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2007 License and Dues
- The 2007 License and Dues forms have been mailed.
- License and dues fees are due on or before Feb. 1, 2007.
- Members who have not received the form by the end of December should notify the State Bar, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, fees are due regardless of whether members receive a form.
- Late fees may be assessed if payment is not postmarked by Feb. 1, 2007.

Special Insert:
CLE at Sea 2007
Alaska Cruise July 27–Aug. 3
Book by Jan. 30 for Best Rate

www.nmbar.org
Law School
Courses Open to Lawyers for CLE Credit Spring 2007!

Mexican Criminal Law, Professors William MacPherson and Tim Cornish. Tuesday and Thursday, 6:00–7:15pm (January 11 to April 24, 2007). 35 General CLE credits.

The course is designed to assist the practitioner or future lawyer to be prepared to advise a client as to the basic nature of Mexican criminal procedure and the justice system, and to assist in the preparation of a defense, evaluate the advice and strategy of local Mexican counsel, assist clients in avoiding potential pitfalls when doing business in or living in Mexico, assist in selection of counsel and provide general advice in Mexican criminal matters.

For prosecutors the course offers an overview of institutional settings, who is who in the Mexican criminal justice system, how to secure cooperation in investigations and the basics of foreign prosecutions as versus extradition. We will also consider the available options in securing the return of U.S. Citizens charged with a crime, prisoner exchange and the like.

The following areas will be the principal focus of the course: Historical development of the two criminal systems and the major historical differences. Definitions of criminal conduct in Mexico and the USA. Concepts of guilt and innocence in Mexico with a comparison to the USA concept. Defenses in criminal prosecution in Mexico. Theories of punishment and sentencing in Mexico with a comparison to USA sentencing. An examination of the criminal process in Mexico with a comparison to the USA criminal process. The future impact of oral trials in Mexico. Extradition and the return of USA citizens accused of crimes. Article Four prosecutions in Mexico. The International Criminal Court.

To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu
Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend NOT FOR CLE and pay $5.00 per session. For information about the Access to Justice Network visit http://lawschool.unm.edu/clinic/resources/access/index.php or call Associate Dean Antoinette Sedillo Lopez: (505) 277-5265.

Non-members may take the course for $30.00 per CLE credit. Non-members may take the course NOT FOR CLE and pay $10.00 per session or $100.00 per unlimited sessions.

Fees are paid in advance and are not refundable.
Get the Best of Both Worlds!
New! Free On-Line Access to all One Source of Law® DVD/CD-ROM Subscribers!

New Mexico One Source of Law® DVD and On-Line Contents:

- Official New Mexico Statutes Annotated, 1978™ including prior statute histories. Versions from 1989 to present including Annotations, Authority and Affected Notes, cross references, tables and index.
- NMSA, 1978™ includes fully linked access to helpful research tables as: Tables of Disposition of Laws; Tables of Corresponding Code Sections; Tables of Abbreviations; Table of Adjournment; Perpetual Calendar; Morality Tables; Annuity Tables; Interest Tables — Thousands of links added to get you what you want, when you need it.
- New Mexico Session Laws from the 1993 Regular Session to present
- New Mexico Supreme Court Decisions, Jan. 1852 to present
- New Mexico Court of Appeals Decisions, Nov. 1966 to present
- New Mexico Attorney General Opinions, 1909 to present
- New Mexico Administrative Code
- New Mexico Judicial Decisions
- New Mexico Federal Judicial Decisions
- New Mexico Federal Rules
- U.S. 10th Circuit Judicial Decisions
- New Mexico Resources Journal and New Mexico Law Review
- Expanded Coverage for U.S. Supreme Court Cases
- Over 800 Forms in Word, Wordperfect and PDF formats

State agency and local public body subscribers to New Mexico One Source of Law™ will automatically receive updates to the One Source of Law CD-ROM or the One Source of Law DVD. If you are not a current subscriber and would like to be, please contact the New Mexico Compilation Commission at 505-827-4821.
New Mexico
Lesbian & Gay
Lawyers Association

Join the only organization representing LGBT legal professionals in New Mexico.

Our Purpose:

• We promote and protect the interests of lesbian, gay, bisexual and transgender lawyers and to achieve their full participation in all rights, privileges and benefits of the legal profession.

• We promote the efficient administration of justice and the constant improvement of the law, especially as it relates to lesbians, gay men, bisexual and transgender individuals.

• We advocate the selection of qualified lesbians, gay men, bisexuals and transgender individuals to the bench and other positions relative to the administration of the law and justice.

• We promote and advocate the representation and participation of lesbians, gay men and bisexuals in their efforts to establish a career in the legal profession.

• We educate the public and disseminate information on issues related to lesbians’, gay men’s, bisexuals’ and transgender individuals’ participation in the legal and judicial system.

Become a member or renew your membership in the New Mexico Lesbian and Gay Lawyers Association by checking the appropriate box in Section 8 (“Voluntary Bars”) of your State Bar of New Mexico 2007 Dues/Licensing Form. You can also join online at www.nmbar.org. Click on “Shop/Register” from the menu at top, then select from the menu on the left side “Voluntary Bar Association Membership,” and then click on New Mexico Lesbian & Gay Lawyers Association.

For more information contact:
Michael Hely
Senior Citizens’ Law Office
4317 Lead Avenue SE, Suite A
Albuquerque, New Mexico 87108
Telephone: (505) 265-2300
email: mikehely@yahoo.com
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Professionalism Tip

With respect to other judges:
In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

Meetings

January

8  Attorney Support Group, 5:30 p.m., First United Methodist Church
10  Children’s Law Section Board of Directors, 11:30 a.m., State Bar Center
11  Public Law Section Board of Directors noon, Risk Management Division
11  Business Law Section Board of Directors 4 p.m., State Bar Center
11  Technology Committee Workshop 5 p.m., State Bar Center
12  Historical Committee noon, State Bar Center
13  Ethics Advisory Committee 10 a.m., State Bar Center

State Bar Workshops

January

10  Common Legal Issues Affecting Senior Citizens, 10:30 a.m., Las Cruces Munson Senior Center, Las Cruces
11  Common Legal Issues Affecting Senior Citizens, 10:30 a.m., Hatch Senior Center, Hatch
25  Nursing Home Issues, 1:15 p.m., Meadowlark Senior Center, Rio Rancho

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.

Cover Artist: Russ Ball is known for his exquisite drawings and paintings of birds and dalmatians in oil and pastel. He also paints large and surreal acrylic and oil paintings of harlequins on tightropes and dreamlike “horsewomen” riding the range. Ball painted the official poster of the 2006 Albuquerque Balloon Fiesta. His work is shown at the Weems Galleries in Albuquerque and the Joe Wilcox Gallery in Sedona, Arizona. Ball is well known in Albuquerque for his illustrations in the Albuquerque Journal, where he has worked for the past 27 years.
NOTICES

N.M. Supreme Court Law Library
Open 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; Web site: www.supremecourtlawlibrary.com.

Swearing-In Ceremony for New Chief Justice
The Honorable Edward L. Chávez will be sworn-in as Chief Justice of the New Mexico Supreme Court at 3:30 p.m., Jan. 10. The ceremony will be held in the Supreme Court courtroom with a reception following in the law library atrium. Members of the State Bar are cordially invited.

First Judicial District Court
Destruction of Exhibits
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 1975 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 Jan. 26. Attorneys who may have cases with exhibits may 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 plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Bernalillo County Metropolitan Court Swearing-In Ceremony
The Honorable Rachel Al-Yasi will be sworn-in at the Bernalillo County Metropolitan Court at 4 p.m., Jan. 11, in the Ceremonial Courtroom on the 9th floor of the courthouse. Metropolitan Court Judge Theresa Gomez will preside over the oath-taking. Judge Al-Yasi will be assigned to Criminal Division 17 and will serve in courtroom 340. A reception for the new judge will take place following the investiture ceremonies in the courthouse rotunda.

U.S. District Court for the District of New Mexico Replacement of the Initial Pretrial Report (IPTR)
At U.S. District Court, the Initial Pretrial Report in all civil cases is being replaced by a Joint Status Report and Provisional Discovery Plan (JSR). The Court will soon be ordering JSRs, rather than Initial Pretrial Reports, in all civil cases. For more information, including the JSR form, visit the Court’s Web site at www.nmcd.uscourts.gov.

STATE BAR NEWS
Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 8, 2007, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stravert, (505) 242-6845.

Birthday Celebration
The State Bar of New Mexico will celebrate its 121st birthday at 4:30 p.m., Jan. 18, in the lobby of the State Bar Center. The State Bar will be honoring the oldest and youngest active members, as well as the longest practicing male and female lawyers.

The oldest practicing member is Thomas P. Foy, Sr., 92, in private practice in Bayard, N.M. Foy started practice when he was 18, in the lobby of the State Bar Center in 1946. His daughter, Sue Jollensten, is an attorney at Albuquerque; his daughter, Celia Foy Castillo, is a N.M. Court of Appeals judge in Santa Fe; and his son Jim is in practice in Silver City.

The youngest practicing attorney is Amber Lee Creel, newly admitted to the State Bar and on the staff of the Rodey Law Firm. She is the first in her family to practice law but worked for Beall & Biehler for six summers.

The youngest practicing attorney is Lynnell G. Skarda of Clovis, who began his law career in 1941. Lynn Allan, the longest practicing female, began practice in 1964.

Supreme Court justices, chief judges, State Bar commissioners and the dean of the UNM School of Law have been invited. All members of the legal profession and their guests are also invited to this celebration. R.S.V.P. to (505) 797-6000.

Casemaker Online Legal Research Training in Silver City
Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials, as well as access to 25 other state libraries. Trainings on how to use Casemaker will be held from 5:30-6:30 p.m. on Jan. 17 and from 9 to 10 a.m. on Jan. 18 in Silver City. The training will be conducted in the Grant County Administration Building, Commissioner’s Meeting Room, 1400 Highway 180 East, Silver City. Seating is limited. To reserve a space, call (505) 797-6000. The training is approved for 1.0 CLE general credit.

Children’s Law Section Annual Meeting
The Children’s Law Section will hold its annual meeting from 3 to 3:30 p.m., Jan. 11, in the Santa Fe Room at the Marriott Pyramid, Albuquerque, during the 2007 New Mexico Children’s Law Institute. Agenda items should be sent to 2007 Chair Rebecca Liggett, rebecca@state.nm.us or (505) 476-5476.

Paralegal Division Annual Meeting
Make plans now to attend the Paralegal Division’s Annual Meeting at 11:30 a.m., Jan. 20, at the State Bar Center in Albuquerque. The meeting will be held in conjunction with a CLE co-sponsored by the State Bar and the Paralegal Division. R.S.V.P. to Tricia Bain, (505) 988-5922 ext. 101, toll free (800) 950-5922 ext. 101 or tricia.bain@tpl.org.

Watch for more information regarding the Road and Access Law CLE to be presented after the annual meeting from 1:30 to 4:45 p.m.

Following the CLE, there will be a New Year’s Celebration at Garduño’s at Winrock Mall (2100 Louisiana Blvd NE) including appetizers provided by the division, no-host bar and mingling from 5:30–6:30 p.m., dinner ($19.00 person, cash or check to the Paralegal Division) and socializing from 6:30–8:30 p.m.
Monthly Brown-Bag CLE for Attorneys and Paralegals

The Paralegal Division invites members of the legal community to bring a lunch and attend Medical Confidentiality and Privacy Concerns During Investigation and Discovery, presented by Emily Franke, Butt, Thornton & Baehr PC. The program will be held from noon to 1 p.m., Jan. 10, at the State Bar Center and offers 1.0 ethics CLE credit. Registration begins at the door at 11:30 a.m. and costs $16 for attorneys and $15 for paralegals, legal assistants and secretaries. For more information, contact Cheryl Passalaqua at Butt, Thornton & Baehr, P.C., (505) 884-0777.

Technology Committee Free Workshops

Microsoft Windows Vista—Changes and Legal Implications, 5 to 6 p.m., Jan. 11, State Bar Center: Participants will learn about Microsoft Windows Vista’s new features and the changes that impact firms, their users and their clients. Content will touch on interface changes, security enhancements, built-in encryption options and search features. Make reservations by Jan. 9.

Microsoft Office 2007—Changes and Legal Implications, 5 to 6 p.m., Jan. 25, State Bar Center: Participants will learn about Microsoft Office 2007’s new features and the changes that impact firms, their users and their clients. Content will touch on interface changes (also known as the “Office Ribbon”) collaboration tools, built-in metadata control tools, changes to MS Outlook and integration with MS Exchange server 2007. Make reservations by Jan. 23.

Reservations for both workshops should be made to Mary Patrick, CLE program coordinator, mpatrick@nmbar.org, or (505) 797-6059. Workshops are limited to 11 attendees. Paralegals, attorneys and support staff are invited to attend. CLE credit will not be provided.

OTHER BARS

N.M. Women’s Bar Association Annual Membership Meeting and Networking Lunch

The next annual membership meeting and networking luncheon of the New Mexico Women’s Bar Association will be held from noon to 1:30 p.m., Jan. 10, at NYPD Pizza, 215 Central Avenue, NW, Albuquerque. The new officers will be introduced at this luncheon. Lunch is ordered off the restaurant menu with payment made directly to NYPD Pizza. Register with Patricia Baca at pjb@sutinf rm.com. The luncheons are open to all interested persons.

UNM 2007 Children’s Law Institute

The 2007 New Mexico Children’s Law Institute will be held Jan. 10–12 at the Marriott Pyramid North in Albuquerque. The conference is co-sponsored by the Supreme Court’s Court Improvement Project; the Judicial Education and Children’s Law Centers at the UNM Institute of Public Law; the Children, Youth and Families Department and the New Mexico CASA Network. The conference is intended for judges, attorneys, volunteer advocates, social workers, juvenile probation officers, educators and others who work with children and families. Attorneys usually earn as many as 12.0 CLE credits at this annual event. Save the dates and contact Judy Flynn-O’Brien, (505) 277-1050 or jafob@unm.edu, with any questions.

School of Medicine Institute for Ethics ELM Forum

The UNM School of Medicine Institute for Ethics will present an Ethics, Law and Medicine (ELM) Forum on Mental Health Decision Making from noon to 1:30 p.m., Jan. 19, at the Basic Medical Sciences Building Lecture Hall, room 203, which is located on the UNM North Campus near the Hospital.

Presentations and discussion are planned on the topic of the new N.M. Advanced Directives for Mental Health Care Treatment Decisions Act, the proposed “Kendra’s Law” as well as the N.M. Mental Health Code and how it is impacted by the new law and the proposed law/ordinance. This session is the first scheduled for 2007 in a series of monthly meetings on timely topics in Ethics, Law and Medicine. The ELM Forum is dedicated to the education of consumers and health care providers regarding the some of today’s ethical, legal and medical issues. Past attendees have included patients, students (medical, legal, nursing, allied health), residents, faculty and staff, and professionals of lawyers and doctors. The forum is also open to the community, and all who are interested are encouraged to attend.

For more information, call Melanie Foster, (505) 272-4635, Barbara Mathis, (505) 837-1900. or e-mail ethics@salud.unm.edu.

Health Care Ethics Program

UNM’s School of Medicine is continuing its interdisciplinary Health Care Ethics Certificate Program. Space is limited and will be filled on a first-come/first-served basis.

The first session focuses on basic ethical, legal and cultural issues in health care and begins Saturday Feb. 3, and will continue Tuesdays from 4:30–6:30 p.m.

The second session, which tackles more advanced topics, will begin Feb. 1, 2007 and be held from 4:30–6:30 p.m. every other Thursday. Tuition is $800 for each module. Call (505) 272-4635 for more information and to register.

This program is open to both professionals (lawyers, doctors, nurses, and social workers) as well as non-professionals and those in the community who are interested in learning more about today’s ethical issues.
### January

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<td>Access to Justice Programs Overview</td>
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### February

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## Writs of Certiorari

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

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

**Effective January 8, 2007**

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

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<th>Case Numbers</th>
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<tr>
<td>NO. 30,166</td>
<td>Bankers Trust v. Baca (COA 26,010)</td>
<td>12/22/06</td>
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<td>NO. 30,165</td>
<td>Ferrell v. Allstate Insurance Company (COA 26,058)</td>
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<td>State v. Gonzales (COA 26,011)</td>
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<td>Bird v. Hartford Insurance Company (COA 25,707)</td>
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<td>New Mexico Indirect Purchasers v. Microsoft (COA 25,789)</td>
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<td>State v. Arrequin (COA 26,647)</td>
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### Certiorari Granted but Not Yet Submitted to the Court:

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## Writs of Certiorari

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### Certiorari Granted and Submitted to the Court:

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

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### Petition for Writ of Certiorari Denied:

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OPINIONS
AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925
EFFECTIVE DECEMBER 25, 2006

PUBLISHED OPINIONS

No. 26196 1st Jud Dist Santa Fe JQ-99-32, CYFD v BROWIND C (affirm) 12/22/2006

UNPUBLISHED OPINIONS

No. 25881 2nd Jud Dist Bernalillo CR-03-3981, STATE v D LOPEZ (affirm) 12/18/2006
No. 25965 1st Jud Dist Rio Arriba JQ-03-8, CYFD v FRANCES G (affirm) 12/18/2006
No. 26622 2nd Jud Dist Bernalillo LR-05-94, STATE v K ESQUIBEL (reverse and remand) 12/18/2006
No. 26793 9th Jud Dist Curry CV-06-21, M ARMIJO v D BURDINE (affirm) 12/19/2006
No. 26875 11th Jud Dist San Juan LR-06-17, STATE v P JOE (affirm) 12/19/2006
No. 26910 1st Jud Dist Santa Fe DV-06-291, A SMART v R TRIMMER (affirm) 12/19/2006
No. 25353 3rd Jud Dist Dona Ana CR-03-1128, STATE v R REYES (affirm and reverse) 12/22/2006
No. 25825 5th Jud Dist Lea DM-03-563, A CARTER v O OSBORN (reverse) 12/22/2006

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

#### Clerk’s Certificate of Admission

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Phone Numbers</th>
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<tr>
<td>Anne Maxfield</td>
<td>Office of the District Attorney</td>
<td>(505) 827-5000</td>
</tr>
<tr>
<td></td>
<td>PO Box 2041, Santa Fe, NM 87504-2041</td>
<td>(505) 827-5076 (telecopier)</td>
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#### Clerk’s Certificate of Change to Inactive Status

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<tr>
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<tr>
<td>John J. Britt</td>
<td>5851 Holmberg Rd., #916 Parkland, FL 33067</td>
<td>(505) 400-8003</td>
</tr>
<tr>
<td>John P. Eastham</td>
<td>2201 San Pedro, NE, Bldg. 2, #207 Albuquerque, NM 87110</td>
<td>(505) 837-1900</td>
</tr>
<tr>
<td>Lorette M. Enochs</td>
<td>7809 Wagon Mound Ct., NW Albuquerque, NM 87120</td>
<td>(505) 922-1466</td>
</tr>
<tr>
<td>Janine Renee Friede</td>
<td>11100 Double Eagle Dr., NE Albuquerque, NM 87111</td>
<td>(505) 292-5333</td>
</tr>
<tr>
<td>Beverly Sorensen Ohline</td>
<td>39 Opoho Rd., #4D Dunedin, New Zealand 9001</td>
<td>011-6421-129-5572</td>
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State Bar of New Mexico
4th Annual CLE at Sea Northbound Alaska

July 27 – August 3, 2007
Aboard Royal Caribbean Radiance of the Seas*

Departure Port:
Vancouver, British Columbia

Ports of Call:
- Ketchikan, Alaska
- Juneau, Alaska
- Skagway, Alaska
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PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

The Metropolitan Court Rules Committee is considering whether to recommend proposed amendments to the Rules of Criminal Procedure for the Metropolitan Courts for the Supreme Court’s consideration. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, please send your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received by the Clerk on or before January 29, 2007 to be considered by the Court.

7-504. Discovery; cases within metropolitan court trial jurisdiction.

A. Disclosure by [state] prosecution. [Not less than ten (10) days before trial] Unless a different period of time is ordered by the trial court, within fifteen (15) days after arraignment or the date of filing of a waiver of arraignment, the prosecution shall disclose and make available to the defendant for inspection, copying and photographing any records, papers, documents and [recorded] statements made by witnesses or other tangible evidence in its possession, custody and control [which] that are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant. Such disclosure shall include a written list of the names and addresses of all witnesses whom the prosecution intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the prosecution. In cases involving charges of domestic violence, the prosecution may use the District Attorney’s Office as the address for the alleged victim.

B. Disclosure by defendant. [Not less than ten (10) days before trial] Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of filing of a waiver of arraignment, the defendant shall disclose and make available to the prosecution, copying and photographing any records, papers, documents and statements made by witnesses or other tangible evidence in [the defendant’s] possession, custody [or] and control of defendant which [the defendant intends to introduce in evidence at the trial] are intended for use by the defendant at trial.

C. Witness disclosure. Not less than ten (10) days before trial, the prosecution and defendant shall exchange a list of the names and addresses of the witnesses each intends to call at the trial. Upon request of a party, any witness named on the witness list shall be made available for interview prior to trial. Pre-trial interviews by statement or deposition.

(1) Statements. If requested by either party, any person, other than the defendant, with information that is subject to discovery, shall give a statement. A party may obtain the statement by serving a written notice of statement upon the person to be examined and upon the other party not less than five (5) days before the date scheduled for the statement. The party requesting the statement must make reasonable efforts to confer in good faith with opposing counsel and the person to be examined regarding scheduling of a statement before serving a notice of statement. A subpoena, signed by the judge assigned to the case, may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. A subpoena will only be issued upon a showing that the party requesting the subpoena made good faith efforts to procure the appearance of the witness without the need for a subpoena. Either party may record the statement.

(2) Depositions. A deposition may be taken pursuant to this rule upon:
   (a) agreement of the parties; or
   (b) order of the court, upon a showing that the deposition is necessary to avoid injustice.

D. [Failure to complete interviews. In all cases in which the metropolitan court is a court of record, if a witness interview has not been conducted by the date of trial and the witness is in the court or immediately available, then the court shall order the interview to be conducted at that time and proceed to trial, or, if prejudice can be demonstrated by the party conducting the interview, the court shall continue the trial to the earliest practicable date. The court may also issue an order holding an attorney or party in contempt of court.] Scope of discovery. Unless otherwise limited by order of the court, the parties may obtain discovery regarding any matter, not privileged, that is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

E. Time and place of statement or deposition. Unless agreed to by the parties, any statement or deposition allowed under this rule shall be conducted at such time and place as ordered by the court.

F. Deadline for statement or deposition. Absent the prior approval of the assigned trial judge, a statement or deposition may not be scheduled more than seventy-five (75) days after arraignment or the filing of a waiver of arraignment. If a party needs an extension of time, the party must obtain court approval prior to the expiration of the seventy-five (75) day period. Failure to comply with this rule shall be deemed a waiver of the right to take a statement or deposition.

G. Continuing duty to disclose. If a party discovers additional material or witnesses [which] that the party previously would have been under a duty to disclose and make available at the time of such previous compliance if it were then known to the party, the party shall promptly give notice to the other party...
of the existence of the additional material or witnesses.

[F] Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney or party or witness in contempt of court and subject to disciplinary action.

[G] Statement defined. As used in this rule, “statement” means:

1. A written statement made by a person and signed or otherwise adopted or approved by such person;
2. Any mechanical, electrical or other recording, or a transcription thereof, which is a recital of an oral statement; and
3. Stenographic or written statements or notes which are in substance recitals of an oral statement.

[H] Applicability. This rule applies only to cases within metropolitan court trial jurisdiction.

7-606. Subpoena.
A. Form; issuance.
   1. Every subpoena shall:
      a) state the name of the court from which it is issued;
      b) state the title of the action and action number;
      c) command each person to whom it is directed to attend a trial, hearing, statement or deposition and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person;
      d) state the time and date of the hearing, trial, statement or deposition, the name of the judge before whom the witness is to appear or produce documents; and
      e) be substantially in the form approved by the Supreme Court.

   2. All subpoenas shall issue from the court in which the matter is pending.

   3. In matters involving trial, hearings or production of documents or tangible things, the judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. The judge or clerk may issue a subpoena ducès tecum to a party only if the subpoena ducès tecum is completed by the party prior to issuance by the judge or clerk. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

   4. In matters involving statements or depositions, no subpoena to appear to give a statement or deposition shall be valid unless signed by the trial judge.

   5. Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. Service.
   1. A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person’s attendance is commanded:
      a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;
      b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day’s expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day’s expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is served on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. When the subpoena is issued on behalf of the defendant in a criminal action and when the person whose attendance is commanded is an officer or agent of the state or any agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 7-209 NMRA;
   2. Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

C. Protection of persons subject to subpoenas.
   1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.
   2. a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things need not appear in person at the hearing or trial.
      b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.
(3) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:
   (i) fails to allow reasonable time for compliance,
   (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
   (iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:
   (i) requires disclosure of a trade secret or other confidential research, development or commercial information,
   (ii) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party, or
   (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

E. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court and punishable by fine or imprisonment.
Certiorari Denied, No. 30,085, November 27, 2006
Certiorari Granted, No. 30,127, December 14, 2006

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-152

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
MICHAEL J. ARMENDARIZ,
Defendant-Appellant.
No. 24,448 (filed: October 11, 2006)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
SYLVIA CANO-GARCIA, District Judge

PATRICIA A. MADRID
Assistant Attorney General

PATRICIA GANDERT
Assistant Appellate Defender
Santa Fe, New Mexico

JOHN BIGELOW
Chief Public Defender
VICKI W. ZELLE
Assistant Appellate Defender
Santa Fe, New Mexico

for Appellee

for Appellant

OPINION
JAMES J. WECHSLER, Judge

{1} Defendant appeals his convictions for
one count of false imprisonment, one count
of aggravated burglary, and two counts of
criminal sexual penetration in the second
degree (CSP II). Defendant argues that his
convictions for false imprisonment and
aggravated burglary violate the prohibition
against double jeopardy because they are
based on unitary conduct and are subsumed
within his CSP II convictions. Defendant
also argues that his convictions for two
counts of CSP II violate double jeopardy
because there was only one continuous
course of conduct. Finally, Defendant ar-
gues that he was denied a fair trial based on
the prosecutor’s improper comments.

{2} We reverse in part and affirm in part.
Because Defendant’s convictions for
aggravated burglary and false imprison-
ment violate his constitutional right to be
free from double jeopardy, we vacate those
convictions. We affirm Defendant’s convic-
tions for two counts of CSP II.

BACKGROUND

{3} Victim testified as follows. She was
asleep in her bedroom and woke up when
someone jumped on top of her. The as-
sailant, whom Victim later identified as
Defendant, told her to perform oral sex
and Defendant’s penis touched her lips.
Defendant also penetrated Victim’s vagina
with his penis. After Defendant ejaculated
he let Victim go, at which time she ran to
the bathroom and locked the door. She
rinsed herself off, eventually came out,
and saw Defendant still sitting on her bed.
While Victim was screaming at and chas-
ing Defendant out of her home, she asked
him how he entered. Defendant indicated
that he entered her residence through the
kitchen window.

DOUBLE JEOPARDY

{4} Defendant argues that his convictions
for aggravated burglary and false imprison-
ment violate the prohibition against
double jeopardy. Defendant also argues
that his convictions for two counts of CSP
II are impermissible on double jeopardy
grounds. We review Defendant’s double
jeopardy claim de novo. See State v. Mora,
2003-NMCA-072, ¶ 16, 133 N.M. 746, 69
P.3d 256. We “indulge in all presumptions
in favor of the verdict” when reviewing
the facts. See State v. McClendon, 2001-
NMSC-023, ¶ 5, 130 N.M. 551, 28 P.3d
1092 (internal quotation marks and citation
omitted).

{5} The protection against double jeop-
ardy “protects against both successive
prosecutions and multiple punishments
for the same offense.” State v. Mora,
1997-NMSC-060, ¶ 64, 124 N.M. 346,
950 P.2d 789; U.S. Const. amend. V;
N.M. Const. art. II, § 15 (stating that no
person shall “be twice put in jeopardy for
the same offense”). The double jeopardy
prohibition against multiple punishments
relates to two general categories: (1) “unit
of prosecution,” which prohibits charging
a defendant with “multiple violations of
a single statute based on a single course
of conduct” and (2) “double-description,”
which prohibits charging a defendant with
“violations of multiple statutes for the same
conduct” in violation of the legislature’s
intent. State v. DeGraff, 2006-NMSC-011,
¶ 25, 139 N.M. 211, 131 P.3d 61; see also
Swafford v. State, 112 N.M. 3, 8, 810 P.2d
1223, 1228 (1991). Defendant’s arguments
that his CSP II, false imprisonment, and
aggravated burglary convictions are based
on the same conduct raise double-description
issues. Defendant’s argument that his
convictions for two counts of CSP II are
based on a single course of conduct raises
a unit of prosecution issue.

DOUBLE DESCRIPTION

{6} We address double jeopardy claims
involving double description under the
two-part analysis set forth in Swafford,
112 N.M. at 13-14, 810 P.2d at 1233-34.
First, we determine whether the conduct is
unitary. Id. If the conduct is non-unitary,
multiple punishments do not violate the
Double Jeopardy Clause, and our analysis
ends. Id. at 14, 810 P.2d at 1234. Second,
if the conduct can reasonably be said to be
unitary, we address “whether the legislature
intended multiple punishments.” Id. If the
legislature intended multiple punishments,
there is no double jeopardy violation even
though the conduct for the offenses is
unitary. Id.

{7} The issue of whether conduct is unitary
under the first part of a Swafford analysis
requires a careful review of the evidence.
As recognized in State v. Cooper, 1997-
NMSC-058, ¶ 59, 124 N.M. 277, 949
P.2d 660, “unitary conduct” is more easily
defined by what it is not. Conduct is non-
unitary if sufficient “indicia of distinctness”
separate the illegal acts. Id. Such indicia of
distinctness are present when “two events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred).” Swafford, 112 N.M. at 13-14, 810 P.2d at 1233-34. But if time and space considerations are not determinative, “resort must be had to the quality and nature of the acts or to the objects and results involved.” Id. There are sufficient indicia of distinctness when one crime is completed before another. DeGraff, 2006-NMSC-011, ¶ 27. There are also sufficient indicia of distinctness when the conviction is supported by at least two distinct acts or forces, one which completes the first crime and another which is used in conjunction with the subsequent crime. Id. In both situations, the key inquiry is whether the same force was used to commit both crimes. See id. ¶ 30.

[8] If the conduct underlying two offenses is unitary, we engage in the second part of the Swafford analysis to determine whether the legislature intended multiple punishments for the same conduct. Absent any express legislative authorization of multiple punishments for the crimes at issue, we eschew legislative intent by applying the test from Blockburger v. United States, 284 U.S. 299, 304 (1932). Under this test, we ask “whether each provision requires proof of a fact which the other does not.” id. at 304, and, if not, “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.” Swafford, 112 N.M. at 14, 810 P.2d 1234. If each statute requires proof of a fact that the other does not, we presume that the legislature intended multiple punishments. Id. That presumption can, however, be rebutted by other evidence of legislative intent. Id.

AGGRAVATED BURGLARY AND CSP II

[9] Defendant argues that his conduct was unitary because there were insufficient indicia of distinctness differentiating the acts underlying his aggravated burglary conviction from those underlying his CSP II convictions. He argues that his aggravated burglary was not completed until he committed battery against Victim, and that he only committed one battery, which was the same force used to perpetrate the CSP II. The State argues that the acts were not unitary because the aggravated burglary was completed “at the time that Defendant grabbed the victim,” whereas the CSP II was not completed until moments later. We agree with Defendant.

[10] In the present case, no indicia of distinctness between the aggravated burglary and the CSP II acts are present. Defendant was charged with aggravated burglary, which required that he “touched or applied force to [Victim] in a rude or angry manner.” The force used to complete aggravated burglary—Defendant’s acts of lying on top of Victim, grabbing Victim by her hair and flipping her over—constituted the same force used to restrain Victim to accomplish CSP II. See State v. Crain, 1997-NMCA-101, ¶ 17, 124 N.M. 84, 946 P.2d 1095 (holding that conduct constituting CSP II and kidnapping was unitary because the defendant was charged with both offenses based on “the use of force during the same act of sexual intercourse”). No intervening struggle interrupted the two events. See Cooper, 1997-NMSC-058, ¶¶ 61-62 (finding non-unitary conduct when a struggle “was an intervening event between the initial battery and the acts that caused the death”). Defendant did not attack Victim with multiple weapons. See State v. Foster, 1999-NMSC-007, ¶¶ 18, 34, 126 N.M. 646, 974 P.2d 140 (finding conduct to be non-unitary when the defendant used a glass ashtray to hit the victim and an extension cord to strangle her to death). There was no change in location. See State v. Kersey, 120 N.M. 517, 523, 903 P.2d 828, 834 (1995) (finding non-unitary conduct when the victim was killed “more than two hours [after], [and] nearly sixty miles distant from the abduction”). Finally, Defendant’s intent in lying on top of Victim and flipping her over—the last act of his aggravated burglary—was to commit CSP II. See State v. Barrera, 2001-NMSC-014, ¶ 36, 130 N.M. 227, 22 P.3d 1177 (finding non-unitary conduct because the defendant “approached the victim with the intent to steal the truck, but . . . he shot the victim to silence her”). The conduct underlying Defendant’s convictions for CSP II and aggravated burglary was therefore unitary.

[11] We must next determine the legislature’s intent. The statutes do not expressly allow multiple punishments. See NMSA 1978, § 30-9-11 (2001) (amended 2003); NMSA 1978, § 30-16-4 (1963). We therefore apply the Blockburger test, determining whether each statute requires proof of a fact that the other does not. Blockburger, 284 U.S. at 304. We conclude that aggravated burglary is subsumed within CSP II when, as here, conviction for CSP II requires proof that Defendant had sexual contact with Victim “during the commission of aggravated burglary.” Our result is dictated by DeGraff, 2006-NMSC-011, ¶ 26, in which our Supreme Court recognized that, because “[t]here can be no conviction for killing in the course of a felony without proof of all of the elements of the felony,” “the predicate felony is subsumed within the offense of felony murder, and cannot support a separate conviction.” See also State v. Piso, 119 N.M. 252, 262, 889 P.2d 860, 870 (Cl. App. 1994) (“[T]he constitutional protection against double jeopardy precludes multiple punishment for both the greater offense of CSP II, felony, and the aggravating factor, kidnapping, when the conduct is unitary.”). Because aggravated burglary is subsumed within CSP II, Defendant’s convictions for both aggravated burglary and CSP II impose a greater punishment than that intended by the legislature. We therefore vacate Defendant’s aggravated burglary conviction.

FALSE IMPRISONMENT AND CSP II

[12] Defendant also argues that the court erred in failing to vacate his false imprisonment conviction. We again engage in a Swafford analysis, addressing first whether the conduct was unitary and, if so, examining whether the legislature intended multiple punishments for the unitary conduct.

[13] Victim awakened when Defendant was on top of her. While verbally assaulting Victim, Defendant restrained Victim and both orally and vaginally penetrated Victim with his penis. Upon completion of the sexual conduct, Defendant released Victim, thus simultaneously completing both the false imprisonment and the CSP II. The same force used to effect false imprisonment was used to commit CSP II. The conduct was therefore unitary. See State v. Allen, 2000-NMSC-002, ¶ 67, 128 N.M. 482, 994 P.2d 728 (noting that conduct would not be unitary if “the perpetrator forcibly abducted the victim before attempting sexual penetration or continued to use force or restraint after the sex act was completed”).

[14] Because we have concluded that the conduct underlying Defendant’s convictions for CSP II and false imprisonment was unitary, we must determine whether the legislature intended multiple punishments for false imprisonment and CSP II. The statutes at issue in this case do not expressly provide for multiple punishment. See § 30-9-11; NMSA 1978, § 30-4-3 (1963). We must therefore apply the Blockburger test and compare the elements of the relevant statutes to determine whether the legislature intended multiple
punishments. See Swafford, 112 N.M. at 14, 810 P.2d at 1234.
{15} “When applying the Blockburger test to . . . offenses that may be charged in alternate ways, we look only to the elements of the statutes as charged to the jury and disregard the inapplicable statutory elements.” See State v. Armitio, 2005-NMCA-010, ¶ 22, 136 N.M. 723, 104 P.3d 1114. Defendant’s convictions for CSP II require that the jury find that Defendant caused Victim to engage in sexual conduct during the commission of an aggravated burglary. See § 30-9-11(D)(5). Because commission of aggravated burglary is an element of CSP II, we also consider the charged elements of aggravated burglary in our Blockburger analysis: that Defendant “entered a dwelling without authorization;” that Defendant did so “with the intent to commit a criminal sexual penetration or false imprisonment once inside;” and that Defendant “toched or applied force to [Victim] in a rude or angry manner while entering or leaving, or while inside.” See § 30-16-4(C). Defendant’s conviction for false imprisonment requires that Defendant “restrained or confined [Victim] against her will” when he “knew that he had no authority” to do so. See § 30-4-3.

{16} Defendant’s conviction for false imprisonment is not subsumed within his CSP II convictions because each required proof of a fact that the other did not. On the one hand, Defendant’s CSP II convictions required proof of sexual conduct perpetrated in the commission of aggravated burglary. Defendant’s false imprisonment conviction did not. On the other hand, Defendant’s false imprisonment conviction required that Defendant restrained Victim against her will when he knew that he had no authority to do so. While Defendant’s CSP II convictions required proof that Defendant “knew or should have known that permission to enter [Victim’s apartment] had been denied,” they do not require proof of Defendant’s knowledge that he had no authority to restrain Victim. Because false imprisonment and CSP II each requires proof of a fact that the other does not, a presumption arises that the legislature intended multiple punishments. Swafford, 112 N.M. at 8, 14, 810 P.2d at 1228, 1234.

{17} But this presumption is not conclusive and may be overcome by other indicia of legislative intent, such as a strong similarity in the social evils to be proscribed or a significant difference in the quantum of punishment allowed. Id. at 14-15, 810 P.2d at 1234-35. We also consider whether the statutes are usually violated together. State v. Gonzales, 113 N.M. 221, 225, 824 P.2d 1023, 1027 (1992). As to the social evils proscribed, “[t]he CSP statute is designed to prevent unwanted sexual violence while the false imprisonment statute is designed to prevent unlawful restraint of any sort.” State v. Fielder, 2005-NMCA-108, ¶ 31, 138 N.M. 244, 118 P.3d 752, cert. granted, 2005-NMCERT-008, 138 N.M. 330, 119 P.3d 1267, and cert. quashed, 2006-NMCERT-004, 139 N.M. 430, 134 P.3d 121. Based on this factor, the statutes may be viewed as amenable to multiple punishments. However, the differing quantum of punishments for the respective crimes suggests otherwise. Defendant’s convictions for CSP II are punishable by nine-year sentences, see NMSA 1978, § 31-18-15 (A)(2) (1993) (amended 2005), whereas eighteen months could have been imposed for false imprisonment. See § 31-18-5(A)(4); Swafford, 112 N.M. at 15, 810 P.2d at 1235 (“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.”). One additional factor persuades us that the legislature did not intend to authorize punishments for both false imprisonment and CSP II arising out of the same conduct. As we have recognized, CSP II and false imprisonment are offenses that, as a practical matter, are committed together. See Crain, 1997-NMCA-101, ¶¶ 21-22 (noting that force or restraint is “necessarily involved in every sexual penetration without consent”); see also Fielder, 2005-NMCA-113, ¶¶ 31-33 (finding that, although restraint is “necessarily” committed with CSP, the legislature nonetheless intended to authorize multiple punishments for CSP III and false imprisonment because the social evils are different and the quantum of punishment is similar). As a result, because commission of CSP II usually, if not always, involves commission of false imprisonment, but is punishable by a significantly greater sentence, we hold that the legislature did not intend multiple punishments for false imprisonment and CSP II in this case.

{18} We lastly note that, contrary to Defendant’s representation, we do not agree that the prosecutor conceded that the false imprisonment conviction violated double jeopardy principles. A review of the transcript shows that the parties disputed the application of double jeopardy. Because the district court apparently believed that double jeopardy issues may be resolved by concurrent sentencing, the district court declined to rule on Defendant’s argument. A sentencing merger, however, fails to correct a double jeopardy violation. See Mora, 2003-NMCA-072, ¶ 27 (holding that a double jeopardy violation was not rendered harmless by concurrent sentencing). We vacate Defendant’s conviction for false imprisonment.

UNIT OF PROSECUTION
{19} Defendant argues that his two convictions for CSP II violate the double jeopardy prohibition against “unit of prosecution” multiple punishments. Herron v. State, 111 N.M. 357, 361, 805 P.2d 624, 628 (1991), sets forth six factors for addressing whether distinct criminal sexual penetrations have occurred during a continuous attack:

1) temporal proximity of penetrations (the greater the interval between acts the greater the likelihood of separate offenses); (2) location of the victim during each penetration (movement or repositioning of the victim between penetrations tends to show separate offenses); (3) existence of an intervening event; (4) sequencing of penetrations (serial penetrations of different orifices, as opposed to repeated penetrations of the same orifice, tend to establish separate offenses); (5) defendant’s intent as evidenced by his conduct and utterances; and (6) number of victims (. . . multiple victims will likely give rise to multiple offenses).

We need not consider all of the Herron factors because Herron also states that “[e]xcept for penetrations of separate orifices with the same object, none of these factors alone is a panacea, but collectively they will assist in guiding future prosecutions.” Id. at 362, 805 P.2d at 629. Because Defendant’s penis penetrated Victim’s mouth and vagina, the evidence supports the conclusion that the CSP II offenses were separate and distinct. Defendant’s convictions for two counts of CSP II therefore do not violate his right to be free from double jeopardy.

PROSECUTORIAL MISCONDUCT
{20} Defendant argues that he was denied a fair trial based on the prosecutor’s improper comments. Specifically, Defendant refers to the prosecutor’s voir dire characterization of the events as “crimes,” “burglary,” and an “unauthorized entry . . . into the victim’s home.” Defendant further characterizes as
prosecutorial misconduct the prosecutor’s reference to Defendant as “a rapist,” as well as the prosecutor’s statement that “what you’re going to hear about in this case is that there was sexual intercourse forced to the victim.” Defendant also generally asserts that the prosecutor “was allowed to instruct the venire on the law.” Defendant lastly argues, without any reference to the transcript, that the prosecution during closing argument improperly referred to Defendant as “a rapist and a burglar.”

{21} We review Defendant’s claims of prosecutorial misconduct under an abuse of discretion standard. See State v. Jett, 111 N.M. 309, 314, 805 P.2d 78, 83 (1991); see also State v. Trujillo, 2002-NMSC-005, ¶ 49, 131 N.M. 709, 42 P.3d 814 (noting that the “trial court is in the best position to evaluate the significance of any alleged prosecutorial errors”) (internal quotation marks and citation omitted). In addressing Defendant’s arguments, we consider “whether the prosecutor’s improprieties had such a persuasive and prejudicial effect on the jury’s verdict that the defendant was deprived of a fair trial.” See State v. Duffy, 1998-NMSC-014, ¶ 46, 126 N.M. 132, 967 P.2d 807.

{22} Regarding the prosecutor’s voir dire comments, we agree with the State that the prosecutor’s reference to burglary, unauthorized entry, and “forced intercourse” was not inappropriate as these identified the charged crimes. Similarly, the prosecutor’s references to terms used in the jury instructions did not instruct the jurors on the law, but instead were made in the context of exploring potential jurors’ attitudes about the sensitive subject of the CSP II crimes and therefore were not unfairly prejudicial. Further, although any reference by the prosecutor to Defendant as a “rapist” and “burglar” was arguably inappropriate, such reference does not merit reversal without a clear demonstration of prejudice. See State v. Martinez, 99 N.M. 353, 355-56, 658 P.2d 428, 430-31 (1983) (recognizing that the prosecutor’s characterization of the defendant as a “chola punk” was inappropriate but finding that any prejudice that might have resulted was adequately cured by instructions to the jury to disregard it); State v. Chavez, 116 N.M. 807, 815, 867 P.2d 1189, 1197 (Ct. App. 1993) (finding no misconduct in the prosecutor’s characterization of the defendant as “a ‘loose cannon,’ a ‘macho tough guy,’ and a ‘very, very dangerous’ person” because it “could arguably be justified” by the evidence); State v. Diaz, 100 N.M. 210, 214-15, 668 P.2d 326, 330-31 (Ct. App. 1983) (noting that extensive use of “vituperative language” by the prosecutor, such as references to the defendant as “a ‘yo yo’, as ‘stupid’, as a ‘thief’, and as a ‘crook’” inflamed the jury and, in combination with other misconduct, warranted reversal); State v. Vigil, 86 N.M. 388, 392, 524 P.2d 1004, 1008 (Ct. App. 1974) (finding that, in light of evidence that the defendant had been convicted of petty theft and other crimes, the prosecutor’s characterization of the defendant as a “punk” was “a comment on the evidence not amounting to reversible error”).

{23} Unlike State v. Breit, 1996-NMSC-067, ¶ 45, 122 N.M. 655, 930 P.2d 792, in which the prosecutor’s misconduct was “unrelenting and pervasive” and included inflaming the jury with irrelevant allegations, exaggerating claims without evidentiary support, belittling the defendant’s fundamental right to remain silent, and suggesting that opposing counsel were lying, the comments in the present case were isolated and of little, if any, impact. See State v. Boergadine, 2005-NMCA-028, ¶ 31, 137 N.M. 92, 107 P.3d 532 (holding that comments constituting an “isolated, minor impropriety” did not deprive the defendant of a fair trial) (internal quotation marks and citation omitted); State v. Taylor, 104 N.M. 88, 96, 617 P.2d 64, 72 (Ct. App. 1986) (noting that isolated comments were not so pervasive or prejudicial as to deprive the defendant of a fair trial).

{24} As for the prosecutor’s comments during closing argument, Defendant made no objections to these comments. See State v. Tafoya, 94 N.M. 762, 764, 617 P.2d 151, 153 (1980) (refusing to review an allegedly improper prosecutorial statement when defendant made no timely objection). Although this Court will review, in the absence of an objection—“certain categories of prosecutorial misconduct that compromise a defendant’s right to a fair trial”—such as comments on a defendant’s right to silence—any reference to Defendant as a “rapist” or “burglar” does not fall within these categories. Allen, 2000-NMSC-002, ¶ 27.

CONCLUSION

{25} We affirm Defendant’s convictions for two counts of CSP II. We reverse and remand to vacate Defendant’s convictions for false imprisonment and aggravated burglary, with instructions that Defendant be resentenced consistent with this opinion.

{26} IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE,
Chief Judge
CYNTHIA A. FRY, Judge
Opinion

James J. Wechsler, Judge

1 This case is an election contest of the Town of Edgewood mayorality election in 2004. The canvassing board certified that Contestee Robert Stearley won by one vote. He was awarded the certificate of election. Contestant Howard Calkins timely contested the election. The Town of Edgewood intervened as a party. After trial, the district court determined that three Stearley voters and two Calkins voters were ineligible to vote because they did not reside within the Town of Edgewood. The district court also determined that a voter whose name did not appear on the voter registration list and who voted on a “required challenge” ballot for Calkins did not cast a vote that should be counted, and further, that a voter who entered the voting machine but did not activate the indicator to cast a vote should not have her vote counted for Stearley, for whom she testified she voted. The district court, therefore, concluded that the election resulted in a tie vote, necessitating a decision by impartial lot under NMSA 1978, § 3-8-60 (1985).

2 The issues on appeal are framed by Stearley’s appeal and Calkins’ cross-appeal. Stearley argues that Calkins could not challenge the legality of non-resident voters in an election contest in district court unless he first exercised a challenge before or during the election. He also argues that the vote of the voter who did not activate the vote cast indicator, Dorothy Brown, should be counted. Calkins argues that the vote of the voter who voted by required challenge ballot, Madelyn Hastings, should be counted. Neither contends that the non-resident voters were qualified to vote. Because all issues raised are matters of statutory interpretation, we afford them de novo review, after considering factual findings for substantial evidence. See Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960. We hold that the Municipal Election Code, NMSA 1978, § 3-8-64 (1985), permits a candidate to challenge the legality of voters in district court without challenge prior to or during the election. We additionally hold that the district court properly addressed the votes at issue. We affirm the judgment of the district court.

TIMING OF CHALLENGES

3 Election statutes provide various means to challenge the legality of a registered voter. Under NMSA 1978, § 1-4-22(A) (1995), the secretary of state, county chairs of major political parties, and twenty county voters may petition prior to an election to cancel the voter registration of persons improperly registered. Under NMSA 1978, § 3-8-31(A)(1) (1999), candidates may appoint challengers for polling places in a municipal election. These challengers, as well as election officials, may challenge the qualifications of a voter at the polls or the reading of absentee ballots. NMSA 1978, § 3-8-43(A) (2003); NMSA 1978, § 3-9-15 (1999). If a challenge at the polls is affirmed by election judges in a municipal election, the vote of the challenged voter is collected in a sealed envelope with the voter’s name and labeled as rejected. Section 3-8-43(B)(1)(c).

4 This case poses the question of whether these statutes are the exclusive means to challenge a non-resident voter in a municipal election. The question raises the tension between efficiency and finality on the one hand and completeness in the purity of the electorate on the other.

5 Both sides of this question stake claim to the high ground. In arguing exclusivity, Stearley states that prohibiting post-election challenges eliminates the desire for political advantage from the challenge process, thereby protecting the fairness of the process and the purity of the election. He further states that requiring candidates to exercise the statutory challenge procedures and limiting post-election challenges to discrepancies that could not be reasonably discovered before or during the election promotes the interest of the electorate in finality without unduly burdening the process with post-election disputes concerning voter qualifications. The procedure Stearley promotes is described in the context of a collective bargaining election under the National Labor Relations Act in NLRB v. A.J. Tower Co., 329 U.S. 324 (1946). One of the commonest protective devices is to require that challenges to the eligibility of voters be made prior to the actual casting of ballots, so that all uncontested votes are given absolute finality. In political elections, this device often involves registration lists which are closed some time prior to election day; all challenges as to registrants must be made during the intervening period or at the polls. Thereafter it is too late. The fact that cutting off the right to challenge conceivably may result in the counting of some ineligible votes is thought to be far outweighed by the dangers attendant upon the allowance of indiscriminate challenges after the election. To permit such challenges, it is said, would invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory claims by defeated candidates and keep perpetually before the courts.

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-153

HOWARD CALKINS,
Contestant-Appellee/Cross-Appellant,

versus

ROBERT STEARLEY,
Contestee-Appellant/Cross-Appellee.

No. 25,790 (filed: November 7, 2006)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

JAMES A. HALL, District Judge

DENNIS K. WALLIN
THE LAW OFFICES OF
DENNIS K. WALLIN, P.C.
Moriarty, New Mexico
for Appellee/Cross-Appellant

ROBERT E. TANGORA
ROBERT E. TANGORA, L.L.C.
Santa Fe, New Mexico
for Appellant/Cross-Appellee

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the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.

Id. at 331-32 (internal quotation marks and citation omitted).

{6} The opposite position pursues the purity of the election by continuing the purging process through post-election review. With such a goal, every opportunity is afforded to purge unqualified voters in order to give full effect to the will of the majority of qualified voters. See Kiehne v. Atwood, 93 N.M. 657, 661-62, 604 P.2d 123, 127-28 (1979). This policy, by extending the process, more fully embraces completeness at the expense of efficiency. The policy proposed by Stearley embraces finality, to some extent sacrificing completeness, but, as argued by Stearley, removes the motives necessarily contained in a post-election challenge to change the victor in the process.

{7} Stearley brought this contest under Section 3-8-64(A), which addresses an election contest in a municipal election. See also NMSA 1978, § 1-14-4 (1969) (addressing election contests in non-municipal elections). Section 3-8-64(A) provides:

Judgment shall be rendered in favor of the person legally qualified to take office for whom a plurality of the legal votes shall be proven to have been cast in accordance with 3-8-32 NMSA 1978, and shall be to the effect that the person is entitled to the possession of the contested office and for the emoluments belonging thereto and for his costs. If the contestant prevails, then that person shall have judgment placing the contestant in possession of the contested office and for the emoluments thereof from the beginning of the term for which the contestant was elected and for costs.

{8} We have previously discussed Section 3-8-64(A) in Darr v. Village of Tularosa, 1998-NMCA-104, 125 N.M. 394, 962 P.2d 640. In that case, also a municipal election contest, there were irregularities in the election process involving non-resident voters and voters who received absentee ballots but voted in person. Id. ¶¶ 3, 5. The district court rejected the results of the election based on NMSA 1978, § 3-8-67 (1985), which permits such a result if election officials fail to substantially comply with their responsibilities under the Municipal Election Code. Darr, 1998-NMCA-104, ¶ 6. We held that the district court erred because, despite the “impurity” of the process, the district court could have determined the “lawful winner” of the election by identifying the persons who voted unlawfully and, through the testimony of those persons or other circumstantial evidence, excluding their votes. Id. ¶¶ 13-16, 18. Through Section 3-8-64(A), we avoided disenfranchising the lawful voters and accomplished “the essential principle of the elective system . . . that the will of the majority of the qualified voters shall determine the right to an elective office.” Darr, 1998-NMCA-104, ¶ 17 (alterations in original omitted) (internal quotation marks and citation omitted).

{9} We note that, in Darr, we mentioned the exclusivity of the statutory means of challenging unqualified voters in passing. Id. ¶ 4. The district court had stated that it ordinarily would have considered the failure to challenge on the election day as a waiver, but would not because of confusion concerning voter eligibility caused by statements of officials. Id. Apparently, this issue was not raised in the case because we did not otherwise discuss it. Id. We nevertheless held that the district court could have entertained the challenges as part of a Section 3-8-64(A) analysis. Darr, 1998-NMCA-104, ¶ 20. We believe that Darr counsels that such an analysis is not improper in appropriate circumstances, in the effort, under Section 3-8-64(A), to determine the lawful winner in a municipal election contest. We do not believe that the circumstances of this case, in which the electorate is discrete and the number of challenges is small, justifies a different result.

{10} Stearley relies on A.J. Tower Co., in which the United States Supreme Court upheld the NLRB’s policy prohibiting post-election challenges on an abuse-of-discretion standard. A.J. Tower Co., 329 U.S. at 332-33. A.J. Tower Co. involved a collective bargaining election under the National Labor Relations Act, and the election was conducted in accordance with an agreement between the union and the respondent, which provided for challenges of the voters’ eligibility before or at the time of voting. Id. at 325-26. The agreement designated a director to investigate and report on challenges. Id. at 326. The respondent challenged a voter’s eligibility four days after the election on the ground that she was not an employee and therefore was ineligible to vote. Id. at 327. In the closed setting of an NLRB election, after setting forth the above-quoted policy statements, the Supreme Court upheld the denial of the challenge based on the NLRB’s general rule that a ballot cannot be challenged after it “has been cast without challenge and its identity has been lost.” Id. at 332.

{11} Significantly, one case upon which Stearley principally relies was decided on the basis of insufficient ballot identity. In Opinion of the Justices, 371 A.2d 616 (Me. 1977), the Maine Supreme Court, addressing the timing of a challenge to absentee ballots, held that the challenge had to be made before the ballots are counted because “once the envelopes and [the] applications [for the absentee ballots] are separated from the ballots” a subsequent challenge must “be limited to facial defects in the ballots, or irregularities common to whole classes of identifiable ballots.” Id. at 621. But with a court’s ability to examine the vote of an ineligible voter, the loss of the identity of the vote, or the loss of the connection between a vote and a challenged voter, is of diminished import. The significant fact is the identity of the ineligible voter, because the voter can testify about the vote cast.

{12} The last case upon which Stearley relies, Veuleman v. O’Con, 417 So. 2d 131 (La. Ct. App. 1982), was based on a Louisiana statute that expressly provided the proposition that Stearley proposes—that an irregularity in the conduct of an election that could have been raised by challenge or objection at the polls with exercise of due diligence was waived. Id. at 133. New Mexico’s Municipal Election Code has no such provision. Although reading the statutory challenge provisions to be exclusive as Stearley argues would reduce post-election conflict and streamline the process to achieve finality, Section 3-8-64(A) allows the district court to determine the lawful winner of a municipal election. The only time limitation is found in NMSA 1978, § 3-8-63(C) (1999), which requires that the “complaint shall be filed no later than thirty days from issuance of the certificate of election . . . or thirty days after completion of canvassing for elections.”

{13} In view of Section 3-8-64(A) and the ability of the district court to inquire into the votes illegally cast by ineligible voters, we do not construe the Municipal Election Code to include such a limiting provision without a clearer statement of legislative intent to the contrary. See, e.g., Cal. First Bank v. State, 111 N.M. 64, 75, 801 P.2d 646, 657 (1990) (refusing to adopt
a construction of a statute that would be contrary to public policy "[a]bsent some clear indication of a contrary legislative intent"). We thus conclude that our legislature has allowed the challenges under Section 3-8-64(A) in this case through post-election challenges to the qualifications of voters, even though such challenges may impair the efficiency of the process.

VOTE OF DOROTHY BROWN

{14} Dorothy Brown, who is elderly, entered the voting booth with her daughter, Lois Fols, for physical assistance. Both were eligible voters, signed the signature roster, and were given voting slips by precinct officials. They only cast one vote between them and left the polling place. Precinct officials noted that only one vote was cast. Both Fols and Brown testified at trial that they voted for Stearley. The district court found that Fols cast her vote and that Brown intended to cast her vote for Stearley, but failed to activate the cast vote indicator.

{15} Stearley contends that Brown’s vote should be counted. Citing Kiehne, he contends that nothing in the Municipal Election Code expressly prohibits counting it and election laws should be construed to give effect to the will of the electorate. One of the issues in Kiehne involved the legality of voters by absentee ballot who knew when they applied for an absentee ballot that they would be present in the county on election day. Kiehne, 93 N.M. at 663, 604 P.2d at 129. Our Supreme Court determined that it should not adopt a policy that prohibited all such votes because there was no provision in the election law expressly addressing the situation that voided an absentee ballot if the voter casts the ballot and then is present in the county for the election. Id. at 664-66, 604 P.2d at 130-32.

{16} There is, however, a statutory provision that expressly addresses Brown’s situation, obviating any need for us to entertain any presumption in construing the election laws. NMSA 1978, § 1-9-4.2(A) (2003), provides:

A vote on a touch-screen direct recording electronic voting system or electronic voting system consists of a voter’s selection of a candidate or answer to a ballot question selected by the electro-optical ballot display of the device, followed by the voter activating the cast vote indicator. Because a vote on a machine such as that used in this election requires by definition “the voter activating the cast vote indicator,” we conclude, as did the district court, that Brown did not cast a legal vote. Id.

{17} In light of Section 1-9-4.2(A), Stearley contends that the precinct board nevertheless has the responsibility to correct “an imperfect vote” as cast by Brown. By virtue of NMSA 1978, § 3-8-55(A)(2), (3) (1999), a municipal precinct board must meet after an election and “make the necessary corrections or supply omissions . . . if it appears . . . that there is a discrepancy within the election returns” or “a discrepancy between the number of votes set forth in the certificate for all candidates and the number of electors voting as shown [on] the election returns.” Indeed, such a discrepancy existed. The election returns include “the certificate showing the total number of votes cast for each candidate, . . . signature rosters, registered voter lists, [and] machine printed returns.” NMSA 1978, § 3-8-2(B)(6) (2003).

{18} Precinct officials noted on the signature roster that Brown did not cast a vote and further noted that the election returns include an extra signature because Fols and Brown voted at the same time. The election returns did not provide a basis to correct the discrepancy. The question then becomes whether the precinct board’s responsibility included contacting Brown to determine if she did not intend to vote, and, if she did, to obtain her vote. We think not. The precinct board reviews the election returns and has the statutory mandate to make corrections or supply omissions that appear from the election returns. Section 3-8-55(A). Section 3-8-55(A) does not provide authority to investigate discrepancies outside the election process or to extend the voting process to clarify votes. To be sure, our electoral system makes every effort to uphold the secrecy and fairness of the ballot. See, e.g., N.M. Const. art. VII, § 1 (“The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise.”); NMSA 1978, § 1-14-13 (1969) (providing that the votes of a precinct shall be rejected when “the secrecy and sanctity of the ballot” was not protected); NMSA 1978, § 3-8-1(B) (1995) (listing the purposes of the Municipal Election Code); Rule 11-507 NMRA (recognizing the privilege of a legal voter to refuse to disclose the person’s vote); Kiehne, 93 N.M. at 660, 604 P.2d at 126 (“The sanctity of a New Mexican’s ballot is undoubtedly one of his most cherished and jealously-guarded rights.”); State ex rel. Read v. Crist, 25 N.M. 175, 200, 179 P. 629, 637 (1919) (noting the overwhelming importance of “the secrecy and purity and security of elections”); Darr, 1998-NMCA-104, ¶ 14 (stating that “the secrecy of the ballot is in most respects sacrosanct in this country”).

{19} The notations on the election returns explained to the precinct board the reason for the discrepancy. A qualified voter has the right to enter the voting machine and decide to not cast a vote. The precinct board’s inquiry after the election would allow such a voter to change such a decision. We do not believe that the legislature contemplated such action. Rather, Section 1-9-4.2(A) controls by defining a vote to exclude circumstances in which the vote is not activated. Brown had the responsibility to properly cast her vote. The district court correctly ruled that Brown did not vote.

VOTE OF MADELYN HASTINGS

{20} Madelyn Hastings has lived in the Town of Edgewood since 1994 and was a registered voter. She resides at 22 Sanford Road with her husband, Charles Nilson, and son. Hastings went to the polling place on election day, attempting to vote. Precinct workers informed her that she was not listed on the signature roster. Her husband’s name was listed. Precinct workers told her that they would call the county clerk to verify her registration. She left the polling place to run errands. When she returned thirty to forty-five minutes later, she was told to complete a required challenge ballot, which she did. She voted for Calkins and believed her vote counted.

{21} Apparently, Hastings was not listed on the signature roster because of the address on her voter registration. Approximately two months prior to the election she received a voter registration card from the county clerk that had the address of 2038-B Old U.S. 66, the address used for her residence prior to its incorporation into Santa Fe County. Hastings did not read the new card or check the information on it. The others in her household did not receive new cards, and she assumed the county clerk made a mistake in not issuing them new cards.

{22} Calkins contends in his cross appeal that Hastings’ vote should be counted. He contends that it is not disputed that she was a qualified elector and that she was disenfranchised by the mistakes of the county clerk.

{23} In support, Calkins points to the re-
quired challenge vote of Cheryl Huppertz that was counted by the precinct board. Huppertz’s name did not appear on the signature roster. Her husband’s name also did not appear, but he was issued a certificate of eligibility and voted on the voting machine. When Huppertz was not issued a certificate of eligibility, her husband went to the city clerk’s office to inquire. The city clerk called the county clerk’s office and learned that there had been a mistake and that Huppertz and her husband lived at the same address. The city clerk received a copy of Huppertz’s certificate of eligibility from the county clerk’s office later the same day, the day of the election.

{24} We agree with Calkins that a series of mistakes interfered with Hastings’ vote. The county clerk apparently issued a registration card with the wrong address. When the precinct worker called the county clerk, he was informed that Hastings was not on the roster; the clerk did not issue a certificate of eligibility. However, Hastings also did not review her registration card when she had the opportunity to have the mistake corrected.

{25} As with Brown’s situation, there is a statutory provision that expressly addresses Hastings’ vote. Under NMSA 1978, § 3-8-40(B), (C) (2003), a voter whose name is not on the signature roster may nevertheless be permitted to vote as if the voter’s name were on the roster if the voter meets certain specific requirements, including a certificate of eligibility from the county clerk. When a person whose name is not on the signature roster and who does not meet these specific requirements, including having a certificate of eligibility, seeks to vote, the precinct workers are required to follow the procedure for a required challenge ballot. Section 3-8-43(C). Under these procedures, the person completes a paper ballot, which is placed in an envelope marked “rejected-required challenge” and sealed with the person’s name. Section 3-8-43(C)(5). The statute states without qualification that “the rejected ballot shall then be deposited in the ballot box and shall not be counted.” Id.

{26} Section 3-8-43(C) is mandatory. See Kiehne, 93 N.M. at 664, 604 P.2d at 130 (stating “that only when the Legislature expressly provides that deviation from the prescribed procedure prevents the counting of the vote will the ballot be declared void”). It does not leave room for the canvassing board’s discretion.

{27} Our Supreme Court addressed a similar provision in Crist, 25 N.M. 175, 179 P. 629. Our Supreme Court refused to count “spurious” ballots cast by voters who were qualified to vote and believed that they had cast votes that would be counted. Id. at 178-81, 179 P. at 629-31. A statute mandated that “[b]allots other than those printed by the respective county clerks according to the provisions of this article shall not be cast, counted or canvassed in any election.” Id. at 180, 179 P. at 630 (internal quotation marks and citation omitted). Our Supreme Court held that the ballots could not be counted:

[1]It is probably better that individual voters and candidates should suffer in a given instance than that the doors to fraud and imposition may open and the secrecy and purity and security of elections be destroyed. We feel confident, however, that the practical consensus of opinion is that under a constitutional provision like ours[ —providing] in section 1 of article 7 that “the Legislature shall regulate the manner, time and place of voting” [and that] “[t]he Legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise”—the Legislature has power to provide, as it did provide by the section of the statute heretofore set out, that only official ballots emanating from a proper official source should be cast, counted, or canvassed. That the statute is mandatory and requires us to enforce it without interpolation and without resort to subtle and unsound methods of interpretation in order to save the voter and the candidate from defeat must be admitted by all. It follows that the votes questioned were illegal votes, and could not be cast, counted, or canvassed . . . .

Id. at 199-200, 179 P. at 637. Likewise, in the case of Ms. Hastings, we must conclude that there is no reasonable interpretation of the law that would enable us to count her vote. We therefore agree with the district court that Hastings’ vote could not be counted.

{28} We agree with Calkins that the circumstances of the Huppertz vote are similar. We do not rule on the Huppertz vote because it is not at issue. The Hastings vote is nonetheless different in that Huppertz was issued a certificate of eligibility on election day.

AUTHORITY OF THE DISTRICT COURT

{29} The dissent would hold that Section 3-8-64(A) confers power on the district court to determine the intent of all voters who were qualified to vote and attempted to vote. We do not believe Section 3-8-64(A) goes so far. Rather, Section 3-8-64(A) allows the district court to determine for which candidate a majority of the “legal votes” was cast. A “legal vote” is not, as the dissent claims, an intention to vote by a legal voter. Rather, it is a vote cast in accordance with legislatively-mandated procedures. Black’s Law Dictionary 1607 (8th ed. 2004) (defining “legal vote” as “[a] vote cast in the proper form and manner for an eligible choice by someone entitled to vote”). Because we have concluded that neither Brown nor Hastings cast a legal vote in accordance with the procedure mandated by our legislature, neither of their votes may be counted by the district court in determining the winner of the election.

{30} As the dissent articulates, the right to vote is of paramount importance and statutes should be interpreted to favor voters. Our courts long recognized that “[w]here any reasonable construction of the statute can be found which will avoid [a] wholesale disenfranchisement of qualified electors through no fault of their own], the Courts should and will favor it.” Darr, 1998-NMCA-104, ¶ 17 (internal quotation marks and citation omitted) (second alteration in original); see also, e.g., State ex rel. Walker v. Bridges, 27 N.M. 169, 174, 199 P. 370, 372 (1921) (“If, therefore, the regulations of elections may be reasonably construed to entitle the citizen to vote, it should be done.”); Crist, 25 N.M. at 199, 179 P. at 637 (“The voter should not lightly be deprived of his right, nor should the successful candidate suffer, if by any reasonable interpretation of the laws governing elections it can be prevented.”). The right to vote is nevertheless constrained by the statutes governing voting, and we may not interpret statutes in an unreasonable way to facilitate voting.

CONCLUSION

{31} Because Calkins’ challenge was timely under the Municipal Election Code, and because the district court correctly concluded that the election resulted in a tie vote, we affirm the judgment of the district court.
to vote, they have a constitutional right because it preserves all other rights). Not to vote is regarded as a fundamental right of the citizen ("highest right of the citizen"); P. at 637 (stating that the right to vote is the right of a citizen to vote at public elections."

Valdez v. Herrera, 48 N.M. 45, 54, 145 P.2d 864, 869-70 (1944) (quoting in Darr, 1998-NMCA-104, ¶ 17); see also Wesberry, 376 U.S. at 17 (stating that the constitutional provision requiring the election of members of the U.S. House of Representatives gives citizens qualified to vote a constitutional right to vote and to have their votes counted).

{35} To these ends, the legislature has declared:

It is the purpose of the Municipal Election Code to:

(1) secure the secrecy of the ballot;
(2) secure the purity and integrity of elections;
(3) guard against the abuse of the elective franchise; and
(4) provide for the efficient administration and conduct of elections.

Section 3-8-1(B).

The meaning of the phrase to "guard against the abuse of elective franchise" includes but is not limited to insuring that the right of citizens to cast votes for candidates they favor is not impaired. Recognizing that the constitutional right of citizens to vote for the candidate of their choice (N.M. Const. art. VII, § 1) and the constitutional right of the candidate who receives the highest number of votes to take office (N.M. Const. art. VII, § 5) are intertwined, the legislature enacted Section 3-8-63 in 1985, which permits any unsuccessful candidate for election to a municipal office to contest the election by filing a verified complaint of contest in the district court. In turn, Section 3-8-64(A) directs in pertinent part:

Judgment shall be rendered in favor of the person legally qualified to take office for whom a plurality of the legal votes and shall be proven to have been cast in accordance with [Section 3-8-32], and shall be to the effect that the person is entitled to the office in controversy with all the privileges, powers and emoluments belonging thereto and for his costs.

{37} In the process of construing Section 3-8-64 in Darr, we repeated, "[T]he essential principle of the elective system [is] that the will of the majority of the qualified voters shall determine the right to an elective office." 1998-NMCA-104, ¶ 17 (quoting Kiehne, 93 N.M. at 661, 604 P.2d at 127 (alterations in original)). We also said, "[E]ven if the acts of [election] officers are fraudulent the votes of electors should not be invalidated if it is possible to prevent it." Darr, 1998-NMCA-104, ¶ 17 (quoting Orchard v. Bd. of Comm'rs of Sierra County, 42 N.M. 172, 188, 76 P.2d 41, 51 (1938) (alterations in original)). Likewise, our Supreme Court has expressly stated that New Mexico sides with the preponderance of the states by liberally construing statutes "in favor of the voter." Kiehne, 93 N.M. at 664, 604 P.2d at 130 (citing Bryan v. Barnett, 35 N.M. 207, 292 P. 611 (1930) (holding that absentee voters did not lose their votes even though the applications for ballots were not signed by the voters)).

I therefore conclude that Section 3-8-64(A) is a remedial statute to be liberally construed to ensure that every vote cast by a qualified voter is counted. Under Section 3-8-64(A) the district court must decide two questions after hearing the evidence presented: (1) did a person who was qualified to vote at that particular election at that particular time vote; and (2) who did that person vote for. This is how the district court determines "the legal votes" that were "proven to have been cast" under Section 3-8-64(A). In answering these questions, the district court does not act merely as another canvassing board, and mere technical formality does not govern over substance. I now turn to the specifics of this case.

THE VOTE OF DOROTHY BROWN

The town clerk of Edgewood has been personally involved in about fourteen municipal elections either as municipal clerk or as a poll worker. She explained that in the voting booth a voter can change her mind about her vote at any time until she presses the "cast vote" button. If that button is never pushed, then the next voter to vote on the machine will "cancel[] the other person's vote." The safeguard to insure that two people do not register their votes "on top of one another" is that a precinct worker who is near the machine listens for a "beep" that occurs when the voter hits the "cast vote" button, and when the voter leaves the
voting booth, the precinct worker then hits another button on the machine to reset the counter, and the next voter is then allowed to enter the voting booth. “So [it would] be possible if the precinct worker didn’t hit that button, that another vote could be recorded over a previous one.”

{40} She described the following procedure that was supposed to be followed if the voter did not press the “cast vote” button: “We instruct the precinct workers to be very careful that each voter does press the cast button. If they catch it, then they’re able to call the voter back and have them press the cast vote button, or the precinct judge or the individual that’s at the machine can go under the curtain and hit the cast button.” Further, “[w]e tell them to be very careful to watch that sort of thing, because those kind of things do happen at elections.” When asked if the precinct workers “dropped the ball” and did not handle the situation correctly in the situation involving Ms. Brown and her daughter, she answered, “Again, there are things like that that occur during election day that we try to instruct them, so that they’ll be prepared and aware of what things can happen. And it was my understanding that something like that did occur in our municipal election.”

{41} The precinct judge testified that her recollection was that two elderly women came in and got in line. “They both had received a slip when you sign in on the voter roster, checked that you were eligible. They both received a slip with a number on it. They both went into the booth, and they both left. But [the voting machine] only cast one vote.” They entered the voting booth together because one of them needed assistance from the other, although “[y]ou’re supposed to allow one in at a time.” When asked if anyone mentioned that only one vote was cast, he answered, “The lady that was running the machine at the time, to my recollection, there was a line. Things were a little confusing. It was busy in there, and they wheeled her out, and the lady thought that she was going to come back and vote again, and it was too late. They were gone.”

{42} Ms. Brown’s daughter who is elderly testified she recalled bringing her mother to vote and physically helping her mother maneuver with her walker or wheelchair. However, she did not help her mother vote, and her mother went into the voting booth by herself. “No, I didn’t help her. She knew who she was going to vote for, and she voted by herself.” She believed she voted before her mother, but she was not sure. Further, she was “pretty sure” that she pushed the button to cast her vote, “but I really don’t remember.”

{43} Ms. Brown is ninety-nine years old, and she “definitely” intended to vote in the election. She alternates between using either a wheelchair or a walker and her daughter was not in the voting booth when she actually voted. She voted for Robert Stearley, and specifically remembered that she pushed the button that registered her vote. Upon leaving the voting booth, she believed she had properly voted. After completing her testimony, she said, “I hope you boys can get it straightened out.”

{44} In light of the foregoing evidence, several things may have occurred: (1) Ms. Brown failed to activate the cast vote button as found by the district court; (2) Ms. Brown activated the cast vote button but her daughter did not; (3) the poll worker failed to activate the counter reset on the machine, resulting in only one of the votes being counted; or (4) the machine was not working properly and failed to record one of the votes. Whether Ms. Brown failed to properly interact with the technology of the machine, whether the poll worker failed to do her job, or whether the machine itself failed to function properly is really beside the point in this case. We know how Ms. Brown and her daughter voted, and we know they were both qualified to vote on that day in that election, but for some reason one of votes was not recorded by the machine. Nevertheless, the district court concluded, and the majority agrees, that Ms. Brown did not vote because the cast vote indicator was not activated. They rely on Section 1-9-4.2(A), which states:

“A vote on a touch-screen direct recording electronic voting system or electronic voting system consists of a voter’s selection of a candidate or answer to a ballot question selected by the electro-optical ballot display of the device, followed by the voter activating the cast vote indicator.”

{45} In light of the facts recited above, it is a close question whether the evidence is sufficient to support the district court finding that Ms. Brown failed to activate the cast vote button. Nevertheless, I will assume that it is. Significantly, Section 3-8-64(A) does not itself specify that the district court must find that the votes cast complied with Section 1-9-4.2; it states the district court must find the votes were “legal votes.” A vote which complies with Section 1-9-4.2 certainly constitutes a “legal vote” but I respectfully submit that the concept of a “legal vote” is not so limited. Otherwise, there would be no need for a trial under Section 3-8-64(A).

{46} A vote was cast by Ms. Brown for Mr. Stearley and she was legally entitled to vote for him. Her vote was therefore a “legal vote” in that it was made by a “legal voter.” Since the machine did not record her vote, a trial was necessary under Section 3-8-64(A). The trial without contradiction demonstrated that Ms. Brown was entitled to vote, that she voted, and who she voted for. I therefore respectfully submit that her vote in favor of Mr. Stearley should have counted.

THE VOTE OF MADELYN HASTINGS

{47} It is undisputed that Ms. Hastings was a resident of Edgewood and registered to vote in the election. She had never missed a municipal election in Edgewood and her name was always on the signature roster. In this election, however, the poll workers told her she was not on the signature roster when she arrived to vote around 10:00 a.m. She explained that she should be on the roster, and it was noted that her husband was on the roster. She was told that the poll workers would need to call the Santa Fe County Clerk and verify her address “and get some sort of a verification of registration from them.” The precinct judge knew her and that she lived in the town limits. He said he would call the county clerk and verify her address, that she should be on the list, and when he had done that, he would call her and she could return and vote. Ms. Hastings left and returned about forty-five minutes later to vote. At that time she was told she would need to fill out a “required challenge ballot.” She did not know what such a ballot was, no one explained to her what it was, and no one said that the ballot was not going to be counted. She completed the “required challenge ballot” believing she was thereby voting and that her vote was going to be counted. She voted for Howard Calkins for mayor. If she had been told that her vote was not going to be counted, she would have remained at the polling place and requested that the poll workers continue calling the county clerk. “I would have insisted that the County Clerk do her job and verify my address.”

{48} The precinct judge acknowledged he knew Ms. Hastings and that she lived in the Edgewood town limits. When she came to vote, her name was not on the voter roster, so he called the county clerk’s office to see if she was eligible and he was told she was not on the roster. He told them, however, that he knew she lived inside the town of Edgewood. When Ms. Hastings returned,
We informed her of her right to vote. She had that right to vote. We told her she could not vote on the machine. There would be a written ballot that was available to her. She could vote. We would mark the ballot, put it in the box.” Nevertheless, as the precinct judge, he did not know if her vote would be counted later. Later in the day it was discovered that other voters who also lived in the town limits were likewise not on the voter roster due to an error in the county clerk’s office. In fact, the county clerk had left a whole subdivision off the roster. Accordingly, the county clerk started issuing certificates of eligibility to those voters. “But that option wasn’t available for Ms. Hastings.”

Cheryl Huppertz also presented herself to vote but she was not on the voter roster, due to an error by the county clerk. Like Ms. Hastings, she was given a “required challenge ballot” to complete. Later in the election day Ms. Huppertz went to the town clerk’s office to find out why her name had not appeared on the voter roster. The town clerk called the county clerk who acknowledged that Ms. Huppertz should have been on the roster. Accordingly, the county clerk issued her a certificate of eligibility. Ms. Huppertz’ vote was not initially counted, but the canvassing board later decided to count her vote because she had been issued a certificate of eligibility, even though it was issued after she voted.

The district court concluded, and the majority agrees, that Ms. Hastings’ vote should not be counted because she did not receive a certificate of eligibility from the county clerk so her vote was not cast under Sections 3-8-40 and 3-8-40.1. They come to this conclusion even though her name was improperly removed from the roster of voters by the county clerk, so she never should have been required to obtain one in the first place. Furthermore, she was entitled to receive a certificate of eligibility from the county clerk, but she was never given the opportunity to obtain one. They rely on Section 3-8-43(C), which states:

A required challenge shall be interposed by the precinct board when a person attempts to offer himself to vote and demands to vote and his name does not appear on the signature roster and cannot be entered pursuant to Subsection C of Section 3-8-40. . . . A required challenge shall be interposed by the precinct board as follows:

1. the election judge shall cause the election clerks to enter the person’s name and address under the heading “name and address” in the signature roster in the first blank space immediately below the last name and address that appears in the signature roster;

2. the election clerk shall immediately write the words “required challenge” above the space provided for the person’s signature in the signature roster;

3. the person shall sign his name in the signature roster;

4. the person shall nevertheless be furnished a paper ballot, whether or not voting machines are being used at the polling place, and the election clerk shall write the number of the ballot so furnished next to the person’s signature in the signature roster; and

5. the person shall be allowed to mark and prepare the ballot. He shall return the paper ballot to an election judge who shall announce his name in an audible tone and in his presence place the required challenge ballot in an envelope marked “rejected - required challenge” that shall be sealed. The person’s name shall be written on the envelope and the envelope containing the rejected ballot shall then be deposited in the ballot box and shall not be counted.

(Emphasis added.)

Two observations demonstrate immediately why this statute does not prevent Ms. Hastings’ vote from being counted. First, her name could have been entered on the signature roster under Section 3-8-40(C); the only reason it was not was because she was not provided the certificate of eligibility she was entitled to but not given. She could even have been provided the certificate after she voted, but she was not. Secondly, when the statute says that the “required challenge” ballot “shall not be counted,” this only means that the municipal canvassing board cannot count the ballot in the canvass of returns under Section 3-8-53(C). Again, Section 3-8-64(A) does not say that the district court can only count “legal votes as described in Section 3-8-40 and 3-8-40.1,” which provide for votes cast with a certificate of eligibility issued by the county clerk; it says the district court determines from the evidence the “legal votes . . . proven to have been cast.” I would conclude that Section 3-8-64(A) empowers the district court to count Ms. Hastings’ vote because it is without question a “legal vote.” In this regard, it can be questioned why the statute requires the ballot to be completed and sealed if it cannot be counted at any time, even by the district court under Section 3-8-64(A).

A vote was cast by Ms. Hastings for Mr. Calkins and she was legally entitled to vote for him. Her vote was therefore a “legal vote” in that it was made by a “legal voter.” Since she was mistakenly told to vote on a “required challenge ballot,” a trial was necessary under Section 3-8-64(A). The trial without contradiction demonstrated that Ms. Hastings was entitled to vote, that she voted, and who she voted for. I therefore respectfully submit that her vote in favor of Mr. Calkins should have counted.

CONCLUSION

I agree with the majority that Mr. Calkins properly contested the election and that a the Municipal Election Code permitted him to file the action challenging the election in district court without challenge prior to or during the election.

However, I dissent from the majority opinion holding that the votes cast by Ms. Brown and Ms. Hastings should not be counted. I realize that this also results in a tie vote, but this is not a reason not to count each and every vote because the directive that “every vote counts” is most significant in a closely contested election. It has been reported that more than three million votes were never counted in the 2004 presidential election and that a significant portion (1,389,231) were not counted because they were deemed “spoiled” ballots. Among the reasons given were because the “x” was too light or the voter didn’t punch the card hard enough, so the voter “hung the chad.” Greg Palast, Recipe for a Cooked Election, Yes Magazine, Fall 2006. It was also reported that millions of Americans were panicked about computer voting machines leading up to that election. Id. The legislature has provided our courts with the necessary authority in Section 3-8-64(A) to assure our citizens that all “legal votes” that are “proven to have been cast” will be counted and not rejected for technical, trivial reasons and to diminish fears and suspicions that may exist about voting on computer voting machines.

Finally, the facts of this case do not demonstrate “a more compelling consideration” not to count these two votes as required by our Supreme Court in Valdez. Since the majority concludes otherwise, I respectfully dissent.

MICHAEL E. VIGIL, Judge
OPINION
LYNN PICKARD, JUDGE

{1} In this case, we are asked to consider the effect of an employer’s failure to provide notice of its decision regarding selection of health care providers, as required by New Mexico’s Workers’ Compensation scheme. Because the Workers’ Compensation Judge (WCJ) erred as a matter of law when he found that evidence that neither the employer nor the worker chose the first health care provider was sufficient to rebut the presumption raised by the employer’s failure to provide proper notice, we reverse and remand for further proceedings.

FACTS AND PROCEEDINGS BELOW

{2} The relevant facts are, for the most part, undisputed. John Howell (Worker) worked as an electrician for Marto Electric. On June 8, 2005, Worker fell while performing electrical work and suffered serious injuries to his hip, leg, and back. Worker was promptly transported by emergency medical personnel to the University of New Mexico Hospital (UNMH) where he received emergency care for five days. Marto Electric and its insurer, Twin City Fire Insurance Company (collectively, Employer), had notice of Worker’s injury and authorized care at UNMH.

{3} Two days after the accident, Employer mailed a letter to Worker’s home asking Worker to contact Employer regarding his injury, requesting medical authorization to obtain records and bills, and informing Worker that Employer had the right to direct medical care. The letter did not, however, state Employer’s decision regarding which party would choose the initial health care provider. We refer to “health care provider” as “HCP.” While it appears that the letter was mailed to Worker’s home, Worker did not read or see the letter.

{4} While receiving treatment at UNMH, Worker was told that he would need additional rehabilitation for his injuries following his discharge from UNMH. Worker informed UNMH personnel that he wanted to go to a rehabilitation facility somewhere close to his home in Rio Rancho. Hospital personnel then contacted Rita Kelly, a claims adjuster for Employer, regarding preauthorization for Worker’s admittance at Rio Rancho Nursing and Rehabilitation (RRNR). Although Kelly authorized a ten-day stay, RRNR refused to admit Worker because it did not want to comply with the Workers’ Compensation fee schedules.

{5} On June 13, 2005, Worker was transferred to HealthSouth Rehabilitation Hospital (HealthSouth) in Albuquerque. Although this transfer was also preauthorized by Employer, Employer maintains that it had no input in the selection of HealthSouth. Nor did Worker request to be sent to HealthSouth; at the time, he was heavily medicated and unaware of the place to which he was being transferred.

{6} Worker received inpatient care at HealthSouth for approximately eight weeks and was discharged in mid-August. After his discharge, Worker sought treatment from his chiropractor, Dr. Buel Worzeniak, for problems with his sacrum and pelvis. Prior to this appeal, both parties agreed that the treatment was not authorized by Employer and that Worker would not make a claim for payment of the chiropractor’s bills. After an appeal was filed in this case, Employer sought to supplement the record proper with evidence that Dr. Worzeniak’s bills were actually paid by Employer. This motion was held in abeyance pending submission to a panel for a decision and is disposed of below.

{7} In mid-September, Worker told Employer that he wanted Dr. Carlos Esparza to be his HCP. Employer claims that it then advised Worker verbally that he would be able to make the first selection of HCP. Employer also faxed a “Notice of Change of Health Care Provider” form to Worker. Worker returned the completed form to Employer on September 16, 2005. On the same day, Employer filed a “Health Care Provider Disagreement Form Objection to Notice of Change” with the Workers’ Compensation Administration (WCA), stating that while it agreed that Worker could choose Dr. Esparza as his HCP, Employer reserved the right to select a second HCP in sixty days.

{8} A hearing was conducted below to resolve the HCP dispute between the parties. After taking evidence, the WCJ found that non-emergency care began upon Worker’s discharge from UNMH. The WCJ also determined that Employer did not provide written communication to Worker regarding the order of selection of HCPs. The WCJ observed that Employer’s failure to provide notice in this regard gave rise to a presumption that Employer had selected Worker’s initial HCP. However, the WCJ concluded that this presumption “vanishes[d]” once the other evidence recited above was presented; the WCJ determined that neither party selected HealthSouth as an HCP and, alternatively,
that the selection of HealthSouth as an HCP was by implied agreement of both parties. The WJC therefore concluded that Worker’s selection of Dr. Esparza as his HCP constituted the initial HCP selection, such that Employer retained the right to select a second HCP if it wished. Worker appealed the WJC’s decision to this Court.

On appeal, we understand Worker to challenge the WJC’s decision on three grounds. First, Worker attacks the WJC’s determination that the initial HCP, HealthSouth, was selected by neither party, contending that such a characterization is contrary to law. Second, and relatedly, Worker argues that the WJC erred in concluding that the presumption of initial HCP selection vanished through the presentation of evidence that Employer did not deliberately select the first, non-emergency HCP. Third, and finally, Worker asserts that even if the WJC correctly concluded that Employer could rebut the presumption of initial HCP selection in this fashion, the evidence presented by Employer below was insufficient. Because we are persuaded that the WJC erred in its application of pertinent statutory and regulatory laws with respect to these arguments, we reverse and remand for further proceedings.

In this opinion, we will first dispose of the pending motion and countermotion to supplement the record. Next, we will discuss the WJC’s determination that the initial HCP, HealthSouth, was selected by neither party. Finally, we will examine the WJC’s conclusion that the presumption of initial HCP selection vanished and could be rebutted through the presentation of evidence that Employer did not deliberately select the first, non-emergency HCP.

PENDING MOTION AND COUNTERMOTION TO SUPPLEMENT THE RECORD

Initially, it is necessary to dispose of the pending motion and countermotion to supplement the record. As mentioned above, Employer filed a motion to submit to this Court evidence of chiropractor bills that were paid by Employer after the hearing below. Worker opposed the motion, and filed a countermotion seeking to submit evidence to this Court regarding changes to the form letter sent by Employer to injured workers. Both the motion and countermotion were held in abeyance pending submission to a panel for a decision.

It is clear from the record that none of the materials with which the parties seek to supplement the record were submitted below. Generally speaking, this Court’s review is limited to evidence presented to the WJC in the first instance. See Chavez v. White’s City, Inc., 114 N.M. 73, 75-76, 834 P.2d 950, 952-53 (Ct. App. 1992). In administrative appeals, this Court functions as a reviewing court and not as a fact-finder. See Gallegos v. City of Albuquerque, 115 N.M. 461, 464, 853 P.2d 163, 166 (Ct. App. 1993) (observing that it is for the WJC, not the appellate court, to weigh the evidence and make findings of fact); cf. Martinez v. N.M. State Eng’r Office, 2000-NMCA-074, ¶ 48, 129 N.M. 413, 9 P.3d 657 (“[I]n administrative appeals the district court is a reviewing court, not a fact-finder, and therefore may consider only evidence presented... in the first instance [below].”). Because the parties have suggested no compelling reason to depart from these well-established principles of appellate jurisprudence, we decline to consider the supplemental materials. The motion and countermotion are therefore denied.

DISCUSSION


The ideal behind allowing the parties to choose a physician is a balance between two values. On the one hand, the Legislature has recognized the value in protecting an employee’s right to select his or her physician and to maintain a confidential physician-patient relationship. Balanced against this objective, the Legislature has also recognized the value of achieving maximum and quality control of an injured employee’s medical and rehabilitative process. See Grine ex rel. Grine v. Peabody Natural Res., 2005-NMCA-075, ¶ 13, 137 N.M. 649, 114 P.3d 329 (holding that 11.4.4.11(C)(2)(c) NMAC “contemplates allowing an employer to exercise its rights under Section 52-1-49(B), even though the employer may have already obtained medical treatment before the employer makes its choice under the statute”), rev’d in part on other grounds, 2006-NMSC-031, ¶ 38, 140 N.M. 30, 139 P.3d 190 (hereinafter Grine II) (“A[n] employer may inform its workers at the time of employment how to secure prompt medical attention or, upon [the worker’s required] notice under [NMSA 1978, § 52-1-29 (1990)], either allow an injured worker to select a HCP or make its own initial selection.”). However, if an employer fails to give the required notice under 11.4.4.11(C)(2)(a) NMAC, “the employer shall be presumed, absent
other evidence, to have selected the HCP initially.” 11.4.4.11(C)(2)(b) NMAC.

16] Worker contends that the WCJ erred in the interpretation and application of the foregoing statutory and regulatory provisions. The interpretation of the Workers’ Compensation Act and associated regulations is a question of law that we review de novo. See Banks, 2003-NMSC-026, ¶ 11; Abeyta v Bumper to Bumper Auto Salvage, 2005-NMCA-087, ¶ 9, 137 N.M. 800, 115 P.3d 816. Although a court will generally defer to an agency’s interpretation of an ambiguous statute or regulation that it is charged with administering, it is the function of courts to interpret the law in a manner consistent with the legislative intent. State ex rel. Madrid v UU Bar Ranch Ltd. P’ship, 2005-NMCA-079, ¶¶ 25-26, 137 N.M. 719, 114 P.3d 399.

1. Characterization of HealthSouth as an HCP Selected by Neither Party

17] In his findings of fact and conclusions of law, the WCJ found that medical care at HealthSouth was the product of an implied agreement of the parties and was not a selection of HCP by either party. Worker contends that the WCJ’s designation of HealthSouth as the non-selection of either party was a “makeshift homemade creature” concocted in order to allow each party to choose an HCP. Worker argues that such a designation is contrary to law. We agree with Worker.

18] An injured worker has a duty to inform his or her employer of the injury within fifteen days of the occurrence of the injury. Section 52-1-29(A). If, “by reason of his injury or some other cause beyond his control, the worker is prevented from giving notice within that time . . . he shall give notice as soon as may reasonably be done and at all events not later than sixty days after the occurrence of the accident.” Id. Once an employer has notice of a work-related injury, Section 52-1-49(A) provides that

[a]fter an injury to a worker and subject to the requirements of the Workers’ Compensation Act, and continuing as long as medical or related treatment is reasonably necessary, the employer shall, subject to the provisions of this section, provide the worker in a timely manner reasonable and necessary health care services from a health care provider.

Id. (citation omitted); Grine II, 2006-NMSC-031, ¶ 24. In addition to Section 52-1-49(A)’s requirement of providing timely health care services to an injured worker, Section 52-1-49(B) requires that “[t]he employer shall initially either select the health care provider for the injured worker or permit the injured worker to make the selection.” Thus, once an employer receives notice of a worker’s injury, the HCP selection procedures in the Workers’ Compensation Act are triggered, and the employer has the right to either direct care or allow the worker to direct care. Cf. Grine II, 2006-NMSC-031, ¶ 38 (finding that employer notice of a worker’s injury is “a threshold issue in applying Section 52-1-49”). The employer must then communicate its decision regarding selection of care to the worker within a reasonable period of time. Grine II, 2006-NMSC-031, ¶ 24.

19] Emergency care is specifically excluded from the HCP selection process. See 11.4.4.11(C)(1) NMAC. There are no other types of medical care excluded from the HCP selection procedures in Section 52-1-49. Thus, assuming that the employer has notice of the injury, upon the beginning of non-emergency care, Section 52-1-49 specifically contemplates only two types of HCPs: (1) an initial HCP chosen by one of the parties at the employer’s direction and (2) a second HCP chosen by the party that did not choose the initial HCP. See § 52-1-49(B), (C). It is possible that there could be an authorized HCP for a reasonable time following emergency care and before the employer decides which party will select the initial HCP, but the facts of this case are not included in this category. There are no other categories of HCPs described in this section. Therefore, once an employer has notice of a work-related injury and the reasonable time has passed, the first non-emergency HCP must be considered the initial HCP.

20] In the present case, since Employer authorized Worker’s emergency care at UNMH immediately after Worker’s accident, we must assume that Employer had notice of Worker’s work-related accident. Once Employer had notice of Worker’s accident, Section 52-1-49 required Employer to provide reasonable and necessary medical care to the injured worker in a timely manner, see § 52-1-49(A), and to make a decision regarding which party would select the initial HCP, see § 52-1-49(B). Employer then needed to communicate its decision to Worker within a reasonable amount of time. See Grine II, 2006-NMSC-031, ¶ 24.

21] In his findings of fact and conclusions of law, the WCJ concluded that non-emergency care began upon Worker’s discharge from UNMH on June 13, 2005. On that same day, Worker was transferred to HealthSouth. Employer claims without factual basis that because at the time of Worker’s transfer to HealthSouth it was without sufficient information to make a determination as to the choice of HCP under Section 52-1-49(B), HealthSouth must be considered a non-selection of either party. We observe, however, that Worker received care at HealthSouth for eight weeks and that Employer did not communicate its decision regarding choice of care until Worker decided on his own to change providers. Employer then cites to 11.4.4.11(C)(2)(c) NMAC, which provides that “[m]edical treatment provided to the worker prior to the employer’s written decision to either select the HCP, or to permit the worker to select the HCP, shall be considered authorized health care, the cost of which is to be born[e] by the employer.” Although Employer does not explain why it cites to this section, we presume that Employer is implying that this section allows for an HCP that is not a selection of either party. While there may be instances where an HCP is not the selection of either party, we disagree with Employer that this case presents such an instance.

22] We previously ruled that 11.4.4.11(C)(2)(c) NMAC “contemplates allowing an employer to exercise its rights under Section 52-1-49(B), even though the worker may have already obtained medical treatment before the employer makes its choice under the statute.” Grine, 2005-NMCA-075, ¶ 13. As the Supreme Court has recognized, “[t]he distinction between a qualified HCP under Section[] 52-1-49 and [NMSA 1978, § 52-1-51(C) (1990)], and authorized health care under 11.4.4.11(C)(2)(c) NMAC is not clear.” Grine II, 2006-NMSC-031, ¶ 22. The Court further stated that it was not “persuaded that authorized health care is equivalent to treatment by a qualified HCP,” but declined to discuss whether there was a distinction.

Id. While this statement would lend support to Employer’s suggestion that HealthSouth could be considered authorized health care and not an HCP selection by either party, we think that under the facts of this case, the purpose behind the regulation suggests otherwise.

23] In Grine II, the Supreme Court found that the purpose behind 11.4.4.11(C)(2)(c) NMAC is to ensure “prompt medical attention for a work-related injury.” Grine
II, 2006-NMSC-031, ¶ 22. The regulation basically requires an employer to pay for any medical care provided to a worker before the employer complies with the notice requirement under Section 52-1-49(B) and 11.4.4.11(C)(2)(a) NMAC. Because the employer’s duty to direct care begins once the employer has notice of the work-related injury and the medical care has transitioned from emergency to non-emergency care, 11.4.4.11(C)(2)(c) NMAC must cover those situations where the worker has received medical treatment and the employer has not received notice of the work-related injury, such as emergency care. We observe that 11.4.4.11(C)(2)(c) NMAC may also cover those situations where the worker has been automatically transferred from his or her emergency provider to a non-emergency provider, which is similar to the facts of the present case. The reason why HealthSouth cannot be considered an authorized HCP under 11.4.4.11(C)(2)(c) NMAC in this case is because (1) Employer had notice of Worker’s accident prior to his transfer from UNMH to HealthSouth and (2) Employer did not make a decision as to which party was to direct care within a reasonable period of time. Once the employer has notice of a worker’s accident, it must then comply with its duties under Section 52-1-49(B) and make the determination within a reasonable amount of time. Any transfer to an HCP after this cannot be anything other than the selection of an HCP. In this case, we do not believe that eight weeks is a reasonable amount of time in which to give notice. Nor has Employer presented a factual basis showing that the period between June 8 and June 13 was insufficient in time in which to make a determination. Such an interpretation supports the purpose behind the regulation as it allows a worker to seek immediate and continuous medical attention for a work-related injury without creating controversy over which party—employer or worker—will have to pay for the medical care.

{24} To the extent that Employer had notice of Worker’s injury and failed to communicate its decision regarding selection of HCP, HealthSouth must be considered the initial HCP, and we hold that the WCJ erred to the extent that he concluded otherwise. We therefore hold that HealthSouth is the initial HCP under Section 52-1-49, and we now must decide which party chose HealthSouth as the initial HCP. See § 52-1-49(B).

2. Rebuttal of Presumptive Initial Selection by Employer

{25} In the hearing before the WCJ, Employer asserted that the form letter mailed after Worker’s accident constituted sufficient notice of Employer’s decision regarding selection of HCP. The WCJ rejected this argument, based on the contents of the letter and Worker’s assertion that he had not seen the letter. Employer does not challenge this determination on appeal.

{26} The WCJ also determined that Employer’s failure to provide proper notice under 11.4.4.11(C)(2)(a) NMAC gave rise to the presumption under 11.4.4.11(C)(2)(b) NMAC that Employer had chosen the initial HCP. However, the WCJ found that this presumption vanished or was rebutted by the introduction of evidence that neither party chose HealthSouth as the initial HCP, or alternatively that the choice of HealthSouth was by implied agreement of both parties. Therefore, the WCJ held that Worker’s choice of Dr. Esparza as his HCP constituted the initial HCP selection under Section 52-1-49(B). Worker contends that the WCJ’s interpretation and application of 11.4.4.11(C)(2)(b) NMAC are incorrect as a matter of law and defeat the purpose of the provision.

{27} As previously discussed, employers are required to communicate to their workers in writing about their initial decisions with respect to which party will choose the initial HCP. 11.4.4.11(C)(2)(a) NMAC. If an employer does not provide this notice to a worker, the employer is presumed to have chosen the initial HCP. 11.4.4.11(C)(2)(b) NMAC. Worker argues that the WCJ erred as a matter of law by finding that, although Employer did not comply with the notice requirements of 11.4.4.11(C)(2)(a) NMAC, the presumption created by the failure to comply was successfully rebutted by evidence that Employer did not choose HealthSouth as the initial HCP.

{28} The presumption created in 11.4.4.11(C)(2)(b) NMAC has been previously recognized, albeit in dicta, by our Supreme Court in Grine II, 2006-NMSC-031. The Court found that this provision requires an employer who has notice of a worker’s work-related injury to communicate to the worker in writing its decision regarding which party will select the initial HCP. Id. ¶ 24. If the employer does not comply with this requirement, it is deemed to have selected the initial HCP. Id.

{29} In Grine II, a worker suffered a heart attack at work. Id. ¶¶ 10-11. The worker then sought treatment on his own from the New Mexico Heart Institute and from a cardiologist. Id. ¶ 12. Following a dispute over the admissibility of the worker’s medical records, the WCJ concluded that the worker’s treatment and care at the New Mexico Heart Institute and by the cardiologist constituted authorized medical care and that the employer still had an opportunity to make the initial HCP selection. Id. ¶ 22. Although the case was decided on other grounds, the Court stated that if the employer had notice of the worker’s heart attack and did not inform the worker of its decision regarding selection of HCPs within a reasonable period of time following the heart attack, then the cardiologist was the employer’s initial HCP selection. Id. ¶ 24.

{30} In the absence of any guidance or notification from an employer following an accident, it is obvious that a worker in need of medical care will seek treatment on his or her own. Under those circumstances, an employer will have had no input in the selection of the initial HCP. Thus, where an employer’s noncompliance with 11.4.4.11(C)(2)(a) NMAC is challenged by a worker, an employer will always be able to present evidence that it did not in fact choose the initial HCP. Additionally, an employer may also be able to present evidence that the worker selected the initial HCP. See Grine II, 2006-NMSC-031, ¶ 13. To allow either set of facts to rebut the presumption would eliminate the presumption in its entirety. Because the presumption constitutes a clear means of implementing the legislative intent expressed in Section 52-1-49(B) (requiring the employer to either initially select the HCP or permit the worker to make the selection), we will not construe the presumption to be allowed to vanish or be rebutted in this manner.

{31} The Court in Grine II did not address how an employer would rebut the presumption created by noncompliance with the notice requirements in 11.4.4.11(C)(2)(a) NMAC. The Act and regulations provide little guidance as well. We note that one of the purposes behind 11.4.4.11(C)(2)(b) NMAC is to provide an incentive to employers to comply with the notice requirements in 11.4.4.11(C)(2)(a) NMAC. This incentive would be seriously undermined if the presumption could be rebutted solely by evidence that an employer did not select the first non-emergency HCP or by the mere fact that a worker received health care from someone.

{32} It seems reasonably clear that another purpose behind 11.4.4.11(C)(2)(b) NMAC is to prevent those situations, as in the present case, where an employer does not make
a decision as to which party will choose the initial HCP until eight weeks after a worker begins non-emergency health care. Indeed, Employer only informed Worker of its decision regarding selection of HCPs after Worker informed Employer that he wanted to change HCPs. Although our current Workers’ Compensation Act allows both employer and worker input into selection of HCPs, an employer retains the power to decide at what point the worker will be able to select his or her own HCP. See § 52-1-49(B). Concomitantly, an employer has a duty, upon notice of a work-related injury, to “provide the worker in a timely manner reasonable and necessary health care services from a health care provider.” Section 52-1-49(A). It makes sense, therefore, to require an employer who has notice of a work-related injury “to communicate its HCP selection to [a w]orker within a reasonable period of time.” Grine II, 2006-NMSC-031, ¶ 24. In situations where an employer has not complied with its duty to communicate its decision regarding selection of HCPs, it shall be deemed to have selected the first non-emergency HCP. 11.4.4.11(C)(2)(b) NMAC; see Grine II, 2006-NMSC-031, ¶ 24.

We therefore hold that the WCJ erred as a matter of law in concluding that the presumption in 11.4.4.11(C)(2)(b) NMAC could be rebutted by evidence that Employer did not deliberately select HealthSouth as the initial HCP. We express no opinion as to whether Employer may otherwise rebut the presumption with other evidence, but we do hold that the evidence presented below was insufficient.

CONCLUSION

We reverse and remand for further proceedings consistent with this opinion.

LYNN PICKARD, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge
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New Mexico Legal Aid (NMLA) has Staff Attorney openings throughout the State. NMLA is currently seeking attorneys to provide advice, brief service, and representation for domestic relations clients focusing on domestic violence to low income persons. In addition to family law, handling cases in other areas of general poverty law including housing, public benefits, and consumer; utilizing a computerized case management system; participating in community education and outreach to domestic violence victims and providers. Qualifications: Dedication and commitment to serving the needs of the poor living in poverty, excellent research, writing and interviewing skills. Proficiency in Spanish is a plus. New Mexico bar license is preferred, but will consider recent law school graduate who will take the next NM State bar exam. NMLA offers a generous benefits package and which includes health benefits, annual, sick and personal leave, etc. We have 11 offices throughout the State and provide on-going training in-house, thru the State Bar, and other training facilities, both in-State and nationally. Send letter of intent, resume, two references and writing sample to: Gloria Molinar, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001, or email: gloriam@nmlegalaid.org. Salary: DOE. NMLA is an EEO/AA Employer. Deadline: when filled.

**Executive Director**

New Mexico Legal Aid (NMLA) seeks a respected, experienced, innovative and dynamic leader who is passionate about and has a demonstrated commitment to advocate on behalf of low-income people. The new Executive Director must be an experienced attorney knowledgeable in public interest law, federal and state government administration and operations, and have an understanding of the organization and operations of non-profit corporations. NMLA, an equal opportunity employer, is a high quality, non-profit legal services organization that serves the entire state, with offices in Albuquerque, Las Cruces, Santa Fe, Gallup, Roswell, Taos, Silver City, Las Vegas, Mescalero, and Santa Ana, as well as a Migrant unit located in our Las Cruces office. Both our Santa Ana and Mescalero offices serve the Native American population of New Mexico. Our Migrant component serves the State migrant population in the southern part of New Mexico. NMLA has been committed to serving all of New Mexico for over 32 years (as separate programs and since becoming one statewide program in 2003). NMLA is the largest legal services field program in New Mexico, with a unionized staff of over 40 employees and serving almost 5,000 clients per year. Candidates must have at least 10 years legal experience and admittance to or eligibility for admittance to practice in New Mexico. Candidates must also have demonstrated successful experience in grant development, management and fundraising, and be skilled in personnel and financial management, program planning, development and administration. Preference will be given to candidates with at least 3 years of legal services management experience or comparable experience with another legal advocacy organization. Compensation is competitive and based on experience. Excellent benefits. Applications should include a cover letter expressing in detail why the candidate is interested in the position of Executive Director of NMLA as well as what the candidate believes he/she can contribute to the future of the organization and its client community, a resume, and names and contact information for three references. Applications, including an e-mail address, should be received by January 19, 2007 and sent to: Gloria A. Molinar, NMLA Search Committee, New Mexico Legal Aid, 300 N Downtown Mall, Las Cruces, NM 88001. Applications by e-mail should be sent to gloriam@nmlegalaid.org.

**Attorney**

White, Koch & McCarthy, P.A. seeks one or two attorneys with an established practice to join the firm “of counsel” and share low overhead, excellent partners, staff and location. The firm also seeks an associate with 3-5 years experience, strong writing skills and litigation experience. Send resume to ajwolfe@wkkm.com.
Assistant Trial Attorney - Cibola County

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

Legal Assistant

Rodey Law Firm seeks experienced legal secretary/legal assistant to support attorneys in real estate/business practice. Ideal candidate needs to have exceptional organizational ability, be attentive to detail, flexible, and committed to superior client service. Must have commitment to excellent quality of work. Position requires superior computer skills, particularly in MS Word/Outlook. Minimum 5 yrs experience in law firm setting, including support of transactional practice. Firm offers excellent benefit package, competitive salary and great work environment. Forward resume to: HR Manager, Rodey Law Firm, P.O. Box 1888, Alb. 87103-1888 or e-mail to hr@rodey.com.

Legal Assistant Position

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

Legal Assistant

Legal Assistant needed for busy Santa Fe Personal Injury Firm. Candidate must be self-motivated and well organized. Excellent writing, communication and word processing/computer skills are a must. Submit resumes by fax to 505-986-9176.

Legal Nurse Consultant

The Rodey Law Firm is recruiting a Legal Nurse Consultant to assist attorneys in the review of medical records/documents and in the identification of medical-legal issues. Candidate must have a B.S. in Nursing, an extensive background of clinical experience (6-10 year minimum) and must possess a thorough understanding of medical issues and trends related to the total litigation process. Previous legal/risk management experience helpful. Will work directly with attorneys from the intake of the case through the trial process. Requires flexibility and ability to manage multiple deadlines. Need to be a self-starter, willing to take initiative and work as member of case team. Firm offers congenial work environment, competitive compensation and excellent benefit package. Please forward resume to hr@rodey.com or mail to Manager of Human Resources, Rodey Law Firm, P.O. Box 1888, Albuquerque, NM 87103-1888.

Billing Clerk/Legal Secretary/Assistant

The Narvaez Law Firm is looking for a billing clerk/legal secretary/assistant. Applicants must have the ability to pay attention to details, and have good writing and reading skills. Prior billing experience with Tabs billing software is required. Pay is commensurate with ability and experience. Please fax resume to Patrick Narvaez at 505-247-1344 or mail to P.O. Box 25967, Albuquerque, NM 87125-0967.

Paralegal

Experienced Family Law Paralegal (min. 2 years), full-time with fun, fast paced, downtown law firm. Must be organized, self motivated, and work independently. Spanish Speaker, a plus. Salary DOE and 401(K). Send resume with cover letter, salary requirements, and references to: 505-244-8731 or E-mail to mary@newmexlaw.com.

Legal Nurse Consultant

The Rodey Law Firm is recruiting a Legal Nurse Consultant to assist attorneys in the review of medical records/documents and in the identification of medical-legal issues. Candidate must have a B.S. in Nursing, an extensive background of clinical experience (6-10 year minimum) and must possess a thorough understanding of medical issues and trends related to the total litigation process. Previous legal/risk management experience helpful. Will work directly with attorneys from the intake of the case through the trial process. Requires flexibility and ability to manage multiple deadlines. Need to be a self-starter, willing to take initiative and work as member of case team. Firm offers congenial work environment, competitive compensation and excellent benefit package. Please forward resume to hr@rodey.com or mail to Manager of Human Resources, Rodey Law Firm, P.O. Box 1888, Albuquerque, NM 87103-1888.

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 forensicspsychiatry@comcast.net

Services

Transcription 24-7


Low Cost Divorce And Custody?

Mediated-Negotiated-Uncontested-Pro Se. You send them to me, I will save them money and stress. Also low cost bankruptcy, trusts, wills, incorporations. Larry Leshin, 255-4859 lleshin@msn.com.
LOCATIONS

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.

Downtown Albuquerque
Up to three (3) offices with secretarial areas available in downtown area (6th Street & I-40). Rent includes receptionist; use of conference room; high speed internet connection; phone system; runner 3 days a week; free parking for staff and clients; use of copy machine; and employee lounge. Janitorial and utilities included in rent. Contact Jerry at 505-243-6721 or gbischof@dcbf.net.

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

Three 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.

Office Available
New Building, Paseo/I-25 area. Rent includes: Secretarial/Assistant area, receptionist, conference room, high speed internet, kitchen, janitorial, utilities, and alarm. Call 710-9245.

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.

12400 Menaul
Beautiful territorial office building located near Tramway. Convenient to northeast heights with excellent parking for staff and clients. 1,033 sq ft including large reception area, three offices and coffee bar. Asking $1,100 per month. Rent excludes janitorial, electric, and gas. Available 1/1/07. Call Janis at 881-1655 or Jim at 250-6253.

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

LOCATIONS

Lost Will
Searching a will for Diane Alvino, believed completed in summer of 1993 or subsequently. Contact Annie Coogan at 505.982.5929. Diane Alvino died April 2006, Santa Fe.

Miscellaneous

Office Space

Ethics Advisory Opinions

Visit the State Bar advisory opinion archive and topical index on the State Bar Web site, www.nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

Easy to Use

- 80 indexed, summarized opinions.
- Select Attorney Services/Practice Resources then Ethics Advisory Opinions.

More Resources

- Risk Management Hotline, (800) 326-8155.
- Original questions involving one's own conduct should be sent to the Ethics Advisory Committee, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 or membership@nmbar.org.

* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.

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ROAD AND ACCESS LAW

State Bar Center, Albuquerque
Saturday, January 20, 2007
3.0 General CLE Credits

Co-Sponsor: Paralegal Division

1:30 p.m.  Road and Access Law
Alexia Constantaras, Esq., Simons & Slattery LLP
Charlotte Hetherington, Esq., Scheuer, v & Patterson PC

3:00 p.m.  Break

3:15 p.m.  Road and Access Law (continued)

4:45 p.m.  Adjourn

REGISTRATION

Road and Access Law
Saturday, January 20, 2007 • State Bar Center, Albuquerque
3.0 General CLE Credits
☐ Standard Fee - $95
☐ Government and Legal Service Attorney, Paralegal - $90

Name: ____________________________________________________________ NM Bar#: __________________

Firm: __________________________________________________________________________________________

Address: _______________________________________________________________________________________

City/State/Zip: __________________________________________________________________________________

Phone: __________________________ Fax: __________________________

E-mail address: __________________________

Payment Options:  □ Enclosed is my check in the amount of $ _____________ (Make Checks Payable to: CLE)
☐ VISA  ☐ Master Card  ☐ American Express  ☐ Discover  ☐ Purchase Order (Must be attached to be registered)

Credit Card Acct. No. ___________________________________________________________________________ Exp. Date _________

Signature _____________________________________________________________________________________

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.
Please Note: No auditors permitted.

Register Online at www.nmbar.org
LAWYERS FOR THE HOMELESS LEGAL CLINIC
Operated by the Young Lawyers Division of the State Bar

The Lawyers for the Homeless Clinic (HLC) is open every Friday from 9:00 a.m. to 11:00 a.m. in an office provided by Healthcare for the Homeless at 1st and Mountain Rd. NW in Albuquerque. Volunteer attorneys who staff the Clinic meet with an average of three to four homeless persons each 1-2 hour session and provide on the spot legal information and advice as well as referrals to low income/pro bono legal service programs in Albuquerque. The HLC is covered by a malpractice insurance policy through the State Bar of New Mexico and you will be assisted by a trained attorney until you feel comfortable staffing the clinic by yourself. Staffing the HLC is a gratifying experience and a rewarding way to spend a Friday morning. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients, how your help can make such a major difference in their lives, and how grateful they are. Also note that time spent volunteering at the Clinic counts towards fulfilling the obligation of 50 hours of pro bono work under Supreme Court Rule 16-601 NMRA.

HLC SIGN UP FORM

Please check the appropriate box(es):

☐ Staff the HLC on Fridays from 9:00 a.m. to 11:00 a.m. **This service is most needed and without on-site attorneys, the Clinic doesn’t exist.** In many instances, the problems of the interviewees can be resolved at the Clinic, which is fully equipped with a telephone, computer with internet access, printer, New Mexico statutes and standard office supplies, as well as resource materials and manuals that address specific issues that the homeless face. **I am available to staff the clinic. Call me to schedule a date.**

☐ Serve as an “information referral source” to assist clinic attorneys in answering questions for clients in specialized areas of the law such as domestic relations, criminal law, landlord/tenant law, government benefits, and consumer law. **I am available as an information resource, which means that volunteers staffing the HLC can call me with questions (please check box below).**

☐ Become a part of our pro bono referral list to take on cases that cannot be resolved during the limited time period the clinic provides. **I would like to be placed on the pro bono referral list (please check box below).**

Name:__________________________________________________________________________________________
Address:_________________________________________________________________________________________
            Street                                           City                                           Zip
Telephone:__________________________________________    Fax:_________________________________________
Email:__________________________________________________________________________________________

Please check the areas of law that you would be able to assist with:

☐ Domestic Relations    ☐ Criminal Law    ☐ Government Benefits
☐ Consumer Law          ☐ Landlord/Tenant  ☐ Immigration
☐ Civil Rights           ☐ Tort                ☐ Other _______________

PLEASE RETURN TO:
LAUREL NESBITT, c/o STEVEN GRANBERG, ATTORNEY AT LAW,
1400 CENTRAL SE, SUITE 3300, ALBUQUERQUE, NM 87106; fax: 245-8558