defendant, we are not convinced by the Police Department’s argument that Cobos v. Doña Ana County Housing Authority, 1998-NMSC-049, 126 N.M. 418, 970 P.2d 1143, illustrates the application of that principle. In Cobos, the plaintiff, who was a resident of privately owned but government-subsidized housing, brought a wrongful death lawsuit against the Doña Ana County Housing Authority, the Board of County Commissioners, and employees of the Housing Authority after a fire caused by a defective fireplace killed her family. Id. ¶¶ 2-4. Our Supreme Court affirmed the district court’s dismissal of the action against the Housing Authority and the board on the ground that they had not received notice under the TCA, but reversed the dismissal of the claim against the public employees. Id. ¶ 20. Nothing in Cobos indicates that the naming of the public employees as defendants was required under the TCA.

{19} We are not persuaded by the Police Department’s arguments that Abalos, Silva, or Cobos requires the joinder of the entity and the employee in the caption of the complaint. Moreover, neither this Court nor our Supreme Court has ever required that a negligent public employee be named in the complaint. As NMTLA points out in its amicus brief, both this Court and our Supreme Court have resolved numerous appeals in which no employee was joined. Indeed, our review of dozens of TCA cases reveals that sometimes the governmental entity alone is named, see, e.g., Leithead v. City of Santa Fe, 1997-NMCA-041, 123 N.M. 353, 940 P.2d 459; sometimes the employee alone is named, see, e.g., Celaya, 2004-NMSC-005; and sometimes both the government entity and the employee are named, see, e.g., Derringer v. State, 2003-NMCA-073, 133 N.M. 721, 68 P.3d 961. Accordingly, we hold that the TCA does not require a specific negligent employee to be named as a defendant. We therefore reverse the district court’s order granting summary judgment for the Police Department.

B. Coleman

{20} Unlike Lopez’s case, Margaret Coleman’s case proceeded to trial, where the jury found the City’s negligence was a proximate cause of Coleman’s injuries. Following the entry of judgment on the jury verdict, the City moved for judgment as a matter of law or, in the alternative, for a new trial, and the trial court denied the motion. The City now appeals from the judgment on the jury verdict, arguing that Coleman’s claim did not satisfy the jurisdictional prerequisites of a TCA claim. Specifically, the City appears to argue that Coleman’s claim did not fall within one of the TCA waivers of immunity because Coleman failed to name a negligent public employee in her complaint and did not identify such an employee at trial.

{21} Like the Police Department in Lopez, the City argues that failure to name a public employee for whose conduct the City is responsible constitutes a failure to demonstrate that the cause of action fits within a TCA waiver and thus constitutes jurisdictional error. As we wrote in our discussion of Lopez, a named public employee is not a necessary party to a TCA claim that is based on the doctrine of respondeat superior. For the reasons given above, therefore, we are not persuaded that failing to name a specific public employee in the complaint is a defect, let alone a jurisdictional defect. See State ex rel. State Highway & Transp. Dept. v. City of Sunland Park, 2000-NMCA-044, ¶ 16, 129 N.M. 151, 3 P.3d 128 (“[T]he absence of an indispensable (let alone necessary) party is not considered a jurisdictional defect in New Mexico.”). {22} The City also argues that without an identified employee, it was impossible for the jury to determine if the City was responsible for that employee’s conduct. In making this argument, the City relies on the wording of Section 41-4-11(A), which states that immunity is waived for “damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.” Thus, the City argues, the statute must require at least that the evidence identify a negligent public employee who was directly supervised by the City.

{23} Because we have determined that the failure to name a specific employee does not implicate jurisdiction, the City was required to properly and timely preserve its arguments on this point. See State v. Garcia, 2005-NMCA-065, ¶ 6, 137 N.M. 583, 113 P.3d 406 (noting that arguments involving subject matter jurisdiction are an exception to the preservation requirement). We do not reach the merits of the City’s argument because it was not properly preserved under the circumstances of this case.

{24} As indicated above, the requirement of preservation serves the twin purposes of allowing the trial court an opportunity to correct errors and creating a record for appeal. See Diversey Corp., 1998-NMCA-112, ¶ 38. But it also serves the purpose of allowing the opponent of an objection to meet the objection with either evidence or argument. See State v. Gomez, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1 (indicating that one of the purposes of the preservation rule is to give the opposing party a fair opportunity to respond to the objection).

{25} In this case, by waiting until after the judgment had been entered to complain that a negligent employee had not been identified, the City deprived Coleman of the opportunity to introduce evidence identifying specific employees who might have been negligent. It further deprived Coleman of the opportunity to attempt to try a theory of the case that did not require the identification of a specific negligent employee. For example, in Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App. 1981), this Court construed Section 41-4-11 to place an affirmative burden on Silver City to maintain its streets so that they are safe for the traveling public. Id. at 134-35, 628 P.2d at 1130-31. In Cardoza, the driver of a car sued the Town of Silver City after he was injured when he drove his car over an improperly fitted manhole cover that popped out. Id. at 131, 628 P.2d at 1127. Silver City argued that it had no notice of the problem, but this Court held that Silver City installed the manhole cover and had a duty to determine “whether over the years, it had worn to the point where it was dangerous to the traveling public, and whether
reasonable inspections of this cover had been made and reported.” Id. at 135, 628 P.2d at 1131. While Cardoza might be limited to its specific facts, the important point for purposes of this case is that, by not objecting until after the conclusion of the proceedings below, the City deprived Coleman of the opportunity to show that the facts of her case were similar to those in Cardoza.

{26} Moreover, Coleman provided evidence of repeated notice to various City employees of the dangerous conditions on the sidewalk. Under the principles discussed in this opinion, and in the absence of any timely raised argument to the contrary, this was sufficient to establish her prima facie case.

III. CONCLUSION
{27} We reverse the district court’s order entering summary judgment for the Police Department in Lopez, and we affirm the jury verdict in Coleman.

{28} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
JONATHAN B. SUTIN, Judge
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Mark D. Jarner is a Board Recognized Specialist in Workers’ Compensation.
**Positions**

**Twelfth Judicial District Prosecutors**
The 12th Judicial District Attorney’s Office for Otero and Lincoln Counties, is taking applications and letters of interest to fill positions in both historic Lincoln County and diverse Otero County. Although career prosecutors are specifically sought and encouraged to apply, the office would treasure the opportunity to convert civil law minded attorneys into public servants that protect and serve our communities. Our two offices have several opportunities for exciting positions that allow attorneys to live in beautiful Ruidoso or the cool pines of Cloudcroft. These positions are classified but incentive and advancement opportunity make our positions very competitive with other state attorney positions. Limited licenses can be applied for from the Supreme Court for out-of-state, licensed attorneys. Resumes and letters of interest should be sent to Scot D. Key, District Attorney, Room 301, 1000 New York Ave., Alamogordo, New Mexico 88310.

**Assistant Trial Attorney - Valencia County**
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Valencia County Office, Los Lunas, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124. Deadline for submission of resumes: Immediate opening until filled.

**Felony Level Prosecutor Position - Curry County:**
The Ninth Judicial District Attorney’s Office is seeking a motivated prosecutor with experience in felony prosecution to fill an Assistant District Attorney position. The awarded applicant will be primarily assigned to the duties of prosecuting felony violent crimes and narcotic cases. Salary will be based upon experience and the District Attorney’s Personnel & Compensation Plan. Resumes may be emailed to kspears@da.state.nm.us or mailed to the Ninth Judicial District Attorney’s Office, ATTN: Kevin Spears, Ninth Judicial District Attorney’s Office, 700 N. Main, Curry County Courthouse, Clovis, NM 88101. Deadline for submission of resumes: Immediate opening until filled.

**Assistant and Senior Trial Attorney**
**Third Judicial District Attorney’s Office**
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.

**Deputy District Attorney**
The Eighth Judicial District Attorney’s Office is accepting applications for the position of Deputy District Attorney in the Clayton Office. This position will be responsible for a felony and misdemeanor caseload plus administrative duties. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Daniel L. Romero, Chief Deputy District Attorney, 920 Salazar Road, Suite A, Taos, New Mexico 87571. Position open until filled.
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.

Assistant Trial Attorney - Sandoval County
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Sandoval County Office, Bernalillo, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, Compensation Plan. Please send resumes to R. Nathan and criminal work, with emphasis on real estate and probate. Please send resume to R. Nathan.

El Valle De Los Ranchos Water and Sanitation District Request for Proposals
Proposals are being solicited for the following: Legal Services. Copies of the Request for Proposals may be obtained by written request to Patricia Sanchez, Office Manager at Box 9901, 7186 State Highway 518, Ranchos de Taos, New Mexico, 87557 or Faxed to (505) 751-1690 or Email to vdfranchos@qwest.net. All proposals must be submitted in a sealed envelope marked “Legal Services Bid” to the President, Wilbert Archuleta, at 209 E Camino de La Merced, Taos, New Mexico or mailed to EL VALLE DE LOS RANCHOS WATER AND SANITATION DISTRICT, Box 9901, 7186 State Highway 518, Ranchos de Taos, New Mexico, 87557. Deadline for submittal is Monday, August 7, 2006 at 2:00 PM. El Valle de Los Ranchos Water and Sanitation District reserves the right to reject any and all bids or accept the bid deemed to be in the best interest of El Valle de Los Ranchos Water and Sanitation District.

Contract Attorney
Small Santa Fe defense firm seeks contract attorney for part-time position. Flexible hours. Must be available to work in Santa Fe office. Position requires 3+ years civil litigation experience. Fax resume to 505-980-9987.

Associate Attorney
Immediate opening in small, established Silver City firm, for an Associate Attorney to do civil and criminal work, with emphasis on real estate and probate. Please send resume to R. Nathan Gonzales, Esq., 925 N. Hudson St., Silver City, NM 88061 or Fax to (505) 388-8015.

Lawyer Positions
New Mexico Human Services Department, NM HSD, Child Support Enforcement Division is seeking to fill two lawyer positions. One Lawyer-O, Attorney position in Los Lunas (DOL # 95445) and one Lawyer-O, Attorney position in Farmington (DOL #76067). The positions require a Juris Doctor, current licensure with the State Bar of New Mexico and 1 year total legal experience. Salary ranges from $18,356 to $32,634 per hour. Interested individuals must apply using the DOL Job Order Number listed at any NM Department of Labor Workforce Center statewide. For DOL information, please call 505-827-7434 or any DOL office statewide. Please bring resume and copy of your NM bar card for application purposes. Upon completion of the NM DOL application process, please send a copy of your resume, bar card, NM DOL Job Referral Form and cover letter to NM HSD, Child Support Enforcement Division, PO Box 25110, Santa Fe, NM 87504, ATTN: Lila Bird, Chief Counsel. Applications will be accepted until the positions are filled. For general information, you may contact Donna Lopez at 505-827-7725 or by e-mail, donna.lopez@state.nm.us. The State of New Mexico is an Equal Opportunity Employer.

Personal Injury Attorney
Rosenfelt & Buffington, an established Plaintiff’s personal injury firm, seeks attorneys for its Albuquerque and Gallup offices. Substantial experience required for the Albuquerque position. If interested, visit www.rblaw.com and send resume to Managing Director Dan Rosenfelt at 1805 Carlisle NE, Albuquerque, 87110.

Blue Cross and Blue Shield of New Mexico - Legal Assistant
This position provides clerical, administrative and legal assistant support to the BCBSNM Legal Department. Qualified candidate will possess (1) A high school diploma or equivalent; (2) Two years of college with a minimum of two years of experience as a legal assistant in a law firm, corporate legal department, or other equivalent legal environment (or minimum four years of experience as legal assistant if no college); and, (3) Effective verbal, written, and organizational communication skills. In addition, it is a plus if the candidate is proficient in Word and Excel, has insurance experience and/or has litigation experience. We offer a competitive salary and benefits package. Please forward resume to: Blue Cross and Blue Shield of New Mexico, Attn: HR, P.O. Box 27630, Albuquerque, NM 87125-7630. Or fax: (505) 816-5102. Learn more about BCBSNM and this position at www.bcbsnm.com. We are an equal opportunity employer dedicated to workplace diversity and a drug-free and smoke-free workplace. Drug screening and background investigation may be required as a condition of employment.

Court Reporter
The Eighth Judicial District Court in Taos County is accepting applications for the position of Court Reporter. This is an At Will position, which is under general supervision, makes a verbatim record of court proceedings, produces transcripts, maintains and retrieves files, assists the public and performs general secretarial duties. Salary range is $16,988 to $21,235 per hour depending upon qualifications. QUALIFICATIONS: High school diploma or GED; successful completion of a court reporting program from an accredited court reporting school; and New Mexico Certified Shorthand Reporter Certification. May require Certified Court Monitor Certification; Knowledge of proper English usage, grammar, vocabulary and spelling; extensive vocabulary including legal and medical terminology; courtroom procedures; the Rules Governing Recording of Judicial Proceedings; the Rules of Civil and Criminal Procedure; and the Rules of Appellate Procedure; and ability to sit and write uninterrupted for long periods of time while maintaining complete concentration; operate a steno machine in excess of 225 wpm with 95% accuracy; use recording equipment; operate a computer and transcription software; troubleshoot errors with transcription equipment; use discretion in the disclosure of confidential information and to maintain confidentiality; analyze and evaluate case files and determine what action is needed; ensure that information is properly identified and/or accurately reported; understand complex and sometimes technical terminology; organize and prioritize workload; and communicate effectively. TO APPLY: Application and resume must be submitted by 4:00 p.m. on July 31st, 2006 to: Jeannette G. Rael, Court Administrator, Eighth Judicial District Court, 105 Albright Street, Suite H, Taos, NM 87571. This job posting gives only a brief description of the job. A complete job description may be obtained by calling the Eighth Judicial District Court Administrator at (505)758-3173. Applications may be obtained at the Eighth Judicial District Court or may be downloaded at www.nmcourts.com. EQUAL OPPORTUNITY EMPLOYER.

Paralegal
Successful, growing insurance defense firm, with a laid back boss, seeks sharp, energetic paralegal who is self-disciplined, well organized, a team player, and committed to providing the highest quality services to the firm’s clients. The position requires a four-year college degree, at least 5 years insurance defense/employment/products liability experience, and excellent communication skills. Successful candidate will be required to bill 125 hours per month. You’ll like the views, the pay, and benefits too. Please mail resume to Arturo Ricardo Garcia, Esq., John S. Staff & Associates, LLC, 400 Gold Ave. S.W., Suite 1300-West, Albuquerque, New Mexico 87102.
Request For Applications
City Of Albuquerque
Paralegal Position

PARALEGAL POSITION: This para-professional position requires considerable knowledge of legal terminology and Federal and State court procedures. The position requires the ability to perform legal research, assist with trial preparation, draft memoranda, correspondence, briefs, opinions and discovery. Minimum qualifications: Associates Degree in Paralegal Studies, plus three (3) years experience as a paralegal; may substitute two (2) years of additional paralegal experience for the Associates Degree in Paralegal Studies OR Associates Degree in Paralegal Studies, plus Five (5) years experience as a Legal Secretary. Entry level salary: $35,152.00. Please apply online at www.cabq.gov. Application deadline is July 28, 2006.

Experienced Santa Fe Paralegal

Small collegial Santa Fe firm needs a bright, energetic, mature, meticulous and experienced (3+ years) paralegal. Very substantial client contact. Civil practice. Excellent writing, communication and organizational skills required. Computer intensive, informal non-smoking office. Paralegal degree or Certificate desirable. Recent law firm experience required. Firm offers a fun small office workplace. Competitive Compensation Pkg. $45K+ DOE (salary + monthly bonus), 100% paid Medical/Hosp; parking; paid holidays + sick and personal leave. All responses are confidential. Resume with cover letter please to P.O. Box 4817, Santa Fe, NM 87502-4817.

Legal Assistant Positions

Two Vacancies: Experienced legal assistants needed for a year-to-year contract positions (continuation of positions is contingent on availability of funding) with the United States Attorney’s Office in Albuquerque, New Mexico, and Las Cruces, New Mexico. Must be professional, self-motivated and capable of working as a team member. Minimum of three years legal experience desired. Must have excellent WordPerfect skills. Applicants must indicate their typing speed/error rate on their resumes. Applicants must be able to type 40 words per minute with 3 or fewer errors, and must submit a statement self-certifying that they type this speed or higher. Failure to list typing speed/error rate might preclude an applicant’s employment consideration. Applicants should indicate the office location for which they wish to be considered. Background investigation will be conducted to include drug test, criminal history and credit check. Salary - $31,601 - $35,116 per annum. Send resume with references to U.S. Attorney’s Office, Attn: Human Resources, P.O. Box 607, Albuquerque, NM 87103. NO TELEPHONE CALLS PLEASE.

Paralegal/Legal Secretary

Seeking experienced Paralegal/Legal Secretary with strong computer & organizational skills to assist two transactional real estate attorneys in an established Downtown Law Firm. Real estate experience preferred. Team environment, pay D.O.E. and benefits. Fax resume to 247-9109 or mail to M.O.P., 1401 Central NW, Alb. 87104 or email dcorrell@moplaw.com.

Positions Wanted

Legal Assistant Work Wanted

Disabled NM lawyer with 15 years of experience seeks full or part time position as legal assistant. Larry Leshin, 255-4859 illeshin@msn.com.

Consulting

Forensic Psychiatrist

Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, and expert testimony. Licensed in New York, Connecticut and New Mexico. Please call 1-866-317-7959 and leave message for Dr. Kelly.

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For your tape, CD and electronic transcription needs, call Legal Beagle @ 883-1960.

Jena Andres Legal

Transcription Service

Reasonable rates for transcribing pleadings, discovery, etc. Also Temp. work in the event your assistant is on leave. Certified Paralegal. References/resume available. 892-9658 or 688-9068.

Office Space

Louisiana Candelaria Corner

Very desirable location in Uptown. Executive suite and separate staff area. Shared conference room, copier/kitchen area, reception area. 889-3899.

Albuquerque Offices For Rent

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

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 2806SF. Buildouts for larger suite include separate kitchen area, storage and 5 windowed offices. Competitive Rates. Available Now. Tenant Improvements negotiable. Single attorney space available. One-third of 1300SF (approx. 450SF), shared conference room, reception area, coffee bar, etc. w/building owners. $575/month. One (1) year lease. Call Ron Nelson or John Whisenant 883-9662.

Downtown

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

Executive Offices Downtown

The number one building in Albuquerque is now offering Executive Offices. Relocate to the 22 story, Class A Albuquerque Plaza in the heart of downtown. This BOMA “Building of the Year” Award winner offers month to month leasing starting at $200 per month, conference room, utilities, janitorial, 24 hour security and card access system, fiber optics and much more. Great views from the 16th floor of the city. Contact Yasmin Gonzales at 242-2000 to see these great offices.

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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