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2006-NMCA-109, No. 25,708: Cruz v. FTS Construction, Inc.

2006-NMCA-110, No. 24,957: State v. Cook

October 19
**2006 Annual Meeting**
Featuring Professor Patrick Longan from Mercer School of Law School
Location: National Hispanic Cultural Center
$69 for NMDLA Members
$99 for Non Members

2 Ethics and 1 Professionalism MCLE Credits

November 3
**Effective Mediation Techniques for Civil Defense Lawyers**
Location: Albuquerque Petroleum Club
$69 for NMDLA Members
$99 for Non Members

3.5 General MCLE Credits

November 30
**Medicine for Trial Lawyers**
Location: State Bar Center - Albuquerque
$169 for NMDLA Members
$189 for Non Members

5 General and 1 Ethics MCLE Credits

December 8
**Civil Rights 2006 Update**
Location: Marriott Pyramid - Albuquerque
$169 for NMDLA Members
$189 for Non Members

5.5 General and 1 Ethics MCLE Credits

December 15
**Employment Law Boot Camp**
Location: Albuquerque Petroleum Club
$69 for NMDLA Members
$99 for Non Member Lawyers

MCLE Credits TBD

**NMDLA Registration Form**
*Please register me for:*

- __2006 Annual Meeting $ ___________
- __Effective Mediation $ ___________
- __Medicine for Trial Lawyers $ ___________
- __2006 Civil Rights Update $ ___________
- __Employment Law Boot Camp $ ___________

Name(s): _______________________________________
Address: _______________________________________
City/State/Zip _________________________________
Phone: _______________________________________

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Mail or fax to:
NMDLA - PO BOX 94116
Albuquerque, NM  87199
(505) 797-6021  Phone - (505) 858-2597 Fax
www.nmdla.org
Now Available

Public Information Pamphlets

Members can now order Public Information Pamphlets from the State Bar.

- Label or stamp with name or law firm to increase visibility.
- Hand to clients.

Complete and return this form to: State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019, Attn: Veronica Cordova; or call (505) 797-6039.

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OCTOBER 24 - VIDEO REPLAYS

**Immigration Fundamentals: Keeping Families Together**
- 3.0 General CLE Credits
- 9:00 a.m. - Noon • $109

**HIPAA Security: Double Secret Probation**
- 3.0 General CLE Credits
- 12:30 - 3:30 p.m. • $109

**Lurking Dangers and What Lawyers Should Know About the New Mexico Real Estate Contract**
- 1.0 General CLE Credits
- 9:00 a.m. - 10:00 a.m. • $49

**Pro Se Can You See**
- 1.0 Ethics & 1.0 Professionalism CLE Credits
- 10:30 a.m. - 12:30 p.m. • $79

**Diversity - Why Bother? Can We Find Answers in Ethics and Professionalism?**
- 1.0 Ethics & 1.0 Professionalism CLE Credits
- 1:00 - 3:00 p.m. • $79

**Divorce Practice with Larry Rice**
- 6.0 General CLE Credits
- 9:00 a.m. - Noon, 12:30 - 3:30 p.m. • $189

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**FOUR WAYS TO REGISTER**

**PHONE:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.  
(Please have credit card information ready)

**FAX:** (505) 797-6071, Open 24 hours

**INTERNET:** www.nmbar.org, click CLE, then area of interest

**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

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Program Date ________________________________
Program Location _____________________________
Program Cost _________________________________

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☐ Check enclosed $ ____________
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☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # _______________________________________
Exp. Date ________________________________________
Authorized Signature ______________________________
Contributions and announcements to the Bar Bulletin are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

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Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:
I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications.

Meetings

October

16
Lawyers Professional Liability Committee, noon, State Bar Center
17
Solo and Small Firm Practitioners Section Board of Directors,
11:30 a.m., and noon Section meeting, State Bar Center
18
Law Office Management Committee, noon, State Bar Center
26
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 10th floor conference room
26
Committee on Women and the Legal Profession, noon, Lewis and Roca Jontz Dawe, L.L.P.
26
Committee for Delivery of Legal Services to People with Disabilities, noon, State Bar Center
26 Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center

State Bar Workshops

October

16
Child Support Workshop
6 p.m., CNM South Valley Paralegal Law Center, 2816 Isleta SW, Albuquerque
25
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque
26
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

December

6
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque
7
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
N.M. Supreme Court Board of Legal Specialization Comments Sought

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Local Government Law
Luis E. Robles

Law Library
October Library hours:
Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Website: www.supremecourtlawlibrary.com.

Notice of Committee/Board Vacancies
Rules of Civil Procedure 1
Appellate Rules 2
Rules of Evidence 1
Uniform Jury Instructions-Civil 2
Uniform Jury Instructions - Criminal 1
Board of Bar Examiners 3
Disciplinary Board 2
(1 lay member, 1 lawyer member)
MCLÉ 1
Board of Legal Specialization 2
Board Governing the Recording of Judicial Proceedings 2
(1 lawyer member, 1 court monitor)
Code of Professional Conduct 2
(1 lawyer member, 1 district court judge)
Code of Judicial Conduct 1
Judicial Continuing Legal Education Committee 2
(1 district court judge, 1 Metro Court judge)

Attorneys interested in volunteering their time on any of these committees/boards may send a letter of interest and/or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 849, Santa Fe, New Mexico 87504-0848. Deadline for letters/resumes is Oct. 25. Interested attorneys should describe why they believe they are qualified and shall prioritize no more than three committees of interest.

Proposed Revisions to the Rules for Courts of Limited Jurisdiction

The Supreme Court is considering proposed revisions to the Rules for Courts of Limited Jurisdiction. Send written comments to: Kathleen J. Gibson, Clerk New Mexico Supreme Court PO Box 848 Santa Fe, New Mexico 87504-0848 Comments must be received by the clerk on or before Oct. 30 to be considered by the Court. See the Oct. 9 (Vol. 45, No. 41) Bar Bulletin for reference.

First Judicial District Court
Destruction of Exhibits
Criminal, Civil, Children's Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1974 to 1989

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 1974 to 1989, 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 Nov. 24. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the 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 destroyed after Oct. 25 by Order of the Court.

Destruction of Tapes
Criminal, Civil, Children's Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1971 to 1992

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy tapes filed with the court, in criminal, civil, children's court, domestic, incompetency/mental health, adoption and probate cases for years 1971 to 1992, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Oct. 25 by Order of the Court.

Second Judicial District Court
Court Closure for Employee Recognition Ceremony

The 2nd Judicial District Court is honoring court employees at an employee recognition ceremony. On Oct. 25, the court will be closed at the downtown Bernalillo County Courthouse, 400 Lomas Blvd. NW, from 11:15 a.m. to 1:30 p.m., and the Juvenile Justice Center, 5100 2nd Street NW, will be closed from 11 a.m. to 1:30 p.m. Questions may be directed to the court administrator, (505) 841-7425.

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 domestic cases for the years of 1981 to 1989, civil cases for the years of 1982 to 1992, LR (Metro Court Cases) for the years of 1988 to 1995 and criminal cases from 1986 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 Dec. 21. Attorneys who have cases with exhibits should verify exhibit information with the Archives and Special Services Division, at 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.

Third Judicial District Judicial Appointment

Governor Bill Richardson has appointed Lisa Schultz to serve as district judge in the 3rd Judicial District in Las Cruces. Schultz is a graduate of Johnston College, Harvard Divinity School and New York Law School. For over 20 years Schultz has practiced law in Las Cruces, specializing in criminal law, litigation and mediation. She was awarded the New Mexico Governor’s Award for Outstanding Women in New Mexico in 1998 by Governor Gary Johnson. She is also a founding member of the Tonalie Legal Alliance of Women. She served as the Senate Ways and Means Committee Legislative Analyst during the 1993 and 1994 New Mexico legislative sessions. Schultz replaces the Honorable Silvia Cano-Garcia who passed away in September. Schultz stands for election in November 2006.

U.S. District Court, District of New Mexico Case Management/Electronic Case File

The U.S. District Court will transition to the new Case Management/Electronic Case File (CM/ECF) system on Jan. 2, 2007. An information packet was recently sent to all active attorneys with details about the transition as well as a new registration form. The registration form must be filled out and returned before filing with the Court once CM/ECF is implemented. Hands-on training for the CM/ECF system is available in Albuquerque, Santa Fe and Las Cruces. For information on specific class dates and times, visit the Court’s Web site at www.nmcourt.fed.us/cmecf or contact the CM/ECF Help Desk, (505) 348-2075.

Reappointment of Full-Time U.S. Magistrate Judge

The current term of office for incumbent full-time U.S. Magistrate Judge Karen B. Molzen will expire on April 25, 2007. The U.S. District Court has established a panel of citizens, as required by law, to consider the reappointment of Judge Molzen to a new eight-year term. The duties of Judge Molzen are defined in 28 U.S.C. § 636(a) and involve the trial of federal petty and minor offenses as per 18 U.S.C. § 3401; imposition of conditions of release under 18 U.S.C. § 3146; conducting arraignments, non-guilty pleas, and felony guilty pleas; upon designation, conducting hearings and submitting to the judges proposed findings of fact and recommendations for dispositive motions or prisoner petitions; trial and disposition of civil cases upon consent of the litigants; and performing such other duties as conferred or imposed by law or by the Federal Rules of Criminal Procedure and/or the Rules of the U.S. District Court for the District of New Mexico. The public and members of the Bar are invited to submit comments as to whether the reappointment of Judge Molzen to a new term of office should be considered. All comments will be kept confidential and should be submitted not later than Nov. 30 to:

Mr. William B. Keleher, Chairman
U.S. Magistrate Merit Selection Panel
PO Box AA
Albuquerque, NM 87103

Nomination petitions are to be mailed to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 and must be received by 5 p.m., Oct. 23, to allow for the reproduction of the ballots.

Casemaker
Free Legal Research is Here

Casemaker is now live and accessible on the State Bar Web site at www.nmbar.org. Casemaker is free online legal research made available to State Bar members. Contact Veronica Cordova, vcordova@nmbar.org, or (505) 797-6039, for technical assistance or questions.

Family Law Section Annual Meeting and CLE

The Family Law Section will hold its annual meeting at 1 p.m., Oct. 20, in conjunction with the 22nd Annual Family Law Institute. All section members are encouraged to attend. Agenda items should be submitted to Chair Felissa Garcia Kelley, felissagarcia@msn.com or (505) 245-7200.

The cost of the CLE program is $309; $289 for section members, government attorneys and paralegals. Lunch will be provided. See the CLE At-A-Glance insert in the Sept. 11 (Vol. 45, No. 37) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Indian Law Section Annual Meeting, Scholarship Awards and CLE

The Indian Law Section will hold its annual meeting at 1 p.m., Nov. 9, in conjunction with Santa Clara Pueblo v. Martinez: Past and Present Day Consequences. During the annual meeting, two law students will be awarded bar preparation scholarships. Each student will receive $2000 to defray the costs of the bar exam and preparation courses. Agenda items for the annual meeting should be sent to Chair Levon Henry, lhennyrdnalegalservices.org or (928) 871-4151.

The cost of the CLE program is $95; and $90 for section members, government attorneys and paralegals. Attendees will receive 2.7 general CLE credits. Native American cuisine will be provided for lunch. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.
Section Elections 2006

- The names and biographies of candidates selected by the section nominating committees and received since the previous publication of candidates in the Oct. 9 (Vol. 45, No. 41) Bar Bulletin appear below. All reports received to date are on the State Bar Web site, www.nmbar.org.
- In addition, those wishing to be on the ballot may submit a petition signed by at least 10 attorneys who have been members of the section for 30 days or more. The petition must identify the position and term sought and state that the member has agreed to the nomination. Nomination petitions for this year’s section elections must be received at the State Bar office no later than 5 p.m., Oct. 31. A nomination petition form is available on the State Bar Web site.
- If additional nominations are made, a notice of the contested section election will be published in the Bar Bulletin and on the section’s Web page. Ballots will be mailed to all members of the section no later than Nov. 10.
- If no additional nominations are made, the nominees identified by the nominating committee are elected by acclamation and take office on Jan. 1, 2007.

Elder Law Section

Nominating Committee Report

Position 1: Three-Year Term
Mary Ann R. Baker-Randall is managing staff attorney of the Lawyer Referral for the Elderly Program at the New Mexico State Bar Foundation. Prior to that, she practiced law for 19 years, the last 14 years of which were primarily in the areas of family law and estate planning. Baker-Randall has been active in numerous bar association sections and committees at the state and ABA level, including past board member of the Solo and Small Firm and Family Law sections. She received her undergraduate degrees from Rice University and her law degree from Washington and Lee University School of Law, Lexington, Virginia. She is starting classes toward a master’s degree in gerontology at Webster University.

Position 2: Three-Year Term
Lynn McKeever is a graduate of the University of Iowa College of Law and the University of Chicago. Through 1999, she practiced as a solo, primarily in the fields of probate, trusts and estates. She then took a four-year leave of absence to care for her own elderly parents. While on leave, she took graduate business courses in marketing and organizational behavior. Since her return to practice in 2004, Lynn has rejoined the board of People Living Through Cancer, where she serves as vice president. She also served as president of the New Mexico Estate Planning Council.

Position 3: Three-Year Term
Barbara Ann Michael is a sole practitioner in Santa Fe. Her practice areas include estate planning and administration, conservatorships/guardianships, administrative law, education law, contracts, elder law and family law. She is a graduate of the University of Wyoming College of Law. Michael worked in state government serving as assistant general counsel for the New Mexico Human Services Department and the New Mexico Public Education Department. She is a member of the Santa Fe Estate Planning Council, on the board of advisory consultants for Girls’ Inc., a member of the Capital City Business and Professional Women organization, and does volunteer work for the Santa Fe Children’s Museum, the Santa Fe Chamber Music Festival, the Santa Fe Desert Chorale and other organizations.

Family Law Section

Nominating Committee Report

Position 1: One-Year Term
Currently with Carpenter Law, P.C., in Albuquerque, Linda Ellison received her B.A. from Saint Mary’s College in Notre Dame, Indiana, with a double major in psychology and English literature and a minor in sociology. She received her law degree from the UNM School of Law. She has focused her practice in family law for the past 15 years and also has experience in bankruptcy law. She was chair of the Family Law Section in 2005 and, while she cannot take office again, would like to continue serving on the board. She is also a member of the New Mexico Collaborative Law Group and Albuquerque Practice Group as well as serving as part of the settlement facilitator pool in the 2nd Judicial District Court in Albuquerque.

Position 2: Two-Year Term
Catherine Oliver, a solo practitioner in Taos, is a New Mexico board certified specialist in family law. She received a B.A. from the University of Oklahoma, a master’s degree in history from the University of California, Berkeley, and her J.D. from UNM. She is a member of the American Bar Association Family Law Section and the National Association of Counsel for Children. Oliver serves as a board member of the State Bar Family Law Section and of the New Mexico Board of Legal Specialization. She recently served on the statewide alimony committee. She has expanded her practice to include collaborative divorce and is a member of the International Association of Collaborative Professionals, the New Mexico Collaborative Practice Group, the Santa Fe Collaborative Practice Group and the nine-member Rio Grande Collaborative Family Law Group.

Position 3: Three-Year Term
Mark Anthony Acuna is a graduate of the University of California, Los Angeles, where he earned his B.A. in political science. He received his J.D. from Hastings College of the Law and has practiced family law in New Mexico since 1991. Acuna has practiced in both the 1st and 2nd Judicial districts and is familiar with the family court judges in those jurisdictions, as well as the domestic violence and child support hearing officers.

Position 4: Three-Year Term
James Bristol practices primarily in the area of family law. He received his J.D. from UNM, his M.A. and M.Div. from the University of Chicago and his B.A., magna cum laude, from Loyola University Chicago (Phi Beta Kappa). Prior to joining Sutin, Thayer & Browne, Bristol clerked for the Honorable Carol J. Vigil, lst Judicial District, and the Honorable Paul J. Kelly, Jr., U.S. Court of Appeals, 10th Circuit.

Position 5: Three-Year Term
Michael John Collopy earned his B.A. at Hiram Scott and his J.D. at the University of Mississippi. He was a special master to Children’s Court, 5th Judicial District. Collopy is a member of the American Bar Association Family Law Section. He has been recognized as a specialist in family law by the New Mexico Board of Legal Specialization and is a board certified Family Law Trial Specialist by the National Board of Trial Advocacy. His practice areas are family law, criminal law, commercial law and litigation.

Position 6: Three-Year Term
William A. DeRaad graduated with honors from UNM, obtaining a B.A. in political science with a minor in English. He attended the Dave Clark School of Law (formerly known as Antioch Law School) where he completed his J.D. DeRaad participated in
clinical work for the District of Columbia city government and provided legal counsel for underprivileged youth in the D.C. area. He worked as an analyst for the New Mexico House of Representatives Rules Committee and served for several years as a prosecutor for the 7th Judicial District. DeRaad spent a short time in bankruptcy law with the Behles Law Firm, in domestic law with the Standridge Law firm and was subsequently recruited to work at the Garcia & Kelley Family Law Firm. In recent years he opened his own firm, William A. DeRaad Family Law Firm.

Solo and Small Firm Practitioners Section Brown-Bag Meeting

Terry Ashcom, a licensed clinician with the 2nd Judicial District Court, will speak on her recent independent tour of Iran at the Oct. 17 noon meeting of the Solo and Small Firm Practitioners Section at the State Bar. Ashcom’s talk, slide show, and open discussion on The Real Iran Today is open to all members of the Bar and other interested colleagues, and will focus on her three-week, self-guided trip this past May where she learned about the Iranian approach to divorce, criminal conduct and international relations. R.S.V.P. to Tony Horvat, (505) 797-6033, or e-mail thorvat@nmbar.org.

Technology Committee Using Excel in the Legal Environment

The Technology Committee will be holding a free workshop from 5 to 6 p.m., Oct. 26, at the State Bar Center, Albuquerque. In this one-hour session, participants will learn how easy it is to use the Excel Filter and SubTotal tools for sorting lists and quickly finding information in large amounts of data. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by Oct. 24 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

OTHER BARS

Albuquerque Bar Association Monthly Luncheon and CLE

The Albuquerque Bar Association’s monthly luncheon will be held at noon, Nov. 7, at the Albuquerque Petroleum Club. Members of the State Bar Ethics Advisory Committee will present the annual ethics CLE. The presentation will qualify for 1.0 CLE ethics credit and will be presented from 12:30 to 1:30 p.m. Forward questions for the ethics committee to the Albuquerque Bar Association at abqbar@abqbar.com. The committee will address as many specific concerns as possible. Otherwise, committee members will address compelling inquiries regarding participation in Internet advertising/referral schemes and representation of clients who develop mental illness. The committee will also express opinions about candidates for judgeships and legal offices. Lunch only: $20 Members/$25 Non-Members. Lunch and CLE: $20 Members/$55 Non-Members. Register for lunch by noon, Nov. 3. Those who register at the door will be charged an additional $5.

To register:
• Log onto www.abqbar.com.
• E-mail abqbar@abqbar.com
• Call (505) 243-2615 or 842-1151
• Mail request to 400 Gold SW, Suite 620, Albuquerque, NM 87102.

UNM School of Law Alumni Association Awards Dinner

The University of New Mexico School of Law Alumni Association will present the 13th Annual Distinguished Achievement Awards Dinner on Oct. 20 in the Student Union Building ballroom. A beer and wine reception at 6 p.m. will be followed by dinner and award presentations at 7 p.m.


Library Fall Hours

Monday – Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday 12 noon to 11 p.m.
Nov. 23 and 24 Closed
Phone: (505) 277-6236

Native American Law Students Association Raffle

The Native American Law Students Association is raffling a 2007 Harley Davidson Sportster XL. Tickets are one for $25 or five for $100. The raffle will take place at noon, Oct. 31, in the Law School Forum. Proceeds will help send students to moot court competitions, conferences and other student-related activities. For more information, contact NALSA President Shela Young at youngsh@law.unm.edu.

OTHER NEWS

ABA Commission on Women in the Profession

The ABA Commission on Women in the Profession is seeking nominations for the 17th Annual Margaret Brent Women Lawyers of Achievement Awards. These awards will be presented at a luncheon on Aug. 5, 2007, during the ABA Annual Meeting in San Francisco, California. The deadline to submit the nomination form and supporting materials is the close of business, Nov. 27. Previous nominations, which are on file, may be re-submitted. Send a letter stating the renomination and update supporting material. Direct questions to Julia Gillespie, (312) 988-5668 or e-mail gillespj@staff.abanet.org. For more information, go to http://www.abanet.org/women/margaretbrent/nominationinformation.html.

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
New Business Workshops: Oct. 17; Nov. 7, 14 and 21; Dec. 5, 12 and 19.
New Employers Workshops: Oct. 24; Nov. 28; and Dec. 26.
For additional information, contact the State of New Mexico Taxation and Revenue Department, (505) 841-6200.

Grammy Foundation and the ABA Forum on the Entertainment and Sports Industries Legal Writing Contest 2007
The Grammy Foundation announces the ninth annual Entertainment Law Initiative (ELI). The program is designed to promote discussion and debate on the most compelling legal issues facing the music industry today. It also fosters future careers in entertainment law by seeking out the nation’s top law students and giving them invaluable networking and educational opportunities. ELI includes a national writing contest, a legal seminar series and a high-profile scholarship luncheon. The writing contest involves a 3,000 word essay on a compelling legal issue facing the music industry. The contest is open to law students. The paper submission deadline is Jan. 5, 2007. For complete contest rules, e-mail eli@grammyfoundation.com. For more information, contact Marisela Huerta at (310) 392-3777.

N.M. Guardianship Association, Roswell Guardianship and Conservatorship Forum
The New Mexico Guardianship Association will be hosting a Guardianship and Conservatorship Forum from 1 to 4 p.m., Oct. 27, at the First National Bank of Roswell on 5th and Virginia. Topics will be Filing the Annual Reports and Talking with the Doctor. There is no charge for the event and the public is welcome. Call Dixie at (505) 622-5293, Lynne at (505) 622-3675 or e-mail dkruseoptions@hotmail.com for information and to R.S.V.P.

N.M. Hispanic Bar Association Awards Banquet
The New Mexico Hispanic Bar Association (NMHBA) will hold an Awards Banquet Oct. 27 at the Hilton Albuquerque, 1901 University Blvd. N.E. The cocktail hour begins at 5:30 p.m., and dinner begins at 7 p.m. The NMHBA will honor Frederick M. Hart, Esq., and Robert J. Desiderio, Esq., recipients of the Liberty and Justice Award, and Benedicto R. Naranjo, Esq., recipient of the Attorney of the Year Award. Governor Bill Richardson will provide the keynote address. Ticket prices are $55 for members and $75 for nonmembers. Send ticket request and payment by check to Rosalie Fragoso, Esq., New Mexico Hispanic Bar Association, PO Box 92860, Albuquerque, NM 87199. Call Rosalie at (505) 797-6077 if further information is required.

N.M. Christian Legal Aid Fellowship Luncheon
The New Mexico Christian Legal Aid will host a Fellowship Luncheon open to all members of the professional community from 1:45 a.m. to 1:15 p.m., Oct. 27, at the Chama River Brewing Company (off Pan American Parkway). Guest speaker Ann Gardener, a social worker from UNM Mental Health Center, will be discussing the various issues regarding mental health problems. Direct questions to Denise Trujillo, (505) 243-4419.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
New Admittees Sworn In to State Bar

172 men and women take the oath in Kiva Auditorium Sept. 22

New admittees add their names to the Roll of Attorneys and Counselors at Law.
The event was attended by legions of friends and family, members of the legal community, representatives of the State Bar and its organizations and State Supreme Court Justices.
Harvey Law Firm, L.L.C., an Albuquerque-based practice focusing on nursing home abuse and neglect cases throughout the state of New Mexico, announces that it will partner on nursing home cases with the national firm of Nix, Patterson & Roach, L.L.P., which has obtained multiple verdicts and settlements in excess of $1,000,000 in the last several years, including a $17 billion recovery for the state of Texas in the Texas tobacco litigation. Dusti Harvey, principal and founder of the Harvey Law Firm, has extensive experience as a defense attorney for a large nursing home chain, including mediating over 1,500 cases. She now advocates on behalf of the victims of nursing home abuse and personal injury accidents.

The U.S. Senate confirmed Mickey Barnett to the nine-member Postal Service Board of Governors. The board sets the agency’s policy and postal rates.

Marcos Martinez has joined the Rodey Law Firm as an associate in the business department. Martinez will practice in the firm’s Santa Fe office and will focus primarily in the areas of water and natural resources law. Martinez received his J.D. from the UNM School of Law in 2005. Before joining the Rodey Law Firm, he was an assistant city attorney for the City of Albuquerque.

Virginia R. Dugan, an attorney and shareholder practicing divorce and family law with Atkinson & Kelsey, P.A., and president of the State Bar of New Mexico, has been awarded an AV® Peer Review Rating by the Martindale-Hubbell® Law Directory. “A” signifies that the attorney has very high to preeminent legal ability, and “V” stands for very high ethical standards. Dugan is also co-chair of the State Bar’s Committee on Professionalism, chair of the American Bar Association’s Marital Property Committee/Family Law Section and a past president of the Mid-State Chapter of the New Mexico Women’s Bar. She is recognized as a specialist in family law by the New Mexico Board of Legal Specialization and practices before the U.S. District Court for the District of New Mexico.

David J. Pottenger has been hired as corporate counsel for Toro-gumi and its subsidiary, Southwestern Talent Professionals out of Hollywood, California. His duties will include contracts construction, dispute resolution and liaison with the head corporation in Tokyo.

Albuquerque patent attorney Robert W. Harris has been selected for inclusion in the 2007 edition of Best Lawyers in America. He is one of a distinguished group of attorneys who has been listed for ten years or longer. Harris has been a patent lawyer in Albuquerque for the past 29 years.

Carolyn Wolf was recently appointed to fill the vacancy created by the resignation of Robert Castille on the State Bar of New Mexico’s Board of Bar Commissioners. The board is elected from throughout the state and governs the more than 7,500 members of the State Bar. Wolf represents the 3rd Bar Commissioner District that includes Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. Wolf is an attorney with Montgomery & Andrews, P.A., in Santa Fe. She joined the firm in 1995 after almost 17 years in state government where she was an attorney for several agencies including the Taxation and Revenue Department, the Department of Finance and Administration and the Attorney General’s Office. Wolf is a graduate of Manzano High School, Rice University and the UNM School of Law. She has served on the board of the Public Law Section of the State Bar and was its chair in 1995. She also previously served on the Board of Bar Commissioners from 1997 through 2003, representing the 3rd District.

District Judge Jane Shuler Gray of Carlsbad is a recipient of the UNM Alumni Association’s Zia Award. The award is given to UNM graduates who distinguish themselves in philanthropic endeavors, public office, service to UNM, community and volunteer activities, business or professional fields or who have made a contribution to education. Shuler Gray, appointed by Governor Bill Richardson, is the first woman district court judge in the 5th District, which includes Chaves, Eddy and Lea counties.

The New Mexico Defense Lawyers Association has been selected to receive the Defense Research Institute’s Rudolph A. Janata Award, presented annually to an outstanding state or local defense bar organization that has undertaken an innovative or unique program contributing to the goals and objectives of the organized defense bar.
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<th>Date</th>
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<td>Avoiding and Resolving Fee Disputes: What You Must Do What You Should Do</td>
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<td>18</td>
<td>Current Issues in Mediation</td>
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<td>Using Conservation Easements in Estate and Tax Planning in New Mexico</td>
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<td>Medical Records Law in New Mexico</td>
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**G** = General  
**E** = Ethics  
**P** = Professionalism  
**VR** = Video Replay  

Programs have various sponsors; contact appropriate sponsor for more information.
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<td>State Bar Center</td>
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**WRITS OF CERTIORARI**

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

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**EFFECTIVE OCTOBER 16, 2006**

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**PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:**

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**CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:**

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Thursday, December 14, 2006
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How can I determine if my computer will be able to support live webcasts, podcasts, and MP3 downloads?
I currently have an e-mail into Nate on this one just to confirm support of connection...good question.
OPINION

PER CURIAM

[1] In this attorney disciplinary proceeding, we are called upon to clarify the standard of review to use when reviewing recommendations for sanctions under the Rules Governing Discipline. In so doing, we must resolve conflicting findings, conclusions and recommendations for discipline issued by two separate bodies—a hearing committee and a hearing panel—both appointed by the Disciplinary Board to conduct two different types of hearings during the course of this proceeding. For the reasons that follow, we determine that attorney Robert Matthew Bristol (Respondent) should be publicly censured for his violations of our Rules of Professional Conduct.

PROCEDURAL OVERVIEW

[2] Under our Rules Governing Discipline, when a formal disciplinary proceeding is initiated against an attorney, the chairman of the Disciplinary Board, or his designee, shall forthwith designate a hearing officer or a hearing committee to hear the matter. See Rule 17-309(C) NMRA; Rule 17-313 NMRA. The hearing committee may be comprised of New Mexico attorneys and non-lawyer members of the public. See Rule 17-104(A) NMRA. The role of the hearing committee culminates with the issuance of “its findings of fact, conclusions and recommendations for discipline or other disposition of the matter,” which are submitted directly to the Disciplinary Board. See Rule 17-313(D)(8).

[3] Upon receipt of the findings, conclusions and recommendations of the hearing committee, the chair of the Disciplinary Board shall appoint one or more members of the board to serve as a hearing panel to review the recommended decision of the hearing committee. See Rule 17-314(A) NMRA. The hearing panel may allow oral argument or the submission of briefs, but the hearing panel is limited to considering the evidence of record presented to the hearing committee and may not accept additional evidence. See Rule 17-314(B) and (C). In conducting its review, the “[h]earing panel may accept, reject or modify or increase the sanctions contained in the recommendations of the hearing committee.” See Rule 17-315 NMRA. However, the hearing panel “[is] not restricted to the findings of the hearing committee and may render its decision based upon the record and any additional findings that it may make.” Id. If the hearing panel recommends disbarment, suspension, public censure, or probation by this Court under Rule 17-206 NMRA as the appropriate disciplinary sanction, it shall prepare a written report and recommendation to that effect and file it with this Court. See Rule 17-315(C).

[4] Depending on the type of disciplinary recommendation from the hearing panel, review by this Court may be sought by the filing of a request for hearing or petition for review by this Court. See Rule 17-316(D). If this Court reviews the findings, conclusions and recommendations of the hearing committee, a hearing panel of the Disciplinary Board issued its own findings and conclusions, recommending to this Court the more severe disciplinary sanction of suspension from the practice of law for six months.

[5] In this case, a hearing committee of the Disciplinary Board found that Respondent violated the Rules of Professional Conduct and recommended that Respondent receive an informal admonition. After reviewing the findings, conclusions and recommendations of the hearing committee, a hearing panel of the Disciplinary Board issued its own findings and conclusions, recommending to this Court the more severe disciplinary sanction of suspension from the practice of law for six months.

[6] Respondent then requested a hearing before this Court pursuant to Rule 17-316(A)(1), which we granted. At the conclusion of the hearing before this Court, and in a written order we subsequently issued, we adopted the findings of fact of the hearing committee rather than those of the hearing panel. However, we decided that Respondent should receive a public reprimand instead of the informal admonition recommended by the hearing committee or the suspension recommended by the hearing panel.

[7] Public reprimands are issued in two forms under our Rules Governing Discipline—formal reprimands issued through our Disciplinary Board and public censures issued directly by this Court. Compare Rule 17-206(A)(5), with Rule 17-206(A)(4). We directed disciplinary counsel and Respondent’s counsel to work together to prepare a draft formal reprimand. However, counsel ultimately submitted separate draft reprimands to this Court because they could not agree on the substance of the reprimand. Because the parties could not agree on the substance of the formal reprimand to be issued against Respondent, and to bring these disciplinary proceedings to a conclusion, we issue the reprimand as a public censure from this Court. And because this case also has precedential value, the public censure is included as part of this Opinion issued pursuant to Rule 17-206(D) and Rule 17-316(D).

FACTUAL BACKGROUND

[8] Formal disciplinary proceedings were initiated against Respondent based on actions he took during his representation of...
a married couple who wanted to file for bankruptcy. During the course of preparing the bankruptcy petition and related bankruptcy schedules, Respondent discovered that the wife (the debtor) had an interest in a house in Roswell, New Mexico, that she received in a divorce proceeding involving a prior marriage. However, the nature of her interest in the house was unclear.

9] After an initial investigation into the matter, Respondent advised the debtor to list her interest in the house on the personal property bankruptcy schedule as a life estate with a value of one dollar. Respondent subsequently learned that the marital settlement agreement from the divorce proceeding gave the debtor more than a life estate in the house and the conclusion that the debtor would need to amend her bankruptcy schedules accordingly. However, Respondent failed to take steps to ensure that the relevant bankruptcy schedules were amended to reflect the debtor’s true interest in the house before the bankruptcy proceeding was closed.

10] Subsequently, the bankruptcy trustee filed a complaint to revoke the debtor’s discharge in bankruptcy because of her failure to disclose her true interest in the house. In addition to revoking the debtor’s discharge, the bankruptcy judge chastised Respondent for his role in misleading the court and referred the incident to the Disciplinary Board for further investigation.

11] At issue below in this disciplinary proceeding was whether Respondent’s failure to accurately disclose to the bankruptcy court the extent of the debtor’s interest in the house violated our Rules of Professional Conduct. The hearing committee concluded that Respondent’s failure to amend the bankruptcy schedules after determining the debtor’s ownership interest in the house violated Rule 16-103 NMRA (requiring a lawyer to “act with reasonable diligence and promptness in representing a client”), and Rule 16-303(A)(2) NMRA (prohibiting a lawyer from knowingly failing “to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client”). However, the hearing committee also concluded that Respondent’s actions were the result of mistake and negligence, did not involve dishonesty, fraud, deceit, or misrepresentation, and were caused in part by the debtor’s failure to cooperate with Respondent to amend the bankruptcy schedules. Accordingly, the hearing committee recommended that Respondent only receive a private, informal admonition as his disciplinary sanction for violating our Rules of Professional Conduct.

12] In contrast to the hearing committee, the hearing panel appointed to review the recommendation of the hearing committee took a much harsher view of Respondent’s actions. In addition to the rule violations identified by the hearing committee, the hearing panel concluded that Respondent violated several additional Rules of Professional Conduct implicating his competence and fitness to practice law. Most significantly, and contrary to what the hearing committee concluded, the hearing panel concluded that Respondent violated Rule 16-804(C) NMRA by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Ultimately, the hearing panel filed its final report and recommendation with this Court recommending the suspension of Respondent from the practice of law for six months. For the reasons that follow, we reject the hearing panel’s recommendation, adopt the hearing committee’s findings of fact, and independently determine that a public censure is the appropriate level of discipline for Respondent’s misconduct.

DISCUSSION

13] The decision of the hearing panel specifically states that it replaces the findings and conclusions of the hearing committee with the hearing panel’s own findings and conclusions because “the findings of the hearing committee are incomplete and some of the findings of the hearing committee are not supported by substantial evidence.” However, the hearing panel’s decision does not specify the findings of the hearing committee that the hearing panel believed lacked substantial evidence, nor does the decision of the hearing panel discuss why the findings of the hearing committee were incomplete. As we explain below, the hearing panel does have the authority to issue its own findings under limited circumstances. But when it does so in future cases, review by this Court will be facilitated if the hearing panel explains in its report and recommendation to this Court why it has decided to reject or supplement the findings of a hearing committee. Lacking such an explanation in this case, we are left to infer from the hearing panel’s findings why it believed that the findings of the hearing committee were inadequate or incorrect.

14] By comparing the findings, conclusions and recommendations of the hearing committee with those of the hearing panel, it is apparent to us that the hearing committee and hearing panel diverged on one central point—whether Respondent’s acts and omissions during the course of the bankruptcy proceeding were the product of simple negligence or calculated deceit. Although the hearing committee found that Respondent’s ethical lapses were the result of mistake and negligence but nothing more, the hearing panel concluded otherwise. But in doing so, the hearing panel overstepped its role as the administrative reviewer of the hearing committee’s factual findings. To explain why we have reached this conclusion, we must first clarify the standard of review a hearing panel should use when reviewing the findings, conclusions and recommendations of a hearing committee.

A DEFERENTIAL STANDARD OF REVIEW SHOULD BE USED BY THE HEARING PANEL TO REVIEW THE HEARING COMMITTEE’S FINDINGS OF FACT

15] As noted above, the hearing committee is the only entity designated to take evidence during the course of a formal disciplinary proceeding. See Rule 17-314(C); see also Rule 17-313. Because the hearing committee directly observes witness testimony, it is in the best position to weigh the evidence, resolve matters of credibility, and choose between the conflicting inferences that may be drawn from the evidence. See Comm. on Legal Ethics of the W. Va. State Bar v. McCorkle, 452 S.E.2d 377, 381 (W. Va. 1994) (recognizing that a hearing committee is in a better position to resolve factual disputes because it “hears the testimony of the witnesses firsthand and, being much closer to the pulse of the hearing, is much better situated to resolve such issues as credibility”); accord In re Clark, 87 P.3d 827, 830 (Ariz. 2004); In re Pautler, 47 P.3d 1175, 1179 (Colo. 2002); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509, 516 (Conn. 2006); In re Reardon, 759 A.2d 568, 575 (Del. 2000); In re Spak, 719 N.E.2d 747, 754 (Ill. 1999); In re Saab, 547 N.E.2d 919, 927 (Mass. 1989); Grievance Adm’r v. August, 475 N.W.2d 256, 260 (Mich.1991); In re Reiner’s Case, 883 A.2d 315, 318 (N.H. 2005); Pappas v. State Bar, 628 S.E.2d 534, 537 (Va. 2006); In re Poole, 125 P.3d 954, 959 (Wash. 2006); In re Alia, 709 N.W.2d 399, 413-14 (Wis. 2006); N.C. State Bar v. Gilbert, 566 S.E.2d 685, 690 (N.C. Ct. App. 2002).

16] Because the hearing committee is the entity responsible for taking evidence in disciplinary proceedings, we view its role much the same as any other fact finder that should be given deference on questions of
fact. See In re Witt, 583 N.E.2d 526, 531 (Ill. 1991) (providing that the findings of fact made by the disciplinary entity responsible for taking evidence “are entitled to the same weight as are the findings of any initial trier of fact”); cf. N. M. State Bd. of Psychologist Exam’rs v. Land, 2003-NMCA-034, ¶ 5, 133 N.M. 362, 62 P.3d 1244 (noting that when a district court acts in an appellate capacity to review an administrative agency’s factual determinations, the court’s “standard of review is limited in the same manner as any other appellate body” and it “must view the evidence in the light most favorable to the decision of the agency and must defer to the agency’s factual determinations if supported by substantial evidence”). Consistent with the foregoing authorities, we hold that when reviewing the findings of a hearing committee, the hearing panel should defer to the hearing committee on matters of weight and credibility, viewing the evidence in the light most favorable to the hearing committee’s decision and resolving all conflicts and reasonable inferences in favor of the decision reached by the hearing committee.

{17} We recognize that despite this standard of review, our Rules Governing Discipline provide that the hearing panel “is not restricted to the findings of the hearing committee and may render its decision based upon the record and any additional findings that it may make.” Rule 17-315. Nevertheless, the hearing panel’s authority to make additional findings does not allow it to ignore the standard of review set forth above. Instead, the hearing panel’s authority to make additional findings should be limited to factual issues not considered by the hearing committee or to situations where the hearing committee’s findings are not supported by substantial evidence. We realize that the hearing panel in this case issued its own findings of fact in the belief that the hearing committee’s findings were incomplete and unsupported by substantial evidence. However, as discussed later in this opinion, we believe the hearing panel misapplied its standard of review and, as a result, erred in substituting its own findings of fact for those of the hearing committee.

THE HEARING COMMITTEE’S LEGAL CONCLUSIONS AND RECOMMENDATIONS FOR DISCIPLINE ARE REVIEWED UNDER A DE NOVO STANDARD OF REVIEW

{18} In contrast to the deference that a hearing committee’s factual findings should be afforded, the hearing panel is not bound by the hearing committee’s legal conclusions or recommendations for discipline and reviews such matters independently under a de novo standard of review. See McCorkle, 452 S.E.2d at 380-81. In this regard, the hearing panel should give “respectful consideration” to the decision of the hearing committee but remains free to draw its own legal conclusions and independent recommendations for discipline. Id. at 380 n.6 (using the term “respectful consideration” to recognize the important role played by the committee in the disciplinary process, without circumscribing the reviewing entity’s responsibility to independently apply the law and determine the appropriate level of discipline).

THE HEARING PANEL MISAPPLIED THE STANDARD OF REVIEW TO THE HEARING COMMITTEE’S FINDINGS OF FACT

{19} As noted above, the competing sets of findings of fact reflect that the hearing panel disagreed with the hearing committee’s assessment of Respondent’s intent in failing to accurately represent the debtor’s interest in the Roswell house. While the hearing committee found that Respondent’s failures were the product of mistake and inadvertence, the hearing panel found that Respondent’s actions were the product of fraud, deceit, and dishonesty. However, Respondent’s mental state is a quintessential question of fact. See In re Clark, 87 P.3d at 830 (“Determining a person’s mental state requires the resolution of questions of fact.”). And for the reasons that follow, we believe the hearing panel erred by reweighing the evidence and substituting its judgment for that of the hearing committee on that critical question of fact.

{20} As an example of the hearing panel’s improper reweighing of the evidence, the hearing panel apparently relied on portions of the debtor’s testimony to find that Respondent knew before filing the bankruptcy petition that the debtor’s interest in the Roswell house was greater than a life estate and worth more than one dollar. However, Respondent denied receiving such information from the debtor before filing the petition. By instead relying on the debtor’s version of events, the hearing panel implicitly found that the debtor’s testimony was more credible than Respondent’s testimony. In so doing, the hearing panel erred by reweighing the evidence in this manner.

{21} Similarly, the hearing panel’s findings recite portions of the debtor’s marital settle-
the hearing committee’s findings.

[24] The hearing panel’s findings also attempt to cast doubt on Respondent’s actions at the creditor’s meeting. In this regard, there was evidence that Respondent failed to advise the trustee about the debtor’s true interest in the house even though the trustee specifically asked the debtors during the creditor’s meeting whether they had any real property. Respondent testified that he did not hear the trustee’s question during the hearing and may have been distracted because he had numerous other hearings that day. In support of this explanation, the record also showed that creditor’s meetings are very fast-paced with approximately forty to seventy cases on any given day. Although the hearing panel apparently discounted this explanation by pointing out that Respondent made other statements during the hearing clarifying other parts of the debtor’s petition, by doing so the hearing panel erred again by reweighing the evidence and drawing inferences in the light least favorable to the hearing committee’s decision rather than in the light most favorable.

[25] In summary, as detailed above, there was conflicting evidence regarding Respondent’s motivations for delaying, and ultimately, failing to amend the bankruptcy schedules to accurately state the debtor’s interest in the Roswell house. But by finding that Respondent acted with dishonest motive, the hearing panel improperly reweighed the evidence and substituted its judgment for that of the hearing committee on a question of fact. See In re Brodsky, 2003 WL 22793917 *3 (Ill. Atty. Reg. Disp. Com.) (recognizing that it would be improper during an intermediate administrative review in a disciplinary proceeding “to reverse simply because another conclusion is possible, or because the Review Board might have reached a different conclusion if it had been called upon to find the facts in the first instance”). Because the hearing panel’s improper findings of fact formed the basis for its legal conclusions regarding which Rules of Professional Conduct Respondent violated, we also reject those conclusions. We, therefore, proceed to our own assessment of the hearing committee’s findings, conclusions and recommendations.

THE SUPREME COURT USES THE SAME STANDARD OF REVIEW THAT THE HEARING PANEL MUST USE

[26] As the final entity responsible for reviewing recommendations for disciplin-
intermediate sanction of a public censure.

31] As previously discussed, Respondent’s intent was the central factual question at issue below. We have already held that the hearing committee’s factual findings in this regard are supported by substantial evidence. Accordingly, we must accept as a matter of fact that Respondent acted negligently, but not intentionally, when he failed to ensure that the debtor’s bankruptcy schedules were amended to accurately reflect the debtor’s real property interest. In re Clark, 87 P.3d at 830 (“In disciplinary proceedings, a respondent’s mental state can both determine whether an ethical violation occurs and affect the appropriate discipline for a violation.”).

32] Under the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986, as amended 1992) (ABA STANDARDS), suspension from the practice of law is ordinarily only warranted when an attorney acts intentionally with a dishonest, deceitful, or fraudulent motive. See ABA STANDARDS § 4.42 (providing that suspension is generally warranted when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to the client); § 6.12 (providing that suspension is generally warranted when a lawyer knowingly submits false statements or documents to the court, fails to take remedial action, and causes injury or potential injury to a party to the proceeding); see also In re Key, 2005-NMSC-014, ¶ 5, 137 N.M. 517, 113 P.3d 340 (recognizing that this Court looks to the ABA STANDARDS for guidance in determining appropriate lawyer disciplinary sanctions). Because the hearing committee did not find that Respondent possessed a culpable mental state, we reject the hearing panel’s recommendation that Respondent be suspended from the practice of law.

33] Although the hearing committee recommended that Respondent receive a private, informal admonition, under the ABA STANDARDS, a private reprimand is only appropriate when the attorney acts negligently rather than intentionally, and the attorney’s actions cause little or no harm to the client. See ABA STANDARDS § 4.44 (providing that an admonition is generally appropriate when a lawyer’s lack of diligence is the result of negligence that causes little or no injury to the client); § 6.14 (providing that an admonition is generally appropriate when a lawyer negligently submits a false statement or document to the court in an isolated instance and causes little or no injury to a party or the proceeding). However, in this case, the hearing committee found that Respondent’s acts and omissions contributed to the revocation of the debtor’s discharge in bankruptcy. Consequently, even though Respondent acted negligently and without a culpable mental state, Respondent’s conduct nevertheless caused significant harm to the debtor. Accordingly, we reject the hearing committee’s recommendation for an informal admonition and instead independently determine that a public censure is the appropriate level of discipline. See ABA STANDARDS § 4.43 (providing that a reprimand is generally appropriate when a lawyer’s lack of diligence is the result of negligence that causes injury or potential injury to the client); § 6.13 (providing that a reprimand is generally appropriate when a lawyer negligently submits a false statement or document to the court and causes injury or potential injury to a party or the proceeding).

CONCLUSION

34] By this public censure, Respondent is reminded that the license to practice law is a conditional privilege. See Preface to the Rules Governing Discipline; Rule 17-205 NMRA. As a condition to that privilege, Respondent has the duty to act at all times, both professionally and personally, in conformity with our Rules of Professional Conduct. While Respondent may not have acted with deceit or dishonesty, his conduct cannot be condoned. Respondent was aware of the need to correct the inaccuracies contained in the documents he filed with the bankruptcy court. Even though the debtor did not facilitate making those corrections, that does not excuse Respondent’s lack of diligence. As an officer of the court and the debtor’s attorney, Respondent was responsible for taking whatever steps were necessary to properly inform the court and protect his client’s interests. But by doing nothing, Respondent failed to meet his duty to the court and to his client. By publicly reminding Respondent of his ethical duties and publicly reprimanding him for his ethical violations, we trust that this public censure will satisfy the primary concern of every disciplinary proceeding—the protection of the public from the consequences of future unethical conduct of the sort that occurred in this case.

35] Accordingly, this public censure will be filed with the Clerk of the Supreme Court pursuant to Rule 17-206(D) and will remain a part of Respondent’s permanent record with the Disciplinary Board, where it may be revealed upon any inquiry to the Board concerning any discipline ever imposed against Respondent. The costs of this action in the amount of $1,871.34 are assessed against Respondent and, as previously ordered, should have been paid to the Disciplinary Board on or before April 1, 2006.

36] IT IS SO ORDERED.

RICHARD C. BOSSON,
CHIEF JUSTICE
PAMELA B. MINZNER, JUSTICE
PATRICIO M. SERNA,
JUSTICE
PETRA JIMENEZ MAES,
JUSTICE
EDWARD L. CHÁVEZ,
JUSTICE
APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
TEDDY L. HARTLEY, District Judge

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Cynthia A. Fry, Judge

\{1\} Defendant Felipe Padilla challenges his conviction for aggravated fleeing a law enforcement officer (aggravated fleeing) under NMSA 1978, § 30-22-1.1 (2003). He claims that the trial court committed error by failing to instruct the jury on an essential element of the crime when it refused to allow the jury to consider whether the pursuit was conducted “in accordance with” the Law Enforcement Safe Pursuit Act (the Act). NMSA 1978, § 29-20-1 to -4 (2003). We agree and remand for a new trial. Further, Defendant argues that he may not be convicted for both (1) resisting, evading, or obstructing an officer (resisting/evading) and (2) aggravated fleeing because this would result in a double jeopardy violation due to the imposition of multiple punishments for the same offense. We agree with Defendant that resisting/evading is a lesser included offense of aggravated fleeing and that conviction for both crimes for unitary conduct would violate principles of double jeopardy.

BACKGROUND

\{2\} This case involves a high speed chase that began when police attempted to stop Defendant for a vehicle registration violation. We provide context for the facts by first reviewing two laws relating to police pursuits, which were recently enacted, apparently in response to the debate in recent years regarding the risks posed to both the police and the public by high speed police pursuits. See Patrick T. O’Connor & William L. Norse, Jr., Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law, 57 Mercer L. Rev. 511, 511-12 (2006) (describing the “social conundrum” presented by such pursuits and noting the particular concern over whether such pursuits are justified for minor traffic violations); see also State v. Landgraf, 1996-NMCA-024, ¶ 4, 121 N.M. 445, 913 P.2d 252 (describing a high speed pursuit that resulted in the deaths of three bystander children). In 2003 our legislature took action on this issue by imposing requirements governing police initiation and conduct of high speed pursuits and by creating the new felony crime of aggravated fleeing. The pursuit training and policy provisions applicable to police are contained in the Act and were codified at Section 29-20-1 to -4. The crime of aggravated fleeing was incorporated into the criminal code as Section 30-22-1.1, appearing immediately after the existing statute for resisting/evading. Both of these new statutes are central to the issues raised in this appeal.

\{3\} Historically, fleeing from the police either in a car or on foot would, at minimum, constitute the crime of resisting/evading, which is a misdemeanor. NMSA 1978, § 30-22-1 (1981); see, e.g., State v. Gutierrez, 2005-NMCA-093, ¶¶ 20, 21, 138 N.M. 147, 117 P.3d 953 (affirming a conviction for evading an officer where the defendant refused to obey a command to stop and jumped over a fence), cert. granted, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 952. Resisting/evading has a subsection specifically targeting the refusal to stop one’s car after police have “given a visual or audible signal to stop.” § 30-22-1(C). The new crime of aggravated fleeing, which is a fourth degree felony, specifically addresses fleeing from the police in one’s car in a manner that endangers others, by stating:

A. Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle in pursuit in accordance with the provisions of the Law Enforcement Safe Pursuit Act.

§ 30-22-1.1(A) (emphasis added). Defendant claims that the italicized portion incorporates provisions of the Act and constitutes an essential element of aggravated fleeing.

\{4\} The Act defines a high speed pursuit as “an attempt by a law enforcement officer in an authorized emergency vehicle to apprehend an occupant of a motor vehicle, the driver of which is actively attempting to avoid apprehension by exceeding the speed limit.” § 29-20-2. The Act mandates that police undergo training specific to high speed pursuits both at the academy and through ongoing in-service training. § 29-20-3. The Act contains a section entitled “Pursuit policies,” § 29-20-4, which requires that each local police department “shall establish” a written policy for high speed pursuits and defines certain subjects that these policies shall address, such as “the conditions under which a law enforcement officer may” initiate and terminate a high speed pursuit. § 29-20-4(B)(1). The next subsection sets out specific rules for high speed pursuits, stating that each local pursuit policy “shall, at a minimum, require that:”

(1) a law enforcement officer may initiate a high speed pursuit to apprehend a suspect who the officer has reasonable grounds to believe poses a clear and immediate threat of death or serious injury
to others or who the officer has probable cause to believe poses a clear and immediate threat to the safety of others that is ongoing and that existed prior to the high speed pursuit;

(2) a law enforcement officer shall not initiate or continue a high speed pursuit when the immediate danger to the officer and the public created by the high speed pursuit exceeds the immediate danger to the public if the occupants of the motor vehicle being pursued remain at large;

(3) when deciding whether to initiate or continue a high speed pursuit, the following factors, at a minimum, shall be taken into consideration:

(a) the seriousness of the offense for which the high speed pursuit was initiated;
(b) whether a suspect poses a clear and immediate threat of death or serious injury to others;
(c) road, weather, environmental and vehicle conditions;
(d) the amount of motor vehicle and pedestrian traffic; and
(e) knowledge of the suspect's identity, possible destination and previous activities that may make apprehension at a later time feasible; and

(4) no more than two law enforcement vehicles shall become actively involved in a high speed pursuit, unless specifically authorized by a supervisor.

§ 29-20-4(C). Defendant claims that because the Act requires each local police department's pursuit policy to contain these rules and because the aggravated fleeing statute requires the police officer to be "in pursuit in accordance with the provisions of the [Act]." compliance with these requirements is an element of the offense of aggravated fleeing. § 30-22-1.1(A).

Against this statutory backdrop, we summarize the events leading to Defendant's convictions for both aggravated fleeing and resisting/evading. In October 2003 at 2 a.m., after the two new laws had gone into effect, a Portales police officer observed Defendant driving a Buick. The officer saw the car turn down an alley and stop, but no one got out of the car. This situation struck the officer as odd, so he called in the license plate; the registration came back as belonging to a Ford, not a Buick. Because of this apparent vehicle registration violation, the officer attempted to stop Defendant by activating his emergency overhead lights. Defendant accelerated his car and ran a stop sign, at which point the officer turned on his siren. Defendant continued to flee, eventually running ten stop signs, and the chase at times reached speeds of eighty miles per hour. Defendant crossed over the center line when making turns, and the officer testified that at one point, when Defendant ran a stop sign while going fifty miles per hour in a twenty-five mile per hour zone, Defendant barely missed colliding with another motorist. Defendant eventually turned his car into a mobile home sales lot and, when his vehicle was blocked by a stairway between two mobile homes, he abandoned it and crawled under a nearby mobile home. After an officer ordered him to come out, Defendant crawled back out and was arrested. The pursuit was videotaped by a dashboard video camera installed in the police car and this tape was shown at Defendant's trial.

Defendant was charged with aggravated fleeing, driving with a suspended or revoked license, failure to have car insurance, resisting/evading, reckless driving, and improper display of a license plate. At trial, Defendant effectively conceded guilt on all but the aggravated fleeing charge, which was the only felony charge. In cross-examination and in his closing, Defendant focused on the officer's failure to comply with the elements of the Portales police department's pursuit policy. (However, the department's pursuit policy was not introduced as evidence and is not in the record.)

Defendant objected to the State's proposed jury instruction on aggravated fleeing because it did not include any mention of compliance with either the Act or the local pursuit policy. Defendant asked the trial court to "add one more line" to the jury instruction in order to put to the jury the question of compliance with the Act. In response, the State argued that the Act "merely requires" that the local department have a pursuit policy in place and that the officer's testimony established this. The trial court declined to add any language to the instruction and concluded that compliance with the Act was a matter of law for the court to decide. Using this approach, the trial court ruled that the testimony of the pursuing officer showed compliance with the Act. Defendant objected again to the proposed instruction, contending that compliance was a factual matter for the jury. The trial court overruled Defendant's objection and gave the jury the following instruction:

For you to find [D]efendant guilty of Aggravated Fleeing a Law Enforcement Officer, as charged in Count 1, the State must prove to your satisfaction beyond a reasonable doubt, each of the following elements of the crime:

1. [D]efendant operated a motor vehicle;
2. [D]efendant drove willfully and carelessly in a manner that endangered the life of another person;
3. [D]efendant had been given a visual or audible signal to stop, either by light, siren, or other signal, by a uniformed law enforcement officer;
4. The uniformed law enforcement officer was in an appropriately marked law enforcement vehicle engaged in a pursuit; and
5. This happened in New Mexico, on or about the 14th day of October, 2003.

The jury convicted Defendant of all the charged crimes. Defendant appeals only his conviction for aggravated fleeing.

DISCUSSION

Defendant argues that (1) the jury instructions in this case omitted an element of the offense; (2) even if the instructions were correct, there was insufficient evidence to support a conviction for aggravated fleeing; and (3) conviction of both aggravated fleeing and resisting/evading violates principles of double jeopardy. Because we agree with Defendant that the jury instruction on aggravated fleeing constitutes reversible error, we address his second argument to determine whether he is entitled to dismissal rather than retrial and conclude that sufficient evidence supported his conviction. We address Defendant's double jeopardy argument to provide guidance to the trial court on remand.

I. Jury Instruction on the Elements of Aggravated Fleeing

As described above, the aggravated fleeing statute expressly references the Act by requiring that the pursuit be "in accordance with the provisions of the [Act]." § 30-22-1.1(A). Defendant argues that this is an essential element of the crime of aggravated fleeing and its absence from the jury instruction requires reversal of his conviction. The State responds that it would
be “absurd” to require police compliance with the Act as an element of aggravated fleeing because of the burden that would be imposed on the jury.

{11} Where the denial of a jury instruction involves statutory construction of an offense, we conduct de novo review. State v. Marshall, 2004-NMCA-104, 136 N.M. 240, ¶ 6, 96 P.3d 801; see State v. Rowell 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (stating that “interpretation of a statute is an issue of law” subject to de novo review). Our ultimate goal in statutory interpretation is to find and give effect to the intent of the legislature by looking to the plain meaning of the language used in the statute. State v. Smith, 2004-NMSC-032, ¶ 9, 136 N.M. 372, 98 P.3d 1022. We avoid any construction that would be “absurd, unreasonable, or contrary to the spirit of the statute.” Id. ¶ 10. To search for legislative intent, we look at the overall structure and function of the statute in the comprehensive legislative scheme, we consider any particular provision in reference to the statute as a whole as well as to other statutes dealing with the same subject, and we strive to read different enactments as harmonious. Id. We are without power to revise the language used in a criminal statute. State v. Powell, 114 N.M. 395, 403, 839 P.2d 139, 147 (Ct. App. 1992); see State v. Javier M., 2001-NMSC-030, ¶ 32, 131 N.M. 1, 33 P.3d 1 (holding that “[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous” (internal quotation marks and citation omitted)); Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (stating that “it is the particular domain of the legislature, as the voice of the people, to make public policy”). “What is, or is not, an essential element of an offense depends upon the statutory language.” State v. Rhea, 93 N.M. 478, 480, 601 P.2d 448, 450 (Ct. App. 1979).

{12} There is no uniform jury instruction for aggravated fleeing; thus, the trial court must craft an “appropriate instruction stating the essential elements” of the crime. UJI 14, General Use Note NMRA. A failure to instruct the jury on an element of a crime constitutes reversible error. State v. Nemeth, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936, rev’d on other grounds by State v. Ryon, 2005-NMSC-005, 137 N.M. 174, 108 P.3d 1032.

{13} As a starting point, we view the Act and the aggravated fleeing statute as evincing a legislative intent to promote two public policies: (1) to more severely punish people who jeopardize others by forcing police to pursue them while driving carelessly, and (2) to impose restraints on police pursuits and require police departments to closely scrutinize their policies and practices for engaging in high speed pursuits in light of the risks posed to both police and the public. We think compliance with the Act is an essential element for the fact finder for the simple reason that the phrase “in pursuit in accordance with the provisions of the [Act]” must be there for a purpose. Javier M., 2001-NMSC-030, ¶ 32. And, given the policy goals of these two statutes, we conclude that purpose is to motivate police to abide by the legislature’s promulgated rules regarding safe pursuits. This is clear from reading the aggravated fleeing statute together with the Act.

{14} The statute’s phrase, “in accordance with the provisions of the [Act]” modifies the word “pursuit.” The aggravated fleeing statute imposes a number of conditions on the pursuit: (1) the officer must be in uniform, (2) the officer must be in an appropriately marked law enforcement vehicle, and (3) the officer must be “in pursuit in accordance with the provisions of the [Act].” § 30-22-1.1(A). Because the phrase “in accordance with” conditions the term “pursuit” we think the most natural reading of this language is that it is a particular pursuit, conducted by a specific officer or officers, which must be “in accordance with” the Act. This reading promotes the policy objectives of the Act and the aggravated fleeing statute by (1) more severely punishing a person who flees in a car in a dangerous manner, while at the same time (2) requiring that police obey the legislature’s rules relating to high speed pursuits. However, because the training and filing requirements of the Act do not directly mandate how police conduct a particular pursuit, we think those requirements are not included in the evaluation of whether a given pursuit was conducted “in accordance with the provisions of the [Act].”

{15} The State contends that the phrase “in accordance with the provisions of the [Act]” simply means that the aggravated fleeing statute and the Act must not contradict one another, and by implication, that this phrase does not describe a particular pursuit as a factual matter. We do not fully understand this argument in terms of what it would leave for a trial court to evaluate in any given case. For example, would such an interpretation mean that a trial court need only conclude that the aggravated fleeing statute and the Act not conflict in the abstract? We are not persuaded and conclude that such a reading would render the phrase “in pursuit in accordance with the provisions of the [Act]” superfluous, which is contrary to our rules of statutory construction. Javier M., 2001-NMSC-030, ¶ 32.

{16} The State also contends that forcing police to comply with the Act is “not required since the statute itself has no penalty for failure to comply with its provision.” We disagree. The penalty imposed on police for failing to comply with the Act is the fact that Defendant may not be convicted of the felony of aggravated fleeing. Denying police a criminal conviction for an accused is a time-honored way to motivate police compliance with the law. See United States v. Brooks, 438 F.3d 1231, 1240 (10th Cir. 2006) (noting that, in the search and seizure context, the exclusionary rule is intended to motivate police compliance with the law and as a deterrent against police over reaching).

{17} We think a reasonable reading of the phrase “in accordance with” requires an evaluation of how police conduct the pursuit caused by a defendant. And while it is not common for an element of a crime to focus on the conduct of police rather than the conduct of a defendant, it is not unheard of in the criminal code. For example, for the crime of aggravated assault on a peace officer, one element of the offense is that the officer was carrying out his or her official duties at the time of the assault. Rhea, 93 N.M. at 480, 601 P.2d at 450. If the officer’s conduct was outside of his or her official duties, the element is not met and the offense is not committed. Id. Here, we conclude that “in accordance with the provisions of the [Act]” refers to how police conduct a particular pursuit and that this language incorporates those concrete requirements contained in the Act for the conduct of high speed pursuits.

{18} The State also raises two additional concerns that we consider and reject in turn. First, the State raises a practical consideration that wholesale incorporation of the Act would be unworkable, burdensome, and contrary to legislative intent. The State conjures the specter of a complex trial-within-a-trial evaluating an officer’s training on high speed pursuits and a detailed examination of the Act, and it concludes that requiring such an inquiry would be “absurd.” Because we have held that the Act’s general training and filing requirements are not part of the inquiry into how a specific pursuit is conducted, these aspects need not be proven to the fact finder.

{19} The tone of the State’s argument also
implies a second concern, that a jury is not equipped to evaluate whether a pursuit was conducted under the rules set out in the Act. Juries can and do regularly make factual determinations on complex questions. See State v. Aguayo, 114 N.M. 124, 132, 835 P.2d 840, 848 (Ct. App. 1992) (observing that juries are able to evaluate complex evidence). We are not persuaded that, as a practical matter, proof of this element will prove burdensome or unworkable. And even if it were burdensome to show compliance with the Act, we have no power to rewrite the statute in order to simplify prosecution or ease the State’s burden to prove every element of an offense. Our role is to further the letter and spirit of the language used by the legislature, and we think that by modifying “in pursuit” with the phrase “in accordance with the provisions of the Act,” the legislature has plainly commanded that police conduct be evaluated as part of proving this crime. While the legislature is free to remove or modify this language, this Court may not do so. Powell, 114 N.M. at 403, 839 P.2d at 147.

One final question is whether the jury must evaluate a pursuit for compliance with the local police department’s pursuit policy or with the Act. The Act requires that each local law enforcement agency have a pursuit policy and that these policies meet certain minimum standards. § 29-20-4(A), (C). We therefore think it furthers the goal of the legislature to focus on the local departmental policy. That local policy must contain the minimum rules in the Act, but this is not a factual matter for the jury. We think it appropriate for the judge to decide early in the proceedings, in writing, perhaps at a Foulenant-type hearing, whether the local policy complies with the Act. We think it is intuitive that a pursuit would not be “in accordance with the provisions of the Act” if a local police department had no pursuit policy. Thus, there are two steps to proving whether a given pursuit was “in accordance with the provisions of the Act”: (1) if the issue is contested, the judge may decide whether the local pursuit policy complies with the requirements of the Act and—if so—then (2) the jury determines whether the officer’s pursuit of a defendant complied with that local pursuit policy.

Because the jury in this case was not instructed on an element of the offense charged, Defendant’s conviction must be reversed. Reese v. State, 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987).

II. Sufficiency of the Evidence

Next, we address Defendant’s contention that insufficient evidence supported his conviction for aggravated fleeing. We address this argument because Defendant would be entitled to dismissal, instead of retrial, if the evidence at trial were insufficient to support his conviction. State v. Jofola, 2005-NMCA-119, ¶ 2, 138 N.M. 459, 122 P.3d 43, cert. granted, 2005-NMSC-010, 138 N.M. 494, 122 P.3d 1263.

In missing-element jury instruction cases, we review the sufficiency of the evidence under the instructions as given, even if the instructions were erroneous. State v. Rosaire, 1996-NMCA-115, ¶¶ 20, 21, 123 N.M. 250, 939 P.2d 597. “The standard of review for sufficiency of evidence claims requires us to view all of the evidence in the light most favorable to support the jury’s verdict, and to determine whether any rational jury could find all elements of the crime based on the facts presented at trial.” State v. Lopez, 2005-NMSC-036, ¶ 20, 138 N.M. 521, 123 P.3d 754 (internal quotation marks omitted).

We need not repeat the jury instruction on the charge of aggravated fleeing. After reviewing the testimony given and viewing the videotape of the pursuit, we conclude that sufficient evidence supported a finding of guilt under the instruction given. The evidence showed that Defendant was operating a motor vehicle in a willful and careless manner, and he never contested that he was behind the wheel. We think a rational jury could have found that Defendant endangered another person in either of two ways. First, the officer testified about the danger to another motorist on the road, whom Defendant came close to striking. Second, the officer testified that the passenger door of Defendant’s car was ajar at different points in the pursuit, and the passenger door was incapable of being latched closed. The officer had given both visual and audible signals to Defendant to stop and the officer testified, and the video shows, that he was uniformed. Finally, the officer testified that he was in a marked police car and was engaged in a pursuit on the date in question. The evidence adduced was sufficient to support a finding of guilt under the elements as charged in the erroneous instruction. Therefore, Defendant is not entitled to a dismissal.

III. Multiple Punishment and Double-Description

Because we remand, we address Defendant’s double jeopardy argument that if he is tried and convicted again for aggravated fleeing, he cannot also be found guilty of resisting/evading for the same conduct. We agree that resisting/evading is a lesser included offense of aggravated fleeing. We begin with a review of the jury instructions on the resisting/evading count because they govern our analysis. See State v. Mora, 2003-NMCA-072, ¶ 21, 133 N.M. 746, 69 P.3d 256 (noting that where an offense may be charged in alternative ways, we only examine the statutory elements as charged to the jury for double jeopardy purposes). We then discuss the category of multiple punishment cases referred to as double-description cases, and finally, we evaluate whether Defendant could be convicted for both resisting/evading and aggravated fleeing for one course of conduct.

We need not repeat the jury instruction (the most generic charge of resisting/evading) would violate double jeopardy. [D]efendant, with the knowledge that Glenn Russ was attempting to apprehend or arrest [D]efendant, fled, attempted to evade or evaded Glenn Russ; or

[D]efendant resisted or abused Glenn Russ in the lawful discharge of Glenn Russ’ duties;

This happened in New Mexico on or about the 14th day of October, 2003.

This instruction was modeled after the resisting/evading model instruction, except that, instead of containing only one of the two alternatives, as the Use Note directs, the instruction given contained both alternatives. UJI 14-2215, Use Note 4 NMRA. The jury convicted Defendant of resisting/evading, but it did not indicate which alternative it found was proven. In this situation, we are required to presume that the jury selected the alternative that violates double jeopardy because the jury cannot be expected to discern legally insufficient alternatives from legally sufficient ones. State v. Foster, 1999-NMSC-007, ¶¶ 27, 28, 126 N.M. 646, 974 P.2d 140. We conclude that conviction of the first alternative instruction (the most generic charge of evading) would violate double jeopardy under the circumstances of this case.

The double jeopardy clause of the
federal constitution applies to the states and prohibits multiple punishments for “the same offense.” State v. DeGraff, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61 (internal quotation marks and citations omitted). We analyze a multiple punishment double jeopardy challenge under Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991), and its progeny. Specifically, where a person is charged with violations of multiple statutes for the same conduct, we analyze the challenge as a so-called double-description issue. Id. at 8, 810 P.2d at 1228. In a double-description case, double jeopardy bars a conviction if the conduct underlying the two offenses is unitary and the legislature has not indicated an intent to punish the same conduct separately. DeGraff, 2006-NMSC-011, ¶ 26.

{27} The first step involves a determination of whether the conduct at issue is unitary, meaning whether Defendant’s actions may be reasonably viewed as one distinct act or transaction. See id.; State v. Franco, 2005-NMSC-013, ¶¶ 9, 10, 137 N.M. 447, 112 P.3d 1104 (evaluating the factual distinctiveness of conduct to determine whether a jury could have found two distinct acts). We make this determination based upon an evaluation of whether there are sufficient “indicia of distinctness” in the actions including any separations in time or space, the similarity of the acts, their sequence, intervening events, and defendant’s goals and mental state in the context of each act. Franco, 2005-NMSC-013, ¶ 7 (internal quotation marks and citation omitted). Where a defendant’s behavior constitutes two distinct acts, then the conduct is non-unitary and there is no double jeopardy bar to separate convictions because the “same conduct” is not being doubly punished. See DeGraff, 2006-NMSC-011, ¶ 31; Swafford, 112 N.M. at 14, 810 P.2d at 1234 (stating that a double jeopardy multiple punishment inquiry ends when conduct is “separate and distinct”).

{28} We conclude the conduct here is unitary because it is virtually indistinguishable from conduct that we determined to be unitary in State v. LeFebre, 2001-NMCA-009, ¶ 18, 130 N.M. 130, 19 P.3d 825. In LeFebre, a suspect fled from police until his car became stuck in a field. Id. ¶ 2. He then continued to flee on foot and hid until he was arrested. Id. The defendant was charged and convicted of both resisting/ evading for failing to stop his car, as well as the more generic form of evading for his flight on foot. Id. ¶ 18. We held that such conduct was unitary because there was one course of flight from the police. We were not persuaded that there was any change in motivation, nature of the act (based upon mode of flight), or any intervening event. Id.

{29} The State argues that the conduct we held to be unitary in LeFebre is no longer deemed unitary due to the creation of the new statute for aggravated fleeing. Determination of whether conduct is unitary is primarily a factual determination in light of the elements of the charged offenses. Franco, 2005-NMSC-013, ¶ 7; Swafford, 112 N.M. at 14, 810 P.2d at 1234 (stating that “the task is merely to determine whether the conduct for which there are multiple charges is discrete (unitary) or distinguishable”). The facts in this case are effectively identical to those in LeFebre. However, our Supreme Court has recently emphasized that conduct may be viewed as non-unitary if one can clearly discern a point in the events where one crime has been completed and another crime has yet to be committed. DeGraff, 2006-NMSC-011, ¶ 27 (stating that “[i]n our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed”). The State contends that when Defendant stopped his car due to an obstacle, he had completed the crime of aggravated fleeing. Then, when Defendant left his car and fled on foot, he committed another crime, resisting/evading. We do not agree because this is precisely the approach that we rejected in LeFebre, and we see no reason to adopt it now. 2001-NMCA-009, ¶ 23.

{30} In LeFebre we treated different provisions of the resisting/evading statute as separate statutes for double jeopardy purposes. Id. ¶ 16. The State is correct that since LeFebre was decided, the legislature has enacted another statute addressing evading the police, that is, doing so while driving carelessly and endangering others, known as aggravated fleeing. § 30-22-1.1. But the addition of yet another statute to the landscape does not alter the approach we adopted in LeFebre, that it is artificial to parse conduct when a suspect flees from the police in one way and then immediately continues to flee in another way. In short, we do not think the addition of another statute converts what we have concluded is factually unitary conduct into non-unitary conduct. We leave open the possibility that a defendant’s conduct in fleeing from the police may be distinct when the facts show a separation in time or space between acts or changes in the nature, intent, or objective of the conduct. See 2001-NMCA-009, ¶ 17.

However, the conduct at issue here is factually indistinguishable from that in LeFebre, and we remain of the view that this manner of fleeing represents one distinct course of conduct.

{31} Having found that Defendant’s conduct is unitary, we turn to the second step in a double-description analysis: whether there is any indication of legislative intent to punish unitary conduct separately. State v. Dominguez, 2005-NMSC-001, ¶¶ 5, 6, 137 N.M. 1, 106 P.3d 563. The State contends that creating the crime of aggravated fleeing evinces a legislative intent to separately punish unitary conduct. Defendant responds by arguing that resisting/evading in Section 30-22-1(B) is a lesser included offense of aggravated fleeing and thus, he cannot be convicted of both crimes for the same conduct. We agree with Defendant on this point.

{32} The “sole limitation on multiple punishments is legislative intent.” Swafford, 112 N.M. at 13, 810 P.2d at 1233. Absent a clear expression of legislative intent, a court first must apply the Blockburger test to the elements of each statute. If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both. Id. at 14, 810 P.2d at 1234. In our search for legislative intent, we focus on the statutory elements of the offenses at issue, and not the evidence or proof offered at trial. Dominguez, 2005-NMSC-001, ¶ 12.

{33} Our Supreme Court has stated that we should consider the level of punishment set by the legislature:

Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes. If the punishment attached to an offense is enhanced to allow for kindred crimes, these related offenses may be presumed to be punished as a single offense. Swafford, 112 N.M. at 15, 810 P.2d at 1235.

{34} The crimes in this case are clearly “kindred” crimes, and we think this rule applies here. The base offense of resisting/evading by “intentionally fleeing, attempting to evade or evading,” § 30-22-1(B), is a misdemeanor, and aggravated fleeing,
a fourth degree felony, incorporates the elements of fleeing or evading. Under a Blockburger elements analysis, aggravated fleeing contains several elements not contained in evading, such as driving a car carelessly to endanger another. § 30-22-1.1(A) However, the reverse is not true—misdemeanor evading contains no additional elements beyond those in aggravated fleeing. By definition, to carelessly drive a car fleeing from the police is to evade or attempt to evade. We think that it is not possible to commit aggravated fleeing without “evading or attempting to evade” as defined in the resisting/evading statute. See State v. Collins, 2005-NMCA-044, ¶ 9, 137 N.M. 353, 110 P.3d 1090 (explaining that one crime is a lesser-included offense of another when it would be impossible to commit the greater offense without committing the lesser because the statutory elements of the lesser crime are a subset of the elements of the greater crime); State v. Diaz, 121 N.M. 28, 30, 908 P.2d 258, 260 (Ct. App. 1995) (stating that “[i]n general, a crime is a lesser included offense of another when the defendant could not have committed the greater offense without also committing the lesser offense”). The only arguable difference in the two crimes is a slightly different articulation of the necessary mental state. Evading requires the defendant to be evading while “knowing” that the police are attempting to apprehend him. § 30-22-1(B). Aggravated fleeing requires the defendant to be “wilfully” fleeing once a signal to stop has been given. § 30-22-1.1(A). We see this as a distinction without a difference because evading “wilfully” implies knowledge that the police are attempting to apprehend.

Thus, we conclude that there are no indications of any legislative intent to allow multiple punishments for misdemeanor resisting/evading and aggravated fleeing when there is unitary conduct. We hold that resisting/evading under Section 30-22-1(B) is a lesser included offense of aggravated fleeing and that Defendant may not be convicted of both crimes for the same course of conduct. Swafford, 112 N.M. at 15, 810 P.2d at 1235.

Where we conclude that double jeopardy has been violated, we vacate the lesser offense and retain the conviction for the greater offense. State v. Santillanes, 2001-NMSC-018, ¶ 37, 130 N.M. 464, 27 P.3d 456. Thus we vacate the conviction for resisting/evading. Since we have found reversible error as to the greater offense, that conviction is reversed. Upon retrial, the State may charge Defendant with aggravated fleeing, which, as we have held, contains the lesser included offense of resisting/evading. Thus, if the evidence is similar to that at the first trial, Defendant may request a lesser included instruction upon retrial. State v. Jernigan, 2006-NMSC-003, ¶ 21, 139 N.M. 1, 127 P.3d 537 (explaining that the defendant is entitled to a lesser included offense instruction where there is evidence tending to establish the greater offense and that evidence establishes that the lesser offense is the highest degree of crime committed). Double jeopardy principles require that where the conduct is unitary, Defendant may be convicted on retrial of either aggravated fleeing or resisting/evading, but not of both crimes.

CONCLUSION

For the foregoing reasons, we reverse Defendant’s conviction for aggravated fleeing and vacate the conviction for resisting/evading. We remand for a new trial consistent with this opinion.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge
WE CONCUR:
MICHAEL D. BUSTAMANTE, Chief Judge
JAMES J. WECHSLER, Judge
Hydro’s contention that the water rights firming on that ground, we do not address of Hydro’s predecessor-in-interest. Against this backdrop, Hydro claimed that it was the owner of the water rights as the agent and on behalf of Gray’s predecessor-in-interest developed rights in Hydro. We affirm, holding that the water rights are appurtenant to the mining claims and mill sites. Therefore, the water rights are appurtenant to the mining claims and mill sites.

I. BACKGROUND

{1} Harris Gray and William Frost (together, “Gray”) appeal from a summary judgment favoring Hydro Resources Corporation in a dispute over water rights associated with mining claims. Gray claims ownership of the water rights based on his predecessor-in-interest’s (a former mineral lessee) development of the water rights under a mineral lease from Hydro’s predecessor-in-interest. Hydro claims ownership contending that the mineral lessee developed the water rights on behalf of the lessor and the water rights are appurtenant to mining claims owned by Hydro and mill sites developed for the mining operation. The district court quieted title in the water rights in Hydro. We affirm, holding that Gray’s predecessor-in-interest developed the water rights as the agent and on behalf of Hydro’s predecessor-in-interest. Affirming on that ground, we do not address Hydro’s contention that the water rights

...
through the filings with the OSE. Hydro asserted that the Partnership owned the water rights as Inspiration’s agent and that the water rights were essential to the mining operation and appurtenant to the mining and associated mill site claims owned by Hydro. The district court granted Hydro’s motion for summary judgment and denied Gray’s motion for summary judgment. This appeal by Gray followed.

II. DISCUSSION

A. Standard of Review

{8} When a summary judgment comes before us on review based on undisputed facts, our review is de novo. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

B. Water Law and Mining Law

{9} New Mexico follows the doctrine of prior appropriation. N.M. Const. art. XVI, § 2; State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶¶ 28-29, 135 N.M. 375, 89 P.3d 47; Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 417, 467 P.2d 986, 989 (1970). Beneficial use is “the basis, the measure and the limit of the right of the use of water.” N.M. Const. Art. XVI, § 3; see also NMSA 1978, § 72-12-2 (1931); Martinez, 2004-NMSC-009, ¶ 34. One acquires a water right by being the first to divert and apply water to beneficial use. See id.; Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357 (1900). The law of prior appropriation has its roots in mining and evolved from mining customs that developed in the American West during the nineteenth century. See generally, Pomeroy, supra, § 14. As explained by an Oregon court:

During the nineteenth century, the federal government began to permit the mining of public lands in the West. Because the government retained title to the land itself, the traditional rules of riparian rights did not readily apply to the use of waters running through the mining claims. Mining customs developed over time, however, to fill the need of the times. One such custom was that rights to use water in mining operations could be obtained as an incident of the mining activity and that competing claims to the use of the water would be determined by the time of actual appropriation of the water for that use.

Kinross Copper Corp. v. State, 981 P.2d 833, 838 (Or. Ct. App. 1999); see also Yeo v. Tweedy, 34 N.M. 611, 616-20, 286 P.970, 972-73 (1929) (discussing the rejection of riparian law in favor of prior appropriation in arid western states, including New Mexico).

{10} Eventually, the doctrine of prior appropriation became embodied in federal mining law. See Pomeroy, supra, § 17; see also Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935). Both the Mining Acts of 1866 and 1870 contain provisions protecting the vested, pre-existing water rights of appropriators for mining and other purposes and reaffirm that water rights are governed by state, not federal, law. 30 U.S.C. §§ 51, 52 (1994); see Andrus v. Charlstone Stone Prods. Co., 436 U.S. 604, 612-13 (1978); see also State ex rel. State Game Comm’n v. Red River Valley Co., 51 N.M. 207, 218, 182 P.2d 421, 428 (1945) (recognizing that appropriation of public waters began as a local mining custom which the United States government was bound to protect). Moreover, in 1877, Congress passed the Desert Land Act, which effectively severed water rights from public lands and required that such water rights be obtained in accordance with applicable state water laws. 43 U.S.C. § 321 (1994); Cal. Or. Power Co., 295 U.S. at 158-62. Thus, patented and unpatented mining claims, when issued by the United States government, carry with them no appurtenant water rights. See State ex rel. Bliss v. Dority, 55 N.M. 12, 21, 225 P.2d 1007, 1013 (1950). With this background in mind, we turn now to the parties’ contentions.

C. The Parties’ Contentions

{11} The Partnership drilled the wells on mill sites developed for Inspiration’s mining claims, and developed the water for use in mining operations on Inspiration’s mining claims and under the 1974 mineral lease between Inspiration and Robertson. Gray claims that, pursuant to its possessor interest as mineral lessee, the Partnership held a possessor interest in the mining claims, and that, pursuant to the terms of the lease, the Partnership had the right to take whatever means were necessary to extract minerals from the Property, including drilling wells and perfecting its own water rights. See First State Bank v. McNew, 33 N.M. 414, 269 P. 56 (1928) (supporting the general proposition that one having a mere possessor interest in land, like a lessee or licensee, may own or acquire water rights by appropriating and beneficially using water on land owned by another). Gray asserts that because the Partnership exclusively developed the water for its own beneficial use, the Partnership became the owner of the water rights based on a straight application of the prior appropriation doctrine, and that title to the water rights vested in Gray.

{12} Hydro asserts that the Partnership developed the water rights on behalf of Inspiration for beneficial use essential to the mining operations, and that this development occurred and could only occur by reason of the Partnership’s status as a lessee under the mineral lease. According to Hydro, absent an express conveyance in the lease, a lessee cannot acquire water rights developed under the lease on the lessor’s land and necessary and indispensable to the mining operations. Thus, the Partnership, as mineral lessee, had only the right to use the water in question for the term of the lease and, further, the water rights could not be severed from the mining or mill site claims without destroying their value.

{13} Of course, the problem here is the mineral lease’s silence on the subject of water rights. Because of that, we have a troublesome intersection between the law of prior appropriation with that of mining, property, and agency. Neither party provides instructive, much less controlling, authority pointing us to a result when, as here, a mineral lease has no provision regarding water rights to be developed for the mining operations.

{14} We are persuaded that the law of prior appropriation should not, under the circumstances in this case, place ownership of the water rights in the Partnership and later Gray. Absent evidence of an intent in 1974 of Inspiration and Robertson to the contrary, we conclude that the mineral lease must be construed such that the Partnership acted on behalf of Inspiration and as Inspiration’s agent in developing the water rights for use in the mining operations. See First Sec. Bank v. State, 291 P. 1064, 1066 (Idaho 1930) (“If the water right was initiated by the lessee, the right is the lessee’s property, unless the lessee was acting as agent of the owner.”). Gray’s claim derives solely and exclusively from the rights and actions of the Partnership as lessee of the mining claims owned by Inspiration. The Partnership could not develop the mill sites and water, but for the lease permitting it to mine and to develop mill sites and water for the mining operations. A lessee under a mineral lease ordinarily acts for the mutual benefit of both the lessor and the lessee. See Killam Oil Co. v. Bruni, 806 S.W.2d 264, 267 (Tex. App. 1991) (“The object of a mineral lease is to secure development of the property for the mutual benefit of the
The record that the Partnership relocated, amended, or applied for patents on any of Inspiration’s existing mining claims, Hydro did present evidence that additional mill site claims were staked or located in the name of Inspiration for the purpose of developing water for the mining operation. Although in the district court proceedings Gray first denied this assertion, Gray presented no evidence to controvert the statement pursuant to Rule 1–056(E) NMRA. We conclude that the Partnership’s development of water was on behalf of Inspiration and as Inspiration’s agent.

As well, the mineral lease permitted the lessee to “relocate, amend, or apply for patents” on any unpatented mining claims” owned by Inspiration, but “in the name of Inspiration” and at the lessee’s own expense. Although it does not appear from such declarations prove his ownership under the circumstances here. Nor are we persuaded by Gray’s argument that Hydro is not entitled to claim ownership of the water rights because Hydro only paid $10 for the mining claims and thus did not intend to acquire water rights in the conveyance of the mining claims. Our review of the lease and option to purchase between Inspiration and Hydro indicates that the parties agreed that the sum of $250,000 would be paid for the purchase of the mining claims, including appurtenant water rights. The quitclaim deed from Inspiration to Hydro also specifically includes “appurtenances” and recites that Hydro paid “the sum of Ten Dollars ($10.00), and other good and valuable consideration.” (Emphasis added.)

CONCLUSION

We affirm the grant of summary judgment in favor of Hydro Resources Corporation.

IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

JONATHAN B. SUTIN, Judge

Certiiorari Granted, No. 29,938, August 23, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-109

TERRI CRUZ,
Plaintiff-Appellant,
versus
FTS CONSTRUCTION, INC.,
FRED P. SANCHEZ, Individually, FRED P.
SANCHEZ d/b/a FTS CONSTRUCTION, and
NATHAN SANCHEZ, Individually,
Defendants-Appellees.
No. 25,708 (filed: June 29, 2006)

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
JOHN W. POPE, District Judge

ALEXANDER D. CRECCA
THE LAW FIRM OF
ALEXANDER D. CRECCA, P.C.
Albuquerque, New Mexico
for Appellant

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RAY A. PADILLA, P.C.
Albuquerque, New Mexico
BRETT J. OLSEN
BRETT J. OLSEN, P.C.
Albuquerque, New Mexico
for Appellees

OPINION
LYNN PICKARD, Judge

This case involves two lawsuits—one that is presently pending before the district court on de novo appeal from the magistrate court and one (the action on appeal here) that was originally filed in the district court. We examine a doctrine most recently articulated in Valdez v. Ballenger, 91 N.M. 785, 786, 581 P.2d 1280, 1281 (1978), which we term “priority jurisdiction.” The purpose of the doctrine is to prevent the same lawsuit from being litigated twice. We hold that under the circumstances of this case, the district court did not err in dismissing Plaintiff’s complaint under the doctrine of priority jurisdiction. Rejecting several additional arguments made by Plaintiff, we affirm the district court’s dismissal, and we clarify that Plaintiff’s complaint should have been dismissed without prejudice to her right to recover in the other proceeding pending in district court.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff entered into a contract to purchase a newly constructed house from Defendants. In 2001, Plaintiff filed a pro
The following four conclusions of law:

1. The District Court Did Not Err in Dismissing the Complaint Under the Doctrine of Priority Jurisdiction

2. The Defendants argued that Plaintiff’s complaint should be dismissed under the doctrine of “prior exclusive jurisdiction.” Alternatively, Defendants argued on the merits that Plaintiff’s claims failed as untimely. The court to the doctrine as a “plea of abatement by prior exclusive jurisdiction” (internal quotation marks and citation omitted).

3. In their motion to dismiss, Defendants asserted that Plaintiff’s complaint should be dismissed under the doctrine of “prior exclusive jurisdiction.” Defendants cited Valdez, 91 N.M. at 786, 581 P.2d at 1281, which reads as follows:

   Generally, a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a court of competent jurisdiction in the same state between the same parties and involving the same subject matter or cause of action, if the rights of the parties can be adjudged in the first action.

4. The Defendants’ position that this cause of action must be abated and dismissed in favor of Defendants’ appeal from the judgment entered by the . . . Magistrate Court . . . is well taken.

5. On appeal, Plaintiff makes four arguments:

   (1) the district court misapplied the doctrine of “prior exclusive jurisdiction” because its elements were not satisfied in this case;
   (2) the district court erred in dismissing the complaint because Sanchez v. Reilly, 54 N.M. 264, 267, 221 P.2d 560, 562 (1950), specifically permits Plaintiff to file a new complaint in district court despite the prior magistrate court proceedings;
   (3) the dismissal infringed on Plaintiff’s constitutionally protected right of access to the courts; and
   (4) the de novo appeal to the district court “annulled” the magistrate court judgment.

DISCUSSION

1. The District Court Did Not Err in Dismissing the Complaint Under the Doctrine of Priority Jurisdiction

   7) Plaintiff argues that the district court erred in dismissing the complaint because the elements of the doctrine that the court applied were not satisfied. Because the case was disposed of on a motion to dismiss, we will accept all of Plaintiff’s facts as true, and we will review de novo the question of whether the district court properly applied the law to those facts. See R & R Deli, Inc. v. Santa Ana Star Casino, 2006-NMCA-020, ¶ 2, 139 N.M. 85, 128 P.3d 513. We hold that the district court did not err in dismissing the complaint.

   8) In their motion to dismiss, Defendants asserted that Plaintiff’s complaint should be dismissed under the doctrine of “prior exclusive jurisdiction.” Defendants cited Valdez, 91 N.M. at 786, 581 P.2d at 1281, which reads as follows:

      Generally, a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a
in New Mexico, and we have found only three New Mexico cases that discuss it in any more than passing fashion. See Valdez, 91 N.M. at 786-87, 581 P.2d at 1281-82 (stating and applying the doctrine); Burchards v. U.S. Fid. & Guar. Co., 74 N.M. 618, 621, 397 P.2d 10, 12 (1964) (stating the doctrine but finding no basis for reversal because the doctrine was not jurisdictional and had not been raised below), overruled on other grounds by Quintana v. Knowles, 113 N.M. 382, 387, 827 P.2d 97, 102 (1992); State ex rel. Kernmac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 482-83, 375 P.2d 118, 123-24 (1962) (stating the doctrine but holding that, although trial court perhaps should have abated the suit, its failure to do so was not grounds for a writ of prohibition).

12 Valdez, which is the only New Mexico case to actually apply the doctrine, arose out of a car accident where numerous people were injured. 91 N.M. at 786, 581 P.2d at 1281. Ballenger sued Valdez and Hall in Bernalillo County. Id. Then, Valdez sued Ballenger in Torrance County, and Hall joined this second action as a plaintiff. Id. Our Supreme Court held that the Torrance County action should be abated and that Valdez and Hall should assert their claims as counterclaims in the Bernalillo County action. Id. at 786-87, 581 P.2d at 1281-82. The Court clarified that the appropriate procedure was to dismiss the Torrance County action without prejudice to the rights of the parties to proceed in the Bernalillo County action. Id. at 787, 581 P.2d at 1282.

13 The elements of priority jurisdiction as articulated in Valdez can be broken down as follows: (1) the two suits must involve the same subject matter or the same cause of action, (2) the two suits must involve the same parties, (3) the first suit must have been filed in a court of competent jurisdiction in the same state, and (4) the rights of the parties must be capable of adjudication in the first-filed action. Id. at 786, 581 P.2d at 1281. We hold that all of these elements are satisfied in this case.

14 With regard to the first element, Plaintiff argues that the subject matter of the present case is different from the subject matter of the first case because new claims and new “theories of law” were added in the present action. We disagree with this argument, and instead we agree with courts from other jurisdictions that have chosen to ask whether the two suits arise out of the same transaction. See, e.g., Plant Insulation Co., 274 Cal. Rptr. at 152 (holding that the doctrine is applicable where “the first and second actions arise from the same transaction” (internal quotation marks and citations omitted)). We believe this is the appropriate standard because our test for res judicata, which also requires that the two cases involve the “same cause of action,” uses a transactional analysis. See Cagan v. Vill. of Angel Fire, 2005-NMCA-059, ¶ 19, 137 N.M. 570, 113 P.3d 393.

15 It makes sense to use the same standard for priority jurisdiction that we use for res judicata because the policy rationales behind the two doctrines are so similar. The policy rationales behind the doctrine of priority jurisdiction are to “avoid[] conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and [to prevent] vexatious litigation and multiplicity of suits.” Plant Insulation Co., 274 Cal. Rptr. at 150; see also 1 Am. Jur. 2d Abatement § 6 (2005) (“The purpose of the defense of abatement by reason of another action pending is to protect a party from harassment by having to defend several suits on the same cause of action at the same time.”). The policy rationales behind the doctrine of res judicata are similar. “The underlying principle behind res judicata is to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and[,] by preventing inconsistent decisions, encourage reliance on adjudication.” Cordova v. Larsen, 2004-NMCA-087, ¶ 23, 136 N.M. 87, 94 P.3d 830 (internal quotation marks and citation omitted). Thus, priority jurisdiction serves the same purpose as res judicata, but operates where there is not a final judgment and instead there is a pending case.

16 We now evaluate the two cases pursuant to the transactional analysis. First, we do not agree with Plaintiff that mere changes in legal theory sufficiently distinguish this case from the previous case. See Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 78, 134 N.M. 77, 73 P.3d 215 (reiterating the transactional test for res judicata and noting that “a mere change in a legal theory does not create a new cause of action” (internal quotation marks and citation omitted)); Twp. Oil Co., 413 N.W.2d at 95 (holding that abatement was properly applied to dismiss case even though the plaintiff had claimed more damages in the second action).

17 Second, in the recent case of Brooks Trucking Co. v. Bull Rogers, Inc., 2006-NMCA-025, ¶¶ 16-18, 139 N.M. 99, 128 P.3d 1076 (Brooks), we held that res judicata did not bar a subsequent lawsuit where the operative facts underlying the second lawsuit were not in existence when the first suit was brought. Plaintiff appears to make a similar argument in this case when she alleges that the magistrate court complaint was for breach of warranty in connection with Defendants’ failure to build a wall and failure to repair minor, cosmetic cracks in the walls of the house, whereas the district court complaint involved wider cracks that were indicative of structural damage. Even assuming that these differences could support the idea that there were two different transactions, which we doubt, the documents Plaintiff submitted below indicate that she knew of structural damage prior to the filing of the magistrate court complaint and knew that the jurisdictional limit of the magistrate court would preclude recovering damages sufficient to repair all the problems. More importantly, however, the operative facts for both cases are the same, and thus this is not a case like Brooks. Here, Plaintiff’s allegations in both lawsuits relate to the same transaction—Defendants’ alleged faulty building of the house, which purportedly caused the foundation to subside and caused cracks and other structural damage. Thus, we hold that the first element of priority jurisdiction is satisfied.

18 With regard to the second element, that the two cases involve the same parties, Plaintiff argues that the parties in this case are different because three defendants have been added. Plaintiff’s original suit named only FTS Construction. In this case, Plaintiff added FTS Construction, Inc., Fred Sanchez, and Nathan Sanchez. In response to Plaintiff’s argument that this case involves different parties, Defendants argue that all of the new defendants are in privity with the original defendant. Plaintiff does not dispute this statement in her reply brief and does not provide any additional argument with regard to the question of whether the two actions involve the same parties. See Delta Automatic Sys., Inc., v. Bingham, 2006-NMCA-122, ¶ 31, 126 N.M. 717, 794 P.2d 1174 (holding that the appellant’s failure to respond to an argument in the answer brief “constitute[d] a concession on the matter”). We also note that Plaintiff’s amended complaint in this action alleges that (1) Fred Sanchez is the president and qualifying contractor for FTS Construction, (2) both corporate defendants are liable for the actions of Fred and Nathan Sanchez under a theory of agency or respondent superior, and (3) FTS Construction, Inc. is liable for the actions of FTS Construction and the other
two defendants on a theory of successor liability. Under these circumstances, and in the absence of any response to the contrary from Plaintiff, we agree that the new defendants are in privity with FTS Construction. Thus, we hold that both actions involve the same parties for purposes of priority jurisdiction. See Lytwyn v. Fry's Elecs., Inc., 25 Cal. Rptr. 3d 791, 805 n.10 (Ct. App. 2005) (relying on privity principles from preclusion cases in case involving priority jurisdiction), review granted and opinion superseded by 110 P.3d 1218 (Cal. 2005). (Although Lytwyn is technically not citable under California's rules, it has been found persuasive on another issue in a case that notes the opinion was withdrawn in order to rule on the retroactivity of "Proposition 64," which was the other issue addressed in the Lytwyn case. See Chamberlan v. Ford Motor Co., 369 F. Supp. 2d 1138, 1150 & n.6 (N.D. Cal. 2005.).)

{19} With regard to the third element of priority jurisdiction, that the first suit was filed in a court of "competent jurisdiction," Plaintiff argues that the present action should not be dismissed in favor of the first case (which is presently on de novo appeal in the district court), because the magistrate court was not a "court of competent jurisdiction" and thus the district court sitting on appeal is also not "competent." Plaintiff argues that both courts are "without subject matter jurisdiction over [P]laintiff's new damages and new claims." We agree with Plaintiff that a district court hearing an appeal from the magistrate court is bound by the lower court's jurisdictional limits and that, if the magistrate court lacked jurisdiction, the district court would also lack jurisdiction. See State v. Haar, 100 N.M. 609, 611, 673 P.2d 1342, 1344 (Ct. App. 1983). However, we disagree with Plaintiff that either court lacks jurisdiction under the circumstances of this case.

{20} At the time that Plaintiff commenced her action in magistrate court, that court had jurisdiction "in civil actions in which the debt or sum claimed does not exceed seven thousand five hundred dollars ($7,500), exclusive of interest and costs." See § 35-3-3 (amended effective July 1, 2001 to raise jurisdictional limit from $7,500 to $10,000). Plaintiff's argument appears to be that, because she now believes her damages to exceed $7,500, the magistrate court and the district court sitting on appeal lack subject matter jurisdiction over her first action. We disagree.

{21} We find this issue to be similar to the issue of federal diversity jurisdiction under 28 U.S.C. § 1332 (2000). This statute permits diversity jurisdiction where the statute's "amount in controversy" and citizenship requirements are satisfied. It is well established that these requirements are measured at the time the suit is filed:

Satisfaction of the [28 U.S.C.] § 1332(a) diversity requirements (amount in controversy and citizenship) is determined as of the date that suit is filed—the "time-of-filing" rule. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction. . . . Federal diversity jurisdiction is not lost by post-filing events that change or disturb the state of affairs on which diversity was properly laid at the outset. Wolde-Meskel v. Vocational Instruction Project, 166 F.3d 59, 62 (2d Cir. 1999) (internal quotation marks and citations omitted).

{22} We think that, as with diversity jurisdiction, the magistrate court's jurisdiction must be measured at the time of filing. The primary reason for our holding is the concern that it would prove unworkable to adopt a rule that could cause jurisdiction to come and go during the course of a lawsuit, based on the dollar amount that the plaintiff happened to be claiming at the time. Cf. 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3608, at 452 (1984) (noting that the diversity jurisdiction time-of-filing rule is a "policy decision" that provides stability and minimizes abuses of jurisdictional rules and repeated challenges to subject matter jurisdiction).

{23} While we are aware of the general rule that parties cannot create or confer subject matter jurisdiction by consent, see, e.g., Chavez v. County of Valencia, 86 N.M. 205, 209, 521 P.2d 1154, 1158 (1974), we are also of the view that, by bringing suit in the magistrate court, Plaintiff acknowledged that she was willing to dispose of her claims for $7,500 or less. Under Section 35-3-3(A), the magistrate court's jurisdiction is dependant upon the dollar amount of the "debt or sum claimed." Obviously, the plaintiff is the only party who is in a position to decide whether or not to "claim" a sum of more than $7,500. Accordingly, Plaintiff cannot now avoid the effects of the previous litigation (which was brought in the forum of Plaintiff's choice and resulted in a judgment in her favor) by claiming that the magistrate court has been ousted of subject matter jurisdiction due to her current claim that her damages exceed that court's jurisdictional limit. Because any other rule would prove unworkable, we hold that the magistrate court's jurisdiction under Section 35-3-3 must be measured at the time suit is filed.

{24} We understand Plaintiff's argument that due to later-discovered damages, she cannot obtain complete recovery if she is left with only the de novo appeal, in which the district court will be bound by the magistrate court's jurisdictional limit. We are not persuaded by this argument. We are again informed by the analogous doctrine of res judicata. A plaintiff cannot avoid the application of res judicata where he or she brought a prior suit on the same cause of action in a court with a jurisdictional limit. See Anaya v. City of Albuquerque, 1996-NMCA-092, ¶ 7, 122 N.M. 326, 924 P.2d 735 (indicating that New Mexico follows the Restatement (Second) of Judgments § 24 (1982) for res judicata purposes); Restatement (Second) of Judgments § 24, cmt. g ("The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim."); see also Vincent v. Clean Water Action Project, 939 P.2d 469, 473-74 (Colo. Ct. App. 1997) (collecting cases standing for the proposition that where the plaintiff chooses the initial forum, he or she will not be heard to complain that the chosen forum could not afford complete relief due to jurisdictional limitations). Thus, we hold that the magistrate court and the district court hearing the appeal are courts of "competent jurisdiction" for purposes of priority jurisdiction in this case.

{25} We also note that the cases Plaintiff appears to cite in support of her argument that the magistrate court and the district court sitting on appeal lack jurisdiction are not on point. Rather, these cases for the most part recite the familiar rule that a district court hearing a de novo appeal is bound by the jurisdictional limits of the inferior court that rendered the judgment from which appeal was taken. See Rojas v. Kimble, 361 P.2d 403, 406 (Ariz. 1961) (holding that where inferior court properly dismissed action for lack of jurisdiction, district court on appeal also lacked jurisdiction, even though case could have been brought under district court's original jurisdiction); Thornily v. Pierce, 15 P.335, 336 (Colo. 1887) (holding that where the plaintiff on appeal from an inferior court...
recovered more than he could have in the inferior court, the court hearing the appeal should have either dismissed the case or required the plaintiff to remit the extra money); Stacy v. Mullins, 40 S.E.2d 265, 266, 268 (Va. 1946) (dismissing case without prejudice and stating that “the appeal from the [inferior court] is a continuation of the original case, and on the appeal the warrant cannot be amended to make a case of which the [inferior court] would not have had jurisdiction”). The other cases cited by Plaintiff are similarly unhelpful. See Lewis v. Baca, 5 N.M. 289, 296-97, 21 P. 343, 344 (1889) (stating that a party on de novo appeal from the probate court has a right to a jury trial in appropriate circumstances); Gillett v. Richards, 46 Iowa 652 (1877).

{26} With regard to the last element of priority jurisdiction, that “the rights of the parties can be adjudged in the first action,” Defendant merely reiterates her argument that the district court on appeal lacks subject matter jurisdiction and cannot make her “whole.” We have already rejected this argument and, in the absence of any additional arguments by Plaintiff on this point, we need not speculate as to what circumstances might defeat this element of priority jurisdiction. We hold that the final element of the doctrine is satisfied in this case. See Robertson v. Carmel Builders Real Estate, 2004-NMCA-056, ¶ 25, 135 N.M. 641, 92 P.3d 653 (“The burden is on the appellant to clarify how the trial court erred.”).

{27} Having determined that all the elements of priority jurisdiction are satisfied in this case, we hold that the district court did not err in dismissing the complaint under that doctrine. Because the district court’s order does not specify whether the dismissal is with or without prejudice, we clarify that the dismissal should be considered without prejudice to Plaintiff’s right to recover in the de novo appeal that is currently pending before the district court. See Valdez, 91 N.M. at 787, 581 P.2d at 1282 (remanding for the district court to dismiss without prejudice to the right to recover in the first-filed action).

{28} Before we reach Plaintiff’s remaining arguments, we wish to clarify two issues regarding priority jurisdiction that were not properly addressed by the parties in this case. First, it appears from the record that Defendants argued, and the district court believed, that the doctrine was jurisdictional. Contrary to Defendants’ arguments, the doctrine is not jurisdictional in New Mexico. See Burroughs, 74 N.M. at 621, 397 P.2d at 12 (stating that the doctrine “would seem to apply” under the facts of the case but affirming the trial court’s refusal to dismiss the complaint because there was “no question of jurisdiction” in the case and the doctrine had not been raised below).

{29} Second, because the doctrine is not jurisdictional, it may be an affirmative defense that could be waived if not timely raised, although we expressly do not decide the point. Cf. People ex rel. Garamendi v. Am. Autoplan, Inc., 25 Cal. Rptr. 2d 192, 197 (Ct. App. 1993) (stating that the doctrine is “similar to an affirmative defense” and that “[p]rior to an appropriate pleading [invoking the doctrine], the trial court in the second action properly exercises its jurisdiction”). However, we cannot say that Defendants have waived their priority jurisdiction argument in this case, because Plaintiff never alerted the trial court to the fact that the doctrine is not jurisdictional and never asserted that Defendants’ arguments should be considered waived because they were not timely raised. Nor does Plaintiff make these arguments on appeal. Under these circumstances, we hold that the trial court did not err in dismissing Plaintiff’s complaint under the doctrine of priority jurisdiction. See Hall v. Hall, 114 N.M. 378, 384, 838 P.2d 995, 1001 (Ct. App. 1992) (noting that absent extraordinary circumstances, we do not raise arguments for appellants).

2. Sanchez Does Not Permit Plaintiff to Re-file Her Case in District Court

{30} Plaintiff next argues that Sanchez, 54 N.M. 264, 221 P.2d 560, specifically permits her to file in district court, despite her earlier suit in magistrate court, because she determined after filing suit in magistrate court that her damages exceeded that court’s jurisdictional limit. Because Sanchez is distinguishable, and because the portion of the case on which Plaintiff relies is dicta, we reject Plaintiff’s argument.

{31} In Sanchez, the plaintiff brought a forcible entry and detainer action in the justice of the peace court. Id. at 265, 221 P.2d at 561; see State v. Ramirez, 97 N.M. 125, 126, 637 P.2d 556, 557 (1981) (stating that magistrate courts used to be called justice of the peace courts). The justice of the peace court ordered restitution of the property and awarded the plaintiff $200 in damages, which it found to be the rental value of the premises from the date the defendant took possession to the date of judgment. Sanchez, 54 N.M. at 265, 221 P.2d at 561. The defendant appealed to the district court, which tried the case de novo. Id. The district court ordered restitution of the property and awarded $200 in damages, but also awarded statutory double damages from the date of the transfer of title to the date defendant actually vacated the premises. Id. at 265-66, 221 P.2d at 561.

{32} Our Supreme Court held that a district court hearing a de novo appeal of an inferior court judgment is bound by the jurisdictional limits of the inferior court. Id. at 266, 221 P.2d at 562. Thus, the Court held that despite the statute expressly allowing the type of double damages the district court awarded, the district court lacked jurisdiction to award any damages in excess of the inferior court’s jurisdictional limit. Id. at 266-67, 221 P.2d at 562. Then, the Court stated the following dicta on which Plaintiff in this case relies:

[T]he district court can render judgment for no greater amount than could the justice of the peace.

If a plaintiff desires, he may sue in the justice court for possession alone and, where the damages at the beginning, or later through delay in trial, seem likely to exceed jurisdiction of the justice of the peace, sue separately for such damages in the district court.

Id. at 267, 221 P.2d at 562. Plaintiff argues that this dicta permits her to have filed her second suit in district court. She analogizes her case to Sanchez, stating that “through delay, subsequently occurring damages[,] and subsequent discovery, . . . [P]laintiff became aware that her damages did exceed the jurisdictional limits of the magistrate court.”

{33} We think Plaintiff reads too much into Sanchez. The dicta on which Plaintiff relies, referring as it does to an initial suit for “possession alone,” specifically contemplates a suit for forcible entry and detainer, which is significantly different from Plaintiff’s suit. There is a special statutory procedure for bringing suits for forcible entry and detainer in the magistrate court and appealing to the district court. See NMSA 1978, §§ 35-10-1 to -6 (1968, as amended through 1975). Moreover, the nature of such a suit is that damages will continue to accrue as long as the defendant is wrongfully in possession of the property. See § 35-10-5(A)(1) (stating that the measure of damages on appeal to the district court is “the actual value of the rent due until entry of judgment by the magistrate court and double the value of all rent accrued thereafter until entry of judgment in the district court”). Thus, it makes sense that our Supreme Court would
clarify the method by which a plaintiff can get compensation for damages that accrue “through delay in trial.”

{34} We think the dicta on which Plaintiff relies is limited to suits for forcible entry and detainer. While Plaintiff does allege either newly occurring or newly discovered damages, her suit is not analogous to a suit for forcible entry and detainer, where damages necessarily continue to accrue as long as the defendant remains in wrongful possession. Thus, we disagree with Plaintiff that the dicta in Sanchez can be read to encompass any situation where additional damages become apparent after a suit has been commenced or litigated in an inferior court.

{35} In addition, we do not think that the dicta in Sanchez can be used to overcome the doctrine of priority jurisdiction. We note that Larrazolo, 70 N.M. 475, 375 P.2d 118, which appears to have been the first New Mexico case to state the doctrine of priority jurisdiction, was published approximately twelve years after Sanchez. Other courts of appeals have held that to the extent that two supreme court cases appear to produce inconsistent results, the later one would control. See Hoffman v. Mem’l Hosp. of Iowa County, 538 N.W.2d 627, 629 (Wis. Ct. App. 1995) (“When decisions of the [Wisconsin Supreme Court] appear to be inconsistent, we follow that court’s most recent case.”). Thus, we reject Plaintiff’s argument that Sanchez affirmatively permits her district court suit.

3. The District Court’s Dismissal of Plaintiff’s Complaint Did Not Deprive Her of Due Process or Equal Protection

{36} Plaintiff next argues that the district court violated her constitutional rights in dismissing her complaint. Plaintiff appears to rest this argument on her contention that the district court was the only court that could make her whole and that she thus has a constitutional right to “full and fair litigation” of all her “claims and damages” before the district court. The cases cited by Plaintiff do not support her argument. See Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (“[G]iven the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”); Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 21, 125 N.M. 721, 965 P.2d 305 (“Access to the courts encompasses the ability of a party to have access to the judiciary to resolve legal claims. Nevertheless, such access is not boundless. A right of access to the courts does not guarantee the continued existence of a cause of action or remedy.” (internal citations omitted)); Jiron v. Mahlab, 99 N.M. 425, 427-28, 659 P.2d 311, 313-14 (1983) (holding statute requiring plaintiffs to submit medical malpractice case to the Medical Review Commission prior to filing in district court unconstitutional as applied to particular plaintiff who filed in district court first in order to be able to serve process on the defendant who was about to leave the country).

{37} Plaintiff has not cited any case that would support her argument that a litigant has a constitutional right to have her claims heard for a second time in a different court, after fully litigating her case in the forum of her choice and obtaining a favorable judgment, simply because she now claims more damages. Accordingly, we reject Plaintiff’s constitutional arguments.

4. The Finality or Lack Thereof of the Magistrate Court Judgment Does Not Change the Result

{38} Finally, Plaintiff disputes the district court’s conclusion that the magistrate court judgment was final despite the pending de novo appeal. However, Plaintiff does not explain how this conclusion prejudiced her, what effect (if any) it has on the district court’s dismissal of the present case on the ground of priority jurisdiction, or how the decision otherwise constitutes reversible error. Thus, we need not address Plaintiff’s argument. See Deaton v. Gutierrez, 2004-NMCA-043, ¶ 30, 135 N.M. 423, 89 P.3d 672 (“In the absence of prejudice, there is no reversible error.” (internal quotation marks and citation omitted)).

{39} Moreover, we do not see how the finality or non-finality of the magistrate court judgment would make any difference to the outcome of this appeal. As we stated previously, a final judgment triggers res judicata analysis, while a pending case is subject to priority jurisdiction analysis. In either case, the result is the same: Plaintiff’s complaint was properly dismissed.

CONCLUSION

{40} We affirm the district court’s dismissal of Plaintiff’s complaint. We reiterate that the dismissal should be considered without prejudice to Plaintiff’s right to proceed in the other action currently pending in the district court.

{41} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

CELIA FOY CASTILLO, Judge
OPINION

RODERICK T. KENNEDY, Judge

{1} A jury convicted Defendant of kidnaping, two counts of criminal sexual penetration, and two counts of tampering with evidence. The jury instructions on the tampering charges were identical except for references to different counts in the indictment, and those counts were also identically worded. On appeal, Defendant challenges (1) his convictions for two counts of tampering with evidence on the ground that they violate his right to be free from double jeopardy, and (2) the enhancement of his sentence on the ground that the trial court’s factual findings violated his Sixth Amendment right to a jury. In addition, the State asks us to review whether Defendant should have been sentenced for evidence tampering as third, rather than fourth, degree felonies. Because we conclude that convicting Defendant for two counts of tampering with evidence violates his right to be free from double jeopardy, we remand to the trial court for dismissal of one of Defendant’s convictions for evidence tampering. We affirm both the enhancement of Defendant’s sentence and his sentence for tampering with evidence as a fourth degree felony.

BACKGROUND AND FACTS

{2} In July 2003, Victim was working at a grocery store when Defendant kidnaped her from the parking lot, drove her out of town, and raped her inside his truck. Victim testified that after penetrating her, Defendant ejaculated on her hand and thigh. Victim later agreed with the State that Defendant ejaculated on her hand, thigh, and the seat of the truck. She stated that Defendant then scrubbed the semen off with a T-shirt. Victim did not know where this T-shirt was because she could not see and only remembered “feeling the cloth on my leg and on my hand.”

{3} Defendant proceeded to tell Victim that she needed to “clean that off, that’s DNA, that’s evidence.” He led Victim down to the riverbank, giving her a paper cup to scoop up water to wash herself. Victim scooped up one cup of water and acted as if she was washing herself thoroughly while trying to save some of the evidence. Defendant later released Victim, after which he was apprehended and made statements to police consistent with Victim’s statements.

{4} The grand jury indicted Defendant on two counts of tampering with evidence as fourth degree felonies. Each identical count did not reveal the specific factual basis for the charge. Both Counts 4 and 5 read as follows:

Tampering with Evidence, on or about July 17, 2003, in Doña Ana County, New Mexico, the above-named defendant did destroy body fluids, trace evidence and/or physical evidence with the intent to prevent the apprehension, prosecution or conviction of himself, a fourth degree felony, contrary to [NMSA 1978, § 30-22-5 (2003)].

The record reveals that there was initially some confusion between the parties as to the basis for the two counts of evidence tampering. However, after the defense rested, defense counsel informed the trial court that there was no dispute about the jury instructions. Those instructions read as follows:

For you to find the defendant guilty of tampering with evidence as charged in Count 4 [or Count 5], the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant destroyed body fluids, trace evidence and/or physical evidence;
2. The defendant intended to prevent the apprehension, prosecution or conviction of himself;
3. This happened in New Mexico on or about the 17th day of July, 2003.

In closing, the State argued to the jury that Count 4 referred to Defendant’s beginning to wipe Victim and wiping his truck and that Count 5 was based on making Victim wash at the river. Defense counsel asserted that Count 4 was based on Victim’s testimony that Defendant attempted to clean the truck seat and that Count 5 was based on Victim’s washing in the river. Defendant argued that he should be acquitted on Count 5 because Victim did not destroy evidence when she washed at the river. The jury found Defendant guilty on both counts.

{5} The State then filed a notice that it sought enhancement of Defendant’s basic sentence for kidnaping under NMSA 1978, § 31-18-15.1 (1993). At sentencing, the trial court found that aggravating circumstances existed and enhanced Defendant’s sentence by three years.

DISCUSSION

{6} Defendant raises two issues on appeal: (1) whether the identical jury instructions violated Defendant’s rights to due process and freedom from double jeopardy, and (2) whether the enhancement of Defendant’s sentence violated his Sixth Amendment right to have a jury find the facts supporting the enhancement of his sentence. In its
answer brief, the State raises the issue of whether Defendant was correctly sentenced for the two counts of evidence tampering. We address each issue in turn. The Jury Instructions

{7} Defendant argues that the identical jury instructions on two counts of tampering with evidence violate his right to due process and his right to be free from double jeopardy. More specifically, Defendant argues that the undifferentiated jury instructions, combined with identical counts in the indictment, provided no guidance for the jury about which facts were relevant to each count. Thus, Defendant argues, the jury could have relied on the same facts to convict him of two crimes.

{8} While we note that Defendant did not object to the jury instructions, Defendant may raise a double jeopardy challenge on appeal regardless of whether the issue was preserved. *State v. Rodriguez*, 2004-NMCA-125, ¶ 4, 136 N.M. 494, 100 P.3d 200, *cert. granted*, 2004-NMCERT-10, 136 N.M. 542, 101 P.3d 808; *State v. Soto*, 2001-NMCA-098, ¶ 12, 131 N.M. 299, 35 P.3d 304. Relying on *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977), the State urges us to consider Defendant’s argument as an un preserved attack on the jury instructions. In *Elliott*, our Supreme Court held that the defendant had committed four separate acts for purposes of double jeopardy. *Id.* at 758, 557 P.2d at 1107. However, our Supreme Court also stated that defendant’s single-intent doctrine argument was not preserved because the defendant had not sought an instruction on the issue. *Id.* In this case, we also take up the issue of double jeopardy.

{9} Because Defendant was charged with two counts of tampering with evidence, the double jeopardy issue raised in this appeal arises from a subset of multiple punishment claims: a unit-of-prosecution claim. That is, Defendant was charged with more than one violation of the same statute. See *Swafford v. State*, 112 N.M. 3, 8, 810 P.2d 1223, 1228 (1991). “The pivotal question in multiple punishment cases is whether the defendant is being punished twice for the same offense.” *Id.* at 7-8, 810 P.2d at 1227-28. In such cases, we first inquire “whether the legislature intended punishment for the entire course of conduct or for each discrete act.” *Id.* at 8, 810 P.2d at 1228. We then look to see “whether the charged acts were sufficiently distinct.” *State v. Stewart*, 2005-NMCA-126, ¶ 13, 138 N.M. 500, 122 P.3d 1269.

{10} Our Supreme Court has noted that “the only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.” *State v. Pierce*, 110 N.M. 76, 84-85, 792 P.2d 408, 416-17 (1990) (internal quotation marks and citation omitted). Thus, if the legislative intent is unclear, we presume “the legislature did not intend to fragment a course of conduct into separate offenses.” *Swafford*, 112 N.M. at 8, 810 P.2d at 1228. In other words, we presume that the statute was not intended to impose “multiple punishments for acts that are not sufficiently distinct.” *State v. DeGraff*, 2006-NMSC-011, ¶ 32, 139 N.M. 211, 131 P.3d 61. We apply this “rule of lenity” because “criminal statutes should be interpreted in the defendant’s favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute.” *State v. Ogden*, 118 N.M. 234, 242, 880 P.2d 845, 853 (1994).

{11} The record demonstrates that the State and Defendant initially did not agree about the factual bases for each count. The parties differed considerably, at times representing Defendant’s telling Victim to wash herself, keeping Victim’s undergarments, destroying evidence on Victim’s body, wiping the truck seat, and having Victim wash in the river as the facts underlying either of the two counts at different times during the trial. The facts supporting criminal convictions should not be capable of such shifting. The parties’ “clarifications” of the instructions only served to confuse the factual bases for each count.

{12} The evidence itself was occasionally vague and equivocal, as shown concerning whether Defendant wiped the truck seat. Victim initially testified that Defendant ejaculated “on my hand and my thigh,” and that “he scrubbed it off with a T-shirt.” Victim did not mention the truck seat. Subsequently, the following interchange took place:

  [State]: You said he had ejaculated and got some on your leg and your hand and on the seat.

  [Victim]: Uh-hum.

  [State]: Do you know where that T-shirt was that he cleaned the seat with?

  [Victim]: No, I don’t. At the time, I assumed it was the shirt taken from me. But I have no proof of that. I just remember feeling the cloth on my leg and on my hand.

The question is not evidence. This testimony does not clearly establish that Defendant cleaned the seat, and Victim never volunteered that he did.

{13} In light of this confusion, we are not persuaded that the evidence supports two counts of tampering. Our Supreme Court has recently addressed the issue of what constitutes unitary conduct in the context of multiple counts of tampering with evidence. See *DeGraff*, 2006-NMSC-011, ¶ 34. In *DeGraff*, the Court concluded that the tampering with evidence statute, Section 30-22-5, “does not clearly define the unit of prosecution.” *Id.* ¶¶ 34-35. Thus, we must now turn to whether Defendant’s acts bore sufficient “indicia of distinctness.” *Id.* ¶ 35 (internal quotation marks and citation omitted). In doing so, we consider “the timing, location, and sequencing of the acts, the existence of an intervening event, the defendant’s intent as evidenced by his conduct and utterances, and the number of victims.” *Id.*

{14} In *DeGraff*, the defendant was convicted of five counts of tampering with evidence for hiding five different things: a knife, a glass, a hammer, a car, and clothing. *Id.* ¶ 32. Our Supreme Court reduced the five counts to three, reasoning that the evidence was disposed of “at three distinct times in different locations.” *Id.* ¶ 36. First, the defendant fled the scene of the crime in the victim’s car and threw the knife, glass, and hammer from the car on the highway. *Id.* ¶ 5. The next day, he abandoned the car and returned to his home. *Id.* After returning home, the defendant changed his clothes, putting the clothes he had been wearing in a pillowcase and hiding them in a van outside his home. *Id.* These three episodes, our Supreme Court concluded, formed the bases of three separate counts rather than five. *Id.* ¶ 36.

{15} Our Supreme Court further concluded that disposing of the knife, glass, and hammer constituted only one count because those items were “gathered in a short period of time” and “thrown together, in a single box, on the side of the road.” *Id.* ¶ 38. Our Supreme Court emphasized that there is no indication that Defendant’s intentions were different with respect to each weapon. To the extent that the crime had identifiable victims, they were the same with respect to each weapon. . . . [The same interest
was harmed when the knife, glass, and hammer were hidden, and we have already found that these items were hidden at the same time and in the same location.

Id. {16} In the current case, Victim testified that after Defendant ejaculated on her hand and thigh, “he scrubbed it off with a T-shirt, and then he steps back and looks and says, ‘Oh, you better clean that off, that’s DNA, that’s evidence.’” Defendant then told Victim to go down to the river and clean herself. The truck was apparently parked next to the river, and Victim’s testimony indicates that the washing on the river bank occurred after the wiping in the truck. In our view, the same evidence was being destroyed in an uninterrupted course of conduct. There was a single victim and Defendant had one motive—to destroy the specific DNA evidence. There was no lapse in time between cleaning in the truck and at the river, no intervening act, and getting out of the truck to complete the cleaning process does not demonstrate a significant change in location. We therefore conclude that only one continuous act of tampering occurred. Cf. State v. Salazar, 2006-NMCA-066, ¶ 30, 139 N.M.603, 136 P.3d 1022 [No. 24,468 (Feb. 15, 2006)].

{17} Defendant notes that the problem in this case is that even if the facts demonstrated that Defendant’s conduct could be divided into distinct acts, the jury could not tell from the instructions which act (or acts) formed the basis of each charge. Defendant argues that a similar issue was addressed by the Sixth Circuit in Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005). In Valentine, the defendant was charged with multiple identically worded counts of sexual abuse. Id. at 628. The circuit court held that “the multiple, undifferentiated charges in the indictment violated Valentine’s rights to notice and his right to be protected from double jeopardy.” Id. at 631. In that case, the indictment’s identical counts presented due process problems because of lack of notice. Id. at 634. Double jeopardy problems arose because “the undifferentiated counts introduced the very real possibility that Valentine would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense,” since it was unclear which facts supported which charges. Id. at 634-35.

{18} The State argues that Valentine is inapplicable to this case because Defendant has not challenged the indictment and because the parties, the trial court, and the jury understood the factual distinction between the two counts of tampering with evidence. We agree with the State that Defendant has not preserved any due process issues arising from the indictment. See Woolwine v. Fury’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). However, we are not persuaded that Valentine is inapplicable to the double jeopardy issue in this case.

{19} As described above, the absence of a factual basis for each charge in the written instructions, in light of the confused discussions, could have resulted in the jury convicting Defendant of the same crime twice for a unitary course of conduct. As the Sixth Circuit Court explained in Valentine, unspecified conduct would not have been problematic if Defendant had only been charged with one count of the offense, but “[t]he constitutional errors in this case lie in the multiple identical counts rather than the generic statutory language of the charges.” Valentine, 395 F.3d at 637. Similarly, in this case, although the language of the jury instructions followed the language of UJI 14-2241 NMRA, because the instructions differed only insofar as they incorporated by reference the language of two separate but identical counts from the indictment, they did not make clear to the jury which conduct it should consider to support each charge. We therefore remand for the trial court to dismiss one conviction and sentence for tampering with evidence.

The Finding of Aggravating Circumstances

{20} Defendant also argues that the enhancement of his kidnapping conviction following the trial court’s finding of aggravating circumstances and subsequent increase in his sentence, violated his right under the Sixth Amendment—articulated in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and Blakely v. Washington, 542 U.S. 296, 301 (2004)—to have that finding made by a jury. In Apprendi, the United States Supreme Court wrote: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490.

{21} Under Section 31-18-15.1, the trial court may alter a defendant’s basic sentence if it finds after a hearing “any mitigating or aggravating circumstances surrounding the offense or concerning the offender.” In this case, the trial court sentenced Defendant to nine years for kidnapping and enhanced it by three years because it found Defendant had “put a great deal of planning into these crimes,” and “forced the victim to remain blindfolded during the incident, increasing her terror.”

{22} Prior to Defendant’s appeal, this Court held in State v. Frawley, 2005-NMCA-017, ¶ 13, 137 N.M. 18, 106 P.3d 580, overruled by State v. Lopez, 2005-NMSC-036, ¶ 62, 138 N.M. 521, 123 P.3d 754, that enhancement of a sentence pursuant to Section 31-18-15.1 was unconstitutional under Blakely. Our Supreme Court has since held that because New Mexico’s legislature has determined that a trial court must hold a hearing to determine whether aggravating or mitigating circumstances exist to justify altering a sentence, the legislature created ranges of permissible sentences with enhanced sentences at the top of that range. Lopez, 2005-NMSC-036, ¶ 45. The Supreme Court concluded that sentences enhanced in this way do not increase the statutorily-authorized maximum sentence, and thus are constitutional. Id., ¶ 55. In light of our Supreme Court precedent in Lopez, therefore, we conclude that the enhancement of Defendant’s sentence did not violate his Sixth Amendment rights.

Sentence for Tampering With Evidence

{23} In its answer brief, the State asks us to review whether Defendant was correctly sentenced for tampering with evidence. The State argues that the 2003 amendment to Section 30-22-5 was in effect at the time of Defendant’s sentencing, and thus Defendant should have been sentenced for evidence tampering as third degree rather than fourth degree felonies. See DetGraff, 2006-NMSC-011, ¶ 34 (observing that prior to the 2003 amendment, Section 30-22-5 was punishable as a fourth degree felony regardless of the severity of the underlying crime). The State acknowledges that this argument was not made below. Relying on State v. Shay, 2004-NMCA-077, ¶ 6, 136 N.M. 8, 94 P.3d 8, and State v. Bachicha, 111 N.M. 601, 608, 808 P.2d 51, 55 (Ct. App. 1991), it contends that an argument that a sentence was illegal can be made for the first time on appeal by either the defendant or the State.

{24} While the State may challenge an illegal sentence for the first time on appeal, the State must comply with the requirements of Rule 12-202 NMRA in filing a cross-appeal under Rule 12-201 NMRA. Bachicha, 111 N.M. at 608-09, 808 P.2d at 55-56. In Bachicha, we addressed the issue as one of judicial efficiency, even though the State had not filed a cross-appeal but
simply raised the issue in its answer brief. Id. at 609, 808 P.2d at 56. The State here has also raised the issue in its answer brief without filing a cross-appeal. In this case, however, we decline to address the issue; having ordered dismissal of only one count without reversing the entire judgment, this issue will not arise on remand and judicial efficiency cannot be served.

CONCLUSION

{25} For the foregoing reasons, we affirm the enhancement of Defendant’s sentence for kidnapping, but we remand to the trial court with directions to dismiss one of the convictions for tampering with evidence.

{26} IT IS SO ORDERED.
RODERICK T. KENNEDY,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE,
Chief Judge
IRA ROBINSON, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-111

PEDRO TERRAZAS, SOCORRO TERRAZAS,
AGUSTINA E. GARCIA and FILIGONIO GARCIA,
Plaintiffs-Appellees,
versus
GARLAND & LOMAN, INC.,
Defendant-Appellant,
TEXAS MUTUAL INSURANCE COMPANY,
Plaintiff-in-Intervention/Appellee.
No. 24,581 (filed: July 26, 2006)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
ROBERT E. ROBLES, District Judge

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Opinion

A. Joseph Alarid, Judge

{1} Defendant-Appellant Garland & Loman, Inc. (G & L) appeals from a jury verdict in favor of Plaintiffs, Pedro and Socorro Terrazas and Filigonio and Agustina E. Garcia. G & L argues that the district court erred by applying Texas law and refusing to instruct the jury on comparative negligence under New Mexico law. We agree that the district court erred in denying G & L instructions on comparative negligence, and accordingly we reverse and remand for a new trial on the issue of comparative negligence.

BACKGROUND

{2} G & L is a New Mexico corporation located in Las Cruces, New Mexico, licensed by the State of New Mexico to engage in general contracting. G & L agreed to act as general contractor in the construction of a 75,000-square-foot prefabricated building in Las Cruces. G & L entered into a sub-contract with Alamo General Contractors, Inc. (Alamo), a Texas corporation with a New Mexico contractor’s license. The subcontract obligated Alamo to obtain workers’ compensation insurance. Alamo obtained workers’ compensation insurance from Texas Mutual Insurance Co. (Texas Mutual), a Texas insurance company.

{3} Two of Alamo’s employees, Plaintiffs Pedro Terrazas and Filigonio Garcia, both residents of Texas, were seriously injured when the metal framing of the building collapsed while they were working in separate scissor lifts at the roof level of the structure.

{4} In March 2001, Pedro Terrazas filed suit against G & L in Doña Ana County District Court. Terrazas alleged that his injuries were proximately caused by the negligent conduct of G & L. G & L filed an answer stating that Terrazas’ injuries were caused by an “act of God”—a sudden and unexpected gust of wind that caused the structure to collapse. As an affirmative defense, G & L asserted the comparative negligence of others, including Terrazas, his fellow employees, Alamo, and unknown
persons.

5 Thereafter, Filigonio Garcia filed a Plea in Intervention containing substantially the same allegations as set out in Terrazas’ complaint. G & L filed an Answer Denying Liability and asserted that Garcia’s injuries resulted from an “act of God.” G & L asserted, as an affirmative defense, the comparative negligence of Garcia, Alamo, and Garcia’s fellow employees. Plaintiffs, joined by their spouses, filed a First Amended Complaint. G & L filed an Answer Denying Liability. G & L asserted the comparative negligence of “individuals or entities other than [G & L]” as an affirmative defense.

6 Texas Mutual moved to intervene in the case. G & L initially opposed Texas Mutual’s motion to intervene, but thereafter withdrew its opposition. Texas Mutual filed its Complaint in Intervention, requesting judgment against G & L “for all sums proven to have been paid pursuant to its policy of insurance out as a result of the Defendant[s]’ negligence.” G & L filed its answer to Texas Mutual’s complaint, admitting that Plaintiffs had been injured, but denying that Plaintiffs’ injuries were caused by G & L’s negligence. G & L asserted, as an affirmative defense, that Texas Mutual “is barred from recovery, in whole or part, due to the comparative negligence of individuals or entities other than [G & L], including the insured of [Texas Mutual].”

7 In March 2003, the district court entered a scheduling order setting the case for trial on a trailing docket in September 2003. On August 28, 2003, Plaintiffs filed a motion seeking application of Texas workers’ compensation law to determine whether the question of Alamo’s negligence should be submitted to the jury. Plaintiff also filed a motion in limine seeking to preclude G & L from making any reference to the negligence of Alamo on the grounds that such evidence was not relevant under Texas workers’ compensation law. G & L filed responses arguing that New Mexico would not allow Alamo to recover subrogation rights, including pure comparative fault, G & L’s negligence was a proximate cause of Plaintiffs’ injuries, and that G & L’s negligence was not a proximate cause of Plaintiffs’ injuries. The jury was not given any instructions on comparative negligence.

8 At trial, Plaintiffs presented evidence that G & L was negligent. G & L does not dispute that this evidence was sufficient to support a finding that G & L was at fault and that G & L’s negligence was a proximate cause of Plaintiffs’ injuries. G & L presented evidence that Alamo was negligent in not providing adequate temporary bracing and that the collapse of the structure was due to Alamo’s failure to adequately brace the structure.

9 G & L tendered instructions on proximate cause and comparative negligence patterned on New Mexico Uniform Jury Instructions. The district court rejected G & L’s proposed instructions and instead submitted the case to the jury under instructions based on Texas law. Under these instructions, the jury could consider evidence of Alamo’s negligence only in determining whether Alamo’s negligence was the sole proximate cause of Plaintiffs’ injuries. The jury was not given any instructions on comparative negligence. The jury returned a verdict in Plaintiffs’ favor and against G & L, awarding Plaintiff Pedro Terrazas $1,130,821.92, Plaintiff Filigonio Garcia $1,562,428.49, and $10,000 each to Plaintiffs Socorro Terrazas and Augustina Garcia. Applying Texas subrogation law, the district court awarded Texas Mutual $69,375.70 from the damage award in favor of Pedro Terrazas and $69,375.70 from the damage award in favor of Filigonio Garcia.

DISCUSSION


11 The initial step in conflicts analysis is characterization: deciding the area of substantive law—e.g., torts, contracts, domestic relations—to which the law of the forum assigns a particular claim or issue. Ratzlaff v. Seven Bar Flying Serv., Inc., 98 N.M. 159, 162, 646 P.2d 586, 589 (Ct. App. 1982) (observing that “[u]nder a traditional conflict of law approach, we must first determine under what area of law the dispute arises”); Eugene F. Scales et al., Conflict of Laws § 3.2 (3d ed. 2000). The forum applies its own rules in characterizing an issue for conflicts analysis. Restatement of the Law of Conflict of Laws § 7(a) (1934) (hereafter First Restatement); Joseph M. Cormack, Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle, 14 S. Cal. L. Rev. 221, 224 (1941) (observing that “the forum is to perform the process of characterization in accordance with its own views—that is, the forum will not inquire whether or not the problem is similarly characterized by the jurisdiction to which the forum looks as the result of its own determination of the character of the problem”); see also Robert A. Leflar et al., American Conflicts Law § 87 at 257 (4th ed. 1986).

12 Plaintiffs’ First Amended Complaint clearly relies on a common-law theory of tort liability. The complaint asserts that G & L’s acts or omissions “constituted negligence which negligence was a proximate cause of the injuries to Plaintiffs which is made the basis of this cause of action.” In determining which jurisdiction’s law should apply to a tort action, New Mexico courts follow the doctrine of lex loci delicti comissi—that is, the substantive rights of the parties are governed by the law of the place where the wrong occurred. First Nat’l Bank in Albuquerque v. Benson, 89 N.M. 481, 553 P.2d 1288 (Ct. App. 1976). Here, there is no dispute that the place where the wrong occurred was the job site in Las Cruces, New Mexico. Torres v. State, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995) (observing that the place of the wrong is the location of the last act necessary to complete the injury); First Restatement § 377 n.1 (observing that in determining the place of the wrong, “[t]he question is only where did the force impinge upon [the plaintiff’s] body”). Thus, if the lex loci delicti is the appropriate conflicts rule, New Mexico tort law would determine the rights and liabilities as between Plaintiffs and G & L. Applying New Mexico’s system of pure comparative negligence, G & L would be liable only for the percentage of Plaintiffs’ damages attributable to G & L’s negligence.

13 Plaintiffs and Texas Mutual argue that once Texas Mutual was allowed to intervene in order to enforce its statutory subrogation rights, the character of this lawsuit changed from a personal injury law-
suit governed by New Mexico tort law into a workers’ compensation dispute governed by Texas law. We are not persuaded that the facts of this case justify a departure from binding Supreme Court precedent endorsing the *lex loci delicti* rule. The foundation of this lawsuit is New Mexico tort law. Plaintiffs’ affirmative right of recovery exists solely by virtue of the common law of New Mexico; it in no way depends upon Texas workers’ compensation law. Texas Mutual’s right to subrogation is “entirely derivative” of Plaintiffs’ right to recover damages. *Guillot v. Hix*, 838 S.W.2d 230, 232 (Tex. 1992); see *Amica Mut. Ins. Co. v. Maloney*, 120 N.M. 523, 528, 903 P.2d 834, 839 (1995) (observing that “in insurance subrogation cases . . . there is but one cause of action for the entire recovery, including the subrogated amount, and that cause of action lies in the name of the insured”).

{14} We recognize that this case has significant connections with Texas. Our Supreme Court has not adopted the “most significant relationship” approach of the Restatement (Second) of Conflict of Laws §§ 6, 145 (1971) (hereinafter Second Restatement). *In re Estate of Gilmore*, 1997-NMCA-103, ¶ 20, 124 N.M. 119, 946 P.2d 1130 (discussing Second Restatement; observing that our Supreme Court “has not embraced” the Second Restatement approach to choice-of-law in either tort or contract). New Mexico’s traditional *lex loci delicti* approach does not require—indeed, does not permit—a case-by-case policy analysis. Leflar et al., supra, §§ 86-87 (discussing the theory underlying the First Restatement, vested rights approach to choice-of-law). New Mexico courts have steadfastly applied the *lex loci delicti* rule in tort cases even when the connection between the lawsuit and New Mexico was largely fortuitous. E.g., *Benson*, 89 N.M. at 481, 553 P.2d at 1288 (applying New Mexico law to a wrongful death action arising out of an airplane crash in New Mexico in which all of the plaintiff’s decedents were Missouri residents and the accident occurred as the plane was flying from Las Vegas, Nevada, to Missouri); *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 7, 132 N.M. 696, 54 P.3d 537 (applying New Mexico tort law to a single car accident in New Mexico involving non-residents passing through New Mexico on route from California to Georgia). The case for applying New Mexico tort law is far stronger here than in either *Benson* or *Ballard*. G & L is a New Mexico corporation. G & L, Alamo, and Plaintiffs were purposefully present at a New Mexico construction site performing work that is licensed and regulated by the State of New Mexico. NMSA 1978, §§ 60-13-1 to -59 (1967, as amended through 2005).

{15} We hold that for choice-of-law purposes, G & L’s right to assert comparative fault as a defense to a common-law negligence action brought by a plaintiff-worker is properly characterized as an issue of tort law, not workers’ compensation law. Texas Mutual’s intervention in this lawsuit to assert its derivative subrogation rights did not alter the character of the underlying common-law negligence action. Applying the established *lex loci delicti* choice-of-law rule, we hold that the substantive tort law of New Mexico governs G & L’s right to assert the defense of comparative negligence.

{16} Plaintiffs argue that it is unfair to apply New Mexico tort law to reduce their recovery in proportion to the percentage of negligence attributable to Alamo, yet require Plaintiffs to reimburse Texas Mutual under Texas workers’ compensation law, which does not correspondingly reduce Texas Mutual’s subrogation interest in proportion to the percentage of comparative negligence attributable to Alamo. We recognize the possibility that, on remand, the net amount of Plaintiffs’ recovery could be significantly reduced by a jury finding that Alamo was at fault, and yet, under Texas law, Texas Mutual would be entitled to recover its full subrogation interest with respect to each of Plaintiffs’ recoveries. The fairer outcome would have resulted if G & L were entitled to assert comparative fault at every appropriate juncture and that G & L vigorously opposed Plaintiffs’ and Texas Mutual’s efforts to displace New Mexico tort law with Texas workers’ compensation law. G & L did not invoke the district court’s error in excluding the defense of comparative negligence. Second, Plaintiffs argue that the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, requires New Mexico courts to apply Texas workers’ compensation law rather than New Mexico tort law. This argument is entirely without merit. *Carroll v. Lanza*, 349 U.S. 408, 411-12 (1955); *Scoles et al.*, supra, § 3.24 at 158; *Leflar et al.*, supra, § 163 at 464-65.

**CONCLUSION**

{18} We affirm the judgment to the extent it fixes the total amount of Plaintiffs’ damages and the amount of Texas Mutual’s subrogation interest with respect to each Plaintiff; we reverse and remand for a new trial in which principles of comparative negligence are to be applied in determining the liability of those persons whose negligence is determined to have caused Plaintiffs’ injuries.

{19} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

**WE CONCUR:**

MICHAEL D. BUSTAMANTE,  
Chief Judge  
LYNN PICKARD, Judge

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1 As compared with New Mexico law, Texas law in effect at the time this lawsuit was brought was significantly less favorable to a third-party tortfeasor sued by an injured employee. In particular, Texas law did not reduce the damages awarded against a third-party tortfeasor by the portion of damages attributable to the employer’s negligence. *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 752 (Tex. 1993) (discussing *Varela v. Am. Petrofina Co.*, 658 S.W.2d 561 (Tex. 1983)).
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Legal Secretary
Send resume and references to: MCML, P.A., 420 Central, SW, Suite 200, Albuquerque, New Mexico 87102; or fax: 242-8227.

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.

Uptown Square Office Building

Taos County
Job Title: County Attorney
Salary: Salary $72,000.00. This is an exempt (Unclassified) position.
Definition: Performs managerial and professional duties as required to carry out the efficient and effective litigation of civil or criminal cases and the ongoing legal processes of County government. Serves as the lead County legal advisor in all civil and criminal matters
Minimum Qualifications:
Education and Experience:
A. A Juris Doctorate degree from an accredited college or university; plus other advanced training in business management, or public administration; AND
B. Eight (8) years of progressively responsible legal experience in public government; two (2) years of which must have been in a managerial capacity; OR
C. An equivalent combination of education and experience.
Knowledge, Skills, and Abilities:
Must possess a license to practice law in the State of New Mexico. TAOS COUNTY IS AN EQUAL OPPORTUNITY EMPLOYER.
The last day to apply for this position is Friday, October 13, 2006 at 5:00 p.m.
The job announcement gives only a brief description of the position. A complete job description can be obtained at the Taos County Administration Office, 105 Albright Street, Suite A, Taos NM 87571 or by calling (505)737-6309, www.taoscounty.org.

Trust Assistant
Small but rapidly growing trust operation is seeking talented and ambitious Trust Assistant to work in all phases of client administration, operations, and new business development. Ideal candidate will also be comfortable dealing with clients, prospects, and referral sources coming from a wide and varied cross section of the State. Also prefers candidates having experience reading and interpreting trusts, wills, and related documents. Relevant experience might include work in a trust department, investment advisory firm, insurance agency, or law office. Opportunity to advance as operation continues to grow. Send resume with salary requirements to: Trust, P.O. Box 1048, Albuquerque, NM 87103.

Environmental Attorney
Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 5-7 years experience in environmental law. Prefer New Mexico practitioner with strong academic credentials and broad environmental law background. Firm offers excellent benefit package. Salary commensurate with experience. Please send resume, references, law school transcript and a writing sample to Deborah E. Mann, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential

Paralegal
Peifer, Hanson & Mullins, P.A. is seeking an experienced commercial litigation paralegal. The successful candidate must be detail-oriented team player with strong organization skills and writing ability. Experience in database and document management preferred. Salary DOE. Profit-sharing, health insurance, paid leave time and overtime available. Please send resume, references and salary requirements to Robyn Rohr, Firm Administrator, P.O. Box 25245, Albuquerque, NM 87125.

Legal Secretary-Operational
The New Mexico Department of Transportation General Counsel’s office seeks a Legal Secretary-Operational to work in its Santa Fe office. This position reports to the Office Administrator and will perform receptionist, administrative and legal secretarial duties for the office as needed. Must be proficient with computer programs such as Word and Excel and have the potential to work with the new PeopleSoft program and Case Management. Applicants should have a high school diploma or GED and three years legal secretarial experience. Must have a valid NM driver’s license. Salary range is $9.80 to $17.41 per hour, with all State benefits to apply. Apply to the State Personnel Office: http://www.state.nm.us/spo by the closing date of October 20, 2006.

Attorney
NM Children Youth & Families Department is looking for a self-starter, energetic attorney to work with our team in the Office of General Counsel in Santa Fe. This position will provide legal representation to the Department primarily in employment law matters, personnel discipline cases, employee/union grievances and policy review. This position will have an emphasis in employment law and will have oversight responsibilities for civil rights and tort cases, and other responsibilities as assigned.
Experience: Must have 7 years experience in the practice of law, of which 5 years must have been in handling employment litigation and conducting administrative hearings.
Education Required: Juris Doctor Degree from an accredited law school Applicant must be in good standing and admitted to practice law in the state of New Mexico.
Agency Preference: A strong candidate should be knowledgeable and skilled in administrative litigation and should have strong research, analytical and legal writing skills. Two recent legal writing samples will be required along with a letter of interest.
Conditions of Employment: Must possess and maintain a valid NM driver’s license, pre-employment background investigation is required, and some travel is required.
To Apply go to www.state.nm.us/spo/ and click on JOBS. Apply for JOB ID 2790.
The agency contact for this position is: Ida Lujan 505-476-0471.
Attorney
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To Apply go to www.state.nm.us/spo/ and click required, and some travel is required.

Legal Assistant
Legal Assistant w/exp needed for law firm representing numerous, nationwide banking/servicer clients in full range of creditor's rights. Must thrive in a fast paced environment. Great ben include hol, vac, sick leave, health, dental, retire plan & more. Submit in confidence cover letter, resume, sal his & req to: 7430 Washington Street, NE Albuquerque, NM 87109, fax 833-3040, or email admin@littleledanttel.com.

Associate Attorney
Santa Fe Firm has immediate opening for associate attorney with 0-4 years’ experience to practice real estate, commercial, corporate and estate planning law. Strong academic credentials and writing skills are essential. All inquiries kept confidential. Please send resumes to pwhite@rubinkarzlaw.com or mail to Manager, Rubin Karz Law Firm, PO Drawer 250 Santa Fe, NM 87504-0250.

Public Defenders
The Public Defender Department is seeking entry and mid-level attorneys for the Appellate Division in Santa Fe. Competitive salaries; excellent benefits. Please contact John Stapleton at (505) 827-3900, x102, or e-mail at john.stapleton@state.nm.us. The State of New Mexico is an equal opportunity employer.

Santa Fe Paralegal
Experienced Santa Fe Paralegal Small collegial Santa Fe firm needs a bright, energetic, mature, meticulous and experienced (5+ 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. $45,000 DOE (salary plus 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
Northern New Mexico Hospitality/Tourism Company, Taos area: full-time senior-level position, reporting to the General Counsel. 8-10 years experience required with proficiency in Word, Excel, Outlook, and legal document preparation. Join our Winning Team. Competitive pay and comprehensive benefits including amenities. Send cover letter and resume in confidence to cooljobsnm@zianet.com. EOE

Office Space Available
400 Gold SW
Executive suite includes reception, conference rooms, breakroom, copy/fax services, & phone system. Offices starting at $475/month. Suites also available 950SF to 5000 SF, negotiable lease terms and improvements. Covered on-site parking available. Call Daniel 241-3803, daniel@armstrongproperties.net.

Nob Hill Executive Center
Designed for attorneys and all mediators who want a presence in Albq. The office is equipped with state of the art technologies, concierge svc, reception and package handling. Office space & Virtual space available, Rates are daily/weekly. Contact Adrienne 505-314-1300.

Uptown Square Office Building
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 850SF & 1008SF available now and 2806SF available February 1, 2007. Buildouts for larger suite include separate kitchen area, storage and 5 windowed offices. Competitive Rates. Tenant Improvements negotiable. Call Ron Nelson or John Whisenant 883-9662.

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.

3009 Louisiana
Very desirable Uptown location. Executive suite and staff station. Shared conference room, reception area. copier/kitchen. 889-3899.

COnsulting

Forensic Psychiatrist
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, and expert testimony; CV and case listings available upon request. Contact Dr. Kelly at 1-866-317-7959 or by email at forensicpsychiatry@comcast.net

Thousands of Medical Malpractice Expert Witnesses

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 $165 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145.

Executive suite includes reception, conference rooms, breakroom, copy/fax services, & phone system. Offices starting at $475/month. Suites also available 950SF to 5000 SF, negotiable lease terms and improvements. Covered on-site parking available. Call Daniel 241-3803, daniel@armstrongproperties.net.

Albuquerque Offices
Albuquerque offices for rent. 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statues up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

Office Space

Looking for Will
Alice C. Brice, Albuquerque, New Mexico Contact: Margaret Foster 346-9149

mIScellaneous
# 22nd Annual Family Law Institute

**State Bar Center, Albuquerque**  
Friday and Saturday, October 20-21, 2006  
10.0 General and 1.0 Ethics Credits,  
plus 1.0 Professionalism Credit (optional)  
Co-Sponsor: Family Law Section

## Friday, October 20, 2006

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| 8:20 a.m. | **Introductory Remarks**  
*Felissa Garcia Kelley, Esq.,*  
*Garcia Kelley & Kelley Chair,*  
*Family Law Section* |
| 8:30 a.m. | **Divorce Taxation**  
*Melvyn B. Frumkes, Esq., Miami, FL* |
| 10:30 a.m. | Break |
| 10:45 a.m. | **The New Bankruptcy Act and What It Means for DR Lawyers**  
*Hon. Dee McGarity, WI* |
| 12:30 p.m. | Lunch (provided at the State Bar Center) |
| 1:30 p.m. | **Division of Military Retirement Benefits in Divorce**  
*Marshal S. Willick, Esq., Las Vegas, NV* |
| 3:30 p.m. | Break |
| 3:45 p.m. | **Panel Discussion**  
*Hon. Nan Nash,*  
*Second Judicial District Court*  
*Hon. Raymond Z. Ortiz,*  
*First Judicial District Court*  
*Hon. James T. Martin,*  
*Third Judicial District Court*  
*Hon. Violet C. Otero,*  
*Thirteenth Judicial District Court* |
| 5:00 p.m. | Adjourn and Reception (State Bar Center)  
*Reception Hosts: Walther Family Law Firm, Atkinson & Kelsey, Little & Gilman-Tepper* |

## Saturday, October 21, 2006

<table>
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| 8:20 a.m. | **Introductory Remarks**  
*Felissa Garcia Kelley, Esq.,*  
*Garcia Kelley & Kelley Chair,*  
*Family Law Section* |
| 8:30 a.m. | **Collaborative Law Overview**  
*Gretchen Walther, Esq.* |
| 9:30 a.m. | **Ethics Utilizing the Bounds of Advocacy for the American Academy of Matrimonial Lawyers (1.0 E)**  
*David Walther, Esq.* |
| 10:45 a.m. | **Computer Tools for Family Law Attorneys**  
*Stephen J. Harhai, Esq., Denver, CO* |
| 12:30 p.m. | Lunch (provided at the State Bar Center) |
| 1:00 p.m. | **Professionalism Video Replay (optional) (1.0 P)**  
*Adjourn* |

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**REGISTRATION – 22nd Annual Family Law Institute**  
Friday and Saturday, October 20-21, 2006 • State Bar Center, Albuquerque  
10.0 General, 1.0 Ethics CLE Credits and 1.0 Professional (optional)  
☐ Standard Fee - $309  |  ☐ Family Law Section Members, Government, Paralegal - $289

Name: ________________________________  
NM Bar#: ____________________________

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